

1 ARTICLE 5 **1**

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1 ARTICLE 5

1.1 Text of Article 5

Article 5

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:
 - (i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;
 - (ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;
 - (iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and
 - (iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.
- (b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.
2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

1.2 Text of interpretative note to Article 5

Note to Article 5

1. The term "unit price at which ... goods are sold in the greatest aggregate quantity" means the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales take place.

2. As an example of this, goods are sold from a price list which grants favourable unit prices for purchases made in larger quantities.

<i>Sale quantity</i>	<i>Unit price</i>	<i>Number of sales</i>	<i>Total quantity sold at each price</i>
1-10 units	100	10 sales of 5 units 5 sales of 3 units	65
11-25 units	95	5 sales of 11 units	55
over 25 units	90	1 sale of 30 units 1 sale of 50 units	80

The greatest number of units sold at a price is 80; therefore, the unit price in the greatest aggregate quantity is 90.

3. As another example of this, two sales occur. In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units are sold at a price of 90 currency units each. In this example, the greatest number of units sold at a particular price is 500; therefore, the unit price in the greatest aggregate quantity is 95.

4. A third example would be the following situation where various quantities are sold at various prices.

<i>(a) Sales</i>	
<i>Sale quantity</i>	<i>Unit price</i>
40 units	100
30 units	90
15 units	100
50 units	95
25 units	105
35 units	90
5 units	100
<i>(b) Totals</i>	
<i>Total quantity sold</i>	<i>Unit price</i>
65	90
50	95
60	100
25	105

In this example, the greatest number of units sold at a particular price is 65; therefore, the unit price in the greatest aggregate quantity is 90.

5. Any sale in the importing country, as described in paragraph 1 above, to a person who supplies directly or indirectly free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods any of the elements specified in paragraph 1(b) of Article 8, should not be taken into account in establishing the unit price for the purposes of Article 5.

6. It should be noted that "profit and general expenses" referred to in paragraph 1 of Article 5 should be taken as a whole. The figure for the purposes of this deduction should be determined on the basis of information supplied by or on behalf of the importer unless the importer's figures are inconsistent with those obtained in sales in the country of

importation of imported goods of the same class or kind. Where the importer's figures are inconsistent with such figures, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the importer.

7. The "general expenses" include the direct and indirect costs of marketing the goods in question.

8. Local taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5.

9. In determining either the commissions or the usual profits and general expenses under the provisions of paragraph 1 of Article 5, the question whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis by reference to the circumstances involved. Sales in the country of importation of the narrowest group or range of imported goods of the same class or kind, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of Article 5, "goods of the same class or kind" includes goods imported from the same country as the goods being valued as well as goods imported from other countries.

10. For the purposes of paragraph 1(b) of Article 5, the "earliest date" shall be the date by which sales of the imported goods or of identical or similar imported goods are made in sufficient quantity to establish the unit price.

11. Where the method in paragraph 2 of Article 5 is used, deductions made for the value added by further processing shall be based on objective and quantifiable data relating to the cost of such work. Accepted industry formulas, recipes, methods of construction, and other industry practices would form the basis of the calculations.

12. It is recognized that the method of valuation provided for in paragraph 2 of Article 5 would normally not be applicable when, as a result of the further processing, the imported goods lose their identity. However, there can be instances where, although the identity of the imported goods is lost, the value added by the processing can be determined accurately without unreasonable difficulty. On the other hand, there can also be instances where the imported goods maintain their identity but form such a minor element in the goods sold in the country of importation that the use of this valuation method would be unjustified. In view of the above, each situation of this type must be considered on a case-by-case basis.

1.3 Article 5.1

1.3.1 General

1. In *Thailand – Cigarettes (Philippines)*, the Philippines claimed that Thailand violated Article 5 by declining to use that provision for impermissible reasons such as a lack of contemporaneous financial information. The Panel stated that:

"We do not find in the text of Article 5 any specific obligation according to which Members must use the method under that provision rather than the subsequent valuation methods. In other words, the provisions of Article 5 do not provide for the criteria to be used in deciding whether the decision not to use the valuation method under Article 5 is consistent or not with the obligations under Article 5. Rather, Article 5 prescribes the principles to be applied in using the deductive valuation method once the customs authority has decided to use the deductive valuation method under Article 5. In our view, declining to use Article 5 for impermissible reasons, namely, a lack of contemporaneous financial information, would, for example, lead to a finding that the condition for resorting to a method under Article 7.1 is not satisfied in the light of the text of the provisions under Article 7.1. ...

We therefore find that the Philippines failed to establish a prima facie case for its claim under Article 5."¹

1.3.2 Article 5.1(a)(i) and (ii): "usual"

2. In *Thailand – Cigarettes (Philippines)*, the Panel stated that:

"[T]he terms 'usually' and 'usual' can be found in Article 5.1(a)(i) and (ii), which states, for example, 'the commissions *usually* paid or agreed to be paid', 'the additions *usually* made for profit and general expenses' and 'the *usual* costs of transport and insurance and associated costs'. A plain reading of these phrases therefore suggests that the deductions of the commissions or the additions or the costs of transport as set out in Article 5.1(a)(i) and (ii) need not necessarily be tied to a particular unit price for the GAQ² sale that is being used in the deductive value calculation.

A treatise cited to by the parties also supports this view: 'It should be pointed out initially that the deductions will in general *not* relate to the same resale(s) from which the price has just been derived'. At the same time, we note the phrase 'in general' in this statement, which appears to imply that there may be exceptional situations. We also observe the Technical Committee's commentary on Article 5.1 that 'in general, the application of the deductive valuation method under Article 5 of the Customs Valuation Agreement may differ on a set of circumstances from another and thus the practical application of Article 5 requires a flexible approach, having regard to the circumstances in each case'.³

1.3.3 Article 5.1(a)(iv): Provincial taxes payable

3. In *Thailand – Cigarettes (Philippines)*, Thailand argued that unlike national taxes, which are deductible if they are *payable* under Article 5.1(a)(iv), provincial taxes are deductible if included in the unit price on which the deductive value is based. The Philippines asserted that Article 5.1(iv) requires the deduction of the national taxes *payable*, not the taxes *paid* on the GAQ sales. The Panel agreed with the Philippines, stating:

"Article 5.1(a)(iv) refers to 'the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods', but not to provincial taxes. 'Local taxes' are however mentioned in the interpretative note to Article 5, in paragraph 8, where it states, 'local taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5'. The phrase in the Interpretative Note to Article 5 'local taxes payable by reason of the sale of the goods' mirrors the phrase in Article 1(a)(iv).

The term 'payable' can be defined as '*adj.* (Of a sum of money or a negotiable instrument) that is to be paid. An amount may be payable without being due. Debts are commonly payable long before they fall due'. It can also be defined as '*adjective.* 1 Of a sum of money, a bill, etc: that is to be paid; falling due (usu. at or on a specified date or to a specified person). 2 Able to be paid'. Therefore, the ordinary meaning of the term 'payable' refers to both 'a sum of money that is to be paid without being due' and 'that is due to be paid'. This suggests that national taxes and provincial taxes subject to the deduction under Article 5 need not be related to the GAQ sale. The phrase 'by reason of the importation or sale of the goods' also supports the view that these taxes refer to those usually to be paid upon importation and upon sale in the market.

Furthermore, paragraph 8 of the Interpretative Note to Article 5 states that 'local taxes payable ... for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5'. Article 5.1(a)(i) refers to 'either the commission *usually* paid or agreed to

¹ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.292.

² The term "GAQ" stands for greatest aggregate quantity.

³ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.347-7.348.

be paid or the additional *usually* made for profit and general expenses ...'. Therefore, we consider that provincial taxes *payable* must be deducted if the information shows *usual* payments made for local taxes even if they are not included in the sales price based on which the deductive valuation method will be applied under Article 5.

Further, we note the statement in the above-mentioned treatise, as Thailand points out, that 'state and local taxes ... are deductible if included in the resale price upon which the [deductive value] is based'. This statement, in our view, supports our view as it stipulates that while state and local taxes are *deductible* if they are included in the resale price, it does not necessarily imply that that is the only situation in which state and local taxes can be deducted."⁴

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⁴ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.357-7.360.