

<b>1 ARTICLE 7 .....</b>	<b>1</b>
1.1 Text of Article 7.....	1
1.2 Text of interpretative note to Article 7.....	1
1.3 Article 7.1 .....	2
1.3.1 Condition for using a valuation method under Article 7 .....	2
1.3.2 Application of the deductive valuation method under Article 7.1 .....	3
1.4 Article 7.2 .....	4
1.4.1 General .....	4
1.4.2 Paragraph (b).....	4
1.4.3 Paragraph (f) .....	4
1.5 Article 7.3 .....	5

**1 ARTICLE 7**

**1.1 Text of Article 7**

**Article 7**

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.
2. No customs value shall be determined under the provisions of this Article on the basis of:
  - (a) the selling price in the country of importation of goods produced in such country;
  - (b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;
  - (c) the price of goods on the domestic market of the country of exportation;
  - (d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;
  - (e) the price of the goods for export to a country other than the country of importation;
  - (f) minimum customs values; or
  - (g) arbitrary or fictitious values.
3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

**1.2 Text of interpretative note to Article 7**

**Note to Article 7**

1. Customs values determined under the provisions of Article 7 should, to the greatest extent possible, be based on previously determined customs values.

2. The methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 7.

3. Some examples of reasonable flexibility are as follows:

- (a) *Identical goods* - the requirement that the identical goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of Articles 5 and 6 could be used.
- (b) *Similar goods* - the requirement that the similar goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of Articles 5 and 6 could be used.
- (c) *Deductive method* - the requirement that the goods shall have been sold in the "condition as imported" in paragraph 1(a) of Article 5 could be flexibly interpreted; the "90 days" requirement could be administered flexibly.

### 1.3 Article 7.1

#### 1.3.1 Condition for using a valuation method under Article 7

1. In *Thailand – Cigarettes (Philippines)*, the Philippines argued that Thailand violated the sequencing obligation contained in Article 7.1. The Panel did not consider that Article 7.1 can form the basis for an independent sequencing claim under the Customs Valuation Agreement.

"Next, we address the Philippines' claim under Article 7.1 in respect of Thailand's alleged violation of the sequencing obligation. The text of Article 7.1 stipulates that resort to Article 7.1 for customs valuation is conditioned on the situation where "the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6". As such, Article 7 may only be applied if the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6. We understand that the Philippines' sequencing claim under Article 7.1 stems from this part of Article 7.1. In our view, this phrase in Article 7.1 lays down a condition or requirement that needs to be met before a customs authority can use the valuation principles under Article 7.1. As such, we do not consider that Article 7.1 can form the basis for an independent sequencing claim under the Customs Valuation Agreement. We consider that the Philippines' claim pertaining to this part of Article 7.1 rather falls within the Philippines' claim that Thailand improperly applied the deductive valuation method under Article 7.1 ... [.]"<sup>1</sup>

2. The Panel in *Thailand – Cigarettes (Philippines)* found that the condition for using a valuation method under Article 7 was not met in the factual circumstances of that case because Thai Customs had necessary financial data (i.e. financial data from prior years) to use the valuation method under Article 5.2 The Panel noted in this connection that financial data from prior years, even if not the most current data, could be used for valuation under Article 5.3

3. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, Thailand argued that the detailed rules in Article 6, concerning the computed value calculation, were inapplicable in this case, as any determination of the revised customs value applied the computed value method with

<sup>1</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.279.

<sup>2</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.297.

<sup>3</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.297.

"a reasonable flexibility" as permitted by Article 7.<sup>4</sup> Although the Panel found that the reasonable flexibilities of Article 7.1 did not extend to the case at hand,<sup>5</sup> the Panel recognized that:

"[T]here could be cases in which a customs authority determines a revised customs value on the basis of a computed value method that deviates from the strict requirements of Article 6. The Panel is mindful of Article 7.2(d) ... However, the Panel does not read this language to mean that no deviation from the strict rules of Article 6 is ever permissible; rather, Article 7.2(d) appears to envisage that in appropriate cases the rules of Article 6 may be applied with reasonable flexibility, but clarifies that any computed values must nonetheless relate either to identical goods, as defined in Article 15.2(a), or to similar goods, as defined in Article 15.2(b)."<sup>6</sup>

### 1.3.2 Application of the deductive valuation method under Article 7.1

4. In *Thailand – Cigarettes (Philippines)*, the Philippines claimed that Thai Customs valued the entries at issue inconsistently with Article 7.1 because it failed to make deductions for sales allowances, provincial taxes and internal transportation costs. Thailand argued that the importer did not provide sufficient evidence before Thai Customs at the time of determination to justify the requested deductions. In evaluating the proper application of the deductive valuation method within the meaning of Article 7.1, the Panel in *Thailand – Cigarettes (Philippines)* made the following observation:

"The text of Article 7.1, read together with paragraph 2 of the Interpretative Note to Article 7, provides that when using a deductive valuation method under Article 7.1, a customs authority is required to apply the same principles that would be applied under Article 5, with allowance for a reasonable flexibility where Article 5 cannot be applied strictly. The parties' arguments concerning Thai Customs' valuation of the entries at issue are therefore based on the specific principles to be applied in using the deductive valuation method as prescribed in Article 5."<sup>7</sup>

5. In light of the relationship between Article 5 and Article 7.1, the Panel in *Thailand – Cigarettes (Philippines)* analysed the deductibility of sales allowances, provincial taxes and internal transportation costs under the principles of Article 5, particularly Article 5.1(a) in order to assess the consistency of Thai Customs' decision not to deduct these items with Article 7.1. Furthermore, the Panel addressed the procedural aspect of Thai Customs' decision not to deduct the items at issue under Article 7.1.

#### 1.3.2.1 Procedural aspects

6. The parties in *Thailand – Cigarettes (Philippines)* disputed the obligations imposed on both the importer and the customs authority in the process of applying the deductive valuation method. Referring to, inter alia, the general principle contained in paragraph 2 of the General Introductory Commentary to the Customs Valuation Agreement, the Panel emphasized that the process of determining a customs value under the principles of Article 5 should be a "process of consultation". The Panel explained that:

"Although the first sentence of paragraph 2 refers to 'value under the provisions of Article 2 or 3', we consider that the spirit of the Customs Valuation Agreement envisaged under this paragraph, namely the determination of customs value through a *process of consultation* between the customs administration and importer, equally applies to other valuation methods. The phrase 'using reasonable means consistent with the principles and general provisions of this Agreement' in Article 7.1 also supports this view. As the Philippines submits, while the importer is the party that typically possesses relevant information for a deductive calculation, it is the customs authority that knows the specific information necessary to accept the requested deductions. Viewed in this light, it is difficult to conceive that the drafters of the Agreement would have intended a process of consultation between the customs

<sup>4</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines II), para. 7.369.

<sup>5</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines II), para. 7.371.

<sup>6</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines II), para. 7.370.

<sup>7</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.298.

administration and importer to be limited solely to the valuation process under Article 2 or 3."<sup>8</sup>

7. In light of the above and under the factual circumstances of the dispute, the Panel in *Thailand – Cigarettes (Philippines)* concluded that Thai Customs' failure to properly consult the importer on the information necessary for the requested deductions renders its decision not to deduct the concerned items inconsistent with Article 7.1 of the Customs Valuation Agreement.

### **1.3.2.2 Substantive aspects - deductions in general and deductibility of sales allowances, provincial taxes and transportation costs under the principles of Article 5.1**

8. Regarding the deductions for sales allowances, provincial taxes and transportation costs, the parties in *Thailand – Cigarettes (Philippines)* did not dispute that these items were, in principle, deductible under Article 5.1(a). The disagreement between the parties was on the type of evidence required from the importer for the deduction of these items. Specifically, the question at issue was whether, as a general matter, the importer is required to prove that these expenses are actually tied to the GAQ<sup>9</sup> sales based on which the unit price was decided.<sup>10</sup>

## **1.4 Article 7.2**

### **1.4.1 General**

9. In *Colombia – Ports of Entry*, the Panel explained that Article 7.2 provides that reasonable means of valuation, permitted under Article 7.1, cannot be determined using a series of prohibited customs valuation methods.

### **1.4.2 Paragraph (b)**

10. In *Colombia – Ports of Entry*, with respect to Article 7.2(b), Panama contended that because the Colombian measure requires the use of an indicative price for customs valuation purposes whenever the transaction value is lower than the indicative price, it is tantamount to the acceptance of the higher of two alternative values.<sup>11</sup> The Panel found that:

"[A]s well as the various resolutions establishing indicative prices, impose 'the acceptance for customs purposes of the higher of two alternative values'. ... [F]or products subject to indicative prices, customs duties and sales taxes are levied at the time of inspection on the basis of the higher of two values: the declared value or the indicative price. The Panel therefore finds that ... as well as the various resolutions establishing indicative prices, which mandate the use of indicative prices for customs valuation purposes are inconsistent with Article 7.2(b) of the *Customs Valuation Agreement*."<sup>12</sup>

### **1.4.3 Paragraph (f)**

11. In *Colombia – Ports of Entry*, Panama argued in relation to Article 7.2(f) that the indicative prices are minimum customs values because importation of products subject to indicative prices will not be permitted unless this minimum value is declared by the importer.<sup>13</sup> The Panel found that:

"[I]n cases in which the declared value is lower than the indicative price, an importer has to 'correct' the import declaration and pay custom duties and sales tax based on the indicative price. If the importer refuses to do so, the importer has no choice but to re-ship the goods or abandon them. As a result, only two possible scenarios exist when subject goods are submitted for customs clearance: either customs duties and sales tax are collected on the basis of a value equal or higher than the indicative

<sup>8</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.327.

<sup>9</sup> The term "GAQ" stands for greatest aggregate quantity.

<sup>10</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.333.

<sup>11</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.147.

<sup>12</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.149.

<sup>13</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.147.

price; or the goods are not imported into Colombian customs territory at all. In practice, this results in a system in which customs duties and sales tax are never levied on the basis of a value lower than the one provided by the indicative price. For this reason, the Panel concludes that indicative prices amount to 'minimum prices' and, therefore, finds that ... as well as the various resolutions establishing indicative prices which mandate the use of indicative prices for customs valuation purposes are also inconsistent with Article 7.2(f) of the *Customs Valuation Agreement*.<sup>14</sup>

### 1.5 Article 7.3

12. Based on the text of Article 7.3, the Panel in *Thailand – Cigarettes (Philippines)* observed that the customs authority must inform the importer of the customs value determined and the method used under Article 7 to determine such value when there is a request from an importer. The Panel further clarified that the content of the information to be provided under Article 7.3 needs to be specific and elaborative on the method chosen as well as the application of that method to derive at the final customs value. The Panel stated that:

"We observe that the obligation to inform the customs value determined under the provisions of Article 7.3 and the method used to determine such value can be compared to the obligation under Article 16 to provide an explanation as to how the customs value was determined. We clarified above 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 importer's goods was determined, including the basis for rejecting the transaction value, the identification of the method used and the illustration of how the method was applied in reaching the final customs value. The information to be provided under Article 7.3 on the other hand may be different from the explanation to be given under Article 16, *inter alia*, in its scope, as the Philippines submits. In other words, as Article 7 is a provision addressing how to determine the customs value when it cannot be determined under the provisions of Articles 1 through 6, the information to be delivered to an importer under Article 7.3 may be confined to the specific valuation method used within the meaning of Article 7 and may not include, for example, the basis for rejecting the transaction value.

We also consider that the request for information under Article 7.3 would become possible only if the importer was already aware at the time of requesting that the customs authority had relied on a valuation method under Article 7. Given the particular nature of Article 7, i.e. allowing the customs authority to use any of the valuation methods under Articles 2 through 6 with a reasonable flexibility, we can envisage a situation where the importer wishes to clarify the exact method used under Article 7 once it is known that the customs authority used one of the methods falling within the scope of Article 7.

To the extent that the information to be provided under Article 7.3 is linked to a particular method used under Article 7, the content of the information, in our view, needs to be specific and elaborative on the method chosen as well as the application of that method to derive at the final customs value. The term 'method' in Article 7.3 is defined as '*noun*. I. Procedure for attaining an object. 2. A mode of procedure; a (defined or systematic) way of doing a thing, esp. (with specifying word or words) in accordance with a particular theory or as associated with a particular person'. The ordinary meaning of the word 'method' therefore indicates that more than a mere identification of the type of valuation method used must be provided, including how a given method was applied to calculate the customs value of the imported goods concerned."<sup>15</sup>

Current as of: December 2020

<sup>14</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.150.

<sup>15</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.393-7.395.