

**ARTICLE 1904
BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT**

_____)	
IN THE MATTER OF:)	
)	
FRESH CUT FLOWERS FROM MEXICO,)	Secretariate File No.
FINAL RESULTS OF ANTIDUMPING DUTY)	USA-95-1904-05
ADMINISTRATIVE REVIEW)	
_____)	

**DECISION OF THE PANEL
December 16, 1996**

Before:

Mark R. Sandstrom, Esq. (Chairman)
Maximo Carvajal Contreras, Esq.
Lucia Reyna Antuna, Esq.
Jorge A. Witker Velasquez, Ph.D.
Kenneth B. Reisenfeld, Ph.D.

Appearances:

On behalf of the Investigating Authority:
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On behalf of the Floral Trade Counsel:
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On behalf of the Respondents; Rancho El Aguaje; Rancho El Toro; and Rancho Guacatay:
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I. INTRODUCTION

This Binational Panel ("Panel") was organized in accordance with Article 1904(2) of the North American Free Trade Agreement¹ ("NAFTA") and Title IV of the North American Free Trade Implementation Act² in response to a November 27, 1995 request by Rancho El Aguaje, Rancho Guacatay and Rancho El Toro (collectively, the "Complainants" or the "Ranches") for a panel review of the Final Results of Antidumping Duty Administrative Review: Fresh Cut Flowers from Mexico³ ("Final Determination") issued by the International Trade Administration of the U.S. Department of Commerce (the "Department").

In the Final Determination, the Department concluded that (i) certain carnations, chrysanthemums, pompon chrysanthemums, and miniature carnations ("fresh cut flowers") imported from Mexico were being sold in the United States at less than fair value and that the domestic industry producing like products was suffering material injury as a result, and (ii) each of the Complainants had been uncooperative in responding to the Department's questionnaires and had impeded the Department's investigation.⁴ For the period of review April 1, 1991, through March 31, 1992 ("POR"), the Department assigned a dumping margin of 39.95 percent⁵ based

¹North American Free Trade Agreement ("NAFTA"), signed Dec. 17, 1992, at Washington, D.C., Mexico City, and Ottawa; supplemental agreements were signed Sep. 14, 1993; reprinted in H. Doc. 103-159, Vol. I and in 32 I.L.M. 605 (1993) (entered into force Jan. 1, 1994).

²Pub. Law No. 103-182, approved December 8, 1993, 107 Stat. 2057; codified at various sections of United States Code, Title 19 and several other titles.

³60 Fed. Reg. 49569 (Sep. 26, 1995).

⁴Id.

⁵Id.

upon adverse inferences as the best information otherwise available ("BIA") pursuant to section 776(c) of the Tariff Act of 1930, as amended (the "Act").⁶

On November 27, 1995, Rancho El Aguaje, Rancho Guacatay and Rancho El Toro, three of the respondents in the underlying investigation,⁷ filed a Complaint contesting the Final Determination and the assessment of a dumping margin of 39.35 percent.⁸ For purposes of Rule 7 of the Panel Rules, the allegations of errors of fact and law set forth in the Complaint are sufficient to permit a review by this Panel.

II. STATEMENT OF FACTS

A. General Background

On April 23, 1987, the Antidumping Duty Order: Certain Fresh Cut Flowers from Mexico was published in the Federal Register.⁹ The Department formally initiated its fifth administrative

⁶19 U.S.C. §1677e(c) (1988).

⁷A fourth respondent, Visaflor S. de P.R., had no shipments to the United States during the POR.

⁸The Complaint and other Public Documents referred to herein are on file at the Secretariat, U.S. Section, in accordance with Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Reviews, 59 Fed. Reg. 8686, 8695 (1994) ("Panel Rules").

⁹52 Fed. Reg. 13491 (1987).

review¹⁰ on the Antidumping Duty Order: Certain Fresh Cut Flowers From Mexico on or about May 22, 1993¹¹ at the request of the Floral Trade Council ("Petitioner").¹²

B. Fifth Administrative Review

On or about July 2, 1992, the Department began the fifth administrative review by sending its standard antidumping questionnaire¹³ to each of the Complainants with a cover letter.¹⁴ The Department requested that each provide, inter alia, audited and internal financial statements, including profit and loss statements from related subsidiaries.¹⁵ The Complainants were given 45 days (or until August 16, 1992), to respond to the initial questionnaires and to submit the requested information. In the cover letter sent with the initial questionnaires, the Department warned the Complainants that "upon receipt of a response that is incomplete or deficient to the

¹⁰Subsequent to the initiation of the administrative review, the U.S. Congress amended the U.S. antidumping laws. See Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, tit. II, 108 Stat. 4809, 4842 (1994). The amendments do not apply to administrative reviews, such as the instant one, initiated before Jan. 1, 1995. See Torrington Co. v. United States, 68 F.3d 1347, 1352 (Fed. Cir. 1995). Consequently, the law discussed in this Panel Decision is the law in effect during the POR.

¹¹Initiation of Antidumping Duty Administrative Review, 57 Fed. Reg. 21769 (May 22, 1993). The Department does not conduct administrative reviews unless requested to do so by an interested party. 19 U.S.C. §1675(a) (1999); see also 19 C.F.R. §353.22(a)(1) (1993).

¹²The Floral Trade Council is a domestic trade association which represents primarily small, family-owned greenhouse growers.

¹³Response Brief of the Investigating Authority at p. 2.

¹⁴Public Documents 10 (Aguaje), 9 (Guacatay), and 11 (Toro). (Citations to the "public documents" contained in the administrative record are hereinafter referred to as "Pub. Doc.").

¹⁵Id.

extent that the Department determines it to be non-responsive the Department will not issue a deficiency letter and will use the best information otherwise available."¹⁶

Each Complainant responded to the initial questionnaires by stating that it maintained only unaudited internal financial statements.¹⁷ None of the Complainants included these unaudited internal financial statements with its response to the Department's initial questionnaire.

On March 23, 1993, the Department requested in its first supplemental questionnaires that the Complainants submit the referenced internal financial statements.¹⁸ On April 2, 1993, Guacatay and Toro submitted their unaudited internal financial statements for 1991 and 1992.¹⁹ Three days later, on April 5, 1993, Aguaje submitted an annual account summary of its monthly general ledger accounts for 1991. Aguaje supplemented its account information for 1991 on June 3, 1993.²⁰

On December 7, 1993, the Department sent second supplemental questionnaires to the Complainants requesting that each Complainant reconcile its internal financial statements with

¹⁶Id. The Department's BIA regulation appears at 19 CFR §353.37 (1992), which is based on section 776(b) of the Act. 19 U.S.C. §1677e(c) (1992).

¹⁷Pub. Doc. 17 at 2-3 (Aguaje); Pub. Doc. 18 at 3 (Guacatay); Pub. Doc. 20 at 3 (Toro).

¹⁸Pub. Doc. 29.

¹⁹Pub. Doc. 31 (Guacatay); Pub. Doc. 32 (Toro).

²⁰Pub. Doc. 33; Pub. Doc. 36.

independent sources, including any tax returns.²¹ The second supplemental questionnaires provided, in relevant part:

On page 3 of your response, you indicate that the farm does not maintain an audited financial statement. In light of this fact, please describe the internal controls which are present in your accounting system. In your discussion please describe what independent sources (i.e., bank statements, tax returns, labor reports) are available to ascertain the accuracy of the data submitted.

In the event that this farm is not required to file a tax return, please submit the relevant supporting law which exempts the farm from filing.²²

In response to the Department's second supplemental questionnaires, each of the Complainants stated that it was not obligated by Mexican law to prepare audited financial statements or to file tax returns during the POR.²³ However, none of the Complainants submitted evidence supporting its exempt status. On January 12, 1994, the Complainants supplemented their responses to the Department's second supplemental questionnaires with English translations of the pertinent portions of the Diario Oficial, which the Complainants claimed exempted them from paying income taxes and filing tax returns.²⁴

²¹Pub. Doc. 46 at 1 (Aguaje); Pub. Doc. 45 at 1 (Guacatay); Pub. Doc. 44 at 1 (Toro).

²²Id.

²³Pub. Doc. 49 at 1 (Aguaje); Pub. Doc. 50 at 1-2 (Guacatay); Pub. Doc. 48 at 1 (Toro).

²⁴Pub. Doc. 52 (Aguaje); Pub. Doc. 51 (Guacatay and Toro).

On May 16, 1994, the Department served each Complainant with a third supplemental questionnaire.²⁵ The Department requested clarification from each Complainant as to which of the six tax exempt categories listed in the Diario Oficial was applicable to it and supporting documentation evidencing registration with the Mexican authorities as a party entitled to tax exempt status.²⁶ Contrary to the responses and information the Complainants provided the Department in January, on June 9, 1994, the Complainants informed the Department that their tax exempt statuses were not premised upon any of the six tax exemptions listed in the Diario Oficial. Instead, each Complainant reported that its exempt status was based upon its classification as a "special tax base" under an old law.²⁷ The Complainants informed the Department that they were unable to furnish it with the relevant law granting them this "special tax base" exemption because of the age of the law.²⁸ Notwithstanding their claimed exemption under the "special tax base" law, the Complainants also informed the Department that the "old" law had changed as of February 4, 1991, and that in accordance with the revised law they were indeed required to pay taxes on income earned as of January 1, 1991. However, the Complainants said that their income

²⁵Pub. Doc. 54 (Aguaje); Pub. Doc. 56 (Guacatay); Pub. Doc. 55 (Toro).

²⁶Pub. Doc. 54 at 1 (Aguaje); Pub. Doc. 56 at 1 (Guacatay); Pub. Doc. 55 at 1 (Toro).

²⁷Pub. Doc. 60 at 1-2 (Aguaje); Pub. Doc. 62 at 1-2 (Guacatay); Pub. Doc. 61 at 1-2 (Toro).

²⁸The Complainants informed the Department that the law granting this "special tax base" was "an old law dating back as far as 1973." Pub. Doc. 60 at 1-2 (Aguaje); Pub. Doc. 62 at 1-2 (Guacatay); Pub. Doc. 61 at 1-2 (Toro).

tax payments for 1991 did not appear on their 1991 books or records because those taxes were not payable until July 1992.

On June 28, 1994, the Department served the Complainants with its fourth supplemental questionnaires, requesting that each Complainants: (i) provide tax returns for 1991 and 1992 (as required under the "new" law); (ii) reconcile all income and expenses reported in the tax returns to the amounts provided in the Complainants' earlier questionnaire responses; (iii) if no tax returns had yet been filed for the applicable years, explain why they had not been filed; and (iv) provide copies of supporting documentation allowing for extensions of time to file the returns.²⁹

In response to the Department's fourth supplemental questionnaire, Aguaje stated that it could not substantiate or reconcile its financial statements because it had not filed tax returns for the applicable years.³⁰ According to Aguaje, it was engaged in a dispute with the Mexican tax authority concerning issues affecting its 1991 and 1992 tax returns and, until this dispute was resolved, Aguaje did not intend to file its returns.³¹ In support of its claimed dispute, Aguaje submitted a letter dated October 23, 1992, addressed to the Mexican government in which Aguaje sought guidance on the proper tax treatment for a loan.³² Aguaje also provided the Department

²⁹Pub. Doc. 64 at 1.

³⁰Confidential Document 24. (Citations to "confidential documents" in the administrative record will be designated as "Con. Doc.") All Confidential Documents are on file at the Secretariat, U.S. Section.

³¹Id.

³²Id.

with a copy of the Mexican government's October 27, 1992 response to its letter which informed Aguaje that it should treat the loan as income and installed Aguaje to file its return.³³ Aguaje provided no additional documentation concerning its dispute with the Mexican tax authority.

On July 6, 1994, having maintained in all of their previous responses to the Department that no tax returns were required or existed for the POR, Guacatay and Toro provided the Department with tax returns for 1991 and 1992.³⁴ Neither Guacatay nor Toro reconciled these tax returns with their financial statements or questionnaire responses as requested by the Department.

C. The Department's Preliminary Determination

On April 17, 1995, the Department published its Preliminary Determination in the Federal Register.³⁵ The Department assessed the Complainants a BIA dumping margin of 39.95 percent

³³Con. Doc. 24 at Exhibit 4; Pub. Doc. 69.

³⁴Pub. Doc. 68 at 1 (Guacatay); Pub. Doc. 67 at 1 (Toro).

³⁵Fresh Cut Flowers from Mexico: Preliminary Results of Antidumping Duty Administrative Review ("Preliminary Determination"). 60 Fed. Reg. 19209 (Apr. 17, 1995). Pub. Doc. 77.

in accordance with section 776(c) of the Act.³⁶ In support of its BIA rate assessment the Department stated:

As a result [of the Complainants' failure to cooperate], in accordance with section 776(c) of the Act, we have determined that the use of BIA is appropriate. Whenever, as here, a company refuses to cooperate with the Department, or otherwise significantly impedes an antidumping proceeding, we use the higher of (1) the highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less-than-fair-value ("LTFV") investigation or in prior administrative reviews; or (2) the highest rate found in this review for a firm for the same class or kind of merchandise.³⁷

The BIA rate of 39.95 percent that was assessed was the second highest rate found for Mexican producers in prior administrative reviews.³⁸

³⁶The Act provides, in relevant part:

In making [its] determinations under this subtitle [the Department] shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes and investigation, use the best information otherwise available.

19 U.S.C. §1677e(c) (1988); see also 19 C.F.R. §353.37 (995).

³⁷60 Fed. Reg. at 19210. The Department's analysis and assessment of a BIA rate using these standards is commonly referred to and is referred to herein as "first-tier." The Department's BIA policy also recognizes a "second tier" BIA rate for those instances in which a respondent is cooperative but fails to provide information. In such cases, the Department can use the higher of (1) the firm's rate from the original investigation (LTFV) or the all other rate if the firm is not investigated; or (2) the highest calculated rate in the same review, same merchandise, and same country. See Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1188 notes 1 and 2 (Fed. Cir. 1993) (citing 56 Fed. Reg. 31750); see also Antifriction Bearings from France, et al.: Final Results of Administrative Review, 58 Fed. Reg. 39729, 39739 (July 26, 1993).

³⁸60 Fed. Reg. at 19210. The highest rate found was 264.43 percent. The Department determined that this margin was calculated for a company with extraordinarily high business expenses during the review period, and as such this rate was aberrational and not appropriate for use in this action. Id.

The Department concluded that assessment of the 39.95 percent BIA dumping margin was appropriate as to Aguaje because Aguaje was evasive in its responses to the Department's questionnaires, and because Aguaje failed to substantiate its claim that it was not required to file tax returns. The Department concluded that the assessment of the first-tier BIA rate of 39.95 percent was similarly appropriate with respect to Guacatay and Toro because they also were evasive in their responses to the Department's questionnaires, and failed to provide the Department further the requested financial reconciliations.³⁹ The Department also found that the Complainants significantly impeded the Department's investigation by failing to cooperate with the Department's questionnaires, and by making inconsistent statements to the Department regarding whether or not they were required to file tax returns.

In the Preliminary Determination, the Department explained that it had accepted unaudited internal financial statements from the Complainants in prior administrative reviews because the Complainants were not required under Mexican law to maintain audited financial statements or file tax returns during those PORs.⁴⁰ However, because Mexican law governing income tax reporting changed in 1991, the Complainants were required by law to file tax returns for the years covered by the POR. Therefore, for the Administrative Review covering the period of April 1, 1991, through March 31, 1992, the Department requested that the Complainants provide the

³⁹Id.

⁴⁰Id.

income tax returns they were required by Mexican law to submit to the Mexican tax authority. In explaining the importance of the tax returns the Department noted:

The Department relies on the accounting system used in the preparation of the audited financial statements to ensure a company's submitted sales and cost data are credible. An "in-house" system which has not been audited, and is not used for tax purposes or for any purpose other than internal deliberations of the company, does not assure the Department that costs have been appropriately captured by the "in-house" system.⁴¹

In the absence of audited financial statements from the Complainants, the Department required the tax returns as a means of independent verification.

1. Petitioner's Comments to the Preliminary Determination

On May 17, 1995, Petitioner submitted its comments regarding the Department's Preliminary Determination.⁴² The Petitioner argued that the Department should use the highest dumping margin presented in any prior administrative review, *i.e.*, 264.43 percent, as the BIA for the Complainants because they were uncooperative and impeded the Department's investigation.⁴³

⁴¹60 Fed. Reg. 19209 (1995).

⁴²Pub. Doc. 84 and Con. Doc. 28.

⁴³Pub. Doc. 84 and Con. Doc. 28.

2. Complainants' Comments to the Preliminary Determination

On May 17, 1995, the Complainants also submitted comments regarding the Department's Preliminary Determination.⁴⁴ In its comments on the Preliminary Determination, Aguaje advanced several arguments.⁴⁵ First, Aguaje asserted that confusion over the legal requirement to file tax returns and the availability of tax information covering the POR lead to the misunderstandings contained in Aguaje's responses. Aguaje noted that once it fully understood the Department's requests, it provided the Department with evidence that it had not filed any tax returns covering the POR.⁴⁶ Second, Aguaje argued that the Department's application of BIA was not legal because Aguaje had demonstrated significant cooperation in its frequent, timely responses to the Department's multiple requests for information.⁴⁷

Guacatay and Toro advanced several arguments in their comments on the Preliminary Determination.⁴⁸ First, they argued that although they may have made some minor mistakes in

⁴⁴Pub. Doc. 88 and Con. Doc. 30. In the case briefs submitted containing their comments on the Preliminary Determination, all three Complainants referred to and included factual information not submitted in the administrative proceeding below. The Complainants filed briefs on May 22, 1995, that did not contain references to these additional facts. See Pub. Docs. 85 and 86. On June 10, 1996, the Department filed a Motion with the Panel requesting that the Panel strike portions of the Complainants' briefs containing the additional information. See Motion to Strike. See Section IV below for the Panel's decision on that Motion.

⁴⁵Pub. Doc. 88 and Con. Doc. 30.

⁴⁶Pub. Doc. 88 at 4-7.

⁴⁷Id. at 7-10.

⁴⁸Pub. Doc. 87 and Con. Doc. 29.

responding to the Department's questionnaires, these mistakes did not reach a sufficient level for the Department to find them "uncooperative."⁴⁹ Second, Guacatay and Toro argued that the Department's request for a reconciliation of financial statements and tax returns was not part of the standard questionnaire that the Department uses for investigatory purposes, and that therefore the request was unreasonable.⁵⁰ Third, Guacatay and Toro contended that their failure to be more forthcoming concerning their tax returns and the requested reconciliation between their financial statements and their tax returns was a matter of "misunderstandings" rather than the result of any evasiveness.⁵¹ Finally, Guacatay and Toro asserted that because they cooperated fully, there was no legal authority for the Department to use BIA to determine a dumping margin. Moreover, they asserted that the selected BIA rate was inaccurate.⁵²

On May 24, 1995, the parties submitted rebuttal briefs.⁵³ Thereafter, on May 31, 1995, the Department held a public hearing attended by the Complainants and the Petitioner.⁵⁴

⁴⁹Pub. Doc. 87 at 6-9.

⁵⁰Id. at 11-12.

⁵¹Id. at 10-13.

⁵²Id. at 19-27.

⁵³Pub. Doc. 90 (Guacatay and Toro); Pub. Doc. 91 (Aguaje); Pub. Doc. 92 (Petitioner).

⁵⁴See Pub. Doc. 94.

D. The Department's Final Determination

On September 26, 1995, the Department published its Final Determination in the Federal Register.⁵⁵ The Department assessed a first-tier BIA dumping margin of 39.95 percent,⁵⁶ based upon its determination that the Complainants were uncooperative and non-responsive. In assessing the first tier BIA dumping margin, the Department determined that the Complainants: (i) significantly impeded the Department's investigation by making "evasive and misleading statements" regarding their tax liabilities and their obligations to file tax returns under Mexican law, and (ii) failed to provide the Department with the information it requested in a timely fashion.⁵⁷ The Department went so far as to state: "We disagree that the [Complainants] tried in good faith to comply with the Department's requests for information."⁵⁸

The Department found that Aguaje specifically had not acted in good faith because: (i) it failed to provide the Department with its true tax status until the third supplemental questionnaire,

⁵⁵60 Fed. Reg. 49569 (September 26, 1995).

⁵⁶Id. at 49571. The Department stated:

We have selected this rate because the highest rate found for any Mexican flower producer in prior reviews and the LTFV investigation, 264.43% is an aberrational rate not representative of the market.

This rate was due to a company's extraordinary high business expenses during the review period resulting from investment activities which were uncharacteristic of the other reviewed companies. Therefore, we found it inappropriate to use this rate as BIA, both in the prior review and in this review.

⁵⁷Id. at 49570-71 (Comment 2.)

⁵⁸Id.

and (ii) the correspondence Aguaje submitted in response to the third supplemental questionnaire was insufficient evidence that it had not filed tax returns for 1991 and 1992.⁵⁹ The Department determined that Guacatay and Toro also had not acted in good faith because they: (i) failed to reveal their true tax status until the Department sent its fourth supplemental questionnaire, and (ii) provided tax returns to the Department in response to the fourth supplemental questionnaire that were illegible, untranslated, and unaccompanied by the requisite reconciliation worksheets.⁶⁰

As in the Preliminary Determination, the Department set forth in the Final Determination reasons supporting its findings. Specifically, the Department noted that tax returns were necessary so that the Complainants' questionnaire responses could be independently substantiated.⁶¹ The Department justified its reconciliation request by pointing out that the sales and cost information in Guacatay's and Toro's tax returns did not conform to the information provided in their earlier questionnaire responses. In the absence of "this explanation, the Department cannot use the tax returns to independently substantiate the reported sales and costs; without such independent substantiation, the entire questionnaire is unusable."⁶²

⁵⁹Id.

⁶⁰Id. at 49570.

⁶¹ As set forth previously, in prior administrative reviews, the Department had not required such independent verification because none existed. However, a 1991 change in Mexican law required the Complainants to file tax returns for the POR. Consequently, the Department requested that the Complainants produce the returns that were required to be filed under Mexican law and that should have been filed well before the Department's fourth supplemental request.

⁶²60 Fed. Reg. at 49570 (Comment 1).

E. The Challenge To The Final Determination

On November 27, 1995, the Complainants filed their Complaints contesting the Department's Final Determination and requested a NAFTA binational panel review. The Petitioner also filed a complaint. The Complainants filed their briefs on April 9, 1996. The Department and the Petitioner filed their respective response briefs on June 10, 1996. Complainants filed their reply briefs on June 25, 1996, and their appendices to the briefs on July 1, 1996. This Panel held a hearing on August 15, 1996, in Washington, D.C. Because of the proprietary nature of a significant portion of the information before the Panel, the hearing was closed except to those persons having applied for and received proprietary information access orders from the Secretariat or the Panel.⁶³

The Complainants argue that the Department's determination that they failed to cooperate and impeded the Department's review is unsupported by substantial evidence on the administrative record and is otherwise contrary to law. Accordingly, the Complainants argue that the Department's decision to invoke BIA was not supported by substantial evidence on the record and is contrary to law.

This Panel must determine, from the information available in the administrative record, whether the Department's Final Determination that the Complainants gave evasive and misleading statements and were uncooperative and impeded the review proceeding was supported by

⁶³Part IV of the Panel Rules, entitled "Proprietary Information and Privileged Information," permits the issuance of proprietary information access orders.

substantial evidence in the record and was otherwise in accordance with law so as to approve the Department's assessment of a first-tier BIA dumping margin of 39.95 percent.

F. Issues To Be Determined

1. Whether the legal and factual determinations contained in the Department's Final Determination are supported by substantial evidence in the administrative record and are otherwise in accordance with law.

2. Whether the Department's determination that the Complainants were uncooperative, made evasive and misleading statements to the Department, and impeded the Department's investigation are supported by substantial evidence in the administrative record and are otherwise in accordance with law.

3. Whether the Department's resort to BIA was supported by substantial evidence in the record or otherwise in accordance with law.

4. Whether the Department acted in accordance with law and based upon substantial evidence in the administrative record when it assigned the Complainants dumping margins of 39.95 percent based upon first tier BIA analysis.

III. STANDARD OF REVIEW

Article 1904(3) of NAFTA mandates that this Panel apply the "standard of review" and the "general legal principles"⁶⁴ that a United States court⁶⁵ would apply in its review of a final determination by the Department.⁶⁶ Section 516a(b)(1)(B) of the Act requires that the CIT "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law."⁶⁷ This Panel must therefore do the same.

The issue on review before this Panel is whether or not the administrative record contains substantial evidence to support the Department's Final Determination.⁶⁸ The Act mandates that the Department only consider the "information presented to or obtained by [the Department] . . .

⁶⁴Such principles include "standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies." NAFTA Art. 1911.

⁶⁵Decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit are binding on Article 1904 binational panels. NAFTA Article 1904(2)-(3). However, decisions of the Court of International Trade ("CIT") are not binding upon binational panels. See Rhone Poulenc v. United States, 583 F. Supp. 607, 612 (Ct. Int'l Trade 1984) (A decision of the CIT is "valuable, though non-binding, precedent unless and until it is reversed.") Similarly, the decision of an Article 1904 binational panel is not binding on future panels. See Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93-1904-03, at 78 note 254 (October 31, 1994).

⁶⁶An Article 1904 Binational panel review of a less-than-fair value determination in a U.S. antidumping duty action must be conducted in accordance with U.S. law. NAFTA Art. 1902(1).

⁶⁷The "law" consists of "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing party would rely on such materials . . ." NAFTA Art. 1904(2).

⁶⁸Daewoo Elec. Co. v. International Union, 6 F.3d 1511, 1520 (Fed. Cir. 1993), cert. denied, 114 S.Ct. 2672 (1994).

during the course of the administrative proceeding . . ."⁶⁹ Consequently, the Panel is not permitted to conduct a *de novo* review and make new findings of fact⁷⁰ but is limited to the facts available in the administrative record,⁷¹ and to the findings actually contained in the Final Determination.⁷² If the administrative record contains substantial evidence to support the Department's Final Determination and the Final Determination is otherwise in accordance with law, the Panel must uphold the Department's Final Determination.

A. Substantial Evidence

The parameters of "substantial evidence" are well defined in U.S. case law. As defined by the U.S. Supreme Court, substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁷³ The Supreme Court further delineated this definition holding that substantial evidence can be

⁶⁹19 U.S.C. §1516a(b)(2)(A)(I).

⁷⁰See Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965, aff'd per curiam, 810 F.2d 1137 (Fed. Cir. 1987).

⁷¹The "substantial evidence" standard mandated by the NAFTA is statutorily linked to evidence that "is on the record." Article 1904(2) of the NAFTA expressly limits the Panel's review to the "administrative record" filed by the Department.

⁷²Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 427 (CIT 1993) (citing SEC v. Chenery, 318 U.S. 80, 87 (1943)). See also Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) ("The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court . . . The task of the reviewing court is to apply the appropriate[] standard of review [] to the agency decision based on the record the agency presents to the reviewing court.")

⁷³Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

"something less than the weight of the evidence."⁷⁴ In assessing the substantiality of the evidence, the Panel must consider the entire record, including not only the information supporting the Department's determination, but also the evidence that "detracts from the weight of the evidence relied on by the agency in reaching its conclusions."⁷⁵

The Panel has an obligation under the substantial evidence standard not to substitute its judgment for the judgment of the Department: "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."⁷⁶ The Panel, therefore, may not "displace the [Department's] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo."⁷⁷ The substantial evidence standard "frees the reviewing [authority] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute."⁷⁸

⁷⁴Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

⁷⁵Universal Camera, 340 U.S. at 488.

⁷⁶Consolo, 388 U.S. at 620.

⁷⁷Universal Camera, 340 U.S. at 488.

⁷⁸Consolo, 383 U.S. at 620.

B. Deference Afforded To The Department

The substantial evidence standard requires the Panel to afford deference to the Department's factual findings, interpretations, and methodologies.⁷⁹ Prior binational panels have also concluded that "deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority."⁸⁰ In the antidumping area, the U.S. Congress has "entrusted the decision making authority in a specialized, complex economic situation to administrative agencies."⁸¹ Consequently, reviewing courts have acknowledged that "the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has broad discretion in executing the law."⁸²

However, giving deference to the Department does not mean that the Panel should abdicate its authority at the expense of conducting a meaningful review.⁸³ The Department's determination must have a reasoned basis, an adequate analysis, and adequate reasoning.⁸⁴ Also,

⁷⁹N.A.R., S.p.A. v. United States, 741 F. Supp. 936, 939 (Ct. Int'l Trade 1990) ("Deference is given to the expertise of the administrative agency regarding factual findings.").

⁸⁰Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 6 (citing Red Raspberries from Canada, USA-89-1904-01, at 18-19 (Dec. 15, 1989)).

⁸¹S. Rep. No. 249, 96th Congress, 1st Session 252 (1979).

⁸²Smith Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984); see also Consumer Prod. Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

⁸³See Al Tech Specialty Steel Corp. v. United States, 651 F. Supp. 1421, 1424 (Ct. Int'l Trade 1986).

⁸⁴CSX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987).

there must be a rational connection between the facts in the administrative record and the determination of the Department.⁸⁵ In order for the reviewing authority to determine whether the Department's determination is supported by substantial evidence on the record, the Department must provide an adequate explanation for its conclusions.⁸⁶

Similarly, the deference afforded by a reviewing body to the Department's statutory interpretation is not limited. "No deference is due to an agency interpretation at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."⁸⁷ The manner and methodology used by the Department in the performance of its review also "must be lawful, which is for the courts finally to determine."⁸⁸

Finally, although "[a] presumption of regularity attaches to the actions and conduct of government officials in the performance of their lawfully executed duties,"⁸⁹ the Department is

⁸⁵Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

⁸⁶See Mitsubishi Motors Corp. v. United States, 820 F. Supp. 608, 621 (Ct. Int'l Trade 1993); SCM Corp. v. United States, 487 F. Supp. 96, 108 (Cust. Ct. 1980).

⁸⁷Public Employees Retirement Sys. of Ohio v. June M. Betts, 492 U.S. 158, 171 (1989); see also Cabot Corp. v. United States, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988) (A reviewing authority may not allow an agency "under the guise of lawful discretion or interpretation to contravene or ignore the intent of Congress.").

⁸⁸Brother Indus. Ltd. v. United States, 771 F. Supp. 374, 381 (Ct. Int'l Trade 1991) ("Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.").

⁸⁹Takashima U.S.A., Inc. v. United States, 886 F. Supp. 858, 861 (1995) (citing Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 795 (Fed. Cir. 1993)).

legally obligated to observe the principles of due process and fundamental fairness.⁹⁰ Any deviations that the Department makes from settled practice must be supported by reasonable explanations which are supported by substantial evidence on the record.⁹¹

This Panel in has applied the aforementioned standard of review reaching its decision and has followed all established principles of law.⁹²

IV. OUTSTANDING MOTIONS

The Panel took under consideration two motions filed by the Parties before and after the hearing. First, prior to the hearing, the Department and the Petitioner moved to strike an exhibit that the Complainants had attached to their case brief. For the reasons stated below, we grant this motion and order that the exhibit be stricken from the record and all references to the exhibit in Complainants' brief be redacted. Second, the Department filed a motion shortly after the hearing requesting leave to file its Notice of Appearance out of time. As discussed below, the Panel grants this motion.

⁹⁰See Sigma Corp. v. United States, 841 F. Supp. 1255, 1267-68 (Ct. Int'l Trade 1993); Usinor Sacilor v. United States, 893 F. Supp. 1112, 1141 (Ct. Int'l Trade 1995).

⁹¹See Western Conference of Teamsters v. Brock, 709 F. Supp. 1159, 1169 (Ct. Int'l Trade 1989); see also National Knitwear and Sportswear Ass'n v. United States, 779 F. Supp. 1364, 1369 (Ct. Int'l Trade 1991).

⁹²So as not to exceed their jurisdiction, binational panels must accurately articulate the standard of review and conscientiously apply the appropriate standard. See Live Swine from Canada, ECC-93-1904-01 USA, at 11 (Apr. 8, 1993) (citing Fresh, Chilled, and Frozen Pork from Canada, ECC 91-1904-01 USA, at 21 (June 14, 1991)).

A. The Department's And The Petitioner's Motions To Strike

In separate motions filed on June 10, 1996, the Department and the Petitioner moved to strike Exhibit 5 and all references thereto contained in Complainants' brief filed on April 9, 1996. Exhibit 5 is the public version of the verification report for the Sixth Administrative Review (1992-1993) concerning Fresh Cut Flowers from Mexico. According to the Department, this verification report was not before the Department at the time that it made its final determination in the Fifth Administrative Review (1991-1992).⁹³ Accordingly, the Department and the Petitioner maintain that the verification report is not properly part of the administrative record to be reviewed by this Panel.

This Panel was established to review the Fifth Administrative Review of the antidumping order concerning Fresh Cut Flowers from Mexico. The POR covered by this Administrative Review covers 1991-1992. At the same time that the Department was conducting this Administrative Review, it also was conducting the Sixth and Seventh Administrative Reviews, covering the 1992-1993 and 1993-1994 PORs, respectively.

The present motion concerns the Department's verification report describing the Department's visits to the Complainants' ranches in March 1995 to verify the information provided in response to questionnaires issued in the 1992-1993 Administrative Review. The verification trip took place in March 1995. Before this report was published on August 30, 1995, the

⁹³Department Motion to Strike at 4.

Department had issued its Preliminary Determination in April 1995 and the parties had filed their case briefs in May 1995.

In this Panel Review, Complainants have tried to insert the 1992-1993 administrative review verification report into the administrative record for the POR by attaching it to their April 9, 1996 Brief on the merits in support of their complaint. The Complainants also made numerous references to the verification report in the same brief. The Department and the Petitioner objected to this submission and have moved to strike the 1992-1993 verification report (Exhibit 5) from the Complainants' brief.

For the reasons set forth below, we conclude that the motions to strike should be granted.

1. The Motions To Strike Were Timely Filed

The Department and the Petitioner filed their motions to strike simultaneously with filing their Response Briefs. The Complainants argue that the Panel should apply CIT Rule 12(f) which requires that a motion to strike be filed "before" responding to a pleading. The Ranches do not refer to any Panel decision which has followed this suggestion. This Panel declines to do so.

Rule 2 of the Panel Rules permits, but does not require, this Panel to refer to the rules of procedures of the CIT for "guidance" where a procedural question arises that is not covered by the Panel Rules. Rule 61 of the Panel Rules governs the submission of motions to the Panel. This Rule broadly covers all motions to be submitted to the Panel, but it does not establish a deadline for the submission of motions to strike. The Complainants argue that Rule 61's silence on this

point demonstrates that the schedule for filing motions to strike is not covered by the Panel Rules.

On the contrary, we believe that the Panel Rules cover this situation and yet, Rule 61 does not impose a deadline for filing.

Even if the issue of deadlines for filing a motion to strike were deemed not to be covered by the Panel Rules, the Panel still would decline to exercise its discretion to adopt a procedure which retroactively and without fair warning would deny a participant an opportunity to protect its interests. This would defeat the objective set forth in Rule 2 of securing a "just" review.

2. The Motions To Strike Are Granted

The Complainants attempt to augment the administrative record under review by submitting a document arising from an entirely separate Administrative Review. The Complainants support their action by arguing that the "facts" contained in the 1992-1993 verification report were "presented to" and "obtained by" the Department before the Preliminary Determination was issued for the 1991-1992 POR.⁹⁴ The Complainants also argue that the verification report is "sufficiently intertwined" with the 1991-1992 administrative review that it should be "part of the record no matter how or when [it] arrived at the agency."⁹⁵ We find the Complainants' arguments unconvincing.

⁹⁴Complainants' Opposition at 6.

⁹⁵Id. at 7-8, 10 (quoting Floral Trade Council of Davis, California v. United States, 709 F. Supp. 229, 230 (Ct. Int'l Trade 1989) ("Floral Trade Council")).

Article 1911 of the NAFTA defines the administrative record to be reviewed by this Panel as follows:

All documentary or other information presented to or obtained by the competent investigation authority in the course of the administrative proceeding . . .

(emphasis added.) This language is modeled on the nearly identical language used in the definition of the administrative record under U.S. law:

[A]ll information presented to or obtained by the Secretary, the administering authority, . . . during the course of the administrative proceeding . . .⁹⁶

The legislative history of the U.S. definition of the administrative record clarifies that judicial reviews of the Department's final determination should "proceed upon the basis of information before the relevant decision-maker at the time the decision was rendered."⁹⁷ In reviewing agency action, a reviewing court "must base its decision upon the administrative record. New evidence may not be required."⁹⁸

In this proceeding, the Department declares to the Panel that: "the Department did not have the 1992-1993 verification report before it for the purposes of the Department's final results for the fifth review."⁹⁹ The Petitioner also maintains that the 1992-1993 verification report could

⁹⁶19 U.S.C. §1516a(b)(A) (1988) (emphasis added).

⁹⁷S. Rep. No. 96-249, 96th Cong., 1st Sess. 247-48 (1979) (emphasis added).

⁹⁸Atcor, Inc. v. United States, 658 F. Supp. 295, 300 (Ct. Int'l Trade 1987).

⁹⁹Department Motion at 4.

not have been "presented to" or "obtained by" the Department — or even been "before" the Department — in the course of the 1991-1992 administrative review because it was issued on August 30, 1995, more than four months after the Preliminary Determination was issued and the factual record closed pursuant to 19 C.F.R. §353.31(b)(2) (1995).¹⁰⁰

The Complainants do not contend that the 1992-1993 verification report, itself, was "before" the Department in a timely fashion under binding U.S. regulations. Rather, Complainants argue that the "facts" contained in the verification report were "presented to" and "obtained by" the Department on March 20-23, 1995, one month before the Preliminary Determination was issued. Significantly, Complainants do not provide any authority to support their contention that the administrative record consists not only of "documents" submitted or obtained by the Department, but also "facts" made known to Department personnel.

The Complainants rely solely upon Floral Trade Council to support their argument that "facts" presented in one administrative review can be considered part of the administrative record in another administrative review. This single judicial precedent, however, is factually and legally distinguishable from the case under review.

¹⁰⁰Petitioner Motion at 1-2. Section 353.31(b)(2) provides:

“in no event will the Secretary consider unsolicited questionnaire responses submitted after the date of publication of the Secretary’s preliminary determination.”
19 C.F.R. §353.31(b)(2) (1995).

In Floral Trade Council, the Department issued a scope ruling which stated expressly that the Department had examined the underlying antidumping duty investigations during deliberation of the scope determination. The plaintiffs sought to include documents from the underlying investigations in the administrative record of the scope ruling appeal. The Court permitted augmentation of the administrative record to add documents that the agency "expressly incorporated" into the proceeding.¹⁰¹

Subsequent decisions clarify that the Floral Trade Council opinion stands for the limited proposition that,

[T]he administrative record properly contains documents submitted to the ITA as well as any other documents intertwined with the particular inquiry and considered by ITA in making its determination.¹⁰²

Where the Department has not expressly referred to or relied upon documents or information outside the record, the CIT has consistently rejected attempts to augment the administrative record with documents from other administrative reviews.¹⁰³ The Panel therefore determines that, absent proof that the Department referred to or relied upon documents or information outside the particular administrative review under consideration, each administrative

¹⁰¹Floral Trade Council at 230-31.

¹⁰²Intrepid v. International Trade Administration, 787 F. Supp. 227, 229 (Ct. Int'l Trade 1992) (emphasis added).

¹⁰³See, e.g., Rhone Poulenc, 710 F. Supp. 341, 345 (Ct. Int'l Trade 1989).

review is to be considered a separate "unrelated proceeding" for purposes of determining the scope of the Administrative Record.¹⁰⁴

By contrast to the facts in Floral Trade Council, the Department expressly denies in this appeal that it had examined or considered the verification report from the 1992-1993 Administrative Review in making the Final Determination at issue in this action. Therefore, the Panel finds no basis to conclude that the investigation report from the 1992-1993 Administrative Review is "sufficiently intertwined" with the 1991-1992 Administrative Review to be considered part of the administrative record.

The motions to strike Exhibit 5 to Complainants' Brief and portions of that brief which contain references thereto are hereby granted.

B. The Department's Motion To File Its Notice Of Appearance Out Of Time

The Department filed its Notice of Appearance on January 17, 1996, more than five weeks after the deadline date of December 11, 1995. Pursuant to Panel Rule 40(1), the Department was required to file its Notice of Appearance within 45 days after the filing by the Complainants of their request for panel review on October 26, 1995. The Department failed to meet the December 11, 1995 deadline for filing its Notice of Appearance. The Department also failed to request an extension of time to file its Notice of Appearance at least 10 days prior to the deadline date as required by Rule 40(1).

¹⁰⁴See Becker Indus. Corp. v. United States, 7 Ct. Int'l Trade 313, 317 (1984).

None of the participants appeared to take notice of or objected to the Department's failure to file its Notice of Appearance on time. One member of the Panel, however, sua sponte discovered the Department's omission on August 15, 1996 -- the morning of the scheduled oral hearing. The Department participated in the hearing with the understanding that the Panel, if it found that the Notice of Appearance was defectively filed, could strike from the record the Department's oral testimony and written submissions.

Subsequent to the hearing, on August 16, 1996, the Department submitted to the NAFTA Secretariat a Motion for Leave to File the Notice of Appearance Out of Time. The Floral Trade Council consented to the Department's motion. On August 23, 1996, the Complainants filed a response in opposition to the Department's motion.

The Panel must now decide whether to grant the Department's Motion for Leave to File the Notice of Appearance Out of Time and to permit the Department to be considered a participant in the proceeding. The Panel censures the Department for its unjustified failure to follow the clear procedural rules for this Panel review. Nevertheless, for the reasons stated below, the Panel concludes that the Complainants were not prejudiced by the Department's failures to file its Notice of Appearance on time or to file a timely Request for Extension. Also, the Panel believes in this case that a rigid adherence to the time period set forth in Rule 40(1) not only would result in unfairness or prejudice to the Department and to the Petitioner, but it also would undermine the ultimate goals of the Panel Rules, "to secure just, speedy and inexpensive

reviews of final determinations."¹⁰⁵ Therefore, although done reluctantly and without an intention to sanction the Department's approach in this case, the Panel exercises its discretion under Panel Rule 20 to grant the Department's motion.

1. Analysis

It is undisputed that the Department failed to file its Notice of Appearance within 45 days after the Complainants had filed their Request for Panel Review as required by Panel Rule 40(1). It also is undisputed that the Department failed to request an extension of time more than 10 days prior to the December 11, 1995 deadline for filing its Notice of Appearance.¹⁰⁶ The question before the Panel, therefore, is whether the Panel, relying upon Panel Rule 20(3), should grant the Department's motion for leave to file out of time its request for an extension of time.

The Department argues that Panel Rule 40 is a procedural mechanism, not a jurisdictional predicate. It is designed to identify the participants to a particular proceeding. The Department also argues by analogy to CIT Rule 24(a), which establishes the rules for intervention, that "the timeliness requirement for intervention is not intended to punish an applicant for not acting more promptly, but rather is designed to ensure that the original parties are not prejudiced by the delay."¹⁰⁷ The Department notes that it has been actively participating in the proceeding from the

¹⁰⁵Panel Rule (1)(d).

¹⁰⁶See Panel Rule 20(2).

¹⁰⁷Silver Reed America, Inc. v. United States, 600 F. Supp. 852, 856 (Ct. Int'l Trade 1985).

time that it filed its Notice of Appearance on January 17, 1996, and that the Complainants, rather than objecting, have responded to each of the Department's submissions. Therefore, the Complainants arguably have suffered no prejudice from any procedural deficiency caused by its untimely filing of the Notice of Appearance.

The Complainants request that the Panel reject the Department's motion and strike its untimely Notice of Appearance -- and all of its filings and other oral or written presentations -- from the record of this proceeding. The Complainants argue that the Department not only failed to comply with Rule 40 by filing its Notice of Appearance after the December 11, 1995 deadline date, but the Department also failed to comply with Panel Rule 20(3), providing that a participant,

who fails to request an extension of time pursuant to subrule (2) may file a notice of motion for leave to file out of time, which shall include reasons why additional time is required and why the participant has failed to comply with the provisions of subrule (2).

The Complainants argue that the Department has not provided any credible explanation for its failure to file a Notice of Appearance by December 11, 1995, or for its failure to request an extension of the deadline by December 1, 1995, as required under Rule 20(2). Complainants argue that the Department's failure to follow these rules should lead to the denial of the Department's motion and to the striking of its Notice of Appearance and other presentations to the Panel.

This Panel takes specific note of the Department's cavalier approach to the NAFTA Panel Rules. The Department admits that it failed to file its Notice of Appearance on time. It further

failed to file a request for extension of time within the time period set forth in Rule 20(2).

Furthermore, the Complainants accurately point out that the Department did not provide a credible explanation for why it failed to comply with these Rules. The Department refers to the U.S. government shutdown between December 18, 1995 and January 5, 1996 and to snow days on January 8-10, and January 12, 1996, all time periods which occurred after the Notice of Appearance was due. The Department states that it filed a consent motion for an extension of time to file the administrative record on January 17, 1996. According to the Department, the attorney representing the Department believed that this motion for extension of time covered both the Department's responsibility to file an administrative record and the deadline for the Notice of Appearance. The Department asserts that the motion for extension "inadvertently" did not cover the Notice of Appearance in addition to the administrative record issue.

Even taking the Department's position at face value, it does not explain how a filing on January 17, 1996, would satisfy Rule 20(2) for the admittedly untimely filing of its Notice of Appearance. Due to the government shutdown and snow days, the Department's request for extension of time filed on January 17, 1996, was filed before the deadline date for filing the administrative record pursuant to Rule 41. But it was significantly after the deadline date had passed for filing its Notice of Appearance. Even if the request for extension filed on January 17, 1996, had referred to the Notice of Appearance, it still would have been untimely filed under Rule 20(2) and a motion for leave to file out of time would have been required.

We find, therefore, that the Department's failure to file on time was not "inadvertent," but resulted from "misfeasance or negligence."¹⁰⁸ The Panel affirms that all parties involved in a review procedure before a NAFTA panel must adhere strictly to the terms and conditions established in the applicable Panel Rules, including complying with any applicable deadlines.

This Panel wishes to state clearly that the Department violated the provisions set forth in the NAFTA Panel Rules regarding compliance with procedural deadlines.

The Panel considers it to be extremely important and fundamental that the parties involved in a review procedure before a binational Panel fully comply with all terms and provisions established in the applicable NAFTA Panel Rules. Furthermore, it is this Panel's opinion that in order to achieve the objectives of the NAFTA's dispute resolution mechanisms, it is mandatory that all participants observe and comply with all procedural deadlines on a strict and rigorous basis and in clear adherence to their legal obligations.

In view of the foregoing, this Panel emphatically disapproves of the violations made by the Department through its untimely compliance with the deadlines set forth in Rules 40 and 20(2). Nevertheless, in order to ensure that this review proceeding is computed on a just, speedy and inexpensive basis, and having taken into consideration the case law mentioned within the body of this opinion, the Panel will, as a limited exercise of its discretion under Panel Rule 20(i), grant the

¹⁰⁸Cf. Penrod Drilling Co. v. United States, 925 F.2d 406, 408 (Fed. Cir. 1991) (determining that the late filing of a notice of appeal was the result of "misfeasance and negligence" and was not justified on the grounds of "excusable neglect or good cause").

Department's Motion for Leave to File Out of Time and the Notice of Appearance. The Panel thereby avoids the significant disruption to the Panel proceedings that would result if the Department were to be removed as a participant.

The Panel reads its authority under Rule 20(1) broadly. This rule authorizes the Panel to extend "any time period fixed in these Rules" if the following four conditions are met:

- (a) adherence to the time period would result in unfairness or prejudice to a participant or the breach of a general legal principle of the country in which the final determination was made;
- (b) the time period is extended only to the extent necessary to avoid the unfairness, prejudice or breach;
- (c) the decision to extend the time period is concurred in by four of the five panelists; and
- (d) in fixing the extension, the panel takes into account the intent of the rules to secure just, speedy and inexpensive reviews of final determinations.

The first factor weighs heavily in favor of granting the Department's motion. The participation of the Department is vital to the panel review process. In the absence of the Department's oral and written submissions, the Panel would not be able to evaluate fairly the Department's Final Determination challenged by the Complainants.

In the Panel's view, Rule 20(1)(a) also requires that we consider any "unfairness or prejudice" that would result to the Complainants if the Department's motion were granted. Significantly, the Complainants do not argue that they have suffered or would suffer any unfairness or prejudice by virtue of the Department's failure to file its Notice of Appearance on time. Indeed, until the Panel identified this deficiency, the Complainants had accepted and

responded to the Department's participation in this proceeding as a participant. The Panel also notes that the Complainants had agreed to a consent motion extending the period of time for the Panel to file its administrative record. There is no basis in the record to assume that the Complainants would have objected if that motion had not failed to include the Notice of Appearance. The Complainants have not argued -- and thus, we do not find -- that the Complainants have been or would be prejudiced or treated unfairly if the Department were permitted to remain as a participant in this proceeding. On the other hand, if the Panel excluded the Department at this time due to procedural deficiencies that the parties themselves did not notice, the Panel would unfairly undermine the Department's right to justify its final determination before the Panel.

This Panel's application of its discretion under Rule 20 is consistent with analogous precedents of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"), applying the principle of harmless error to U.S. governmental action.¹⁰⁹

In Intercargo Insurance Co. v. United States,¹¹⁰ for example, the Federal Circuit applied the principle of harmless error to a deficient notice of extension of liquidation issued by the

¹⁰⁹Rule 20(1)(a) expressly provides that the Panel may look to the general legal principles of the country in which the final determination under review was made, in order to determine whether adherence to a deadline would result in the breach of such principle.

¹¹⁰83 F.3d 391 (Fed. Cir. 1996).

Customs Service.¹¹¹ The court reviewed two questions: first, whether the error at issue -- Custom's defective notice of extension of liquidation -- was "of the sort amenable to harmless error analysis";¹¹² and second, whether the defect was prejudicial to the importer, the party seeking to have the governmental action declared invalid.¹¹³

Analyzing the first question, the Federal Circuit observed that neither the statute nor the regulation spoke directly to the consequence of a defect in the notice of extension of liquidation.¹¹⁴ Similarly, Panel Rule 40 -- at issue in the instant case -- does not expressly prevent a party from participating in a proceeding if Rule 40's deadlines are not met. To the contrary, Rule 20 permits the filing of an extension of time to file a Notice of Appearance and even authorizes Panels to grant motions to file such extension requests out of time.

The Federal Circuit has observed that the national interest in the administration of a law should not "fall victim to an oversight" by the administering agency.¹¹⁵ Similarly, in this

¹¹¹This "harmless error" analysis applies not only to defects within a filing, but also to the timeliness of a filing or other action. See Brock v. Pierce County, 476 U.S. 253 (1986) (agency's failure to satisfy a statutory timing requirement did not deprive agency of its authority to act); United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (violation of statutory timing requirements for forfeiture actions did not compel dismissal of the underlying forfeiture action); Kemira Fibres Oy v. United States, 61 F.3d 866 (Fed. Cir. 1995) (Department of Commerce failure to publish notice of intention to revoke an antidumping finding did not require revocation of the antidumping finding).

¹¹²Id. at 394.

¹¹³Id. at 396.

¹¹⁴Id. at 394.

¹¹⁵Id. at 396 (quoting Kemira Fibres, 61 F.3d at 873).

proceeding, the national interest in the administration of the antidumping law should not fall victim to the Department's untimeliness.

The second question to be reviewed is whether the non-governmental party was prejudiced by the government's error. The Federal Circuit stated,

[a] party is not "prejudiced" by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect.¹¹⁶

This Panel finds that the Complainants were not prejudiced under this analysis. The Notice of Appearance deadline in Panel Rule 40 serves to protect the interests of all parties to know the identity and basic position of all participants in a Panel Review. As stated above, the Complainants were aware of the Department's participation during each substantive stage of this proceeding. The Complainants, rather than objecting to the Department's participation, responded to each of the Department's submissions. We, therefore, find that the Complainants suffered no injury to any interest Rule 40 was designed to protect.

For the foregoing reasons, the Panel must reluctantly overlook the Department's failure to file on time its Notice of Appearance and its Motion for Leave to File the Notice of Appearance Out of Time, and must grant the Department's motion. To paraphrase the Supreme Court,

¹¹⁶Id. (citations omitted).

[i]t is too late in the day and entirely contrary to the spirit of the [NAFTA Panel Rules] for decisions on the merits to be avoided on the basis of such mere technicalities.¹¹⁷

V. SUMMARY OF PANEL DECISION

A. The Department's Determination That The Complainants Made Evasive And Misleading Statements And Otherwise Impeded The Investigation Was Supported By Substantial Evidence On The Record

The Panel upholds the Department's finding that each Complainant made evasive and misleading statements with respect to its obligations to file tax returns for the years covered by the POR. The Panel finds that there is substantial evidence on the record indicating that the Complainants supplied incomplete and misleading information concerning their obligations to file tax returns for the years covered by the POR. Specific evidence of this conduct by all three Complainants include (1) their referring the Department to a provision in the Diario Oficial and six exemptions permitted thereunder, but failing to furnish a legible and translated copy of the provision until requested and failing to provide any information as to which exemption(s) covered each; (2) thereafter amending their responses and reporting to the Department that their tax exempt status was based on their classification under a "special tax base" without providing a citation to the law because it was an "old law dating back to 1973"; and (3) subsequently providing information that the Mexican law had changed as of February 4, 1991, and required

¹¹⁷Id. at 395 (quoting Foman v. Davis, 371 U.S. 178, 181 (1962)).

payment of income taxes for income earned as of January 1, 1991, and then informing the Department that the income tax payments did not appear on their 1991 books or records because those taxes were not payable until July ?, 1992.

Additionally, with respect to Aguaje, Aguaje maintained that it could not substantiate or reconcile its financial statements because it had not filed the requisite tax returns due to a dispute with the Mexican taxing authority for the years covered by the POR. Although Aguaje provided documents indicating that Aguaje questioned the appropriate manner in which to treat a loan, the Mexican tax authority promptly answered Aguaje's inquiry and informed Aguaje how to treat the loan as income and to file its return. Aguaje provided no additional documentation by the Mexican tax authority to support its continued failure to file its taxes.

As to Guacatay and Toro, they finally submitted the requested tax returns seven months after saying that they did not exist. The tax returns submitted were illegible, untranslated, and unaccompanied by the requisite reconciliation worksheets. The dates of the returns also demonstrated that Guacatay and Toro had filed their tax returns before they had falsely informed the Department that they were not required to file tax returns for 1991-1992.

B. The Department's Determination To Use "Best Information Available" Was Supported By Substantial Evidence In The Record But The Assignment Of A First-Tier Rate Was Not Supportable

The Panel upholds the Department's use of BIA as supported by substantial evidence on the record and otherwise in accordance with law. Notwithstanding the foregoing, the Panel finds

that there is evidence in the administrative record that each of the Ranches made efforts to cooperate with the Department's investigation. Although the Complainants did not cooperate fully by providing all the information the Department requested, each Complainant responded to the Department's first questionnaire, and four supplemental questionnaires, as well as submitted sales, expense, cost, and other financial information to the Department as requested. Under the Act, substantial cooperation by the Complainants renders the assessment of a first-tier BIA dumping margin unsupported by substantial evidence on the record and otherwise not in accordance with law. Therefore, the Panel remands the Final Determination to the Department with instructions to assess the second-tier BIA rate of 18.20 percent for each Complainant.

VI. DISCUSSION OF PANEL DECISION

A. The Department's Determination That Rancho Aguaje Failed To Cooperate And Impeded Review Of The Department's Investigation Was Supported By Substantial Evidence On The Administrative Record Or Was Otherwise In Accordance With The Law

1. Rancho El Aguaje's Arguments

Aguaje argues that it fully cooperated with the Department during its investigation, and that it provided the Department with all the requested information that Aguaje had within its control.¹¹⁸ Aguaje submits that it furnished the Department, in a timely manner, with certified responses to all of the Department's requests for information, including the Department's initial

¹¹⁸Pub. Doc. 50.

questionnaire and its four supplemental questionnaires.¹¹⁹ Also, Aguaje submits that, in support of its response that it had not filed tax returns, it furnished the Department with two letters evidencing its claim that no tax returns had been filed.¹²⁰ Additionally, Aguaje contends that the administrative record is not "incomplete" or "deficient" in any manner that would justify the Department's assignment of BIA.¹²¹

Aguaje claims that the fact that it has no income tax returns for the POR cannot be viewed as a shortcoming on the part of Aguaje. In support of its position, Aguaje refers to Olympic Adhesives, Inc. v. United States.¹²² As set forth therein, Aguaje contends that it was arbitrary, unreasonable, and contrary to law for the Department to use BIA in response to Aguaje's inability to provide information that does not exist. In Olympic Adhesives, the Court held that it was inappropriate for the Department to use BIA in response to a respondent's inability to provide information that did not exist. "[A] `No' answer is not a refusal to provide data. If there is no data, `No' is a complete answer."¹²³ The court rejected the Department's implied interpretation of the applicable statute that it had the authority to use BIA where a respondent cannot produce data

¹¹⁹Id. at 19.

¹²⁰Id.

¹²¹Id.

¹²²899 F.2d 1565 (Fed. Cir. 1990).

¹²³Id. at 1573.

because that data never existed.¹²⁴ In light of Olympic Adhesives, Aguaje maintains that since it responded to all of the Department's requests and since it could not provide tax returns that did not exist, the Department's application of BIA was unreasonable.

Aguaje argues that the sole reason that the Department classified it as uncooperative and penalized it with the adverse BIA rate of 39.95 percent is the Department's finding that it "failed to provide sufficient support for its claim that it had not filed tax returns covering the POR."¹²⁵ Aguaje submits that the Department's determination to use BIA because Aguaje impeded the Department's investigation by making misleading and evasive statements, and by failing to provide the requested information, is not supported by substantial evidence on the administrative record.

2. The Department's Arguments

The Department contends that the application of the first-tier BIA dumping margin of 39.95 percent to Aguaje was correct because Aguaje made evasive and misleading statements in its responses to the Department's questionnaires, and because Aguaje failed to substantiate its claim that it had not filed tax returns or that it was in a dispute with the Mexican authorities regarding the filing of tax returns.¹²⁶

¹²⁴Id.

¹²⁵See 60 Fed. Reg. at 49570, Pub. Doc. 77.

¹²⁶Pub. Doc. 58.

The Department insists that independent corroboration of the Complainants' data was necessary in light of their new obligations under the Mexican tax law:

In prior administrative reviews, the Department did not require the level of independent substantiation as it does in this review because none existed. In the absence of audited financial statements in this review, we required that the Respondents submit their tax returns as a way to independently substantiate their questionnaire responses. Sales and cost information is presented differently in these two documents. Thus, an explanation of how the figures on the tax return reconcile with the ranches' financial statements is also required. Without this explanation, the Department cannot use the tax returns to independently substantiate the reported sales and costs; without such independent substantiation, the entire questionnaire response is unusable.¹²⁷

The Department submits that it provided Aguaje with numerous opportunities to either provide the Department with its tax returns for 1991 and 1992 or explain why it had not filed them, and that Aguaje was evasive in its responses. In its initial questionnaire, dated July 2, 1992, the Department requested that Aguaje supply its cost and sales information, as well as any audited or internal financial statements.¹²⁸ Aguaje responded by providing cost and sales information, and stated that although it maintained "in-house" financial statements, it was not required to maintain audited financial statements.¹²⁹

On March 23, 1993, the Department requested in its first supplemental questionnaire that Aguaje provide the unaudited financial statements referenced in its initial response because it had

¹²⁷60 Fed. Reg. at 49570 (Comment 1).

¹²⁸Pub. Doc. 10 at 3.

¹²⁹Pub. Doc. 17.

failed to do so in its initial response.¹³⁰ Aguaje responded on April 5, 1993, by providing its unaudited financial statements.¹³¹

On December 7, 1993, the Department sent Aguaje its second supplemental questionnaire in which it requested that Aguaje reconcile the unaudited financial statements that it previously submitted with independent sources, such as tax returns. The Department stated that:

On page 3 of your response, you indicate that the farm does not maintain an audited financial statement. In light of this fact, please describe the internal controls which are present in your accounting system. In your discussion, please describe what independent sources (i.e., bank statements, tax returns, labor reports) are available to ascertain the accuracy of this information.

In the event that this farm is not required to file a tax return, please submit the relevant supporting law which exempts the farm from filing.¹³²

Thereafter, on December 21, 1993, rather than submitting their 175 returns or evidence of an exemption, and in spite of the Department's clear request of December 7, 1993, Aguaje responded by stating that it was not required to maintain audited financial statements or to file tax returns because it was exempt under the Diario Oficial.¹³³

¹³⁰Pub. Doc. 29.

¹³¹Pub. Doc. 33; Con. Doc. 10. Aguaje then supplemented its response on June 9, 1993. Pub. Doc. 36; Con. Doc. 12.

¹³²Pub. Doc. 46 at 1.

¹³³Pub. Doc. 49 at 1; Con. Doc. 16.

Despite Aguaje's contention that its exemption from the Mexican filing requirements was evident in the submission provided to the Department, Aguaje initially failed to supply an English translation of the relevant portions of the Diario Oficial. English translations of these documents would have assisted in the Department's analysis of the issue and are required at the time of submission.¹³⁴ On January 12, 1994, Aguaje finally supplemented its prior response with an English translation of the relevant portions of the Diario Oficial that it alleged exempted it from paying income taxes.¹³⁵ No explanation was offered as to why the translation was not timely submitted.

The Diario Oficial exempted six different types of entities from filing tax returns. However, because Aguaje did not tell the Department which of the six categories applied to Aguaje thus qualifying it for tax exempt status, on May 16, 1994, the Department was required to issue a third supplemental questionnaire to Aguaje seeking clarification.¹³⁶

On June 9, 1994, Aguaje reported that its tax exempt status did not, in fact, rest on any of the submitted portions of the Diario Oficial, but rather, now rested on an entirely new basis, i.e.,

¹³⁴19 C.F.R. 353.31(f) (1993).

¹³⁵Pub. Doc. 52.

¹³⁶The Department stated "[i]n the copy of the Mexican regulations which you provided, the regulations listed six entities which are eligible for tax exemption. However, your questionnaire response did not translate this list of entities, nor did it indicate which category applies . . ." Pub. Doc. 54 at 1 (referring to Aguaje's questionnaire response dated Jan. 12, 1994, at 4).

its classification as a "special tax base."¹³⁷ Aguaje instructed the Department to "disregard" the earlier explanation for its exempt status because it had discovered that its exempt status was based on the "special tax base" rather than on one of the six categories asserted in its December 21, 1993 submission.¹³⁸

Although this "new" classification provided the entire basis for Aguaje's claimed exemption, Aguaje was unable to direct the Department to the law granting this "special tax base" exemption because it was an "old law dating back as far as 1973."¹³⁹ Within this same submission, Aguaje then admitted that the Mexican law had changed as of February 4, 1991, such that Aguaje was now required to pay taxes on income earned as of January 1, 1991. Aguaje next explained that these income tax payments did not appear in its 1991 books or records because they were not due until July 1992.¹⁴⁰

On June 2, 1994, the Department was required to issue its fourth supplemental questionnaire in which it specifically requested that Aguaje (i) indicate if it filed tax returns for 1991 and 1992; and if so, (ii) provide the Department with the tax returns with English translations; (iii) reconcile the tax returns to Aguaje's previous questionnaire responses; and (iv)

¹³⁷Pub. Doc. 61 at 1-2; Con. Doc. 19.

¹³⁸Id.

¹³⁹Id.

¹⁴⁰Id. Under Aguaje's own time line, Aguaje provided this explanation to the Department two years after its taxes for 1991 were due.

explain any items that were treated differently for "book" versus tax purposes.¹⁴¹ The Department also specifically requested Aguaje to explain why tax returns had not been filed, if, in fact, no returns had been filed for the years covered under the POR,¹⁴² and to provide supporting documentation authorizing an extension.¹⁴³

Aguaje's July 6, 1994, response to the fourth supplemental questionnaire informed the Department that it could not substantiate or reconcile its financial statements. Aguaje stated that it had not filed tax returns for the years covered by the POR due to a dispute it was allegedly having with the Mexican tax authority. As discussed more fully above, Aguaje provided the Department with two letters allegedly in support of this new position. One letter was from Aguaje to the Mexican government requesting guidance on the proper treatment of a loan. The second letter was the Mexican government's response instructing Aguaje that it should treat the loan as income and that it should file its returns.¹⁴⁴

The Department maintains that the letters Aguaje provided did not evidence a dispute with the Mexican tax authority.¹⁴⁵ The Department states that the letters merely indicate that a question was asked and answered regarding what Aguaje should include in its tax returns and that

¹⁴¹Pub. Doc. 64 at 1.

¹⁴²Id.

¹⁴³Id.

¹⁴⁴Pub. Doc. 69; Con. Doc. 24.

¹⁴⁵Pub. Doc. 58 at 22.

consequently, there is no record evidence that Aguaje had not filed tax returns or that it was engaged in a "dispute" with the Mexican tax authority.¹⁴⁶

Additionally, the Department determined that Aguaje had made a number of misleading and evasive statements which significantly impeded the Department's review proceeding. With respect to Aguaje's tax status the Department noted that:

It was not until the Department had issued its third supplemental questionnaire addressing this issue, specifically requesting the tax returns required under Mexican law, that [Aguaje] revealed [its] true tax status. . . The correspondence Aguaje finally submitted in response to the Department's third supplemental questionnaire concerning this issue, did not support the ranch's statement that no tax returns were filed.¹⁴⁷

With respect to the argument by Aguaje and the other Ranches that these incidents were merely "misunderstandings" arising from confusion over the Department's requests and the change in the Mexican tax law,¹⁴⁸ the Department stated:

The supplemental questionnaire was clear and our request for reconciliation between tax returns and financial statements was not unusual. Whenever a respondent does not understand the Department's questions or directions, it is the responsibility of the respondent to ask the Department for clarification, None of the respondents requested such a clarification.¹⁴⁹

¹⁴⁶Id. at 23.

¹⁴⁷60 Fed. Reg. at 49570-71 (Comment 2); BIA Memorandum, Pub. Doc. 73 at 1-2; Con. Doc. 27 at 1-2.

¹⁴⁸Complainant's Panel Brief at 11, 25-27.

¹⁴⁹60 Fed. Reg. at 49570.

The plain language of the Department's numerous questionnaires and the shifting positions of the Complainants throughout the course of the proceeding indicated to the Department that Aguaje was being misleading and evasive in its statements concerning its tax status and the existence of its tax returns. The Department's reasonable apprehension concerning Aguaje also was confirmed when Aguaje changed its explanation for the missing tax returns from "not filed" to an unsubstantiated "dispute" with the tax authorities following the Department's fourth request for information.

Because the whole of Aguaje's responses shows that Aguaje was being evasive and because Aguaje did not provide the Department with documents evidencing that it had no legal responsibility to file tax returns, the Department contends that the credibility of Aguaje's responses was in doubt. The Department, therefore, believes that it was justified in using first-tier BIA in assessing the 39.95 percent dumping margin for Aguaje.

3. The Petitioner's Arguments

The Petitioner contends that the Department properly rejected the unsupported cost data submitted by Aguaje, and properly imposed first-tier BIA. Petitioner submits that Aguaje was given the opportunity to submit an explanation and copies of Mexican law provisions relating to the issue of whether or not it was required to file tax returns or whether or not it had received permission not to file the returns.¹⁵⁰ Nonetheless, Aguaje failed both before the Preliminary

¹⁵⁰Cf. Pub. Doc. 88 at 9.

Determination or thereafter to submit any evidence that a tax return had not been legally due for the POR.¹⁵¹

Complainants argue that the Department has penalized Aguaje for "failing to provide information that does not exist."¹⁵² Petitioner submits, however, that it is clear on the record that (i) Aguaje submitted inconsistent statements regarding its obligation to file taxes; and (ii) evidence exists demonstrating that these Mexican companies were required to file tax returns.¹⁵³ According to Petitioner, Aguaje officials knew of the 1991 change in Mexican tax law during the verification in the 1989-1990 review proceeding.¹⁵⁴ Nevertheless, after repeatedly informing the Department that it was not subject to taxation, on July 6, 1994, some two years after the initial questionnaire was sent, and twenty-one months after that ranch had sent a letter to the Mexican tax authorities, Aguaje finally informed the Department that it was unable to submit its tax returns because it had not yet filed them.¹⁵⁵

Petitioner contends that given this background, the Department could not rely on Aguaje's assertion that it had no legal objection to file tax returns. Indeed, the record shows that Mexican

¹⁵¹Pub. Doc. 73 at 2. The Department noted that "Aguaje submitted no subsequent correspondence indicating that it . . . had been granted a filing extension."

¹⁵²Complainants' Case Brief at 18.

¹⁵³Pub. Doc. 77; 60 Fed. Reg. at 19210; Pub. Doc. 73 at 2-3.

¹⁵⁴Id.

¹⁵⁵Pub. Doc. 69 at 1.

law imposed a legal obligation on Aguaje to file tax returns for the POR. In the face of such legal obligation, the bare assertion by Aguaje that no tax returns were prepared or filed was an insufficient response to the Department's inquiries.

The Department properly rejected Aguaje's responses because Aguaje failed to submit timely evidence that a tax return did not exist and that none was legally required to be filed.¹⁵⁶ Accordingly, Petitioner argues that the Department's presumption was reasonable and the rejection of the response proper.¹⁵⁷

B. Whether The Department's Determination That Rancho Guacatay And Rancho Toro Failed To Cooperate And Impeded The Review Proceeding Was Supported By Substantial Evidence On The Record Or Was Otherwise In Accordance With Law

1. Complainants' Arguments

a. Guacatay And Toro Were Not Uncooperative Under The Department's Own Practice For Categorizing Complainants As Uncooperative

Toro and Guacatay rest their arguments on what they deem to be disparate treatment by the Department. According to Toro and Guacatay, any perceived "evasive" or "misleading"

¹⁵⁶After submitting its contradictory responses, Aguaje argued in its case brief that supporting information did exist but only in the record of a later (1992-1993) review period. Pub. Doc. 88 at 11-12. This argument was made after the deadline for submitting new evidence had passed. Aguaje claims that it could have submitted additional evidence in the record if it had known of the Department's concerns. Pub. Doc. at 12. Aguaje also asserts that the Department discussed "the identical tax issue with Aguaje's employees at great length during the verification" in the 1992-1993 review. In any event, Petitioner contends that it was clear that Aguaje could have complied with the Department's request for independent, corroborating evidence yet it failed to do so.

¹⁵⁷Petitioner relies upon Creswell Trading Co. v. United States, 15 F.3d 1054, 1060-61 (Fed. Cir. 1994), in support of this position.

statements regarding their obligations to file tax returns did not rise to the level of "uncooperative" as defined by the Department's past practice. Notably, in past cases, the Department limited its designation of "uncooperative" to cases where there was a complete non-compliance with the Department's questionnaire requirements, a failure to submit fundamental information or systematic misreporting of critical data. By way of example, a respondent was found to be uncooperative when it failed to respond to a departmental questionnaire.¹⁵⁸ Respondents have also been found to be uncooperative by withdrawing from an ongoing proceeding.¹⁵⁹ In yet another case, the respondent failed to provide supplemental constructed value data and requested the withdrawal of all of its submissions responding to the Department's antidumping questionnaire.¹⁶⁰ The Department found the respondents list above uncooperative and assigned their rates based on BIA.

Toro and Guacatay submit that they did not (i) fail to report sales data for a whole class of product, (ii) withdraw from the proceeding, or (iii) fail to provide a complete listing of home market sales. Rather Toro and Guacatay assert that they responded in a timely and complete

¹⁵⁸Sparklers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 60 Fed. Reg. 54335 (October 23, 1995)(The respondent failed to answer the Department's questionnaire. The Department verified that the respondent had, in fact, received the questionnaire before determining that the respondent was uncooperative and applying BIA.)

¹⁵⁹See Final Determination of Sales at Less Than Fair Value: Amorphous Silica Filament fabric From Japan, 52 Fed. Reg. 28033 (July 27, 1987).

¹⁶⁰See Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products and Certain Cut-To-Length Carbon Steel Flats from Italy, 58 Fed. Reg. 37152 (July 9, 1993).

manner to all five of the Department's questionnaires. Further, Toro and Guacatay assert that they supplied the Department with detailed and complete information on their entire universe of U.S. sales, and provided complete and excruciating detail of their costs of production and of their selling expenses. Moreover, Toro and Guacatay note that they developed accounting systems which yielded detailed financial statements for the sole purpose of complying with the U.S. antidumping law.

Additionally, Toro and Guacatay point out that the Department has determined respondents to be uncooperative when they refused to undergo verification or when certain responses were discovered at verification to contain a number of discrepancies.¹⁶¹ In situations in which the Department has discovered multiple and significant discrepancies during verification, the Department has found respondents to be uncooperative.¹⁶² In the present case, neither Toro nor Guacatay refused to undergo on-site verification. They did not object to the Petitioner's request for an on-site verification; rather, it was the Department that exercised its discretion and chose not to verify the Complainants in this review.

¹⁶¹Final Determination of Sales at Less Than Fair Value: Sweaters Wholly or in Chief Weight of Man-Made Fiber from Hong Kong, 58 Fed. Reg. 30733 (July 27, 1990)(Respondent refused to permit its response to be verified and as a result the Department assigned as BIA the highest margin alleged in the petition.).

¹⁶²Final Determination of Sales at Less Than Fair Value: Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From Italy, 52 Fed. Reg. 24198 (June 29, 1987) (Included among the discrepancies in this case were insufficient documentation to determine whether sales to the United States were purchase price or exporter's sales price transactions, without which the antidumping margin calculation was impossible. Neither the volume nor value of United State's sales could be verified and dates of these sales were incorrectly reported. Also, charges were based on averages which could not be traced to specific invoices. Since the respondent's responses as a whole were unverifiable, the Department found respondent uncooperative and assigned BIA.).

Further, Toro and Guacatay submit that past and subsequent reviews and verifications,¹⁶³ i.e., those where the Department's "auditing procedures" went far beyond the "reconciliation" requested here, completely corroborated the reliability of the information submitted by Toro and Guacatay.¹⁶⁴ Specifically, in the 1989-1990 administrative review, the Department concluded that:

[t]he administrative record in this case demonstrates that both of the respondents [Toro and Aguaje] have provided all information requested in a timely manner and have cooperated fully with the [Department]. In addition, verification of the respondents' data established that the vast majority of their submissions to the [Department] were complete and accurate and that, in those instances where data was found to be inaccurate, the errors were generally clerical in nature and easily corrected.¹⁶⁵

b. Neither Toro Nor Guacatay Made Misleading Statements

Toro and Guacatay argue that the Department's claim that they made evasive and misleading statements regarding their obligations to file tax returns is not correct or supported by substantial evidence in the record. According to Toro and Guacatay, the infractions alleged by the Department are minor in nature, and are largely the result of misunderstandings resulting from the change in Mexican tax law and its effect upon relatively unsophisticated flower farmers whose

¹⁶³In the 1992-1993 POR, the Department verified the Complainants' information with an on-site verification and assigned the Complainants zero dumping margins. 61 Fed. Reg. 6812 (Feb. 22, 1996). The on-site verification occurred in March 1995, one month prior to the Department's issuance of the Preliminary Determination.

¹⁶⁴See Exhibits L-3, L-5 and L-8 in the Department's Public Version of the Verification Report Memorandum in 1992-1993 Administrative Review (Sept. 12, 1995).

¹⁶⁵56 Fed. Reg. 29621 (June 28, 1991).

ranches had never been subjected to income taxes before the change in the law. Both Toro and Guacatay responded fully and completely within the deadlines established by the Department to each of the Department's five information requests.

c. The Department's Request For A "Reconciliation" Of The Complainants' Tax Returns To Questionnaire Responses Was An Artifice

Part of the basis on which the Department categorized Toro and Guacatay as uncooperative was that they failed to "reconcile their financial statements to their tax returns."¹⁶⁶ Toro and Guacatay urge that their inability to provide these reconciliations did not impede the Department's investigation and, consequently, did not rise to the level of being "uncooperative" under the Department's prior practice. Specifically, Toro and Guacatay submit that they provided the personal tax returns of the ranch owners in their July 5, 1994 responses.¹⁶⁷ Within their proprietary submissions on the issue, Guacatay and Toro provided the Department with what they characterized as the "honest and forthright" reasons behind their inability to provide the requested reconciliations.¹⁶⁸

¹⁶⁶See 60 Fed. Reg. 49569 (September 26, 1995).

¹⁶⁷The Complainants have stated that these personal tax returns contain "all the business activities and personal income of the individual, not just the activity of one business." Pub. Doc. at n. 3.

¹⁶⁸In their proprietary submissions, both Guacatay and Toro provided the same reason for their inability to reconcile their returns and financial statements. See Con. Docs. 23 and 22, respectively.

Toro and Guacatay argue that given these "honest and forthright" submissions, the sole issue relating to these "reconciliations," i.e., the ability of the Department to reconcile the financial statements with the tax returns is merely an artifice. Given the information provided in Toro's and Guacatay's proprietary submissions, submit the Ranches, the Department was fully aware that the requested reconciliations would not be and could not be tendered.

Moreover, Toro and Guacatay contend that they did not reconcile the financial statements with the personal tax returns of the ranch owners, not because they were being uncooperative, but because they genuinely did not understand what "correlation" the documents could possibly have to their responses to the Department's questionnaire. Additionally, Toro and Guacatay argue that the type of exercise involved in the reconciliation of financial statements to tax returns is the sort of exercise reserved for on-site verification.

Despite Toro's and Guacatay's willingness to undergo verification, these Ranches state that the Department rested its entire BIA case on their failure to provide reconciliations, although the Department was fully cognizant of the reasons why neither Guacatay or Toro could provide the reconciliations.

Equally as egregious to Toro and Guacatay is the fact that the Department went so far as to acknowledge in its Final Determination that the existence of tax returns is not a prerequisite to determining cooperativeness.

In prior administrative reviews, the Department did not require the level of independent substantiation as it does in this review, because none existed. In the

absence of audited financial statements in this review, we required that the respondents submit their tax return as a way to independently substantiate their questionnaire responses.¹⁶⁹

Moreover, according to Toro and Guacatay, nothing changed between the prior administrative reviews and this review, except the manner in which the Department chose to treat identically prepared accounting records and dumping submissions. In 1989-90, the Department accepted the same type of information, deemed it sufficient and determined that the Ranches were not dumping.¹⁷⁰ In 1990-91, the same information was accepted and verified, and the Department found that the only ranch reviewed was not dumping.¹⁷¹ For some inexplicable reason, having provided essentially identical information to that provided in 1991-92, the Department concluded that Toro and Guacatay were "giving away their flowers."¹⁷²

Accordingly, Toro and Guacatay submit that the capriciousness and arbitrariness of the Department's result is unreasonable and illegal, and should not be sanctioned by this Panel. Toro and Guacatay maintain that they cooperated fully in the review proceeding and, as such, the Department's Final Determination must be vacated and remanded to the Department with instructions for it to reach a decision on the merits of the questionnaire responses.

¹⁶⁹60 Fed. Reg. at 49570 (emphasis added).

¹⁷⁰56 Fed. Reg. 29621 (June 28, 1991).

¹⁷¹57 Fed. Reg. 19597 (May 7, 1992).

¹⁷²60 Fed. Reg. 49570.

d. The Department's Resort To BIA Was Not Supported By Substantial Evidence On The Record

Toro and Guacatay argue that the Department's selection of BIA is not reasonable and that, in any event, if BIA is appropriate, the Department must select a margin that is "accurate" and "more probative of current conditions."¹⁷³ Toro and Guacatay base their argument that the Department's application of the highest rate from a prior administrative review is improper on the assumption that, in selecting BIA, the Department must choose a rate which is as "accurate" as possible.¹⁷⁴ They define any rate which is not as accurate as possible as "unreasonable" and not "probative of current conditions."¹⁷⁵

2. The Department's Arguments

The Department assessed total BIA margins of 39.95 percent against Guacatay and Toro on many grounds, including the Department's determination that neither ranch reconciled, or attempted to reconcile, their tax returns to their financial statements as requested by the Department.¹⁷⁶ This determination was made notwithstanding the fact that in prior administrative reviews, the Department had not required independent substantiation of the information Guacatay

¹⁷³Complainants' Case Brief at 33-35.

¹⁷⁴Id. at 29-31.

¹⁷⁵Id. at 31-33.

¹⁷⁶BIA Decision Memorandum, Pub. Doc. 73 at 2; Con. Doc. 27 at 2.

and Toro submitted in their questionnaire responses because none had existed.¹⁷⁷ Like Aguaje, Guacatay and Toro were not required to maintain audited financial statements and had developed accounting systems specifically to answer the Department's questionnaires.¹⁷⁸

However, the Department requested that Guacatay and Toro submit their tax returns for 1991 and 1992, the years covering the POR, or explain why the returns were unavailable.¹⁷⁹ After several failed attempts to explain why they were not required to file tax returns, eventually, both respondents admitted that they were required to file tax returns and had indeed already done so.¹⁸⁰ Some years after the returns were actually filed, and subsequent to the numerous responses made by Toro and Guacatay during which both denied the existence of such returns, Guacatay and Toro submitted their 1991 and 1992 tax returns to the Department on July 6, 1994.

The Department also requested that Toro and Guacatay provide reconciliations between the tax documents and the financial statements previously submitted to the Department. The Department requested this information because it was apparent that Guacatay's and Toro's sales and cost information was presented differently in their tax returns and in their financial statements.

¹⁷⁷60 Fed. Reg. at 49570.

¹⁷⁸Con. Doc. 23 at 1 (Guacatay); Con. Doc. 22 at 1 (Toro).

¹⁷⁹Id.

¹⁸⁰Pub. Doc. 68, Con. Doc. 23 at 1 (Guacatay); Pub. Doc. 67, Con. Doc. 22 at 1 (Toro).

The Department needed an explanation of how the figures on the tax returns reconciled with Guacatay's and Toro's respective financial statements.¹⁸¹

Both Guacatay and Toro responded that they could not reconcile their questionnaire responses to their tax returns.¹⁸² Toro and Guacatay informed the Department that their financial statements and their tax returns were based on different sets of reporting requirements and assumptions. Therefore, both Guacatay and Toro argue that reconciliations between the documents was not possible.¹⁸³

Despite Guacatay's and Toro's assertions that their financial statements and tax returns were completely unrelated, the Department indicated to the ranches that their financial statements and tax returns derive from the same sources of sales and cost information which Guacatay and Toro used to respond to the Department's questionnaires. Indeed, this cost and sales information is the very same information the Department requires to perform its antidumping analysis - essential financial data which must have significant credibility.¹⁸⁴

The Department explained that its prior practice of accepting the respondents' unaudited information was based on the unavailability of corroborating documents:

¹⁸¹60 Fed. Reg. at 49570 (Comment 1).

¹⁸²Pub. Doc. 68 at 1-2, Con. Doc. 23 at 1-2 (Guacatay); Pub. Doc. 67 at 1-2, Con. Doc. 21 at 1-2 (Toro).

¹⁸³Complainants' Panel Brief at 25-28.

¹⁸⁴Con. Doc. 27 at 2.

We accepted respondents' unaudited "in-house" statements in prior reviews because they did not have, and therefore could not submit, official corroboration of their internal records.¹⁸⁵

Guacatay's and Toro's tax returns were precisely the types of "official" corroboration the Department desired to verify the credibility of an unaudited, "in house" financial system and the questionnaire information derived from that system. Where, as here, the unaudited system and the information it generates for the questionnaire responses cannot be validated using the official documentation, the credibility of the questionnaire response is in doubt. The Department determined that Guacatay's and Toro's questionnaire responses were unreliable, and therefore, unusable. Without reliable data from Guacatay and Toro to accurately calculate the margins, the Department was forced to use BIA.

As to Toro's and Guacatay's argument that any attempt at reconciliation would have been futile because the returns are "personal tax returns. . .,"¹⁸⁶ the Department notes that this argument is clearly contradicted by the record evidence. Guacatay and Toro submitted these tax returns to the Mexican government as statements of the tax liability incurred by their agricultural businesses.¹⁸⁷

¹⁸⁵60 Fed. Reg. at 19210.

¹⁸⁶Complainants' Case Brief at 27.

¹⁸⁷See Panfield Memorandum, Pub. Doc. 53, Con. Doc. 18 at 1-2; see also Pub. Doc. 68, Con. Doc. 23 at 2 (Guacatay); Pub. Doc. 67, Con. Doc. 22 at 2 (Toro).

According to the Department, Toro and Guacatay not only failed to provide the requested reconciliations, but they refused even to attempt such reconciliations. Consequently, Toro's and Guacatay's bold assertions that reconciliations would have been impossible is unconvincing because Guacatay and Toro neither attempted to do so nor provided evidence of such an attempt, as requested by the Department.¹⁸⁸

The Department similarly has little patience with Toro's and Guacatay's claim that their questionnaire responses were clear and that, where confusion existed, it was a result of the change in the Mexican tax reporting requirements rather than evasiveness.

Just as with Aguaje, the Department determined that Toro and Guacatay were misleading and evasive because their claims regarding their obligations to file tax returns changed over the course of the proceeding.¹⁸⁹

In the Final Determination, the Department determined that Guacatay and Toro significantly impeded the proceeding because of their misleading and evasive statements concerning the tax issue:

The respondents' answer to the Department's supplemental questionnaires were evasive and misleading, and significantly impeded the progress of the review.

. . . It was not until the Department had issued its third supplemental questionnaire addressing this issue, specifically requesting the tax returns required under Mexican law, that the respondents revealed their true tax status. While Guacatay

¹⁸⁸See, Pub. Doc. 68, Con. Doc. 23 at 2 (Guacatay); Pub. Doc. 67, Con. Doc. 22 at 2 (Toro).

¹⁸⁹60 Fed. Reg. at 49570; BIA Decision Memorandum, Pub. Doc. 73 at 1-2, Con. Doc. 27 at 1-2.

and Toro finally provided tax returns, the documents were illegible, untranslated, and were not accompanied by the requested reconciliation worksheets.¹⁹⁰

At no point in the proceeding did either Toro or Guacatay request a clarification from the Department.¹⁹¹ Because their misleading and evasive statements concerning their tax obligations significantly impeded the proceeding, the Department was required to assign Guacatay and Toro a margin based entirely on BIA.

a. Selection Of The 39.95 Percent Margin Was Supported By Substantial Evidence On The Record And Was Otherwise In Accordance With Law

As discussed above, the Department determined that Guacatay and Toro failed or refused to provide the information requested by the Department and as such that they each significantly impeded the proceeding. The Department determined that uncooperative, first-tier BIA was appropriate because Guacatay and Toro each (i) refused or failed to produce financial information or a requested analysis which called into question the credibility of their questionnaire responses, and (ii) made misleading and evasive statements which significantly impeded the Department's

¹⁹⁰60 Fed. Reg. at 49750-71 (Comment 2); BIA Decision Memorandum, Pub. Doc. 73 at 1-2, Con. Doc. 27 at 1-2.

¹⁹¹As set forth in the Final Determination:

The supplemental questionnaire was clear, and our request for reconciliation between tax returns and financial statements was not unusual. Whenever a respondent does not understand the Department's questions or directions it is the responsibility of the respondent to ask the Department for clarification. None of the respondents requested such a clarification.

proceeding. As a result, the Department determined that their questionnaire responses were unusable and that the Department was required by statute to assign margins based entirely on BIA.

As with Aguaje, in the Final Determination, the Department first determined that Toro and Guacatay were uncooperative based on statements concerning their tax liability:

In response to the Department's repeated questions regarding the existence of income tax returns covering the POR, the respondents made evasive and misleading statements regarding their obligations to file tax returns, which significantly impeded this review.¹⁹²

Next, the Department determined that Toro and Guacatay were uncooperative because of their refusal or failure to provide information concerning the reconciliation of their tax returns. The Department reaffirmed its Preliminary Determination in the Final Determination: "[W]e maintain our position that Guacatay, Toro, and Aguaje were uncooperative, and have applied total [uncooperative] BIA to their U.S. sales."¹⁹³ The Department selected a BIA margin for the preliminary results based on its longstanding policy:

As a result [of the respondents' failures to cooperate], in accordance with section 776(c) of the Act, we have determined that the use of BIA is appropriate. Whenever, as here, a company refuses to cooperate with the Department, or otherwise significantly impedes an antidumping proceeding, we use the higher of (1) the highest of the rates found for any firm for the same country of origin in the less-than-fair-value (LTFV) investigation or in prior administrative reviews; or (2)

¹⁹²60 Fed. Reg. at 49579.

¹⁹³60 Fed. Reg. at 49571.

the highest rate found in this review for any firm for the same class or kind of merchandise. (citations omitted).

As BIA we assigned the rate 39.95 percent, which is the second highest rate found for any Mexican flower producer in prior reviews and the LTFV investigation.¹⁹⁴

The Department argues that its determination to assign uncooperative, first-tier BIA margins to Guacatay and Toro as well as to Aguaje was reasonable, reasonably carried out the purposes of the BIA rule, and was otherwise in accordance with law.

With respect to the Complainants' argument that any BIA rate assessed must be as accurate as possible, the Department asserts that the argument demonstrates a fundamental misunderstanding of the rule of BIA. It is well-established that BIA rates are not accurate.¹⁹⁵ The only way to determine if a rate the Department chose is "accurate" would be to compare it to the respondents' actual information -- i.e., the information the Complainants each failed to provide. Absent the Complainants' actual information, there is no reason to believe that a rate from the prior review is any less accurate a representation of their actual rate of dumping. Moreover, the Complainants themselves deprived the Department of the only information by which the accuracy of their numbers could have been tested.

¹⁹⁴60 Fed. Reg. at 49570-71 (Comment 2).

¹⁹⁵Asociacion Colombiana de Exportadores de Flores v. United States, 724 F. Supp. 969, (Ct. Int'l Trade 1989), rev'd in part on remand, 717 F. Supp. 834 (Ct. Int'l Trade 1989), aff'd on other grounds, 901 F.2d 1089 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 136 (1990); Rhone Poulenc, 710 F. Supp. at 346 (quoting Udenholm Corp. v. United States, 676 F. Supp. 1234, 1236 (Ct. Int'l Trade 1987)).

The Court of Appeals for the Federal Circuit has rejected arguments suggesting that the Department's selection of BIA must strive for "accuracy"¹⁹⁶ or relate to the company to which BIA is to be applied. Thus, according to the Department, it clearly is not required to apply a rate which necessarily reflects the circumstances of the company in question.

The Department's practice of selecting the highest rate from a prior review as BIA is well settled.¹⁹⁷ In this case, the Department applied this practice to select margins for the Complainants and assigned each the rate of 39.95 percent, which is the second highest rate found for any Mexican flower producer in prior reviews and the LTFV investigation.¹⁹⁸

The Department's longstanding BIA practice is a reasonable method of effectuating the purposes of the BIA rule contained in the statute. As the selection of BIA has been deliberately left to the discretion of the Department, and as the Department's selection carries out the purposes of the BIA rule in a reasonable manner, it should be upheld.¹⁹⁹ Therefore, the Department

¹⁹⁶In Allied-Signal Aerospace, 996 F.2d at 1192, the Court of Appeals upheld the Department's use of its standardized BIA methodology for administrative reviews. Pursuant to that methodology, when a respondent has failed to cooperate or otherwise significantly impedes the Department's investigation, the Department may select the highest rate found for any firm in a prior review or the investigation. (Although Allied-Signal Aerospace dealt with an administrative review, the statute makes no distinction between investigations and reviews in the application of BIA. 19 U.S.C. §1677e (1988). The only difference is that in a review, the Department has available to it prior calculated rates for the respondent in question for use as BIA. 19 C.F.R. §353.37(b) (1995).)

¹⁹⁷See Antifriction Bearings from France, et al.; Final Results of Administrative Review, 58 Fed. Reg. 39729 (July 26, 1993); Final Determination of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18992, 19033 (May 3, 1989).

¹⁹⁸60 Fed. Reg. at 49571.

¹⁹⁹Rhone Poulenc, 899 F.2d at 1185, 1190 n.9 (1990).

maintains that its determination to assign the Complainants each an uncooperative, first-tier BIA margin of 39.95 percent based on the application of its longstanding BIA methodology is reasonable and is otherwise in accordance with law.

VII. DISCUSSION AND DECISION OF THE PANEL

A. The Department's Questionnaires Were Clear And Requested Specific Information

1. Complainants Provided Incomplete And Misleading Responses

The Department's questionnaires and a respondent's responses form the heart of any antidumping investigation. To implement congressional intent and protect domestic industry from unfair dumping, the Department is required to obtain information from entities subject to departmental investigation. To ensure that the results of the review proceeding are accurate, the Department relies upon the credibility of companies under review in responding to its questionnaires and in providing necessary and requested supporting documentation.

Despite the fact that the Department's questionnaires were clear and specific, the Complainants failed to respond properly to the Department's questionnaires. As set forth in the Statement of Facts provided above, the Department requested that each Complainant submit its tax returns for 1991 and 1992, or to explain why such returns were unavailable. The Department requested this information on no less than three occasions. Rather than properly and promptly answering the Department's questionnaires, the Complainants provided evasive and misleading responses.

Specifically, with respect to whether they had any obligation to file taxes during the POR, the Complainants tried to confuse the Department by first informing the Department that they were exempt from filing tax returns. In support of this exempt status, an untranslated copy of certain provisions of the Diario Oficial was provided to the Department listing six classifications eligible for tax exemptions. At the time that they provided these provisions, the Complainants failed to furnish an English translation and failed to inform the Department which of the six listed exemptions applied even though the applicable regulations require that English translations be provided at the time that the original submission is made. Such a requirement obviates the need for the Department to spend time seeking a translation and therefore hastens the review process.

Because of the Ranches' failure to furnish the Department with complete responses, the Department was required to send supplemental questionnaires to each Complainant requesting clarification of the classification under which it was claiming its exemption.

Thereafter, the Complainants informed the Department that, contrary to their earlier position, none of the six exemptions contained in the Diario Oficial provision applied. Rather, the Complainants argued that their tax exempt statuses arose as a result of their classification under a "special tax base" arising from a different law. The Complainants did not provide the Department with a copy of the law granting this "special tax base" because it allegedly was an "old law dating back as far as 1973."

It was at this time that the Department was informed for the first time that the Mexican tax law had changed as of February 4, 1991, and that the Mexican tax authority required payment of income taxes for income earned as of January 1, 1991. The Complainants told the Department that their taxes for 1991 were not recorded in their books or records because the 1991 taxes were not due until July 1992, a date that was some two years prior to the date of the Complainants' response.

a. The Letters Submitted By Aguaje Were Not Sufficient Evidence Of A Dispute

After attempting to placate the Department by providing numerous inconsistent statements as to why no tax returns were available, Aguaje finally informed the Department that it was embroiled in a dispute with the Mexican tax authority concerning its 1991 and 1992 tax returns and that, consequently, it was exempt from filing these returns. Specifically, Aguaje informed the Department that it was engaged in a dispute with the Mexican government over the tax treatment for a loan. Two letters were submitted by Aguaje as attachments to its supplemental response in support of the "dispute."

The letters furnished by Aguaje do not support its claimed "dispute" with the Mexican tax authority. The letters consist of nothing more than a question from Aguaje to the tax authority and a prompt response from the tax authority to Aguaje. In the first letter, dated October 23, 1992, Aguaje asked the Mexican tax authority a question regarding the treatment of certain loan

proceeds. The tax authority promptly responded by letter dated October 27, 1992, that Aguaje should treat the loan in question as income for tax purposes and instructed Aguaje to file its taxes. Aguaje provided no additional information to the Department of any correspondence between the parties subsequent to its receipt of the tax authority's instructions on how to treat the loan.

Aguaje's request seeking advice on the treatment of certain loan proceeds and the authority's response thereto do not evidence the existence of a conflict with the authority that would justify Aguaje's failure to file returns during the POR. In the absence of further information on the record supporting Aguaje's position, the Panel finds these letters insufficient evidence of a viable dispute with the Mexican tax authority.

b. Guacatay And Toro Misrepresented Their Tax Statuses

At the time that Guacatay and Toro were repeatedly informing the Department that no tax returns were required to be filed for the POR and that none existed, both had already filed tax returns with the Mexican tax authority covering the POR. Neither Guacatay nor Toro has provided a credible explanation for these blatant misrepresentations. Moreover, when Guacatay and Toro finally furnished the subject tax returns, they were illegible and untranslated.

c. Guacatay And Toro Failed To Provide Requested Reconciliations

Although Guacatay and Toro finally provided the requested tax returns, the returns were not accompanied by the reconciliations requested by the Department. The Department had

requested that Guacatay and Toro reconcile their financial statements to independent sources, including any tax returns. Once the Department received the returns, the Department reiterated its request for reconciliations because it was apparent that the sales and cost information for Guacatay and Toro was presented differently in their tax returns and in their financial statements.²⁰⁰

Notwithstanding Guacatay and Toro's proprietary argument as to why such reconciliations could not be performed, once they furnished their tax returns to the Department, they should have been able to provide the Department with some manner of reconciliation. Instead, Toro and Guacatay made no attempt to perform any reconciliation. Furthermore, they used their personal tax returns to show income/expense of their farm business to the Mexican government.

Guacatay's and Toro's tax returns are precisely the types of "official" corroboration the Department requires to carry out its responsibility to the domestic industry. Where, as here, the unaudited system and the information it generates for the questionnaire responses cannot be validated using the official documentation, the very credibility of the Complainants' questionnaire responses is called into doubt.

There is substantial evidence in the record for the Panel to uphold the Department's determination that the Complainants furnished the Department with incomplete and misleading

²⁰⁰60 Fed. Reg. at 49570 (Comment 1).

responses to its multiple questionnaires. Moreover, such a finding is otherwise in accordance with the law.

2. The Department Is Granted Broad Discretion In Using BIA

In those situations in which the Department receives incomplete or evasive responses to its questionnaires, the Department has been statutorily empowered to apply a margin based upon "best information otherwise available." The Act provides:

In making [its] determination under this subtitle, [the Department] shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.²⁰¹

The applicable regulation similarly provides:

If an interested party refuses to provide factual information requested by the [Department] or otherwise impeded the proceeding, the [Department] may take that into account in determining what is the best information available.²⁰²

Recognizing the difficulty and delicacy of the Department's task of administering the antidumping laws, U.S. courts have repeatedly affirmed the Department's broad discretion to decide whether to use BIA.²⁰³ The Department's discretion stems not only from the statutory

²⁰¹ 19 U.S.C. §16677e(b) (1988).

²⁰² See 19 C.F.R. §353.37 (1995). The Department is permitted to craft regulations to implement its statutory authority to resort to BIA. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 35 U.S. 519, 544-45 (1978) (It is a "basic tenet of administrative law that agencies should be free to "fashion [their] own rules of procedure.").

²⁰³ Smith Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984).

grounds that justify the use of BIA, (e.g., refusal to produce information in a timely manner, significantly impeding an investigation, or inability to verify information)²⁰⁴ but also from the need for the Department to control the fact-gathering process. Specifically, the Courts have recognized that the Department's authority to resort to BIA is an instrument essential to the fulfillment of the Department's responsibility to determine, in a timely manner, an accurate dumping margin, both in antidumping investigations and in administrative reviews.²⁰⁵

The Department's ability to impose a margin based upon BIA enables the Department to do the job that Congress has charged it with doing, notwithstanding respondents that are uncooperative, or unable to submit timely, accurate, and complete information during a review.

As observed by the United States Court of Appeals for the Federal Circuit:

[the Department] cannot be left merely to the largesse of the parties at their discretion to supply [it] with information . . . otherwise, alleged unfair traders would be able to control the amount of antidumping duties by selectively providing the [Department] with information.²⁰⁶

²⁰⁴See 19 U.S.C. §1677e(b) and (c).

²⁰⁵Under U.S. law, any conflicts between the NAFTA and U.S. law must be resolved in favor of the latter. 19 U.S.C §58 (c), notes 3301, 3311-3317 (1988).

²⁰⁶Olympic Adhesives, 899 F.2d at 1571-72; see also N.A.R. v. United States, 741 F. Supp. 936, 941 (Ct. Int'l Trade 1990) (party's production of cost data has made by classes of colors rather than, as requested by the Department, by length of tape rolls, justified resort to BIA. "It is for [the Department] to conduct its antidumping investigations the way it sees fit, not the way an interested party seeks to have it conducted."); Rhone Poulenc, 710 F. Supp. at 346-47 (party's failure to provide information on computer tape justified the Department's resort to BIA. The BIA rule "is designed to prevent a respondent from controlling the results of an administrative review.").

The Department can invoke BIA if a respondent inaccurately represents that it was not able to provide information requested by the Department.²⁰⁷ Perhaps the most common ground on which the Department resorts to BIA is the untimeliness of a party's submission, one of the issues presented in the instant administrative review. Courts have repeatedly upheld the Department's authority in that regard.²⁰⁸

Given the numerous statutory grounds upon which the Department can base its resort to BIA and the essential administrative function that such authority provides, courts very rarely overturn the Department's imposition of margin rates based on BIA. Indeed, the Panel is aware of only three cases in which the Department's decision to use BIA has been remanded for reconsideration. In U.N.F.C. Co. v. United States²⁰⁹ and in Olympic Adhesives, the Federal Circuit held that the Department could not assign margin rates based on BIA where parties failed to provide information to the Department when the information requested did not exist. In Daewoo Elecs. Co. v. United States,²¹⁰ the Court of International Trade held that the Department had requested information without using its normal questionnaire procedure and without

²⁰⁷Usinor Sacilor, 872 F. Supp. at 1007.

²⁰⁸Rhone Poulenc, 710 F. Supp. at 350; Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1126-28 (Ct. Int'l Trade 1988); Ansaldo Components v. United States, 628 F. Supp. 2904-06 (Ct. Int'l Trade 1986); Carlisle Tire & Rubber Co. v. United States, 622 F. Supp. 1071, 1081 (Ct. Int'l Trade 1985); UST v. United States, 9 Ct. Int'l Trade 352 (1985).

²⁰⁹916 F.2d 689, 701 (Fed. Cir. 1990).

²¹⁰712 F. Supp. at 944-45.

providing the respondents with appropriate instructions needed to compile the information. For this reason, the Department's resort to BIA was not warranted in Daewoo.

The unusual circumstances found in these three cases serve to underscore the rarity of a judicial remand of the Department's decision to use BIA and to highlight the fact that there is nothing in the administrative record in this action that rises to the level of requiring the Panel to overturn the Department's use of BIA.²¹¹ There is substantial evidence on the administrative record to support the Department's determinations that the Complainants' responses were misleading and evasive. Such evidence includes, but is not limited to, (i) the Complainants' failure to promptly and completely respond to the Department's initial questionnaires, which resulted in the Department having to send a number of supplemental questionnaires; (ii) the Complainants' inconsistent and misleading statements concerning their respective tax statuses; (iii) the Complainants' failure to timely provide an English translation of the Diario Oficial supporting their alleged exempt statuses; (iv) the Complainants' submissions after providing the Diario Oficial provision that it, in fact, did not apply; (v) the Complainants' inability to furnish the "old" law that they claimed did apply; (vi) the Complainants' failure to inform the Department in a timely manner that the Mexican law had changed as of February 4, 1991, and required payment of income taxes for income earned as of January 1, 1991; and (vii) the Complainants' subsequently informing the

²¹¹In several other cases, the Department's decision to use BIA has not been questioned by the courts, although, the Department's selection of particular information as BIA has been remanded.

Department that the income tax payments did not appear on their 1991 books or records because those taxes were not payable until July 3, 1992.

With respect to Aguaje, additional evidence supporting the Department's determination includes (i) its inability to support its position that a legal dispute existed between it and the Mexican taxing authority resulting in its failure -- permissibly -- to file returns for the POR, and (ii) its inability to provide tax returns for the POR despite the fact that under Mexican law the filing of such returns had been required some two years prior to the time that Aguaje informed the Department that it did not have them.

With respect to Toro and Guacatay, additional evidence supporting the Department's Final Determination includes the misrepresentations made concerning their tax statuses and alleged non-existence of such returns for the POR at a time that such returns had already been filed. Further, their failure to provide requested reconciliations or evidence indicating that efforts were made to perform such reconciliations left the Department without reliable data which would have enabled the Department to calculate dumping margins.

Based upon substantial evidence in the administrative record and because such decision is otherwise in accordance with the law, the Panel upholds the Department's assignment of a dumping margin using BIA.

3. The Department's Selection Of First-Tier BIA Rate Of 39.95 Percent Is Not Supported By The Record

Notwithstanding the Panel's determination that the Department properly resorted to BIA to determine the dumping margin to be applied to the Complainants, the Panel finds that the assigned first-tier BIA rate of 39.95 percent is not supported by substantial evidence on the record and is otherwise not in accordance with law. Therefore, the Panel remands this action to the Department with instructions to use the second-tier BIA margin rate of 18.20 percent.

To effectuate the purpose of the BIA statute, the Department must select a rate that will not reward the non-responsive respondent for its failure and or refusal to comply with a request for information.²¹² However, the BIA rate is not statutorily or legislatively defined nor is the methodology for selecting a BIA rate specifically mandated. The Department, however, has implemented a BIA "policy" that governs its selection of BIA rates. Specifically, the Department has held:

Whenever a company refuses to cooperate with the Department, or otherwise significantly impedes an antidumping proceeding, we use the higher of (1) the highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less-than-fair-value ("LTFV") investigation or in prior administrative reviews; or (2) the highest rate found in this review for a firm for the same class or kind of merchandise.²¹³

²¹²Rhone Poulenc, 899 F.2d at 1188.

²¹³57 Fed.Reg. at 28379.

The BIA inquiry does not end here. The Department has also recognized and assigned "second tier" BIA rates for those situations in which a respondent is cooperative but fails to provide information. In such cases,

the Department can use the higher of (1) the firm's rate from the original investigation (LTFV) or all other rate if the firm is not investigated; or (2) the highest calculated rate in the same review, same merchandise, same country.²¹⁴

The Allied-Signal court noted that the:

critical difference in BIA treatment under the first and second tiers lies in the range of LTFV margins subject to consideration as the best information available. . . . Although each tier requires the [Department] to choose the higher of a certain LTFV rate and the highest review rate, the [Department] has acknowledged that in practice "generally the highest rate for any company from the less than fair value (LTFV) investigation, is used for the best information available under the first tier and that under the second tier, "generally, the highest rate found for any company in these reviews is used."²¹⁵

Although the "cooperation" necessary to permit the choice of second-tier rather than first-tier dumping margins is not statutorily defined, the Department's application of its BIA policy provides guidance. In Yamaha Motor Co., v. United States,²¹⁶ the Department's assessed a second-tier BIA dumping rate against Yamaha, a firm the Department had concluded had, among

²¹⁴Id.

²¹⁵Emerson Power Transmission Corp. v. United States, 903 F. Supp. 48, 55 (Ct. Int'l Trade 1995)(quoting Allied Signal, 996 F.2d at 1190)).

²¹⁶910 F. Supp. 679 (Ct. Int'l Trade 1995); see Antifriction Bearings (Other Than Tapered Roller Bearings) and parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom, 56 Fed. Reg. 29618 (1991).

other things, misrepresented its home market distribution system. The Department had based its selection of BIA upon:

(a) Yamaha's inability to provide proof of payment for sales to related distributors in the home market; (b) Yamaha's misrepresentations concerning its home market distribution system and its failure to report sales in the home market in the proper level of trade; and (c) certain methodological problems with Yamaha's questionnaire responses.²¹⁷

With respect to Yamaha's alleged misrepresentations, the Department had noted that:

(1) Yamaha failed to report a significant portion of its home market distribution system; (2) Yamaha made sales to related home market customers at a different level of trade than its sales to unrelated home market customers in the U.S. market; and (3) two of Yamaha's unrelated home market 'customers' were actually net suppliers of bearings to Yamaha.²¹⁸

Despite these "misrepresentations," the Department had assessed a second-tier rate:

Although Yamaha provided some information, the quantity of this information was not sufficient or adequate to form a basis to calculate foreign market value. Therefore, we have relied exclusively upon BIA to determine Yamaha's dumping margin. Nevertheless, because Yamaha attempted to submit some information, we applied the second tier of BIA.²¹⁹

²¹⁷Id.

²¹⁸Id. at 683.

²¹⁹Id. at 682 (quoting 57 Fed. Reg. at 28379).

Upon review of the record, the CIT affirmed the Department's selection of second-tier BIA "given the multiple and pervasive nature of errors and omissions in [Yamaha's] submission."²²⁰

Similarly, in Emerson Power Transmission Corp. v. United States,²²¹ the Department had assessed a second-tier BIA dumping margin where a respondent "attempted to submit some information."²²² In challenging the assessment of second-tier BIA, the respondent argued that it had complied with the Department's questionnaire and had submitted all information requested. Moreover, to the extent that there was any confusion with respect to the questionnaire and the respondent's interpretation of the questionnaire, the respondent argued that its "interpretation was reasonable."²²³

In assigning second-tier BIA, the Department had completely rejected the respondent's questionnaire response, finding that the respondent "did not comply with [the Department's] request for information."²²⁴ Specifically, the Department had concluded that the respondent

²²⁰Id. at 679.

²²¹903 F. Supp. 48 (Ct. Int'l Trade 1995).

²²²Id. at 56.

²²³Id. at 51.

²²⁴Id. at 52.

"failed to report approximately 80 percent of its home market sales."²²⁵ Additionally, the Department had found that if the respondent "found the questionnaire instructions to be ambiguous . . . it should have contact[ed] [the Department] with any questions."²²⁶

In assessing a second-tier BIA dumping margin, the Department had noted that the respondent's "cooperation was considered when [the Department] chose to apply the second-tier BIA rate as opposed to the first-tier BIA rate that is used for uncooperative respondents."²²⁷ The Department concluded that "[b]ecause [the respondent] attempted to submit some information, we applied the second tier of BIA. . . ." ²²⁸ The CIT affirmed the Department's BIA determination.²²⁹

In NSK Ltd. v. United States,²³⁰ the Department resorted to second-tier BIA for the following reasons:

Despite our requests in the initial and supplemental questionnaires, NSK failed to provide either purchase prices from unrelated parties that we could have used to determine whether the transfer prices that NSK paid to related parties for inputs were at arm's length or cost of production data to demonstrate that the transfer prices were not less than COP . . . Therefore, we determine that NSK's . . . data do not provide a reliable basis for FMV. As a result, we have used second tier

²²⁵Id.

²²⁶Id.

²²⁷Id.

²²⁸Id. at 56 (emphasis added).

²²⁹Id.

²³⁰910 F. Supp. 663 (Ct. Int'l Trade 1995).

BIA to determine the dumping margins for those U.S. sales for which CV would have been used as FMV.²³¹

The CIT upheld, in part,²³² the Department's resort to BIA, finding that:

it was proper and consistent with its practice . . . As demonstrated [in the record], NSK failed to submit information that would help [the Department] determine whether the prices paid for related party inputs were at arm's length. NSK also failed to produce requested COP data which could have been used as the best evidence available.²³³

The determination that the Panel must make is whether the Department's decision to apply a BIA rate of 39.95 percent based upon a first-tier analysis is supported by substantial evidence on the administrative record or is otherwise in accordance with law. Having reviewed the evidence in the administrative record and consistent with the Department's own practice, the Panel concludes that the Department's assignment of a dumping margin of 39.95 percent based upon a first-tier BIA analysis was not supported by the administrative record and was, consequently, not in accordance with law. The record in this action supports a finding -- consistent with the Department's findings in Yamaha, NSK, and Emerson -- that the Complainants offered the Department sufficient cooperation that they did not refuse to cooperate with the Department or

²³¹Id. at 666.

²³²With respect to finished bearings purchased from related suppliers, the CIT found that the Department had improperly applied the BIA rate. Id.

²³³Id. at 671.

otherwise significantly impede the administrative review. Consequently, the Department should have assessed a dumping margin using a second-tier analysis.

Specifically, the Panel finds that the Department did not properly take into account the Complainants' repeated efforts to provide answers to the Department's numerous questionnaires. Such efforts and attempts were significant in Yamaha and Emerson, yet were ignored by the Department in this action. The Panel finds it notable that the Complainants are small ranches and that until the recent change in Mexican law, they were not required to maintain information for the purpose of filing income tax returns. Moreover, the Panel is aware that each Complainant developed an accounting system solely for the purpose of being able to respond to the Department's questionnaires during such review proceedings.

In light of the foregoing factors, the Panel finds that the Complainants exhibited substantial cooperation and that any misleading or evasive information supplied by Complainants did not rise to the level of uncooperativeness required, under the Department's own precedents, to apply a first-tier analysis. Accordingly, the Department's own BIA policy mandates that a second-tier BIA dumping margin be assigned. As set forth above, in assigning a second-tier dumping margin, the Panel has essentially three options from which to choose: (1) if the Complainants were investigated in the original investigation (LTFV), the Panel could assign the rate from the original investigation; (2) if the Complainants were not part of the original investigation, the Panel could assign the all others rate from the original investigation; or (3) the Panel could assign the highest

rate calculated in this review for the class or kind of merchandise for any firm from the same country of origin. A review of the original Antidumping Duty Order: Certain Fresh Cut Flowers from Mexico²³⁴ reveals that none of the Complainants were subjects of that investigation. Nonetheless, the Order does contain an all others rate of 18.20 percent.²³⁵ With respect to the third option, there is no calculated rate that could be assigned.

It is the Panel's determination that the Department's use of a first-tier rate of 39.95 percent is not supported by substantial evidence on the record and is not in accordance with law. The Panel finds that there is substantial evidence on the record evidencing substantial cooperation by the Complainants and, accordingly, remands the BIA rate determination to the Department and instructs the Department to assign the Complainants a cooperative or second-tier BIA rate of 18.20 percent, based upon the all others rate established in the original investigation.

VIII. ORDER

The Panel determines that the Department properly determined that the Complainants provided misleading and evasive statements concerning their respective tax statuses and that the Department properly invoked BIA given the substantial evidence on the record in this action. However, the first-tier BIA rate imposed by the Department is not justified by substantial evidence on the record and is not otherwise in accordance with law. Based upon the substantial

²³⁴52 Fed. Reg. 13491 (Apr. 23, 1987).

²³⁵Id.

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evidence on the record, the Panel remands the action with instructions to assign a second-tier rate of 18.20 percent, which is taken from the Department's original investigation and takes into account the substantial cooperation provided by the Ranches.

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ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

_____)	
In the Matter of:)	
)	
FRESH CUT FLOWERS)	SECRETARIAT FILE NO.
FROM MEXICO)	USA-95-1904-05
_____)	

REMAND ORDER

For the reasons set out in the foregoing Panel decision, the Panel hereby ORDERS the U.S. Department of Commerce to issue a determination on remand consistent with the instructions and findings set forth in the Panel's decision. The determination on remand shall be issued within forty five (45) days of the date of this Order.

ISSUED ON DECEMBER 16, 1996

SIGNED IN ORIGINAL BY:

Mark Sandstrom, Chairman

Maximo Carvajal Contreras

Lucia Reyna Antuna

Jorge A. Witker Velasquez

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