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**1 ARTICLE 1**

**1.1 Text of Article 1**

**Article 1**

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

(a) that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

- (i) are imposed or required by law or by the public authorities in the country of importation;
- (ii) limit the geographical area in which the goods may be resold; or
- (iii) do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and

(d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the

importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

- (i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;
- (ii) the customs value of identical or similar goods as determined under the provisions of Article 5;
- (iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

## **1.2 Text of interpretative note to Article 1**

### **Note to Article 1**

#### *Price Actually Paid or Payable*

1. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.

2. Activities undertaken by the buyer on the buyer's own account, other than those for which an adjustment is provided in Article 8, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the customs value.

3. The customs value shall not include the following charges or costs<sup>1</sup>, provided that they are distinguished from the price actually paid or payable for the imported goods:

- (a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;
- (b) the cost of transport after importation;
- (c) duties and taxes of the country of importation.

4. The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value.

#### *Paragraph 1(a)(iii)*

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<sup>1</sup> For jurisprudence, see the report of the Panel under the Independent Entity established pursuant to Article 4 of the Agreement on Preshipment Inspection in G/PSI/IE/R/2.

Among restrictions which would not render a price actually paid or payable unacceptable are restrictions which do not substantially affect the value of the goods. An example of such restrictions would be the case where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year.

*Paragraph 1(b)*

1. If the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued, the transaction value shall not be acceptable for customs purposes. Some examples of this include:

- (a) the seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities;
- (b) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;
- (c) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that the seller will receive a specified quantity of the finished goods.

2. However, conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value. For example, the fact that the buyer furnishes the seller with engineering and plans undertaken in the country of importation shall not result in rejection of the transaction value for the purposes of Article 1. Likewise, if the buyer undertakes on the buyer's own account, even though by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of the customs value nor shall such activities result in rejection of the transaction value.

*Paragraph 2*

1. Paragraphs 2(a) and 2(b) provide different means of establishing the acceptability of a transaction value.

2. Paragraph 2(a) provides that where the buyer and the seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the customs value provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the customs administration have no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For example, the customs administration may have previously examined the relationship, or it may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.

3. Where the customs administration is unable to accept the transaction value without further inquiry, it should give the importer an opportunity to supply such further detailed information as may be necessary to enable it to examine the circumstances surrounding the sale. In this context, the customs administration should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price. Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship. As a further

example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced.

4. Paragraph 2(b) provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value previously accepted by the customs administration and is therefore acceptable under the provisions of Article 1. Where a test under paragraph 2(b) is met, it is not necessary to examine the question of influence under paragraph 2(a). If the customs administration has already sufficient information to be satisfied, without further detailed inquiries, that one of the tests provided in paragraph 2(b) has been met, there is no reason for it to require the importer to demonstrate that the test can be met. In paragraph 2(b) the term "unrelated buyers" means buyers who are not related to the seller in any particular case.

#### *Paragraph 2(b)*

A number of factors must be taken into consideration in determining whether one value "closely approximates" to another value. These factors include the nature of the imported goods, the nature of the industry itself, the season in which the goods are imported, and, whether the difference in values is commercially significant. Since these factors may vary from case to case, it would be impossible to apply a uniform standard such as a fixed percentage, in each case. For example, a small difference in value in a case involving one type of goods could be unacceptable while a large difference in a case involving another type of goods might be acceptable in determining whether the transaction value closely approximates to the "test" values set forth in paragraph 2(b) of Article 1.

### **1.3 Article 1.1**

#### **1.3.1 General**

1. In *Thailand – Cigarettes (Philippines)*, the Panel explained that Article 1.1 sets out the principle that the transaction value is the customs value of imported goods provided certain conditions are met. The Panel further elaborated that, in a related-party transaction, this principle is linked to the conditions prescribed in Article 1.2(a):

"Article 1 sets out the principle under the Customs Valuation Agreement that the customs value of imported goods must be the transaction value provided that the conditions set out in paragraphs (a) – (d) are met.

Sub-paragraph (d) of Article 1 stipulates, as one of the conditions for accepting the transaction value, that the buyer and the seller should *not* be related. In a situation where they are related within the meaning of Article 15, the customs value of the concerned imported goods will be the transaction value if that transaction value is acceptable for customs purposes under Article 1.2. Therefore, the obligation under Article 1.1 of the Customs Valuation Agreement to use the transaction value as the customs value of imported goods is linked to Article 1.2(a) in a situation where the buyer and the seller are related."<sup>2</sup>

2. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, in laying out the general considerations for a violation of Article 1.1 and 1.2(a), the Panel stated that:

"If a customs authority has doubts as to whether the relationship between the buyer and seller affected the price, then under Article 1.2(a), second sentence, the customs authority must examine the circumstances surrounding the sale, and the customs authority may reject the transaction value if it establishes that the relationship influenced the price.

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<sup>2</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.145-7.146.

The CVA does not prescribe the methodology that the customs administration must use to conduct its examination of the circumstances of sale for purposes of Article 1.2(a). In that respect, paragraph 3 of the Interpretative Note to Article 1.2 provides a non-exhaustive list of 'example[s]' of how the examination may be conducted. Each of these examples contemplates a comparison between some aspect of the circumstances of the transaction under consideration, and some comparator or benchmark."<sup>3</sup>

3. The Panel further explained that a customs authority enjoys a margin of discretion in how it determines the "price actually paid or payable" within the meaning of Article 1.1, as well as in how it conducts its "examination of the circumstances of sale" in the context of Article 1.2(a).<sup>4</sup> Nevertheless, the Panel observed that Article 1.1 and Article 1.2(a) form part of the same article, "but are interrelated such that a violation of Article 1.2(a) necessary [sic.] implies a violation of Article 1.1".<sup>5</sup> In light of this consideration, the Panel found that:

"[T]he obligations in Articles 1.1 and 1.2(a), second sentence, are interrelated in a way that makes it illogical for an investigating authority to be free to disregard the minimum requirements of the examination under Article 1.2(a) when seeking to determine the 'price actually paid or payable' under Article 1.1. ... Thus, the Panel considers that the chosen means or methodology must be capable of, and suitable for, revealing whether the declared transaction price corresponds to the 'price actually paid or payable'.<sup>6</sup>

### 1.3.2 "The price actually paid or payable"

4. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, in addressing the applicability of the CVA to the 2002-2003 Charges, the Panel considered whether the reference to "actual price" in the 2002-2003 Charges and their Annex referred to the "price actually paid or payable" for the imports at issue, as Thailand maintained. The Panel rejected Thailand's argument and concluded that the nature and legal basis of the Charges brought against Phillip Morris Thailand Limited (PMTL) by the Public Prosecutor did not permit concluding that the "actual price" reflected a determination of the price actually paid or payable by PMTL to Phillip Morris (PM) Indonesia, but "is rather a revised customs value determined by the DSI and Public Prosecutor."<sup>7</sup> The Panel pointed out:

"In any event, the Panel considers that even if the reference to the 'actual price' in the 2002-2003 Charges is understood as a determination of the 'price actually paid or payable', this would still reflect a customs valuation determination subject to the disciplines in Article 1.1 of the CVA. There is nothing in the ordinary meaning of the terms of Article 1.1 to suggest that an authority has a free hand to determine the 'price actually paid or payable'. ... The Panel does not see any legal basis for, or the logic in, the view that an authority's determination of the 'price actually paid or payable' under Article 1.1 is a matter to which the CVA does not apply."<sup>8</sup>

## 1.4 Article 1.2(a)

### 1.4.1 Obligation to "examine" the circumstances of sale in a related-party transaction

5. Based on the text of the first two sentences of Article 1.2(a), the Panel in *Thailand – Cigarettes (Philippines)* considered that, in a related party situation, Article 1.2(a) imposes an obligation on customs authorities to "examine" the circumstances of the sale before deciding the acceptability of the importer's declared transaction value. The Panel observed that the fact that the importer and the exporter were related was not a sufficient basis for the customs authorities to reject the transaction value.<sup>9</sup> The Panel further explained that, based on the results of such

<sup>3</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.345-7.346.

<sup>4</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.361.

<sup>5</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.361.

<sup>6</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.361.

<sup>7</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.317.

<sup>8</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.312.

<sup>9</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.148.

examination, the customs authorities must then accept the transaction value provided that the relationship did not influence the price. Regarding the examination to be conducted by the customs authorities under Article 1.2(a), the Panel clarified that Article 1.2(a), read in conjunction with the Interpretative Note to Article 1.3, entails certain procedural as well as substantive obligations. As for the procedural steps that the customs authorities' examination entails under Article 1.2(a), the Panel clarified that:

"Article 1.2(a), taken together with paragraph 2 of the Interpretative Notes to Article 1.2, indicates that only when customs authorities have doubts about the transaction value in a related-party transaction, they will need to inquire into the acceptability of the transaction value.

... In examining the circumstances of the sale, therefore, the customs administration may, if and to the extent necessary, choose to ask the importer to provide information relevant to the customs authorities' examination. Paragraph 3 of the Interpretative Notes to Article 1.2(a) illustrates specific examples of the aspects of the transactions that the customs administration should be prepared to examine.

Article 1.2(a) further requires that if the customs administration has grounds for considering that the relationship influenced the price 'in light of the information provided by the importer or otherwise', the customs administration shall communicate such grounds to the importer so as to 'give the importer a reasonable opportunity to respond'. The phrase 'in light of the information provided by the importer or otherwise' indicates that Article 1.2(a) does not impose an obligation on the customs administration to seek information or clarification from the importer when it decides to look further into the circumstances of sale. Particularly, the term '*or otherwise*' in the subject sentence and the absence of the requirement to seek information from the importer in Article 1.2(a) confirms that a customs administration may reach the decision on whether it has grounds for preliminarily considering that the relationship influenced the price without informing the concerned importer of its need for further inquiry or seeking information from the importer. In other words, while a customs administration may choose to inform the importer of its decision to examine the circumstances of sale, it is *not required* to do so in the light of the absence of language to that effect in Article 1.2(a). This is in contrast to the phrase in Article 1.2(a) – '[the customs administration] *shall* communicate its grounds to the importer' – that imposes an explicit obligation on the customs administration to communicate its grounds regarding its consideration to the importer.

Despite the absence of the explicit obligation to inform the importer of its decision to examine the circumstances of the sale, however, we wish to emphasize that it may still be highly desirable for the customs administration to do so in order to facilitate the valuation process by respecting the transparency principle underlying the process.

...

Although Article 1.2(a) does not further elaborate on specific procedures subsequent to customs authorities' communication of grounds, it is logical to understand that the scope of Article 1.2(a) extends to the submission by the importer of further information in response to the customs authorities' communication of grounds for its consideration and the customs authorities' subsequent determination to accept or reject the declared transaction value. If a customs authority decides to reject the transaction value, another valuation method must be used by observing the sequential order of the methods stipulated in Articles 2, 3, 5, 6 and 7.

Overall, therefore, the determination of whether to accept the transaction value as the customs value in a related-party situation under Article 1.2(a) entails the following procedural steps:

- The importer declares a transaction value for the goods imported;
- The customs authority is required to examine the circumstances of the sale only if it has doubts about the validity of the transaction value of the imported goods,

because the fact that the buyer and seller are related should not in itself be grounds for regarding the transaction value as unacceptable;

- The customs authority shall examine the circumstances of the sale in the light of the information provided by the importer or otherwise and communicate to the importer the grounds for preliminarily considering that the relationship influenced the price;
- The customs authority gives the importer a reasonable opportunity to respond. Given the opportunity, the importer submits further information; and
- The customs authority makes a final decision on whether to accept the transaction value.

Based on the procedural steps required in the customs authorities' examination of the circumstances of the sale as above, we can infer that the temporal scope of an examination under Article 1.2(a) begins when a customs authority's doubts on the validity of the transaction value trigger the need for an examination of the acceptability of the transaction value, and ends when the customs authority makes a final decision on the acceptability of that transaction value. Once that determination is made, either the transaction value will be accepted as declared by the importer under Article 1.1 or another method will be used according to the sequential order of the valuation methods to determine the value of the goods imported.<sup>10</sup>

6. Having clarified the procedural aspect of the examination under Article 1.2(a), the Panel in *Thailand – Cigarettes (Philippines)* proceeded to analyse the substantive nature of the examination of the circumstances of sale that the customs administration must conduct. The Panel first observed the different positions put forward by the parties on this issue. The Philippines argued that a customs authority is obliged to undertake an active investigative role by requesting and gathering information from the importer as well as other WTO Members and by analysing information pertaining to the circumstances of the concerned transaction. On the other hand, Thailand was of the view that the obligation on the customs authority will be met as long as it notifies the importer of its preliminary determination and reviews the information provided by the importer before reaching a final conclusion on the acceptability of the transaction value. The Panel turned to the ordinary meaning of as well as the context for the term "examine" in Article 1.2(a) to reach the conclusion that both the customs authorities and importers have respective responsibilities under Article 1.2(a):

"The ordinary meaning of the term 'examine' signifies that the customs authorities must *carefully consider, investigate and inquire into* the information provided by importers concerning the circumstances of the transaction. We also consider that the principle under the Customs Valuation Agreement that the primary basis of valuation is the transaction value sheds light on the nature of examination to be conducted concerning the circumstances of sale in a related-party situation. Given that the transaction value should normally form the basis of a valuation, any situation giving rise to a reason(s) for questioning the transaction value would naturally demand the customs authorities' critical consideration of, inquiry into, and investigation of, the relevant situation.

At the same time, we understand that the principal responsibility of providing relevant information that may show the acceptability of the transaction value, in accordance with the method under either Article 1.2(a) or 1.2(b), rests upon the importer. This is related to the fact that the importer and, in certain situations, its related seller in an exporting country are in possession of the facts relevant to the question before the customs authorities and therefore responsible for providing customs authorities with sufficient information to enable them to assess the acceptability of the transaction value. Specifically, for example, Article 1.2(a) refers to 'in the light of information provided by the importer'. The Interpretative Note to Article 1.2(a) also stipulates in paragraph 3 that the customs administration should 'give the importer an opportunity to supply such further detailed information as may be necessary to enable it to

<sup>10</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.150-7.156.

examine the circumstances surrounding the sale'. The text of paragraph 3 of the Interpretative Note to Article 1.2(a) therefore makes it clear that the responsibility imposed on importers for providing sufficient information is directly linked to the objective of *enabling* the customs authorities to examine the circumstances of the sale.'

...

In sum, we consider that the customs authorities and importers have respective responsibilities under Article 1.2(a). The customs authorities must ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price. Importers are responsible for providing information that would enable the customs authority to examine and assess the circumstances of sale so as to determine the acceptability of the transaction value. Provided with such information, the customs authorities must conduct an 'examination' of the circumstance of sale, which would require an active, critical review and consideration of the information before them."<sup>11</sup>

7. In reaching this conclusion, the Panel in *Thailand – Cigarettes (Philippines)* also referred to the Appellate Body's analysis in *US – Wheat Gluten* of the nature of the investigation to be conducted by the competent authorities in the context of the Agreement on Safeguards. The Panel recalled the Appellate Body's statement that the Agreement on Safeguards envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities.<sup>12</sup> The Panel stated, "both the obligation to *examine* the validity of the transaction value under Article 1.2(a) of the Customs Valuation Agreement and the obligation to carry out a full *investigation* to conduct a proper evaluation of all of the relevant factors under Article 3.1 of the Agreement on Safeguards are imposed on 'domestic authorities'."<sup>13</sup> The Panel further elaborated that:

"As the Appellate Body inferred from the term 'investigate', we consider therefore the word 'examine' also suggests 'a proper degree of activity on the part of the [customs authorities] because authorities charged with conducting an inquiry or a study ... must actively seek out pertinent information'. To that extent, in order to properly examine the circumstances of a given transaction, the customs authority must clearly indicate to the importer how it evaluates the information submitted by the importer, including the insufficiency of the information submitted and, if necessary and feasible, any further particular type of information that may help them assess the validity of the transaction value. This must, in our view, be carried out at the *communication of grounds* stage (the required step under Article 1.2(a) identified ... above) whereby the customs authority will explain the grounds for considering preliminarily that the relationship influenced the price so as to give a reasonable opportunity for the importer to respond.

...

We underline in this regard that the obligations imposed on the customs authorities to examine the circumstances of sale under the Customs Valuation Agreement at the same time need to be understood against the succinct language of Article 1.2(a) of the Customs Valuation Agreement. Particularly, for this reason, we are mindful that the extent and scope of the obligations imposed on customs authorities to 'examine' under Article 1.2(a) of the Customs Valuation Agreement cannot be the same as that imposed on domestic investigative authorities under the WTO agreements concerning trade remedy measures."<sup>14</sup>

8. The Panel in *Thailand – Cigarettes (Philippines)* found that Thailand acted inconsistently with Articles 1.1 and 1.2(a) in rejecting the transaction value of the concerned imported cigarettes

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<sup>11</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.159-7.160, 7.171.

<sup>12</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.150-7.156. See Appellate Body Report, *US – Wheat Gluten*, para. 54.

<sup>13</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.163.

<sup>14</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.164 and 7.166.



because Thai Customs failed to properly examine the circumstances of the transaction between PM Thailand (the importer) and PM Philippines (the seller). In this connection, the Panel highlighted the following factors: (i) the importer did provide evidence to Thai Customs to establish that the relationship between the importer and the seller did not influence the price and thus fulfilled its procedural responsibility under Article 1.2(a) to provide information to the customs administration; and (ii) upon receiving the evidence submitted by the importer, Thai Customs failed to explain to the importer why it considered the information provided by the importer was insufficient and consequently decided to reject the transaction value.<sup>15</sup> The Panel emphasized, "upon receiving information and data from [the importer], Thai Customs was required to inquire into, investigate and critically consider such information and data and communicate its grounds and explain the final determination."<sup>16</sup> The Panel further explained that:

"In the light of the nature of the obligation to 'examine' under Article 1.2(a), as clarified ... above, upon receiving information and data from PM Thailand, Thai Customs was required to inquire into, investigate and critically consider such information and data and communicate its grounds and explain the final determination. In this regard, we wish to emphasize that this question should be distinguished from the question of whether the content of the information provided by PM Thailand did not establish the validity of the transaction value as explained by Thailand [before the Panel]. Addressing the latter would amount to acting outside our mandate to make an objective assessment of the matter at issue.

Turning back to the question before us, we recognize that it may well be that Thai Customs critically considered the information and data submitted based on the reasons it has provided to the Panel in this proceeding. However, we would not be in the position to find that Thai Customs did in fact examine such information unless such reasoning is provided in its communication of grounds and its explanations to the importer in accordance with the obligations under the Customs Valuation Agreement. In its explanation given in the 12 April 2007 letter, Thai Customs does not elucidate the reason why it reached the conclusion that the relationship influenced the price with respect to the entries at issue. We therefore do not have the evidence confirming that Thai Customs did in fact examine the circumstances of the sale by critically considering all information and data before it at the time of determination, as it claims in this proceeding.<sup>17</sup> We do not find any other explanation in the subject letter than that the importer and the exporter are related and that the importer failed to meet the burden of proof. As explicitly stipulated in Article 1.2(a), however, the mere fact that an importer is related to an exporter is not sufficient in itself for a customs administration to reject the transaction value. Article 1.2(a) requires the customs administration to examine the circumstances of the sale in a related-party transaction. Consequently, it follows that Thai Customs was under an obligation to explain why it decided to reject the transaction value, including the basis for considering that the relationship influenced the price, after it had examined the circumstances of the sale.

Thailand further submits that the grounds for Thai Customs not using the transaction value as the customs value were communicated in its letter of 19 December 2006, namely that PM Thailand failed to establish that the relationship did not influence the transfer price. Other than this statement, the concerned letter does not include any of the other explanations that Thailand provided in this proceeding, as noted in the

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<sup>15</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.181-7.195.

<sup>16</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.188.

<sup>17</sup> (footnote original) We recall the Appellate Body's statement in *US – Steel Safeguards*: "[A]s stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the Agreement on Safeguards. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority...." (para. 303)

previous paragraph. Without informing the importer of the basis for its consideration that the information provided up until that stage of the process did not establish the validity of the transaction value, the importer would not have been able to effectively, if at all, respond to the authority's consideration. This would further hinder the ability of the customs authorities to properly examine the circumstances of sale under Article 1.2(a).

Furthermore, Thai Customs' explanation for the final determination of the final customs value for the entries at issue is contained in its letter dated 12 April 2007 and the minutes of the 6 March 2007 meeting. ... Thai Customs indicates in the letter as the reason for its decision to reject the transaction value the following statement: '[t]he company and the overseas seller are related parties, and it cannot be proven whether the relationship has an influence on the determination of customs values or not'. However, none of the explanations provided by Thailand in this Panel proceeding were set out in the Thai Customs' letter of 12 April 2007. In response to the Panel question of whether Thai Customs ever communicated the same explanations that were given in this Panel proceeding to PM Thailand during the domestic proceedings, Thailand submits that although its explanations before the Panel are much more detailed, they are fully consistent with the grounds on which Thai Customs acted and the explanations provided to PM Thailand at the time. As already addressed above, however, in the light of the nature of the obligation to 'examine' the circumstances of the sale, considered in the due process objective of Article 1.2(a) as well as the Customs Valuation Agreement in its entirety, the absence of any explanations on why the information provided was considered insufficient and consequently led Thai Customs to reject the transaction value renders Thai Customs' examination inconsistent with Article 1.2(a).

We address next the minutes of the 6 March 2007 meeting. The minutes include the description of Thai Customs' examination of the circumstances of the sale; its determination to reject the transaction value; and the alternative valuation methods considered to be used for valuation of the cigarettes at issue. ... we will assess whether the minutes explain the basis for Thai Customs' determination to reject the transaction value in the light of the information and evidence provided by PM Thailand. ... This therefore shows that Thai Customs considered it unnecessary to examine the circumstances of the sale in respect of the cigarettes at issue imported in August 2006 based on its examination and consequent determination in 2003 that the relationship between PM Thailand and PM Philippines influenced the price of the cigarettes imported at that time. As the Philippines points out, we do not consider that the requirement to examine the circumstances of the sale under Article 1.2(a) can be satisfied by simply referring back to the examination conducted and determination reached in respect of the transaction that took place three years before the current transaction at issue. There may indeed be a situation where despite the gap in time, the circumstances of both transactions between the same parties turn out to be the same. Even in such a case, however, in our view, the customs authorities are obliged under Article 1.2(a) to explain the basis for finding the current transaction to be the same as the previous transaction which it had already examined."<sup>18</sup>

9. With regard to the effect or impact of a customs authority's examination of the circumstances of sale, the Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines) held as follows:

"Insofar as we find that there is a flaw or shortcoming in the examination that renders the examination inapt to reveal whether the relationship between the buyer and seller influenced the price, then there is a violation of the obligation in Article 1.2(a), second sentence. However, insofar as we find a flaw or shortcoming in the examination, but consider that the nature of the flaw or shortcoming does not render the examination inapt to reveal whether the relationship between the buyer and seller influenced the price – because the flaw or shortcoming is not sufficiently 'serious' or 'consequential', or for some other reason – then we would conclude that there is no violation of Article 1.2(a), second sentence. An assessment of whether a flaw or shortcoming in the

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<sup>18</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.181-7.195.

examination of the circumstances of sale is 'sufficiently serious and consequential' is, to that extent, inherent in the legal standard that we have articulated above.

In our view, consideration of whether a flaw or shortcoming is sufficiently serious or consequential as to render the examination inapt to reveal whether the relationship between the buyer and seller influenced the price is distinct, however, from any attempt to embark on an assessment of how a particular flaw or shortcoming may have affected the calculations performed by the authority, or would have altered the overall outcome reached by the authority. To the extent that the parties' disagreement extends to whether a particular examination of the circumstances of sale (or aspect of that examination) must have gone against the interests of the importer in order to be found to be inconsistent with Article 1.2(a), second sentence, we wish to clarify that a determination may be found to be inconsistent with the obligation in Article 1.2(a), second sentence, regardless of the impact (if any) of the flaw or shortcoming on the final outcome of the determination."<sup>19</sup>

10. In considering whether the relationship between a buyer and seller influenced the price, the Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* found that under the legal standard found in Article 1.2(a) for a comparison "to be apt to reveal whether the relationship between the buyer and seller influenced the price that comparison must be between comparable things". The Panel held that his standard "is reflected in a general principle of comparability that appears both within the CVA itself, as well as throughout the covered agreements".<sup>20</sup>

11. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, the Panel undertook an analysis of the procedural obligation under Article 1.2(a), third sentence, which was not pursued by the Philippines in the first compliance proceedings. In considering whether this obligation applied to the Public Prosecutor as an entity outside of the narrow definition of a "customs administration", the Panel stated that:

"The procedural obligation in Article 1.2(a), third sentence, applies to any entity making a customs valuation determination, but that the nature of the agency and the circumstances in which a determination was made could be highly germane to the appraisal of whether or not the obligation was discharged. Furthermore, if there were circumstances in which it was impossible for entities that do not form part of the 'customs administration' in the narrow sense of the term to comply with the procedural obligation in Article 1.2(a), third sentence, without violating other rules, such as the right to remain silent, then it would apply *mutatis mutandis*. Here again, there is a degree of balance inherent in the CVA."<sup>21</sup><sup>22</sup>

12. The Panel concluded that "the procedural obligation in Article 1.2(a), third sentence, applies to the Public Prosecutor",<sup>23</sup> however:

"As a general consideration, the Panel considers that it is reasonable to expect that the nature of the information and the 'grounds' communicated in the context of a criminal investigation may be different from the nature of the information and the 'grounds' communicated in the context of a typical customs valuation within the

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<sup>19</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.111-7.112.

<sup>20</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.136

<sup>21</sup> (footnote original) The Panel notes that Annex III, paragraph 6 of the CVA provides that Members, "subject to their national laws and procedures," have the right to expect the "full cooperation" of importers in enquiries "concerning the truth or accuracy" of statements, documents, and declarations presented to them for customs valuation purposes. If "the right to expect the full cooperation of importers" in such enquiries is "subject to" each Member's "national laws and procedures", and those national laws or procedures reflect the principle that the accused has the right to remain silent in the context of criminal procedures, this could adequately address any incompatibility that might arise from finding that the procedural obligation in Article 1.2(a) third sentence, and/or the corresponding procedural obligation in the Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, is applicable to criminal procedures.

<sup>22</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.417.

<sup>23</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.419.

institutional framework of a 'customs administration' in the narrow sense of the term."<sup>24</sup>

13. The Panel observed that, in this case, there was evidence on the record of repeated exchanges between the Department of Special Investigation (DSI) and Phillip Morris Thailand Limited (PMTL) specially concerning the CK-21A forms. In this light, the Panel rejected the Philippines' assertion that "even if the DSI's investigation complied with Article 1.2(a), third sentence, the Public Prosecutor was necessarily required to communicate these same grounds again prior to issuing the 2002-2003 Charges."<sup>25</sup> The Panel stated that the wording of Article 1.2(a), third sentence, does not support an interpretation that "each time a distinct customs valuation determination is made, the grounds must be adequately communicated by the customs administration".<sup>26</sup> The Panel agreed with the first compliance panel's view that, in assessing the applicability of the procedural obligation under Article 1.2(a) to two or more successive customs violations, "it is pertinent to consider whether the later determination(s) were based on issues, evidence or grounds that were distinct from those already communicated to the importer in the context of the earlier determination."<sup>27</sup>

14. The Panel found that, notwithstanding the DSI's motivations in requesting that PMTL provide it with copies of the CK-21A forms, the DSI had sufficiently discharged the obligation to communicate its grounds for doubting the acceptability of the declared transaction values and give an opportunity to PMTL to respond.<sup>28</sup> The Panel further found that the Public Prosecutor had not violated the procedural obligation in Article 1.2(a), third sentence.<sup>29</sup>

#### 1.4.2 Obligation to "communicate grounds" for rejecting declared transaction values

15. Regarding the nature of the obligation to communicate grounds for rejecting declared transaction values under Article 1.2(a), the Panel in *Thailand – Cigarettes (Philippines)* explained that:

"The term 'ground[s]' can be defined as '*noun*. ... 6 The basis of an opinion or argument, the reason or motive for an action, (now freq. in *pl.*). In *pl.* also, sufficient reason or reasons *for, that*. ME'. When used in plural, as in Article 1.2(a), 'grounds' thus means 'sufficient reason or reasons' for an opinion or an action. Under Article 1.2(a), the grounds to be provided to the importer are the customs authorities' reasons for considering, in the light of the information provided by the importer or otherwise, that the relationship influenced the price. In this regard, we recall our discussion above regarding the procedural steps to be taken by customs authorities as well as importers under Article 1.2(a). The importer is responsible for providing information relevant to the acceptability of the transaction value once it has been notified by the customs authority of the need to examine the circumstances of the sale in related-party situations. Subsequently, the customs authority must assess the information initially provided by the importer and communicate its grounds for considering that the relationship influenced the price based on the evidence provided if that is the preliminary conclusion reached at that point in the process.

In this context, the obligation to communicate the grounds under Article 1.2(a) can be temporarily distinguished from the obligation to provide an explanation under Article 16 for how the final customs value of the importer's goods was determined. As the parties have also clarified, the obligation to provide 'grounds' under Article 1.2(a) arises *during* the valuation process. The obligation to 'explain' the determination of the customs value, on the other hand, does not arise until after the customs authority has made a final assessment of the customs value of the concerned goods. This temporal difference in the process, in our view, thus affects the substantive nature of the content of 'grounds' under Article 1.2(a) and an 'explanation' under Article 16. Given that under Article 1.2(a), the importer shall be given a reasonable opportunity

<sup>24</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.425.

<sup>25</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.427.

<sup>26</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.427.

<sup>27</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.427.

<sup>28</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.429.

<sup>29</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.430.

to further respond to the customs authority's 'grounds' for considering that the relationship influenced the price, the 'explanation' to be provided after the valuation process is completed must therefore include the assessment of all relevant information, including that provided by the importer as a response to the customs authority's communication of its grounds regarding its consideration.

Moreover, we consider that the right of the importer to have a reasonable opportunity to respond to the customs authority's grounds for its consideration under Article 1.2(a) provides contextual basis for the term 'grounds'. As the Philippines suggests, in order for the importer to have a reasonable opportunity to respond to the customs authorities' consideration, particularly if the customs authority considers that there is insufficient information, the importer must not be left to guess the reasons for the customs authorities' consideration. The right of the importer to have 'a reasonable opportunity to respond' under Article 1.2(a) would lose its meaning unless the importer is informed of at least the reason(s) why the customs authority continues to question the acceptability of the transaction value despite the evidence and information presented or otherwise in the possession of the customs authority until that point. In this regard, we do not find it necessary or useful for us to define the exact extent and scope of 'grounds' to be provided under Article 1.2(a) as they may vary depending on the factual circumstances presented in each case. We do agree, however, with the Philippines that without knowing the reasons for the authority's consideration in relation to the specific evidence before it, the importer would not be in the position to effectively 'respond', for example, by further elaborating on the relevance of the evidence it has already submitted and presenting additional information. It would be desirable if a customs authority could, to the extent possible, inform the importer of the kind(s) of additional factual information that it considers may prove useful in further assessing the acceptability of the transaction value. It is difficult to conceive any other way in which the importer can have a reasonable opportunity to respond to the customs authorities' consideration that the relationship did influence the price."<sup>30</sup>

16. In *Thailand - Cigarettes (Philippines)*, the importer provided Thai Customs with certain information and data to establish the acceptability of the transaction value. Given these factual circumstances, the Panel in *Thailand - Cigarettes (Philippines)* found that Thai Customs' grounds as provided to the importer (that the importer and the seller are related parties ... and the importer has yet to prove if the said relationship influences the customs value determination or not) did not satisfy the obligation under Article 1.2(a) to communicate the grounds for its consideration.<sup>31</sup> The Panel considered that "to the extent that Thai Customs was presented with certain evidence, the grounds for its consideration that the relationship between the buyer and the seller influenced the price must be linked to that concerned evidence so as to assist the importer in understanding the authority's consideration."<sup>32</sup>

#### 1.4.3 Third sentence of Article 1.2(a)

17. The Panel in *Thailand - Cigarettes (Philippines) (Article 21.5 - Philippines)* found that the objective under the third sentence of Article 1.2(a) of enabling 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", similar to the objective found in Article 16 of the Customs Valuation Agreement, therefore, the Panel determined:

"It that is consistent with this objective that an appeals tribunal within the customs administration be subject to the requirements set forth in Article 1.2(a), third sentence. In sum, we see nothing in the nature of the legal obligations contained in

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<sup>30</sup> Panel Report, *Thailand - Cigarettes (Philippines)*, paras. 7.212-7.214.

<sup>31</sup> Panel Report, *Thailand - Cigarettes (Philippines)*, para. 7.220.

<sup>32</sup> Panel Report, *Thailand - Cigarettes (Philippines)*, para. 7.220.

Article 1.2(a), third sentence, that would justify excluding appellate tribunals such as the BoA from the scope of those obligations."<sup>33</sup>

18. Furthermore, the Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* found that it was unclear "how any practical difficulties would arise by subjecting an appeal tribunal within a customs administration, like the BoA, to the procedural obligations contained in the third sentence of Article 1.2(a)."<sup>34</sup>

19. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, in considering whether appeal tribunals were subject to the obligations contained in Article 1.2(a), pointed out that "it would be a straightforward task for customs authorities to circumvent the obligations under Article 1.2(a), third sentence, if appellate tribunals within the administration were not subject to those obligations". The Panel also stated that an appellate tribunal may be making a customs value determination:

"[W]e do not see how a decision by an appellate tribunal as to the correct customs value is *not* a customs value determination within the meaning of Article 1.2(a), and the CVA more generally".<sup>35</sup>

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<sup>33</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.260.

<sup>34</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.261.

<sup>35</sup> Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.267.