

1 ARTICLE 16	1
1.1 Text of Article 16.....	1
1.2 Nature, scope and extent of explanation to be provided under Article 16	1
1.3 Form and timing of explanation to be provided under Article 16	3
1.4 Explanations to be provided under Articles 1.2(a) and 16	4

1 ARTICLE 16

1.1 Text of Article 16

Article 16

Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's goods was determined.

1.2 Nature, scope and extent of explanation to be provided under Article 16

1. The Panel in *Thailand – Cigarettes (Philippines)* noted that Article 16 sets forth two elements, namely (i) a written request from an importer for an explanation in writing and (ii) a customs authority's obligation to provide an explanation in writing as to how the customs value of the importer's goods was determined.¹ The Panel then elaborated on the nature, scope and extent of an explanation to be provided under the second element:

"To understand the nature of the explanation under Article 16, we first turn to the text of the provision. The term 'explanation' can be defined as '*noun*. 1 The action or act of explaining. 2 A statement, circumstance, etc., which makes clear or accounts for something. ...'. The word 'explain' can in turn be defined as follows: '*1 verb trans. & intrans*. Make clear or intelligible (a meaning, difficulty, etc.); clear of obscurity or difficulty; give details of (a matter, *how*, etc) ... *6 verb trans*. account for; make clear the cause or origin of'. The word 'how' means '*adverb* 1. In what way or manner; by what means; in whatever way; by whatever means ...'. The dictionary meaning of the term 'explanation', taken together with the word 'how', therefore indicates that the explanation to be provided under Article 16 requires customs authorities to 'make clear' and 'give details' of the manner and means in which a customs authority determined the customs value of imported goods.

Further, considered in its context, as discussed above, the explanation under Article 16 is temporarily and substantively distinguished from the authority's communication of its grounds for its consideration under Article 1.2(a) as the explanation under Article 16 must be provided after the final assessment of customs value is made and thus must be based on complete information that formed the basis for the customs authority's decision. This can be contrasted with the 'grounds' under Article 1.2(a) that are based on the information initially provided by the importer or otherwise.

We also heed the transparency and due process objective that Article 16 is intended to achieve. As the Philippines submits, an explanation under Article 16 enables importers and foreign governments to effectively exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations. It provides a window through which domestic tribunals and WTO panels review and understand a customs authority's valuation determination. ... our objective assessment of the Philippines' claims under Articles 1.1 and 1.2(a) required us to base our evaluation of Thai Customs' examination of the

¹ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.231.

circumstances of the sale on, *inter alia*, its explanation provided pursuant to Article 16."²

2. The Panel in *Thailand – Cigarettes (Philippines)* also clarified that the explanation under Article 16 must be understood to include in its scope the reason for rejecting the transaction value as well as the basis for the valuation method used:

"As we noted above, the primary basis for customs value under the Customs Valuation Agreement is the transaction value. Whenever the customs value cannot be determined based on the transaction value under Article 1 for the reasons authorized under the same provision, the methods under Articles 2 through 7 are to be used in the sequential order. Therefore, it seems logical for a customs authority to explain the basis for rejecting the transaction value in situations where the authority relies on a valuation method other than the transaction value under Article 1. Interpreting otherwise, in our view, would defeat the procedural objective of Article 16 to preserve due process rights and transparency in the context of customs value determination. This is particularly the case because, if not through an explanation under Article 16, the importer would be deprived of an opportunity to understand the customs authority's determination of the final customs value for the concerned goods. Therefore, we consider that the explanation under Article 16 must be understood to include in its scope the reason for rejecting the transaction value as well as the basis for the valuation method used."³

3. Further, the Panel in *Thailand – Cigarettes (Philippines)* concluded that the explanation to be provided under Article 16 must be sufficient to make clear and give details of how the customs value of the importers' goods was determined, including the basis for rejecting the transaction value and other valuation methods that sequentially precede the method actually used by the customs authorities:

"We now address the extent of an explanation to be provided under Article 16, namely how extensive and detailed an explanation should be to satisfy the obligations under Article 16. The ordinary meaning of the word 'explanation', considered in its context and in the light of the object and purpose of Article 16 as discussed above, suggests that customs authorities' explanation must include, at the minimum, the basis for rejecting the transaction value in the light of the information provided by the importer, the identification of the method used and the illustration of how the method was applied in reaching the final customs value.

In this connection, we observe that the extent of an explanation to be provided under Article 16 is not the same as that under the equivalent provisions of the WTO agreements on trade remedy measures. The obligations imposed on domestic authorities to explain determinations in the context of the trade remedy rules are much more detailed and specific. For example, Article 12.2 of the Anti-Dumping Agreement refers to '*sufficiently detailed* explanations' and '*a full* explanation'. Article 4.1(c) of the Agreement on Safeguards requires a '*detailed* analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. In contrast to these provisions, Article 16 of the Customs Valuation Agreement contains succinct language that the importer shall have the right to 'an explanation ... as to how the customs value of the importer's goods was determined'. The absence of any modifying words such as 'detailed' or 'full' before the term 'explanation' in Article 16 should be taken into account in clarifying the extent of the explanation under Article 16. Moreover, the obligation to provide 'an explanation in writing' under Article 16 arises only if there is a written request from the importer. This too shows that the standard for the explanation required under Article 16 of the Customs Valuation Agreement is less stringent than that under the Anti-Dumping Agreement, the SCM Agreement or the Agreement on Safeguards.

The above considerations lead us to conclude that although not as extensive and detailed explanations as required under the WTO agreements on trade remedy

² Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.232-7.234.

³ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.237.

measures, the explanation to be provided under Article 16 of the Customs Valuation Agreement must be sufficient to make clear and give details of how the customs value of the importer's goods was determined, including the basis for rejecting the transaction value and other valuation methods that sequentially precede the method actually used by the customs authorities."⁴

1.3 Form and timing of explanation to be provided under Article 16

4. In *Thailand – Cigarettes (Philippines)*, Thailand raised an argument that in evaluating the Philippines' claim under Article 16, if the Panel considers the information provided in a formal explanation insufficient, the Panel should consider the circumstances in which the explanation provided by Thai Customs pursuant Article 16 was provided. The Panel considered that this argument raised the question of whether a meeting and/or the minutes of a meeting that is not formally part of the written explanation provided by a customs authority pursuant to Article 16 can nevertheless be considered as constituting the explanation. The Panel explained that:

"As in the case of the requirement to publish a report under Article 3.1 of the Agreement on Safeguards, Article 16 of the Customs Valuation Agreement does not dictate the manner in which a written explanation must be provided. To that extent, we agree that the question of whether a certain instrument can constitute an explanation under Article 16 will have to be decided on a case-by-case basis. We also agree that if an explanation is to be given in multiple parts, factors such as 'the overall structure, logic and coherence' among these various parts must be considered to determine the appropriateness of the explanation given on the determination of the customs value of the goods imported. Furthermore, if explanations are provided in multiple parts, it must also be considered whether such a fact deteriorates the transparency and due process objective of Article 16."⁵

5. The Panel in *Thailand – Cigarettes (Philippines)* further elaborated on the timing and form of an explanation to be provided under Article 16:

"Article 16 specifically requires an explanation to be provided 'in writing'. In the light of this, we do not consider the discussion that took place during the meeting on 6 March 2007 as forming part of the written explanation provided in accordance with Article 16. Furthermore, the subject meeting took place *before* the final assessment of the customs value for the entries at issue was made, while the requirement to provide an explanation of the determination of the customs value arises once the final assessment is made. To recall, Thai Customs started issuing the Notices of Assessment for these entries as of 16 March 2007. In fact, evidence shows that further information was submitted to Thai Customs between the 6 March 2007 meeting and 16 March 2007. ... The considerations above, taken together, suggest that although discussions at the 6 March 2007 meeting may be viewed as part of the process of determining the customs value of the entries at issue, the meeting itself does not constitute a written explanation as to the final customs determination. We consider that accepting the position that a discussion(s) before the final assessment of the customs value was even made forms an explanation, would not be in line with the purpose of Article 16 to maintain transparency and due process in the customs valuation process."⁶

6. The Panel further found that the minutes of the concerned meeting did not constitute part of the written explanation within the meaning of Article 16. In reaching this conclusion, the Panel considered both the formalistic and substantive aspects of the minutes, including where both the original and revised minutes were sent, whether the minutes were referenced in the written explanation sent to the importer, and whether the original and revised minutes refer to the same alternative valuation method.⁷

⁴ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.238-7.240.

⁵ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.259.

⁶ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.262.

⁷ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.263-7.265.

7. In considering the timing of the explanation provided, the Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*) found that although the text of Article 16 does not provide a time-period during which an explanation is to be provided, "it is clear that certain provisions of the covered agreements that establish procedural obligations may, depending on the nature of the procedural obligation contained therein, necessarily carry an implied limitation on when the required action must be performed"⁸. Hence, the Panel held that "an explanation provided three and a half years after it was requested, and, in the specific context of this dispute, several years after the conclusion of the appeal of the customs valuation determination before the Thai Tax Court, does not satisfy the requirements of Article 16. A delay of three and a half years is an excessively long period of time to provide an explanation irrespective of the circumstances".⁹

1.4 Explanations to be provided under Articles 1.2(a) and 16

8. The Panel in *Thailand – Cigarettes (Philippines)* explained that the obligation under Article 16 is to provide a formally sufficient explanation to make clear and give details of the customs authority's decision to reject the transaction value and how the alternative valuation method was applied to derive the customs value in a given case. This obligation, according to the Panel, should be distinguished from the obligation to explain a customs authority's grounds under Article 1.2(a):

"Further, we recall that we considered the substantive content of the explanation provided by Thai Customs of its determination in the context of reviewing the Philippines' claims with respect to Thailand's obligations under Article 1.1 and 1.2(a). Our examination of the explanation in that context should be distinguished from our evaluation of whether the explanation satisfies the requirements within the meaning of Article 16. As the Philippines responded to a question from the Panel, under a hypothetical in which an authority determines the customs value using a spinning wheel, the authority would be found to have complied with its obligations under Article 16 if an authority concluded that the transaction value was not acceptable and provided an adequate explanation for how the spinning wheel was applied in a specific case. This will be the case even though the disclosed reasons would be insufficient to prove a compliance with Articles 1.1 and 1.2(a) in rejecting the transaction value. If, however, no (or insufficient) reasons, including, for example, how the spinning wheel was applied in a specific case, were disclosed in the explanation, the authority would violate both Articles 1.1 and 1.2(a) as well as Article 16. In this light, our assessment of the Article 16 claim should be focused on whether an explanation is *formally* sufficient to make clear and give details of its decision to reject the transaction value and how the valuation method was applied to derive the customs value."¹⁰

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⁸ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*), para. 7.432.

⁹ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*), para. 7.433.

¹⁰ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.241.