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1 GENERAL

1.1 Concept of customs valuation

1. In *Colombia – Ports of Entry*, the parties focused their arguments relating to Colombia's use of indicative prices on a series of factual determinations concerning the actual nature and functioning of indicative prices within Colombia's customs procedures. Panama considered that the use of indicative prices for the payment of customs duties and taxes constituted customs valuation, whereas Colombia was of the view that the indicative prices regime did *not* constitute customs valuation but was used as a customs control mechanism. To address the question whether indicative prices are used for the purpose of customs valuation within the meaning of the Customs Valuation Agreement, the Panel in *Colombia – Ports of Entry* first examined the concept of customs valuation pursuant to the Customs Valuation Agreement:

"The Panel notes that the *Customs Valuation Agreement* does not provide a definition for customs valuation. Article 15 of the *Customs Valuation Agreement* does however include a definition of 'customs value'. The term 'customs value of imported goods' is defined in Article 15.1(a) of the *Customs Valuation Agreement* as 'the value of the goods for the purposes of levying *ad valorem* duties of customs on imported goods'. The Panel believes that this definition of customs value is useful in understanding what customs valuation means within the *Customs Valuation Agreement*. ...

...

In light of the dictionary definitions of valuation and value, as well as the definition of customs value provided in Article 15 of the *Customs Valuation Agreement*, the Panel considers that the ordinary meaning of the concept of customs valuation is straightforward. Essentially, customs valuation involves the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties. With this understanding of the meaning of customs valuation, the Panel will consider whether Colombia determines the customs value of imports through the use of its indicative prices regime."¹

¹ Panel Report, *Colombia – Ports of Entry*, paras. 7.81 and 7.83.

2. The Panel in that dispute further elaborated on the meaning of customs valuation in the context of its analysis of indicative prices used by Colombia:

"In the Panel's view, the two central aspects within the concept of customs valuation are (i) the *value* of the goods, which is used (ii) for the purposes of *levying ad valorem* customs duties.

The first question is whether the indicative prices set by Colombia represent the '*value of the goods*'. In light of the ordinary meaning of customs valuation, indicative prices whenever higher than the declared value reflect the 'value of the goods' imported into Colombia. Accordingly, the question arises whether the value assigned to goods entering Colombia is used for the purposes of levying customs duties. The Panel notes that the term 'levy' is defined in the *Oxford English Dictionary* as 'the collection of an assessment, duty or tax', while the *Black's Law Dictionary* defines 'levy' as 'the imposition of a fine or tax'. The key issue is thus whether Colombia's customs authorities *collect* customs duties on the basis of indicative prices.

...

The parties disagree on whether Colombia collects duties based on indicative prices. This raises the larger issue of whether the 'payment' of duties is in fact a payment *strictu sensu* or instead a guarantee in the form of a cash deposit, as claimed by Colombia.

In the Panel's view, 'payment' and 'guarantee' are two different legal concepts that may not be equated lightly. This is true irrespective of the form that the guarantee may take, whether a bank guarantee, guarantee provided by an insurance company, cash deposit, or any other kind of guarantee. ... the future obligation of payment that is secured by a guarantee cannot be confused with the obligation to provide that guarantee."²

3. In light of the meaning of customs valuation as clarified above and having assessed how the indicative prices regime operates in Colombia, the Panel in *Colombia - Ports of Entry* concluded that Colombia's use of indicative prices constitutes customs valuation within the meaning of the Customs Valuation Agreement because payments made by importers are payments *strictu sensu* and not guarantees in the form of a cash deposit.³

1.2 Applicability of the Customs Valuation Agreement

1.2.1 Customs valuation determinations made by an organ of the State that is not part of the "customs administration"

4. In *Thailand - Cigarettes (Philippines) (Article 21.5 - Philippines II)*, Thailand reiterated its argument from the first compliance proceedings in the same dispute that "the disciplines of the CVA apply only to WTO Members' 'customs administration'," and emphasized that "the Revised Kyoto Convention of the World Customs Organization (WCO) provides a definition of 'Customs' which confirms that entities responsible for enforcing criminal offences, such as the Public Prosecutor, are not considered part of 'customs'."⁴ Moreover, Thailand submitted a copy of a letter from the WCO Secretariat to Thailand.⁵ The Panel noted that the first compliance panel in the

² Panel Report, *Colombia - Ports of Entry*, paras. 7.84-7.88.

³ Panel Report, *Colombia - Ports of Entry*, paras. 7.99-7.130.

⁴ Panel Report, *Thailand - Cigarettes (Philippines) (Article 21.5 - Philippines II)*, para. 7.246.

⁵ (*footnote original*) There are past examples of panels engaging in such consultation. For example, the panel in *China - Auto Parts* sought clarifications from the WCO Secretariat on certain issues relating to the "Revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures" and the WCO's "Glossary of International Customs Terms." These questions touched upon the meaning of certain terms used in both in conventions administered by the WCO and in the GATT 1994, including the terms "on or in connection with importation" in Article II:1(b) of the GATT 1994. (See Panel Report, *China - Auto Parts*, Annex C-3.) In *EC - Approval and Marketing of Biotech Products*, the panel stated that it "requested several international organizations (Codex, FAO, the IPPC Secretariat, WHO, OIE, the CBD Secretariat and UNEP) to identify materials (reference works, glossaries, official documents of the relevant international organizations, including conventions, standards and guidelines, etc.) that might aid us in determining the ordinary meaning of

same dispute had not addressed the meaning of the term "customs administration" in the CVA, since it had disagreed with Thailand's view that the CVA obligations invoked by the Philippines apply only to those state organs that are part of the "customs administration".⁶ Similarly, the second compliance Panel did not consider it pertinent to go further in defining the term "customs administration" in the context of the CVA, and agreed with the first compliance panel's finding that "the substantive CVA obligations at issue apply to any organ of the state that makes a 'customs valuation' determination irrespective of whether that organ forms part of the 'customs administration'".⁷

5. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* stated that, although the WCO Secretariat's view might assist a panel in the interpretation of certain terms, the precise interpretation of the notion of "customs administration" would not alter the Panel's conclusion or analysis in this case, and thus, it is not necessary to consider the definition of "Customs" in the Revised Kyoto Convention, nor the WCO Letter.⁸ The Panel further considered that to find that the substantive obligations in the CVA apply to some state organs but not to others would result in "opening the door for Members to evade their CVA obligations", and "it would conflict with the CVA's preambular objectives."⁹ In this light, the second compliance Panel in this dispute rejected Thailand's argument that the CVA is inapplicable to the 2002-2003 Charges, because they were criminal charges, issued by the Public Prosecutor, which is not part of the "customs administration". The Panel thereby concluded:

"Based on the foregoing, the Panel finds that the obligations in Articles 1.1, 1.2(a), second sentence, and the relevant custom valuation rules in Articles 2 to 7 apply to any organ of the state that makes a 'customs valuation' determination. ... Having reached that conclusion, the Panel again finds it unnecessary to reach any definitive conclusion on the scope of the term 'customs administration' in the context of the CVA."¹⁰

1.2.2 Existence of a "determination" for purposes of the CVA

6. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the Panel addressed the types of measures that may be subject to the obligations of the CVA, noting that the CVA does not contain any general "scope and coverage" provision, but that the text of the CVA contains 43 references to how customs value is to be "determined".¹¹ Thailand submitted that, because one part of the measures at issue, the 2003-2006 criminal charges (the "Charges"), are a "mere accusation of wrong-doing, they do not represent a customs valuation 'determination' for the purposes of the CVA."¹²

7. The Panel looked at the ordinary meaning of "determination"¹³, found guidance in the Appellate Body reports analysing what constitutes a "determination" in the context of Article 23 of the DSU¹⁴ and in the definition of "administrative decision" in footnote 4 to Article 4.1 of the TFA as a decision "with a legal effect that affects the rights and obligations of a specific person in an

certain terms used in the definitions provided in Annex A to the *SPS Agreement*". (Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.96.) In several cases involving the interpretation of conventions that are administered by WIPO and incorporated by reference into the TRIPS Agreement, panels have requested the WIPO Secretariat to provide information relevant to the interpretation of the provisions at issue. (See e.g. Panel Reports, *US – Section 110(5) Copyright Act*, para. 4.1; *US – Section 211 Appropriations Act*, paras. 8.11-8.13; *EC – Trademarks and Geographical Indications*, paras. 2.16-2.18; *China – Intellectual Property Rights*, paras. 2.7-2.9; and *Australia – Tobacco Plain Packaging (Cuba)*, paras. 1.63-1.65.) Finally, in *Dominican Republic – Import and Sale of Cigarettes*, the panel sought and relied upon the opinion of the IMF as to whether a foreign exchange fee applied by the Dominican Republic constituted an "exchange restriction" within the meaning of Article XV: 9(a) of the GATT 1994. (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.143-7.145.)

⁶ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.266.

⁷ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.266.

⁸ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.269.

⁹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.261.

¹⁰ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.274.

¹¹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.585.

¹² Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.586.

¹³ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.588.

¹⁴ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.591-7.592.

individual case".¹⁵ On this basis, the Panel concluded that "the Charges constitute a 'determination' for purposes of the CVA".¹⁶

1.3 Standard of review

1.3.1 General

8. In *Thailand – Cigarettes (Philippines)*, the Panel set out that an objective assessment under Article 11 of the DSU was the proper standard for its review of the complainants' claims under the Customs Valuation Agreement. The Panel further elaborated that the objective assessment must be understood in the light of the relevant obligations of the substantive agreement at issue.¹⁷ As for the claims under the Customs Valuation Agreement, the Panel therefore observed that its objective assessment must be understood in the light of the relevant obligations under the Customs Valuation Agreement, particularly the grounds and explanations to be provided by the customs authority at the time of determination pursuant to Articles 1.2(a), 7.3 and 16 of the Customs Valuation Agreement.

9. In considering the scope of application of the Customs Valuation Agreement, the Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* found relevance in the Appellate Body's findings in *US – 1916 Act*:

"In essence, the Appellate Body's finding in *US – 1916 Act* appears to constitute an application of the more general principle that, insofar as WTO obligations by their terms apply to a particular aspect of a measure being challenged, the fact that the same measure being challenged contains other aspects that are not regulated by those WTO obligations does not remove the whole measure from the scope of application of those WTO obligations. The Appellate Body's analysis in *US – 1916 Act* is instructive because, in that dispute, as in this dispute, the measure at issue was a criminal law measure, and the aspect of the measure that was not regulated by the WTO obligations was the constituent element of the criminal offense regarding 'intent'. The Appellate Body's analysis in *US – 1916 Act* also necessarily implies that, from the point of view of WTO law, the criminal 'intent' (mens rea) element of the offense is separable from the element and aspect of the Charges being challenged by the Philippines, i.e. the basis upon which the Public Prosecutor determined that PMTL did not pay the customs duties due on the imported goods (the actus reus)."¹⁸

10. The Panel in *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)* considered that there is an element of uncertainty inherent in any valuation dispute "since it is not known at the start of the dispute what the final determination will be". This results in a difficulty of precision "at the time of setting the amount of the bond." The Panel appreciated "that in the event of a dispute concerning the value of goods when there is a suspicion of underinvoicing, it is understandable that the amount of the bond be calculated on the basis of a reference value, since the duties and other charges would not be calculated on the basis of the declared value, but rather of corrected values, so there is *de facto* a possibility that the specific bond may not be sufficient to cover all the costs of release".¹⁹

1.3.2 Claims under Articles 1.1 and 1.2(a)

11. With respect to the complainant' claims under Articles 1.1 and 1.2(a) that Thai Customs improperly rejected the transaction value of the imported cigarettes at issue, the Panel in *Thailand – Cigarettes (Philippines)* considered that the appropriate standard of review for it was to assess the consistency of Thai Customs' decision based on the grounds as well as the explanation provided by Thai Customs pursuant to Articles 1.2(a) and 16. The Panel explained that:

¹⁵ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.596.

¹⁶ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.597. See also Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.230 and 7.240.

¹⁷ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.99.

¹⁸ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.682

¹⁹ Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.609.

"[T]he precise standard applicable to a panel's review of a claim, and in particular to the factual aspects of a claim, depends on whether the panel must conduct an analysis of the facts as the first trier of facts or as a reviewer of factual determinations made by domestic authorities. We understand this distinction to be based on the nature of the specific obligations under the particular provision of a given WTO-covered agreement. ...

The Philippines' claim under Articles 1.1 and 1.2(a) of the Customs Valuation Agreement that Thai Customs improperly rejected the declared transaction values of the subject entries of cigarettes, requires us to make an objective assessment of whether Thai Customs examined the circumstances of the sale between PM Thailand and PM Philippines within the meaning of Article 1.2(a). ... the parties' arguments in this regard are focused on whether Thai Customs examined the evidence submitted by PM Thailand at the time of determination and whether the Thai Customs' determination not to accept the transaction value of the cigarettes at issue can be justified by such evidence. Our mandate in examining the claims under Article 1.1 and 1.2(a) is therefore to assess whether the Thai Customs determination under Article 1.2(a) is supported by the factual evidence before it, but *not* to determine as the first trier of facts whether the relationship between PM Thailand and PM Philippines influenced the price based on the information submitted by PM Thailand at the time of the valuation determination.

The substantive obligation under the Customs Valuation Agreement that is relevant to the formulation of the applicable standard of review of the Philippines' claims under Articles 1.1 and 1.2(a), is the obligation imposed on a customs administration under Article 1.2(a) to communicate its grounds for considering that, in the light of the information provided by the importer, the relationship influenced the price. Further, under Article 16, upon request from the importer, the customs administration must provide a written explanation as to how the customs value was determined...

Consequently, an objective assessment of whether Thai Customs properly rejected the transaction value by examining the circumstances of sale within the meaning of Article 1.2(a) must be based on the grounds as well as on the explanation provided by Thai Customs under Articles 1.2(a) and 16 respectively.²⁰ We find support for our view in the Appellate Body's statement in *US – Lamb* ...

...

The Appellate Body also emphasized that a panel must *critically* examine a domestic authority's explanation 'in depth, and in the light of the facts before the panel'. ...

In this connection, we further recall the Appellate Body's reasoning that panels need not necessarily confine their review of a domestic authority's determination to an examination of that determination in terms of the factual and legal arguments put forward by the interested parties during the domestic investigation. The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* also stated, 'this is not to say that a panel is prohibited from examining whether the agency has given a reasoned and adequate explanation for its determination, in particular, by considering other inferences that could reasonably be drawn from – and explanations that could reasonably be given to – the evidence on record. Indeed, a panel must undertake such an inquiry.'²¹

1.3.3 Claims under Article 7.1

12. The Panel in *Thailand – Cigarettes (Philippines)* prescribed the standard appropriate for its review of the Philippines' claim under Article 7.1. The Panel explained that the basis for its assessment of whether Thai Customs' application of the deductive valuation method was

²⁰ (*footnote original*) We recognize that there may be a situation where the importer does not request a written explanation under Article 16. We do not consider it necessary for the purpose of resolving this dispute to determine the proper standard of review in such a situation.

²¹ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.100-7.105.

consistent with Article 7.1 was Thai Customs' explanations provided pursuant to Article 16 as well as information given to the importer under Article 7.3.²² The Panel stated that:

"Our mandate in examining the Philippines' claim under Article 7.1 is to make an objective assessment of whether Thai Customs properly applied the deductive valuation method in determining the customs values of the cigarettes at issue in accordance with the disciplines under Article 7.1 and the principles of the deductive valuation method as prescribed in Article 5. We considered above that in objectively assessing the factual aspects of the customs administration's determinations, we may neither conduct a *de novo* review nor completely defer to the administration's determination.

In examining the Philippines' claim under Article 1.1 and 1.2(a) ... we clarified that our objective assessment of the claims must be based on the grounds and explanations provided by Thai Customs at the time of determination pursuant to Articles 1.2(a) and 16. Under Article 16, in particular, a customs authority is required to make clear and give details of not only the basis for rejecting the transaction value, but also how the chosen deductive valuation method was applied for the calculation of the final customs value.

In applying a valuation method falling under Article 7, customs authorities are required under Article 7.3 to *inform* the importer in writing of the customs value determined under Article 7 and the method used to determine such value if the importer so requests. ... [T]he Philippines made a claim under Article 7.3 in this dispute. In order to set the standard for our review of the Philippines' claim under Article 7.1, we consider the obligation imposed on the customs authority under Article 7.3 also relevant. This is because our objective assessment of Thailand's compliance with its obligations under Article 7.1 requires us to base our review of the factual determinations made by Thai Customs when it applied the valuation method under Article 7.1 on Thai Customs' explanations and information at the time of determination."²³

13. In examining the parties' substantive arguments on the Philippines' claim under Article 7.1, the Panel observed that Thai Customs never explained at the time of the determination why it decided not to deduct certain items under the deductive valuation method used. The Philippines argued that Thai Customs' failure to explain the basis for its decision pursuant to Articles 7.3 and 16 prevented the Panel from basing its decision on *ex post* explanations provided by Thailand in the Panel proceeding.²⁴ The Panel considered that in light of the standard of review formulated for its examination of the Philippines' claim under Article 7.1, it could conclude based on the absence of such explanation that Thai Customs failed to apply the deductive valuation method consistently with Article 7.1.²⁵ Nonetheless, the Panel proceeded to examine the parties' substantive arguments under Article 7.1:

"[D]uring the course of the proceeding, both parties heavily substantiated their arguments related to the deductibility of the three items at issue. Particularly, Thailand explained in detail the reason why Thai Customs, at the time of the domestic proceeding, decided not to deduct the three items at issue. In these circumstances, we consider that making an assessment of Thai Customs' decision not to deduct these three items, as explained in this proceeding based on the evidence before Thai Customs at the time of the determination, helps to resolve the parties' dispute relating to the deductibility of the concerned items."²⁶²⁷

²² Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.314.

²³ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.311-7.313.

²⁴ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.300.

²⁵ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.365.

²⁶ (footnote original) Panels in previous disputes addressed a similar issue. In *Argentina – Ceramic Tiles* and *Argentina – Poultry Anti-Dumping Duties*, for instance, the panels considered that *ex post facto* explanations provided by Argentina in the Panel proceedings should not be taken into account in the panels' analysis. (Panel Report, *Argentina – Ceramic Tiles*, para. 6.27; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.178). The panel in *Argentina – Ceramic Tiles* also refers to the panel's analysis in *Guatemala – Cement (II)*, para. 8.245. We further note that the panels in *Argentina – Ceramic Tiles* and *Guatemala –*

1.4 Reliance on information provided by the exporting country's authorities

14. The Panel in *Thailand – Cigarettes (Philippines II)* addressed the Thai authorities' reliance on the pricing and cost information reported by the producer and seller of the cigarettes at issue, Philip Morris (PM) Indonesia, to Indonesian tax authorities in the CK-21A form. The Department of Special Investigation (DSI) used this information to calculate the actual price/value of Philip Morris Thailand Limited's (PMTL) imports of cigarettes over the 2001-2003 period. This calculation, in turn, formed the basis of the measures at issue in these compliance proceedings, namely, the 2002-2003 Charges and the 1,052 Notices of Assessment (NoAs). In considering the circumstances surrounding the Thai authorities' reliance on the information provided by PM Indonesia, the Panel agreed with Thailand that:

"[T]he authorities in an importing country are not required to start their examination from a 'presumption that information provided by foreign governments is not accurate, or even worse, that producers knowingly submitted fabricated information'."²⁸

15. The Panel stated, instead, that "the customs authorities in an importing county have 'the right to assume that the information provided by the exporting country's authority is accurate and truthful'."²⁹ The Panel further pointed out that:

"However, such an assumption can only operate as that, i.e. rebuttable presumption, and does not entitle an authority to deem information to be accurate without taking into account relevant explanations subsequently provided by the importer. ... [I]f the importer responds by providing other evidence that is relevant, in 'such a situation, if the customs authority fail[s] to take into account such information the customs authority would essentially be failing to conduct an examination of the circumstances of sale that is apt to reveal whether the relationship influenced the price'. In this case, the record of communications from PMTL to the DSI and the Public Prosecutor shows that PMTL repeatedly informed the DSI and Public Prosecutor that the pricing and cost information reported in the CK-21A forms did not represent PM Indonesia's actual costs and profits, and could not be relied upon for customs valuation purposes without violating the CVA."³⁰

16. In response to Thailand's argument that its authorities had no way of independently verifying PMTL's characterization of Indonesia's tax system, the Panel explained that "the Thai authorities could have overcome the problem of the alleged inaccuracy of the costing information reported in the CK-21A forms by accepting PMTL's transaction values, or if they had other grounds for doubting the acceptability of those values, by determining the customs value on the basis of a different method of customs valuation."³¹

17. The Panel concluded that "while there may be cases in which the customs authority in the importing country is entitled to assume that pricing and cost information obtained from a foreign government is accurate and truthful, in this case the DSI and Public Prosecutor had no basis upon which to assume that the CK-21A information was reliable in the light of PMTL's repeated written explanations as to why it was not."³²

1.5 Sequential nature of the valuation methods in Articles 1 through 7

18. In *Colombia – Ports of Entry*, the Panel explained the sequential nature of the valuation methods in Articles 1 through 7.1 of the Customs Valuation Agreement:

Cement (II) nonetheless continued to examine the parties' claims based on the *ex post facto* explanations. The panel in *Argentina – Poultry Anti-Dumping Duties*, however, did not proceed to examine *ex post* explanations.

²⁷ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.365.

²⁸ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.154.

²⁹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.154.

³⁰ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.155.

³¹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.170.

³² Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.171-7.172.

"[T]he *Customs Valuation Agreement* provides for sequential valuation methods in Articles 1 through 7.1. Article 1 establishes the primacy of the transaction value as the valuation method. Whenever customs authorities consider that the transaction value of the imported good, as defined in Article 1, cannot be used, authorities must follow, in a sequential manner, the valuation methods provided for in Article 2 (transactional value of identical goods), Article 3 (transaction value of similar goods), Article 5 (deductive method) and Article 6 (computed value) of the *Customs Valuation Agreement*. Where none of the methods in Articles 1 to 6 are available, Article 7 allows customs authorities to resort to any other reasonable means to determine the customs value, provided such methods are consistent with the principles and general provisions of the *Customs Valuation Agreement* and of *GATT 1994*. In doing so, customs authorities must not use any of the methods prohibited in paragraph 2 of Article 7.

...

The Panel considers that national customs authorities are required to apply the various customs valuation methods laid down in Articles 1, 2, 3, 5 and 6 of the *Customs Valuation Agreement* on a case-by-case basis, so as to reflect the particular conditions of the sale of the product in question. The Panel considers that, inasmuch as the customs values for subject goods are established on a fixed basis for broad categories of products without any examination of the specific circumstances surrounding the transaction at issue, indicative prices do not reflect any of the methodologies set out in the referred provisions.

...

The Panel acknowledges that the sequential nature of the various valuation methods permits national customs authorities to proceed from one method to the next without violating the previous method, provided the former cannot be used. However, the structure and design of the indicative prices system ... prevents Colombian customs authorities from sequentially applying the customs valuation methods provided in Articles 1 through 6. Indeed, when determining the value of subject goods imports, Colombian customs authorities are required to systematically apply a methodology that does not reflect any of the methods provided for in these provisions, i.e. the use of indicative prices, unless the transactional value is higher than the indicative price.

The Panel therefore finds that ... as well as the various resolutions establishing indicative prices, which together mandate the use of indicative prices for customs valuation purposes, are inconsistent with the obligation to conduct customs valuation of subject goods based on the sequential application of the methods established by Articles 1, 2, 3, 5 and 6 of the *Customs Valuation Agreement*.³³

19. In *Thailand – Cigarettes (Philippines)*, regarding the Philippines' claim under Article 7.1 in respect of Thailand's alleged violation of the sequencing obligation, the Panel did not consider that Article 7.1 could form the basis for an independent sequencing claim under the Customs Valuation Agreement:

"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. ...

...

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

³³ Panel Report, *Colombia – Ports of Entry*, paras. 7.136, 7.142-7.144.

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 ... [.]"³⁴

20. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, while accepting that "the customs valuation methods in Articles 1 to 7 must be applied sequentially," Thailand submitted that, in this case, due to "special circumstances", "none of the prior alternative methods in Articles 2, 3 or 5 could be used to determine the customs value of PMTL's imports."³⁵ The Panel disagreed, noting that:

"The requirement to adhere to the hierarchical order of the sequential valuation methods is a legal obligation, and the failure to comply with that obligation would constitute an independent basis for finding a violation of the CVA.

The fundamental nature of this obligation finds further reflection through the manner in which it informs the application of other CVA provisions, including the nature and the content of the explanation that must be provided pursuant to Article 16. ... [A]n explanation 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 and other valuation methods that sequentially precede the method actually used by the customs authorities'. "³⁶

21. In reviewing the methods applied by Thailand to determine the value of Phillip Morris Thailand Limited (PMTL) imports, the Panel recalled that:

"[A] given method (e.g. Article 6) can be used only if the customs value 'cannot be determined' under the preceding method (i.e. Article 5). Thus, it stands to reason that the stronger the basis for considering that the customs value of certain imported goods could have been determined using the preceding method, then the stronger the basis for considering that an authority's decision entailed a violation of the obligation to sequentially apply the customs valuation methods."³⁷

22. In its assessment of Thailand's sequential application of the valuation methods, the Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* found that "there is no direct, contemporaneous or documentary evidence indicating that the Thai authorities sought to apply the methods of customs valuation sequentially."³⁸ In this regard, the Panel noted that Thailand did not elaborate on its arguments that there were "special circumstances" that justified the "jumping directly to computed value under Article 6 without first seeking to use the valuation methods in Articles 2, 3 or 5".³⁹ Thailand's arguments further appeared to be "contradicted by 15 years of practice" of the Thai Customs Department and the Board of Appeals (BoA).⁴⁰

23. The Panel thereby concluded that "the Public Prosecutor acted inconsistently with the obligation to sequentially apply the customs valuation methods in Articles 2 through 7 when it determined the revised customs values of PMTL's imported goods".⁴¹

³⁴ Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.237 and 7.279.

³⁵ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.381.

³⁶ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.388-7.389.

³⁷ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.391.

³⁸ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.395.

³⁹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.395.

⁴⁰ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.395.

⁴¹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.398.

24. The Panel in *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)* held that "the provision of a valuation dispute guarantee must be requested, by definition, before the final value of the goods has been clarified in accordance with the valuation methods established"⁴².

25. In *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)* the Panel held that in cases where there is a suspicion of underinvoicing, "the determination of the coverage of the specific bond does not correspond to customs valuation and does not therefore need to be subject to the valuation methods of Articles 1, 2, 3, 5, 6 and 7 of the Customs Valuation Agreement" and "the amount of the guarantee is understandably calculated on the basis of an approximate reference value".⁴³

1.6 No excessive restrictions on an authority's ability to gather information

26. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* underlined that "CVA obligations should not be interpreted in a manner that imposes 'excessive restrictions' on an authority's ability to gather information necessary to determine the customs value of an importer's goods, whether in the context of gathering information relating to a producer's costs and profits or otherwise"⁴⁴

1.7 Transaction value as the primary basis for customs value

27. In *Colombia – Ports of Entry*, the Panel confirmed that the Customs Valuation Agreement prescribes the transaction value as the primary customs valuation method:

"The primacy of the transaction value as a customs valuation method and the sequential nature of the valuation methods derives from the 'General Introductory Comment' to this Agreement. This Comment explains that the 'primary basis for customs value under this Agreement is 'transaction value' as defined in Article 1', while also indicating that 'Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1'. In addition, the Preamble to the Agreement makes explicit reference to the crucial role of the transaction value in customs valuation.

The Panel therefore understands that the *Customs Valuation Agreement* imposes an obligation on national authorities to determine the customs value of imported goods based on the 'transaction value' and, whenever that is not possible, to sequentially apply the customs valuation methods provided for in Articles 1, 2, 3, 5, 6 and 7.1 of the Agreement."⁴⁵

1.8 Elaboration of GATT 1994

28. In *US – Poultry (China)*, the Panel observed that the Customs Valuation Agreement "elaborates the provisions of the GATT 1994", stating:

"It is not uncommon for the specific agreements on trade in goods to be elaborations on provisions of the GATT 1994. Indeed, we find support for our understanding of such a relationship in the way WTO Members have elaborated other provisions of the GATT 1994 through specific covered agreements. The *Customs Valuation Agreement*, for example, elaborates the provisions of Article VII of the GATT 1994, the *Anti-Dumping Agreement* and the *Agreement on Subsidies and Countervailing Measures* provide that they explain the implementation and application of Article VI of the

⁴² Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.609.

⁴³ Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.609.

⁴⁴ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.114.

⁴⁵ Panel Report, *Colombia – Ports of Entry*, paras. 7.137-7.138.

GATT 1994, and the *Agreement on Safeguards* provides that it clarifies and reinforces the disciplines of GATT 1994, specifically those of Article XIX."⁴⁶

29. In considering GATT Article XX and its applicability to the Customs Valuation Agreement, the Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* found that "[g]iven the limited scope and reach of the obligations in the CVA, we see no reason why authorities pursuing the legitimate regulatory purpose of identifying or combatting customs fraud would need to deviate from the system of customs valuation established in the CVA, so as to require recourse to Article XX of the GATT 1994. For these reasons, we do not agree with the premise that there is no 'inherent balance' in the CVA, such that 'the only way to ensure this balance is respected is for Article XX of the GATT 1994 to be available'".⁴⁷

30. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, the Panel found that "the drafters would not have intended for another layer of general exceptions in Article XX of the GATT 1994 to apply," and considered the specific provisions of Article 7.1 and 7.2 as a further example of the inherent balance in the CVA.⁴⁸ The Panel then stated that:

"[I]nterpolating the general exceptions in Article XX of the GATT 1994 into the CVA would create additional policy space for Members to use one or more of the valuation bases that go beyond the 'reasonable flexibility' already provided for in Article 7.1, and/or which are categorically prohibited by the text of Article 7.2(a) through (g). In the Panel's view, consideration of the specific terms of Article 7 of the CVA suggests that subjecting the comprehensive system for customs valuation established in the CVA to the general exceptions in Article XX of the GATT 1994 would diminish Members' obligations contrary to Articles 3.2 and 19.2 of the DSU."⁴⁹

31. The Panel thus concluded that "the general exceptions in Article XX of the GATT 1994 are not applicable to the obligations in the CVA."⁵⁰

Current as of: December 2020

⁴⁶ Panel Report, *US – Poultry (China)*, para. 7.477.

⁴⁷ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.756

⁴⁸ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.448.

⁴⁹ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.448.

⁵⁰ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.449.