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THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE PHILIPPINES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS371/RW2.

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WORKING PROCEDURES OF THE PANEL

As amended on 30 May 2018

General

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2. In addition, the following Working Procedures shall apply. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

3. The parties to the dispute (hereinafter "the parties") and the Members participating as third parties to the second compliance panel proceeding (hereinafter "third parties") are also subject to the additional working procedures concerning third party access to the final report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, adopted by the Panel on 24 May 2018 (electronic copy provided).

Timetable

4. The Panel will provide the parties and third parties with a timetable for the panel proceeding. The Panel reserves the right to adjust the timetable upon request of a party or third party, or in the light of unforeseen developments, following consultation with the parties.

Confidentiality

5. The deliberations of the Panel and all documents submitted to it shall be kept confidential.

6. Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

7. A party may indicate particular instances of confidential information contained in its submissions that it wishes to be redacted within square brackets in the report of the Panel by placing the information between square brackets in its submissions. The cover letter to any submission containing such information shall give notice of this request and explain why that party considers the information should be redacted. The Panel may redact in its interim/final reports all such information submitted to the Panel by a party that the submitting party has designated for redaction in its submissions. Such information may include particularly sensitive information submitted to the Panel in the course of these proceedings that is not otherwise available in the public domain. The designation of specified information by one party may, in the absence of any objection by the other party, be presumed to constitute confidential information; however, the Panel retains the authority, as adjudicator, to determine, based on objective criteria, whether such information is, in fact, confidential and should be redacted, and the Panel will explain the basis for its decision in its report.

8. Where a party designates its written submissions to the Panel as confidential, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall normally be submitted no later than one week after the written request is presented to the Panel, unless a different deadline is granted by the Panel where good cause is shown.

9. The Panel shall meet in closed session. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it.

10. Each party's written submissions, written answers to questions and comments thereon, comments on the descriptive part of the report, and written request for review of precise aspects of

the interim report and comments on the other party's request shall be made available to the other party and, where appropriate, to the third parties.

11. All submissions and exhibits presented by the parties in the Philippines' first recourse to Article 21.5 of the DSU shall form part of the record of this proceeding. Parties, therefore, may incorporate by reference those submissions or exhibits in their argumentation in this proceeding. In this case, upon request, the parties shall provide to the third parties copies of their own submissions or exhibits from the Philippines' first recourse to Article 21.5 of the DSU to which they refer in this proceeding. Those submissions and exhibits shall be treated as confidential and shall not be disclosed to the public.

Submissions

12. Before the substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit a second written rebuttal submission before the substantive meeting, in accordance with the timetable adopted by the Panel.

13. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission. If the Philippines requests such a ruling, Thailand shall submit its response no later than in its first written submission. If Thailand requests such a ruling, the Philippines shall submit its response no later than in its second written submission. Exceptions to this procedure shall be granted upon a showing of good cause. The Panel reserves the right to ask the parties to submit copies of their preliminary submissions to the third parties, if and when appropriate. The Panel may decide to rule on any preliminary request at an early stage of the proceedings, or may instead defer its ruling to a later stage of the proceedings. If the Panel decides to rule on any preliminary request at an early stage of the proceedings, it shall communicate that intention to the parties. In that case, the Panel reserves the right to hear the parties in the most appropriate manner, be it in writing or electronically or otherwise. Should a meeting on the preliminary ruling request be held, the Panel will consult the parties on suitable dates for the meeting.

14. Each party shall endeavour to submit all factual evidence to the Panel with its first written submission and, in any event, no later than during the substantive meeting, except with respect to evidence necessary for purposes of answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

15. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the exhibit at the same time. Where the exhibit is an excerpt from a larger document, of which only the excerpt is referred to by either party, the larger original document shall be submitted in the original language and the relevant excerpt translated and relied on without the need to translate the larger source document. Exceptionally, the Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause.

16. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. The other party may comment on the objection and alternative translation. If the parties are unable to agree on a common translation, the Panel shall request an appropriate translator to translate the text in question. If the parties are still unable to agree on a correct translation, the Panel shall rule on this matter as promptly as possible thereafter.

17. Any publically available WTO document that is relied on by either party need not be produced as an exhibit. Such publically available WTO documents are deemed to be part of the Panel record. The other party, third parties, the Panel, or the Appellate Body may, at any stage, request a copy of the relevant publicly available WTO documents.

18. Where either party refers to the definition of a word from the New Shorter Oxford English Dictionary, that party need not produce excerpts from this dictionary as exhibits, unless requested to do so by the Panel or the other party. However, if a party wishes to provide the relevant excerpt as an exhibit, it is permitted to do so. If a party relies on any other dictionary, it is required to provide the relevant excerpts as exhibits. Such definitions of words from the New Shorter Oxford English Dictionary are deemed to be part of the Panel record. The other party, third parties, the Panel, or the Appellate Body may, at any stage, request a copy of the relevant dictionary definitions.

19. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the Editorial Guide for English WTO Panel Submissions (electronic copy provided).

20. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. The parties shall continue the exhibit numbering used in the first Article 21.5 proceedings. Thus, exhibits submitted by the Philippines shall be numbered PHL-234, PHL-235, etc. and exhibits submitted by Thailand shall be numbered THA-57, THA-58, etc. If the last exhibit in connection with the first submission in these proceedings was numbered, for example, PHL-240, the first exhibit of the next submission thus would be numbered PHL-241.

21. Each party may cross-refer to an exhibit submitted by another party by using the number attributed to the exhibit by the party who initially submitted it. If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

22. Each party shall provide an updated consolidated exhibit list with each submission made.

Questions prior to the substantive meeting

23. Prior to the substantive meeting, the Panel may pose written questions to the parties and the parties shall provide written responses, in accordance with the timetable adopted by the Panel. The Panel reserves the right to send questions to the parties at any time, in particular, after receiving the first written submissions and before the second sets of submissions, as well as after receiving a request for a preliminary ruling. In the event that the Panel sends questions to the parties that are not expressly provided for in the Panel's timetable, the Panel shall, to the extent possible, give favourable consideration to requests by the parties, in particular joint requests, for modifications to the Panel's timetable in the light of the Panel's additional questions.

Substantive meeting

24. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

25. The parties and the third parties shall provide a list of the participants of their delegation to the Secretary of the Panel, no later than 5.00 p.m. three working days before the substantive meeting commences.

26. The substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the Philippines to make an opening statement to present its case first. Subsequently, the Panel shall invite Thailand to present its point of view. The maximum length of each opening statement may be fixed by the Panel, after consulting the parties. The Panel shall inform the parties of any such time limit at least four weeks in advance of the hearing. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and

in any event no later than 5.00 p.m. on the first working day following the last day of the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, in accordance with the timetable adopted by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall respond in writing to the other party's written questions in accordance with the timetable adopted by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, in accordance with the timetable adopted by the Panel, any questions to the parties to which it wishes to receive a response in writing. Each party shall respond in writing to such questions in accordance with the timetable adopted by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the Philippines presenting its statement first.

Third parties

27. Each third party may transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, but after the written submissions and rebuttal submissions of the parties, in accordance with the timetable adopted by the Panel.

28. Each third party may also present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

29. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of the session set aside for third parties.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties will be given the opportunity to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, in accordance with the timetable adopted by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall respond in writing to such questions in accordance with the timetable adopted by the Panel.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, in accordance with the timetable adopted by the Panel, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall respond in writing to such questions in accordance with the timetable adopted by the Panel.

Descriptive part

30. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, subject to any modifications deemed appropriate by the Panel. The executive summaries shall be annexed

as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

31. Each party shall submit a consolidated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

32. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

33. The Panel may revise the page limits upon request of a party. Paragraph 37 below shall apply to the service of executive summaries.

Interim review

34. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

35. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

36. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

37. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry.

b. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.

c. Each party and third party shall file 1 paper copy of all documents it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing.

d. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org and *****@wto.org. CD-ROMs or DVDs shall be filed with the DS Registry. The electronic version shall constitute the official version for the purposes of the record of the dispute.

e. Each party shall serve on the other party electronic copies only of any document submitted to the Panel. Each party shall, in addition, serve on all third parties electronic copies only of its written submissions in advance of the substantive meeting with the Panel, unless a third party requests service of a paper copy.

f. Third parties shall serve on all other parties and third parties electronic copies only of any document submitted to the Panel, unless another third party requests service of a paper copy.

g. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

h. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the electronic version shall constitute the official version for the purposes of the record of the dispute.

Correction of clerical errors in submissions

38. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. On 4 March 2019, the Panel issued its Interim Report to the parties. On 18 March 2019, the Philippines and Thailand each submitted written requests for the Panel to review aspects of the Interim Report. On 1 April 2019, each party submitted comments on the other's requests for review. Neither party requested an interim review meeting.

1.2. In its request for review, Thailand made seven substantive comments pertaining to specified paragraphs of the Interim Report. Specifically, it requested deletion of one paragraph which in its view did not accurately reflect its argumentation; it suggested five relatively minor changes to the wording used in various paragraphs; and it asked the Panel to provide a hypothetical example illustrating the manner in which, in the event of suspicion of customs fraud, an authority could make an allegation of customs fraud in a way that neither the constituent elements of the customs fraud accusation nor the associated penalty would be covered by the CVA or, alternatively, that both aspects would be covered by the CVA but would be adopted in a manner consistent with the CVA.

1.3. In contrast to the limited number of substantive comments from Thailand, the Philippines made more than 50 substantive comments pertaining to specified paragraphs and subsections of the Report. Among other things, its lengthy submission invited reconsideration of the Panel's approach to the following ten issues:

a. a proposed reformulation of the Panel's articulation of the legal standard under Article 6.2 of the DSU, along with a proposed restructuring of the Panel's reasoning to consider first "the terms of the panel request themselves" before turning to confirm this finding in the light of the "attendant circumstances"[1];

b. an extended argument expressing the Philippines' "deep concern" with the Panel's statement that "in the light of the presumption of good faith on the part of Thailand, the Panel accepts the veracity of Thailand's representations that its authorities received the pricing and cost information reported by PM Indonesia in the CK-21A forms", as well as its disagreement with the Panel's statement to the effect that the parties agree on the factual basis for Thailand's measures[2];

c. an extended argument linked to the Panel's statement that it "is inclined to agree with Thailand" that the authorities of an importing country can treat information received from a foreign government as "presumptively reliable", including a request that the Panel ground its reasoning in this subsection more firmly in the relevant elements of the legal standards in the CVA [3];

d. an extended discussion of a series of points aimed at revising, expanding and restructuring the Panel's analysis to deal more fully with Thailand's "insufficient information" arguments, and in particular to draw out and address the differences between Thailand's "insufficient information" arguments in this proceeding, and its "ripeness" argument in the first compliance panel proceeding[4];

[1] Philippines' request to review the Interim Report, paras. 16-24.
[2] Philippines' request to review the Interim Report, paras. 37-75.
[3] Philippines' request to review the Interim Report, paras. 83-104.
[4] Philippines' request to review the Interim Report, paras. 121-145.

e. a request that the Panel expand and clarify its reasoning on the interpretation of the term "customs administration" in the CVA in the light of Thailand's reliance on the definition of "Customs" in the Revised Kyoto Convention[5];

f. a reiteration of the Philippines' views on the parallels and differences between the nature of the enquiries under Articles 1.1 and 1.2(a) second sentence, aimed at having the Panel revise and expand its discussion of these points[6];

g. an argument as to why the Panel should refrain from stating that the facts are unclear as to whether the "actual price" is the "price actually paid or payable" in a way that implies a degree of uncertainty as to the strength of the Panel's finding[7], and an argument why the Panel should make an affirmative finding as to whether Thailand's measures fall under Article 6 or 7 of the CVA, rather than simply making alternative findings[8];

h. a reiteration of the Philippines' views on why the Panel should find a violation of the obligation to adhere the sequential application of customs valuation methods based on the lack of an explanation by the Thai authorities, and why the Panel should consider Thailand's *ex post* rationalizations on this issue only as a secondary basis, if at all[9];

i. a request that the Panel make certain revisions or additional statements that would facilitate the Appellate Body's ability to complete the analysis under Article XX of the GATT 1994 in case it reverses the Panel's finding on the non-applicability of Article XX to the CVA, including but not limited to the Panel specifying the factual findings that the Appellate Body could rely upon for that purpose[10]; and

j. an argument as to why the Panel should find that Thailand has failed to meet its burden of proving its assertion that the 256 NoAs were withdrawn before the Panel's establishment, rather than remaining "agnostic" on this factual issue.[11]

1.4. In its subsequent comments, Thailand stated that the Philippines' requests goes "far beyond what is intended or appropriate under the DSU at the interim review stage".[12] Thailand noted that in the Interim Report the Panel had ruled in the Philippines' favour "on virtually all of its claims", and "[e]xtraordinarily, however, the Philippines still feels compelled to argue at considerable length – over forty pages – with how the Panel has done its job".[13] Thailand considered that "[t]he DSU does not, however, give the Philippines the right to continue to litigate the case indefinitely, for whatever purpose"[14], and continued by noting that "[n]o matter how gratifying it may be to the Philippines to continue re-litigating points on which it has already prevailed"[15], the Panel cannot indulge these efforts. In Thailand's view, the "kinds of litigation tactics displayed by the Philippines in its comments … affect the due process rights of Thailand, which is placed in the invidious position of having to choose between respecting the rules or also re-litigating the case".[16] Thailand states that in its comments it "chooses to respect the rules"[17], and that "the fact that Thailand does not address all of the Philippines' comments should not be interpreted as Thailand agreeing with those other comments".[18]

1.5. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests for review of precise aspects of the Report made at the interim review stage. The Panel discusses the parties' requests for substantive modifications below. The Panel begins by setting out the general parameters guiding its consideration of the parties' requests

[5] Philippines' request to review the Interim Report, paras. 148-153.
[6] Philippines' request to review the Interim Report, paras. 176-185.
[7] Philippines' request to review the Interim Report, paras. 172-175.
[8] Philippines' request to review the Interim Report, paras. 192-201.
[9] Philippines' request to review the Interim Report, paras. 202-212.
[10] Philippines' request to review the Interim Report, paras. 216-223.
[11] Philippines' request to review the Interim Report, paras. 224-230.
[12] Thailand's comments on the Philippines' request for review of the Interim Report, para. 1.2.
[13] Ibid.
[14] Thailand's comments on the Philippines' request for review of the Interim Report, para. 1.3.
[15] Thailand's comments on the Philippines' request for review of the Interim Report, para. 1.8.
[16] Ibid.
[17] Ibid.
[18] Thailand's comments on the Philippines' request for review of the Interim Report, para. 1.1.

for interim review, and then addresses the requests individually, in sequence according to the sections and paragraphs to which they pertain. To assist in the reader's comprehension of the changes made, the Panel's discussion of each substantive comment is generally followed by showing any substantive revisions in track changes.

1.6. In addition to the substantive requests that are discussed below, various corrections or improvements of a typographical or editorial nature were made to the Report, including but not limited to those suggested by the parties in their interim review comments. In the interest of brevity the Panel will refrain from discussing such changes below.

1.7. The discussion below refers to the paragraph numbering in the Final Report (which is unchanged from the Interim Report).

2 GENERAL PARAMETERS GUIDING THE PANEL'S CONSIDERATION OF THE PARTIES' REQUESTS FOR REVIEW OF THE INTERIM REPORT

2.1. The Panel recalls that the parties have a right to request a review of "precise aspects of the interim report" under Article 15.2. As Thailand rightly notes, it is in principle permissible for a panel to disregard requests that question "large sections of the interim report".[19] In the same vein, past panels have declined to consider requests that amounted to a "whole of report review"[20], or that made "general comments" that were not related to specific paragraphs or footnotes.[21] Furthermore, a request to change a particular legal or factual finding that is fundamental, and which would have the effect of unravelling multiple other key findings, may not qualify as a request to review "precise aspects" of the interim report.[22] However, the Panel considers that a request for a specific change that is related to one or more identified or readily identifiable paragraphs will in principle constitute a request for a review of a "precise aspect" of the Report; furthermore, as long as a request for review is linked to a particular component of a panel's reasoning, it may nonetheless relate to a "precise aspect" of the Panel's reasoning without being linked to a particular paragraph. In this case, most if not all of the Philippines' requests fulfil the minimal threshold requirement of being related to "precise aspects" of the Report in the sense of Article 15.2 of the DSU.

2.2. The Panel recalls that Article 15.3 of the DSU mandates that the findings of the panel report "include a discussion of the arguments made at the interim review stage". By directing a panel to "include a discussion" in its findings of "the arguments made at the interim review stage", Article 15.3 presupposes that those same arguments are not already clearly addressed in the findings of the interim report that the parties' comments are directed at. As Thailand has rightly pointed out, several panels have indicated that the interim review stage is not a time to "reargue" or "relitigate" issues[23], in such a way that would require panels to "defend their findings and conclusions".[24] Having said that, the Panel agrees with the statement that it should not "exclude *a priori* from consideration any request for review from either party on the sole basis that it would seek reconsideration by the Panel of some of its determinations".[25] There are instances in which prior panels have changed their approach to certain substantive issues, including their conclusions on certain claims, in the light of the parties' interim review comments.[26] Indeed, in both the original proceeding and in the first

[19] Thailand's comments on the Philippines' request for review of the Interim Report (referring to Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 7.21, and Panel Report, *Australia – Salmon*, para. 7.3).

[20] Panel Report, *Australia – Salmon*, para. 7.3.

[21] See e.g. Panel Reports, *Japan – Apples (Article 21.5 – US)*, para. 7.21; *Canada – Continued Suspension*, para. 6.17, and *US – Continued Suspension,* para. 6.18; *Indonesia – Iron or Steel Products (Chinese Taipei)*, Annex A-3, para. 2.4.

[22] See e.g. Panel Report, *Indonesia — Iron or Steel Products (Chinese Taipei)*, Annex A-3, para. 2.4.

[23] See e.g. Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *Japan – Apples (Article 21.5 – US)*, para. 7.23; *US – Poultry (China)*, para. 6.32: *EU – Energy Package*, paras. 6.13, 6.31, 6.36, 6.42, 6.45, 6.47, 6.55.

[24] Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2;and *Indonesia — Iron or Steel Products (Chinese Taipei)*, Annex A-3, para. 2.3.

[25] Panel Report, *US – Tuna II (Mexico)*, para. 6.3.

[26] See e.g. Panel Reports, *US – Carbon Steel*, para. 7.24 and paras. 8.135-8.145; and *EC and certain member States – Large Civil Aircraft*, paras. 6.230-6.231.

recourse to Article 21.5 in this dispute, the panels' approach to certain substantive issues was modified in the light of the parties' comments at the interim review stage.[27]

2.3. The Panel has considered Thailand's statement that the Philippines' request for review of the Interim Report "is not a request for review of the Panel's Report", but instead "a request by the Philippines to draft itself the report using its preferred structure and language".[28] The Panel notes that while the wording of Article 15.3 does not confine requests for review to typographical, stylistic, or editorial changes, those types of changes also fall squarely within the scope of "precise aspects" that may be reviewed. For example, a review of Section 6 of the Report in the first recourse to Article 21.5 affords multiple examples of the Panel making revisions, at the request of the parties, to ensure the use of consistent terminology; to use wording that fairly and accurately characterized the parties' arguments on an issue; to avoid ambiguity or unhelpful vagueness; to transform certain unstated premises in the Panel's reasoning into explicit statements; and/or to provide a more precise articulation of certain premises or steps in the Panel's reasoning. The Panel made such changes where it considered them to be objectively warranted and will follow a similar approach in this proceeding.

2.4. In this proceeding, as with the first recourse to Article 21.5, the Panel has received requests to address certain arguments or issues that, in the Panel's view, are not strictly necessary to resolving the dispute in the light of the findings that it has made. In the context of discussing its approach to the parties' interim review comments in the first recourse to Article 21.5, the Panel explained that in exercising its judgement on whether to address certain arguments or disputed issues that were not strictly necessary to resolve in the light of its other findings, it would balance considerations of judicial economy against the equally important interests of contributing to the clarification of WTO law and assisting the parties in arriving at a prompt settlement of the dispute.[29] The Panel follows the same approach in this case.

3 INITIAL CONSIDERATIONS

3.1 General principles of interpretation and standard of review

3.1.1 Paragraph 7.12

3.1. The Philippines suggests the addition of a further point, as a new paragraph following **paragraph 7.12**, relating to the standard of review. The Philippines recalls that, in both the original proceeding and the first recourse to Article 21.5, an issue arose where Thailand's authorities had failed to provide a reasoned and adequate explanation for its customs valuation determinations. The Philippines recalls that, building on case law from other covered agreements, both the original panel and this Panel emphasized that, in that event, "a panel must find that the authority has failed to comply with the relevant obligations".[30] The Philippines proposes a new paragraph summarizing this additional point.

3.2. Thailand does not comment on the Philippines' request.

3.3. The Panel observes that the Philippines' request pertains to the general discussion regarding the standard of review in paragraphs 7.11 and 7.12 of this Report. That brief discussion essentially corresponds to the general discussion regarding the standard of review found at paragraphs 7.85 to 7.87 of the Report in the first recourse to Article 21.5. The Panel recalls that certain aspects of the

[27] In the first recourse to Article 21.5 in this proceeding, the Panel reconsidered its approach to the question of whether its findings under Article III:4 of the GATT 1994 should take account of the factual circumstances which changed in the course of the proceeding; at Thailand's request, the Panel made *arguendo* findings on the consistency of the VAT notification requirement with Article III:4 taking into account Thai competition law as it existed at the date of the issuance of the Report. (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 6.50 and Section 7.4.5.4 ("Legislative changes in the course of the proceeding").) Furthermore, in the original proceeding, the panel was persuaded to modify its decision not to make a recommendation in respect of certain MRSP Notices. (Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 450.)

[28] Thailand's comments on the Philippines' request for review of the Interim Report, para. 1.2.

[29] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.8.

[30] Philippines' request to review the Interim Report, para. 5 (referring to Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.117, citing Appellate Body Report, *US – Steel Safeguards*, para. 303, and also Panel Report, *Thailand – Cigarettes (Philippines)*, fn 499).

standard of review were subjected to a more detailed analysis at paragraphs 7.108-7.121 of the Report in the first recourse to Article 21.5, in the context of the Panel's assessment of the BoA's "examination of the circumstances of sale" under Articles 1.1 and 1.2(a) of the CVA. It was in the context of that more extended discussion that the Panel referred, at paragraph 7.117 of its Report, to the Appellate Body's statement that "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 … [and] the panel has no option but to find that the competent authority has not performed the analysis correctly." With the foregoing in mind, the Panel is wary of selectively incorporating some statements made in the context of the discussion at paragraphs 7.108-7.121 of the Report in the first recourse to Article 21.5 into the brief exposition of the standard of review found in paragraphs 7.11 and 7.12 of the present Report. Furthermore, insofar as the Philippines' request to restate this point is aimed at reinforcing its argument that the Panel should modify its reasoning to find a violation of the obligation to adhere the sequential application of customs valuation methods based on the lack of an explanation by the Thai authorities (see discussion of paragraphs 7.390 to 7.397 below), the Panel considers that the revision that it has made to paragraph 7.390 adequately disposes of this issue. Accordingly, rather than selectively incorporating the statement that was set forth in paragraph 7.117, which the Philippines requests be reiterated following paragraph 7.112 of this Report, the Panel has instead added a more general cross-reference to the more detailed discussion on the standard of review found at paragraphs 7.108-7-121 of its Report in the first recourse to Article 21.5. The revised text of paragraph 7.12, together with its new accompanying footnote, reads as follows:

> 7.12. The Panel recalled the original panel's explanation that the standard of review under the CVA requires a panel to "*critically* examine a domestic authority's explanation 'in depth, and in the light of the facts before the panel'", and its reliance on the Appellate Body's statement that an "objective assessment under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review." The Panel also recalled the original panel's statement that it would therefore make an objective assessment of the matter "in light of the relevant obligations" invoked. **The Panel recalls that it conducted a more detailed analysis of certain aspects of its standard of review when assessing the BoA's examination of the circumstances of sale under Articles 1.1 and 1.2(a) of the CVA.** **[new FN]**
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> **[new FN] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.108-7.121. See also paragraphs 7.146-7.147.**

3.2 Reliance on the Report in the Philippines' first recourse to Article 21.5

3.2.1 Paragraph 7.13

3.4. The Philippines notes that in **paragraph 7.13**, the Panel states that there are "certain similarities between the challenged measures, the Philippines' claims, and Thailand's defences" in the first and second compliance proceedings, and that in its list of examples of such similarities, the Panel mentions that Thailand "once again" argues that the 2002-2003 Charges "do not contain sufficient information for adjudication (an argument that resembles the 'ripeness' argument that it raised in the first recourse to Article 21.5 regarding the 2003-2006 Charges)". The Philippines observes that elsewhere in its findings, the Panel correctly notes that, in the first compliance proceedings, Thailand responded to a question in which it stated that, in those proceedings, it was not arguing that the 2003-2006 Charges at issue lacked "sufficient information". Thus, the Philippines submits that Thailand is not "once again" arguing that the 2002-2003 Charges do not contain "sufficient information", because Thailand expressly said that it was not making this argument in the first compliance proceedings. In the interest of consistency, the Philippines invites the Panel to delete the reference to Thailand's "insufficient information" arguments from paragraph 7.13.

3.5. Thailand does not specifically comment on the Philippines' request. However, elsewhere in its comments on the Philippines' requests, Thailand objects to the Philippines' proposed changes that are partially aimed at ensuring that the Panel more clearly draw out and address the differences between Thailand's "insufficient information" arguments in this proceeding, and its "ripeness"

argument in the first compliance panel proceeding (see the parties' comments below on "Existence of a challengeable measure").

3.6. The Panel has revised the wording of paragraph 7.13 to avoid making the impression that Thailand formulated an argument in terms of "insufficient information" in the first recourse to Article 21.5. The Panel notes that the Philippines has made other interim review requests regarding the Panel's findings on Thailand's "insufficient information" argument, and as with the present request these comments reflect the Philippines' view that Thailand's "insufficient information" argument may be substantively different from its "ripeness" argument in the first recourse to Article 21.5. The Panel addresses this issue in greater detail further below, in the context of addressing the parties' interim review comments on the section of the Report addressing that issue. The revised text of paragraph 7.13 reads as follows:

> 7.13. There is a degree of overlap between the issues raised in this proceeding and the issues already addressed by the Panel in the first recourse to Article 21.5. This overlap is a consequence of certain similarities between the challenged measures, the Philippines' claims, and Thailand's defences. Like the 2003-2006 Charges at issue in the Philippines' first recourse to Article 21.5, it was the Public Prosecutor that filed the 2002-2003 Charges, following an investigation and recommendation by the DSI; and like the 2003-2006 Charges, the 2002-2003 Charges allege that PMTL violated Section 27 of the Thai Customs Act by declaring a "false price" for *Marlboro* and *L&M* cigarettes contrary to the "actual price", with the intention to defraud the government of taxes and customs duties. The Philippines claims, as it did in respect of the 2003-2006 Charges, that the Pubic Prosecutor has again violated Articles 1.1 and 1.2(a) of the CVA by rejecting PMTL's transaction values without a valid basis, and that its determination of the "actual price" again violates the applicable valuation rules in Articles 2 through 7 of the CVA. In response, Thailand ~~**once again argues that the 2002-2003 Charges do not contain sufficient information for adjudication (an**~~ **presents an** argument that resembles the "ripeness" argument that it raised in the first recourse to Article 21.5 regarding the 2003-2006 Charges~~)~~, **and once again argues** that in any event the CVA does not apply to the Charges, and that any inconsistency with the CVA is justified under the general exceptions of Articles XX(d) and (a) of the GATT 1994.

3.3 Thailand's allegations of "illegal acts" by PM Indonesia

3.3.1 Paragraphs 7.45, 7.48 and 7.49

3.7. The Philippines proposes three sets of changes to section 7.1.3.2 of the Report. These proposed changes partially overlap, and for that reason are addressed together below. As elaborated below, the Panel has revised **paragraphs 7.45, 7.48 and 7.49** in the light of the Philippines' comments.

3.8. First, the Philippines proposes the addition of a new paragraph, to be added at the beginning of this section, to reflect how Thailand's argument that the Philippines "cannot base its claims of violation against Thailand on the basis of an admitted illegal act of [PM Indonesia] in a foreign jurisdiction" has shifted during the proceeding. The new paragraph proposed by the Philippines would indicate that Thailand's description of the factual premise of its argument has developed in several respects, including with respect to which entity (the importer PMTL as opposed to the producer PM Indonesia) purportedly committed the "illegal act", and also with respect to whether Thailand itself is even making any assertion of an "illegal act", and how any such assertion has evolved in the course of the proceeding.

3.9. Second, and continuing from the first aspect referred to above, the Philippines notes that throughout this section spanning paragraphs 7.43 to 7.49, the Panel has not followed a consistent approach when summarizing the parties' respective arguments with respect to which entity (the importer PMTL as opposed to the producer PTPMI) is implicated by Thailand's assertion of an "illegal act". In this regard, the Philippines submits that although Thailand "shifted position as to which entity allegedly committed an illegal act", the Panel has, when describing Thailand's arguments, consistently referred to an alleged illegal act by "PM Indonesia", which amounts to "changing" Thailand's arguments; however, in describing the Philippines' arguments, the Panel uses the different terms "importer", "producer" and "importer and/or the producer". The Philippines requests

that the Panel "align the parties' respective arguments to refer consistently to the same Philip Morris entity".[31]

3.10. Third, the Philippines requests that the Panel add a sentence to the end of paragraph 7.49, cross-referencing the Panel's later conclusion, made in the context of Section 7.2.2 of the Report, that there is nothing to suggest that PM Indonesia "engaged in conduct that could be characterized as involving an 'illegal act' under Indonesian law, or systematically or intentionally 'deceived' the Indonesian authorities". The Philippines requests this cross-reference to avoid creating the misleading impression, in Section 7.1.3.2, that PM Indonesia may have engaged in illegal acts.

3.11. Regarding the first request above, Thailand asks the Panel to reject the Philippines' request to insert a new paragraph at the beginning of this section with additional language to "reflect the shift in Thailand's arguments". Thailand submits that it is natural and inevitable that both parties' arguments will evolve throughout the proceedings, and this is why parties are given various opportunities to present arguments in writing and clarify them during oral hearings and in written answers to questions. In Thailand's view, it is hardly to be expected, therefore, that parties will articulate their positions in exactly the same way in every submission. Thailand considers that the approach proposed by the Philippines would punish a party for exercising its right to develop its arguments over the course of a proceeding, and in effect "become a stick with which the complaining Member would be permitted to beat the defending Member".[32]

3.12. Thailand does not specifically comment on the second request above. Regarding the third request, Thailand does not specifically comment on it either, but makes a point of stating that it "agrees only with the Philippines' typographical corrections" in paragraphs 7.49 and 7.163.

3.13. The Panel has not included the new paragraph proposed by the Philippines which would present a list, at the beginning of this section, of four selected extracts from Thailand's first written submission, second written submission, pre-hearing responses to questions, and post-hearing responses to questions. The reason for not including such a paragraph is that the juxtaposition of these statements does not necessarily make clear to the reader what their individual or combined relevance is. However, the Panel considers that it would be appropriate to reflect each of the different elements of this proposed paragraph in the discussion that follows, by adding some explanatory text to a footnote to paragraph 7.45; by adding an additional sentence and footnote to paragraph 7.48; and by adding some additional text to paragraph 7.49. These elements of the parties' arguments are generally presented in terms that remain neutral as to whether there was a "shift" in Thailand's argumentation on either of these points. These revisions are discussed sequentially below.

3.14. With respect to which entity (the importer PMTL as opposed to the producer PM Indonesia) is implicated by Thailand's assertion of an "illegal act", and the Philippines' view that Thailand's position has shifted, the Panel considers that it would be appropriate to reflect this element of the parties' arguments. The Panel notes that it is in **paragraph 7.45** that the Panel describes the Philippines' arguments with reference to the "importer", "producer" and "importer and/or the producer", which contrasts with the reference to "PM Indonesia" throughout most of the other paragraphs in this section. Accordingly, the Panel has added new text to the footnote accompanying the last sentence of paragraph 7.45, explaining why there is a degree of misalignment between the parties' arguments on which Philip Morris entity/entities is/are implicated by Thailand's arguments regarding an alleged "illegal act". This new text is relegated to a footnote because this issue is immaterial the Panel's disposition of the matter before it, and that point is also reflected in the new text. The additional text added to the last footnote to paragraph 7.45 reads:

> 7.45. The Philippines responded that this aspect of Thailand's argumentation "does not posit a general interpretation of Article 1.2(a) that applies in all cases", but instead "posits a supposed *legal bar* to a WTO claim with the applicability of that legal bar premised on the facts of a particular case, i.e., an 'illegal act' by the importer". The Philippines indicated that it doubted whether Thailand's proposed legal bar has any basis in WTO law, as it appears to attribute to a WTO Member the legal consequences of an "illegal act" allegedly committed by an importer. In any event, the Philippines considered that the Panel need not decide whether Thailand's proposed legal bar has

[31] Philippines' request to review the Interim Report, para. 12.
[32] Thailand's comments on the Philippines' request to review the Interim Report, para. 2.3.

any basis in WTO law, because Thailand has failed to show that the importer and/or the producer committed any "illegal act".**[FN]**

> **[FN]** Philippines' second written submission, para. 92. **In its first written submission, Thailand specified in several places that the illegal acts in question were committed by PM Indonesia (see paras. 1.5, 3.47, 3.48, 3.175, 4.3(c)). However, in its first written submission, Thailand also referred to the illegal act "of the company whose products were valued" (paras. 3.79), and of "the entity whose merchandise was valued" (para. 3.96). Thailand has also occasionally referred more broadly, without qualification, to "Philip Morris" (e.g. Thailand's response to Panel question No. 164(a), para. 3.13, quoted in paragraph 7.49 below). The Panel does not understand Thailand's varying formulations to imply that in its view it was the importer, PMTL, that was the entity that engaged in the alleged "illegal act". However, the Philippines understood the reference to "the company whose products were being valued" to mean the PMTL, i.e. the importer (Philippines' second written submission, paras. 86 and 98), and thus proceeded to formulate some of its rebuttal arguments on this issue on the premise that Thailand was alleging illegal acts by "the importer", or "the importer (and/or the producer)". As a result, there is a degree of misalignment between the parties' arguments on which Philip Morris entity/entities is/are implicated by Thailand's arguments regarding an alleged "illegal act". However, this issue is immaterial the Panel's disposition of the matter before it.**

3.15. The Panel now turns to the second element of Thailand's argumentation which the Philippines requests that the Panel highlight: Thailand's statement, in its pre-hearing responses to questions, that "is not alleging anything, [but] simply refer[s] to and describe[s] the Philippines' own arguments regarding the Indonesian data". The Panel considers that it would also be appropriate to reflect this element of the parties' arguments in this section. The Panel notes that it is in **paragraph 7.48** that the Panel refers to two important clarifications provided by the Philippines in its responses to questions. Accordingly, the Panel has added a new sentence and accompanying footnote to paragraph 7.48, reflecting Thailand's argument on this point. This additional sentence and footnote have been added with a view to reflecting Thailand's view that it does not consider itself to be the party making any assertion with respect to the existence of an "illegal act", and noting that the clarification that Thailand provided in its responses to pre-hearing questions was a reiteration of a point it had already made in its second written submission. The revised text of paragraph 7.48, together with its new accompanying footnote, reads as follows:

> 7.48. The Panel put several questions to Thailand aimed at clarifying the nature and relevance of its arguments regarding the alleged "illegal acts" committed by PM Indonesia. **In its responses to questions, Thailand reiterated that "Thailand is not alleging anything", was "simply referring to and describing the Philippines' own arguments regarding the Indonesian data", and "uses the term 'illegal act' to paraphrase the Philippines' own argument regarding the content of these forms".[new FN]** Thailand made two **further** important, interrelated clarifications. First, Thailand clarified that this line of argument is not distinct from its argument regarding the interpretation of the CVA, which as noted above is basically that the authorities of the importing country should have the right to assume that the information provided by the exporting country's authority is accurate and truthful. In response to questions from the Panel, Thailand has clarified that this aspect of its argumentation is not to be construed as raising any issue concerning the admissibility of the Philippines' claims, whether in terms of the *Factory at Chorzów* principle, estoppel, the clean hands doctrine, Article 3.10 of the DSU, or otherwise. Second, and perhaps most importantly, Thailand clarified that its argumentation regarding the proper interpretation of the CVA also "does not hinge on characterizing PM Indonesia's actions as illegal acts under Indonesian law".
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> > **[new FN] Thailand's response to Panel question Nos. 133 and 134, para. 3.4. In its second written submission, Thailand had already responded to the Philippines' contention that Thailand's allegations of "illegal conduct" are "wholly unsubstantiated" by stating that "is not the party**

asserting these facts", but "is merely citing what the Philippines repeatedly and openly states in its submissions before this Panel". (Thailand's second written submission, para. 3.58.)

3.16. The Panel has made two additions to the text of **paragraph 7.49** in the light of the Philippines' comments. The second sentence of paragraph 7.49 states, with reference to Thailand's post-hearing responses to questions, that the Panel's understanding is that Thailand "continues to be of the view" that what matters "is that the inaccuracy was not caused by some external factor outside the control of Philip Morris", but rather "was created knowingly and voluntarily by Philip Morris itself" and that the Philippines' is faulting Thailand for "relying on information that suffers from inaccuracies that are of Philip Morris' own making". The Panel appreciates that this formulation, and in particular the words "continues to be of the view", could be read as the Panel implying that there has been a degree of stability and continuity in Thailand's argumentation, which the Philippines seeks to contextualize with its proposed new paragraph setting out how Thailand's arguments have shifted and developed throughout the proceeding (and only eventually, at a late stage in Thailand's responses to post-hearing questions, culminated in that quoted statement). The Panel has revised the second sentence of paragraph 7.49 to express the point of that sentence more clearly.

3.17. The second addition to paragraph 7.49 which the Panel has made reflects the Philippines' request that the Panel add a new last sentence to paragraph 7.49 referring to the Panel's later conclusion, in Section 7.2.2, that PM Indonesia did not, in any event, engage in any illegal conduct under Indonesian law. In the Panel's view, the more immediately relevant conclusion in Section 7.2.2 to cross-reference in the context of paragraph 7.49 is the Panel's conclusion that, as result of the regulatory constraints mandated by Indonesian excise tax law, the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain. That is the more immediately relevant conclusion to cross-reference in the context of paragraph 7.49 because Thailand's argument, referred to in the immediately preceding sentence of paragraph 7.49, is that what matters is not whether PM Indonesia's conduct is characterized in terms of being an "illegal act", but rather that "the inaccuracy was not caused by some external factor outside the control of Philip Morris", and "was created knowingly and voluntarily by Philip Morris itself", and that the Philippines' is faulting Thailand for "relying on information that suffers from inaccuracies that are of Philip Morris' own making". Accordingly, there would be a degree of misalignment if, following that exposition of Thailand's remaining argument, the Panel states that it addresses "this argument" in the context of Section 7.2, and then refers to its conclusion that there is nothing to suggest that PM Indonesia committed an "illegal act".

3.18. The revised text of paragraph 7.49, reflecting both of the above additions, reads:

> 7.49. Based on the foregoing, the Panel considers that it is sufficiently clear that Thailand is not arguing that the Philippines' claims are inadmissible by virtue of any alleged "illegal act" on the part of PM Indonesia, and that Thailand's other argumentation also does not actually depend on or entail characterizing PM Indonesia's conduct as illegal under Indonesian law. The Panel understands that Thailand**, despite clarifying that its argumentation regarding the proper interpretation of the CVA "does not hinge on characterizing PM Indonesia's actions as illegal acts under Indonesian law",** ~~**continues to be**~~ **is** of the view that what matters "is that the inaccuracy was not caused by some external factor outside the control of Philip Morris", but rather "was created knowingly and voluntarily by Philip Morris itself" and that the Philippines is faulting Thailand for "relying on information that suffers from inaccuracies that are of Philip Morris' own making". The Panel ~~**will**~~ address**es** this argument in the context of Section 7.2, when assessing whether the Thai authorities were entitled to assume that the information reported by PM Indonesia in the CK-21A forms was accurate and truthful**, and concludes that as result of the regulatory constraints mandated by Indonesian excise tax law (i.e. an external factor outside the control of PM Indonesia), the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain.**

3.4 The Philippines' alternative claims under Article 7.1 of the CVA

3.4.1 General considerations

3.4.1.1 Paragraph 7.64

3.19. The Philippines notes that in **paragraph 7.64**, the Panel recalls at length that the original panel found that the Philippines had not advanced timely arguments under Article 4 of the CVA, and queries whether this lengthy discussion of an opposite finding in the original proceeding facilitates the reader's understanding of the issue. The Philippines suggests removing this paragraph or, alternatively, moving this discussion to a footnote to the previous paragraph.

3.20. Thailand opposes the Philippines' request. In its view, the Panel's description of the situation in the original proceeding regarding the Philippines' claim under Article 4 of the CVA is consistent with the Panel's approach in this report of describing similarities and differences between the issues that arose in this proceeding and the issues that arose in the original proceeding and in the first recourse to Article 21.5. Thailand submits that there is no basis to remove one of those references, simply because it is to a finding by the original panel that was adverse to the Philippines.

3.21. The Panel considers that the existing summary in paragraph 7.64 is not unduly long or detailed and serves the useful purpose of facilitating the reader's understanding of how similar issues have arisen and been dealt with in the past, including by the panel in the original proceeding in DS371. Accordingly, the Panel has not deleted this paragraph or moved it to a footnote to the previous paragraph.

3.4.2 Article 6.2 of the DSU

3.4.2.1 Paragraphs 7.67 and 7.71

3.22. The Philippines notes that in **paragraphs 7.67 and 7.71**, the Panel refers to the degree of specificity that could "reasonably be expected" from the Philippines in identifying the legal basis for the complaint for purposes of Article 6.2 of the DSU. The Philippines queries whether this formulation could be misunderstood by some readers to suggest that, in the Panel's view, the legal standard under Article 6.2 for the identification of measures and claims varies according to what can "reasonably be expected" of a complainant. The Philippines understands the Appellate Body to have taken the view that a panel request must meet certain minimum standards irrespective of the circumstances. The Philippines states that a panel request must always meet the basic requirements in Article 6.2, and the need to respect these basic requirements cannot be lessened in light of the attendant circumstances; however, if the basic requirements are met, the attendant circumstances are relevant in assessing the panel request. Based on the foregoing, the Philippines requests that the Panel reformulate the wording to avoid any misunderstanding that the Panel considers that the legal standard under Article 6.2 varies according to what degree of specificity can "reasonably be expected" of a complainant in the circumstances.

3.23. Thailand does not comment on this request.

3.24. The Panel notes that the third sentence of paragraph 7.67 refers to the requirement in Article 6.2 of the DSU to identify "the legal basis of the complaint sufficient to present the problem clearly", and notes that the final sentence of paragraph 7.67 then makes clear that "[i]n the Panel's view, while a complainant must *always* comply with this requirement, *regardless of any difficulties* it faces in obtaining relevant information, such difficulties in obtaining relevant information may be highly germane to the appraisal of what is 'sufficient' to present the problem 'clearly' in the circumstances of a particular case." (emphasis added) Accordingly, it is clear that the Panel is not suggesting that the legal standard under Article 6.2 itself varies according to what can "reasonably be expected" of a complainant; this language expressly confirms the opposite. Furthermore, the Panel notes that its wording in paragraph 7.67 (what "could reasonably have been expected") is not an original formulation. As the Panel notes in the accompanying footnote, in *EC and certain member States – Large Civil Aircraft* the Appellate Body stated that, in the circumstances of that case, "it is still not clear to us what additional degree of specificity *could reasonably have been expected* regarding the identification of R&TD funding allocated through the French Government's budgetary process", and concluded that "[t]aking into account the public information that existed regarding the French R&TD

funding at the time of the United States' panel request", the description set out therein "was sufficiently precise" to establish that the funding challenged by the United States was within the Panel's terms of reference. Therefore, the Panel does not share the Philippines' concern that the reference to what "could reasonably have been expected" is apt to misconstrued as establishing a novel legal standard that is overly permissive, and accordingly sees no need to revise this wording.

3.4.2.2 Paragraphs 7.71 and 7.72

3.25. The Philippines proposes to switch the sequence of the analyses set forth in paragraphs 7.67-7.71 and 7.72-77. As elaborated below, the Panel has revised **paragraphs 7.71 and 7.72** in the light of the Philippines' comments.

3.26. The Philippines understands that the Panel, in its analysis of whether the reference to "Article 7" can be understood as including a claim under Article 7.1, addresses two issues. First, in paragraphs 7.67-7.71, the Philippines understands the Panel to consider the consequences, under Article 6.2 of the DSU, of the fact that the Thai authorities never indicated which valuation method they had used. The Philippines understands the Panel to conclude here that "given Thailand's lack of clarity … the panel request includes a claim under the first paragraph of Article 7" of the CVA.[33] Second, in paragraphs 7.72-7.77, the Philippines' understands the Panel to address, "on an *arguendo* basis, whether the reference to Article 7 in the Philippines' panel request is sufficient, *on its face*, to include a claim under the first paragraph of that provision".[34] Proceeding on the basis of this understanding, the Philippines requests that the Panel reverse the order of these two points, because the Philippines considers that it is more appropriate to consider first "the terms of the panel request themselves", before turning to confirm this finding in light of the "attendant circumstances".[35] If the Panel decides not to reverse the order of the discussion, the Philippines requests that the Panel not address the terms of the panel request on an "*arguendo*" basis, but as an integral part of its reasoning.

3.27. Thailand responds that it does not consider it necessary to reverse the order of the analysis or to alter the *arguendo* approach taken by the Panel. Thailand recalls that the interim review stage is not an opportunity for the parties to seek to restructure the panel's analysis based on their stylistic preferences, or to make "general comments" that are not related to specific paragraphs, and therefore considers that the Philippines' request to restructure this section of the report goes beyond the scope of interim review. In any event, Thailand recalls that so long as the Panel fulfils its obligations under Article 11 of the DSU, the Panel is free to structure its analysis in any manner it sees fit.

3.28. In the light of the Philippines' comment, the Panel considers it useful to clarify its reasoning as follows. Contrary to the Philippines' understanding, the conclusion reached by the Panel in paragraphs 7.67-7.71 is not that "given Thailand's lack of clarity … the panel request includes a claim under the first paragraph of Article 7" of the CVA.[36] The Panel's conclusion as stated in paragraph 7.71 is rather that, in the circumstances of this case, the Philippines was not required in its panel request "to specify which one of the different customs valuation methods in Articles 2 through 7 constituted the basis of its claim", and "[*a*] *fortiori*, the Panel is not persuaded that the Philippines had to go even further and specify which of the three subparagraphs and obligations in Article 7 it was invoking", in order to satisfy the requirement in Article 6.2 of the DSU to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly". Furthermore, the conclusion reached by the Panel in paragraphs 7.72-7.77 is not, as the Philippines' states, that "the reference to Article 7 in the Philippines' panel request is sufficient, *on its face*, to include a claim under the first paragraph of that provision".[37] The Panel's conclusion as stated in paragraph 7.72 is rather that, assuming *arguendo* that the Panel request would only satisfy the requirement in Article 6.2 of the DSU to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly" if it were possible for Thailand to draw a sufficiently clear inference that the reference to "Article 7" embraced a claim under Article 7.1, in the circumstances of this case it is sufficiently clear that the Philippines' general reference to "Article 7" in the panel request covers a claim under Article 7.1. In the light of these clarifications, the Panel has not

[33] Philippines' request to review the Interim Report, para. 17.
[34] Philippines' request to review the Interim Report, para. 18.
[35] Philippines' request to review the Interim Report, para. 19.
[36] Philippines' request to review the Interim Report, para. 17.
[37] Philippines' request to review the Interim Report, para. 18.

reversed the order of the analysis in paragraphs 7.67-7.71 and 7.72-7.7. However, the Panel has revised paragraphs 7.71 and 7.72 to reflect the clarifications set forth above. The revised text of paragraphs 7.71 and 7.72 reads:

> 7.71. Having said that, in the circumstances of this case it is not clear what additional degree of specificity could reasonably have been expected from the Philippines in terms of identifying the "relevant valuation rules" in Articles 2 through 7 with sufficient precision, taking into account the limited information that was communicated to it regarding the basis for calculating the "actual" value/price in the challenged measures. Therefore, the Panel is not persuaded that the Philippines was required to specify which one of the different customs valuation methods in Articles 2 through 7 constituted the basis of its claim. **It sufficed for the panel request to state that the 2002-2003 Charges "are inconsistent with … Articles 2, 3, 4, 5, 6 and 7 of the CVA", without further specification as to which of one of these different articles was applicable.** *A fortiori*, **if such specification was not required at the level of these different articles, then** the Panel is not persuaded that the Philippines had to go even further and specify which of the three subparagraphs and obligations ***within*** Article 7 it was invoking.
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> 7.72. **For the foregoing reasons, the Panel considers that it is unnecessary to proceed with an analysis of whether it is sufficiently clear from the panel request which obligation(s) in Article 7 would be the one(s) at issue, if the "relevant valuation rules" were those found in Article 7, as opposed to Articles 2, 3, 5 or 6 of the CVA.** Assuming *arguendo* that it is necessary to continue further in assessing Thailand's objection that the Philippines failed to identify the specific paragraph of Article 7, the Panel considers that in the circumstances of this case it is sufficiently clear that the Philippines' general reference to "Article 7" in the panel request would cover a claim under Article 7.1. The panel request does not identify any specific paragraph(s) of Article 7, but this becomes apparent from a consideration of the irrelevance of Article 7.3 in this case, and the nature of the interrelationship between Articles 7.1 and 7.2.

3.4.2.3 Paragraph 7.77

3.29. The Philippines notes that in **paragraph 7.77**, the Panel seeks to explain why a reference to Article 7 of the CVA necessarily encompasses a claim under Article 7.1, regardless of whether or not it also encompasses a claim under Article 7.2. The Philippines invites the Panel to reformulate the last sentence of this paragraph for clarity, and also proposes an additional sentence summarizing the point of this paragraph.

3.30. Thailand does not comment on this request.

3.31. The Panel has reformulated what was previously the last sentence 7.77, to align its wording to the first sentence of paragraph 7.77 for greater clarity. The Panel has also included the additional sentence proposed by the Philippines at the end of paragraph 7.77, because the Panel considers that it accurately summarizes the content of this paragraph. The revised text of paragraph 7.77 reads:

> 7.77. This conclusion is not altered by certain considerations relating to the concise narrative that accompanies the listing of Articles 2 to 7 in the panel request. As indicated above, the Philippines' panel request states that the Thai authorities acted inconsistently with Articles 2 to 7 because they "failed to comply with the relevant valuation rules in establishing the alleged 'actual values' of the imported goods". In this respect, Thailand contends that the phrase "relevant valuation rules", as used in the panel request, is generic and overly vague, and could cover "not only the various sub-paragraphs of Article 7, but also all other provisions in Part I of the CVA (that is, Articles 1 – 17)" which is titled "Rules on Customs Valuation". The Philippines argues that Article 7.1 is the only provision setting forth "affirmative" valuation rules that an authority may use in establishing the customs value, and that the phrase "relevant valuation rules" can therefore only refer to that paragraph and no other paragraph. The Panel is not persuaded by that argument, and considers that the phrase "relevant valuation rules" as used in the Philippines' panel request could reasonably be understood as referring

not only to the valuation rules contained in Article 7.1, but also those contained in Article 7.2. Having said this, the fact that the language of the Philippines' panel request may be read as also referring to Article 7.2 **~~is immaterial to the question of whether~~ does not alter the conclusion that** the reference to Article 7 includes a claim under Article 7.1. **In sum, the Panel considers that, read in light of the accompanying narrative, the reference to Article 7 of the CVA necessarily encompasses a claim under Article 7.1 of the CVA, whether or not it also encompasses a claim under Article 7.2.**

3.4.3 Timeliness of the Philippines' alternative claim

3.4.3.1 Paragraph 7.81

3.32. The Philippines observes that, in **paragraph 7.81**, the Panel provides a lengthy statement of the evolution of the parties' arguments under Article 7 of the CVA. The Philippines suggests that, to assist the reader, the Panel could add a concise summary at the end of paragraph 7.81. The Philippines proposes language for such a summary.

3.33. In Thailand's view, the summary proposed by the Philippines is unnecessary. It considers that the Panel's description of the parties' arguments is rather detailed and exhaustive, presumably motivated by the Panel's desire to present the reader with a full account of the circumstances. Thailand sees no need to repeat in a final paragraph the Panel's description of the parties' arguments or to restate this description using different terminology. Thailand fails to recognize how would this assist the reader.

3.34. The Panel does not disagree with the content of the summary paragraph which the Philippines proposes to add at the end of the detailed chronology set forth in subparagraphs (a) through (h) of paragraph 7.81. However, the Panel agrees with Thailand that the proposed summary paragraph involves a degree of unnecessary repetition. Therefore, the Panel has not added the summary paragraph proposed by the Philippines.

3.4.3.2 Paragraph 7.82

3.35. The Philippines observes that, in **paragraph 7.82**, the Panel states that the first indication that the Thai authorities may have "used Article 7 as the basis" for valuing the imported goods appeared in Thailand's first written submission. In the light of the Panel's other statements, and the content of Thailand's first written submission, the Philippines queries this statement and proposes that this sentence state that the first indication that the Thai authorities may have "considered Article 7 as relevant" for valuing the imported goods appeared in Thailand's first written submission.

3.36. Thailand does not comment on this request.

3.37. The Panel does not consider it inaccurate to state that Thailand's first written submission was the first indication that the Thai authorities "may have used Article 7 as the basis for valuing the imported goods", because the word "may" appropriately reflects the ambiguity about whether Thailand's argument was that Article 7 was "used" as "the basis" for valuing the imported goods. However, the Panel considers that it would be more exact to add the words "or otherwise considered Article 7 relevant" as a sub-clause. The revised text of paragraph 7.82 reads as follows:

7.82 Thus, the first indication that the Thai authorities may have used Article 7 as the basis for valuing the imported goods**, or otherwise considered Article 7 relevant,** appeared in Thailand's first written submission. Prior to that point, all that had been explained to the importer was that the determination of the actual values was based on "the cigarette cost structure of PT Philip Morris Indonesia". In the Panel's view, it is difficult to see in this explanation any indication on the part of the Thai authorities that they had resorted to Article 7.1, such that that the Philippines would have been provided with a basis for asserting a claim and supporting arguments under that provision, separate from its claim and supporting arguments under Article 6. In these circumstances, the Philippines cannot reasonably be said to have been in a position to assert a claim and advance arguments under Article 7.1 at the time it submitted its first written submission.

3.4.3.3 Paragraph 7.87

3.38. Thailand requests the Panel to delete **paragraph 7.87**. In its view, the Panel's statement that there was a "persistent ambiguity" in Thailand's position on whether a determination was made under Article 6 or Article 7.1 of the CVA "is plainly at odds" with Thailand's submissions, "which clearly noted" that Article 7.1 and its Interpretative Note "do not make clear whether Article 7.1 is to be considered as a method in itself, separate from Articles 1-6, or simply an authorization to use the methods in Articles 1-6 with reasonable flexibility".[38] Thus, the method used in this case was based on the computed method (Article 6) used with flexibilities (Article 7). As Thailand made clear in its response to a question from the Panel, "[t]he Interpretative Note refers to 'the methods laid down in Articles 1 through 6' and envisages 'a reasonable flexibility in the application of such methods'".[39] According to Thailand, "[i]n these circumstances", Thailand "stated that it was for the Panel, as a legal matter, to decide whether the determination was made under Article 6 or Article 7".[40] Thailand explains that, "[i]n other words, Thailand clearly identified as a legal issue to be decided by the Panel whether a determination using one of the methods in Articles 1-6 of the CVA while using flexibilities under Article 7.1 should, as a matter of law, be considered as having been made under Article 6 or Article 7".[41] In these circumstances, Thailand continues, there was no "persistent ambiguity" in Thailand's position; instead, it "repeatedly (and accurately) described the determination as having been made using the Article 6 method as a base and using the flexibilities under Article 7", and "made clear that it was for the Panel to decide whether, as a legal matter, such a determination should be characterized as made under Article 6 or Article 7".[42]

3.39. The Philippines submits that the Panel should reject Thailand's request to delete paragraph 7.87. In its view, this paragraph constitutes an important part of the Panel's assessment of Thailand's arguments regarding the applicability of Article 6 and/or Article 7. Thailand's efforts to show that its arguments were not "persistently ambiguous" serve only to reinforce the Panel's conclusion that they were. The Philippines states that it is surprised by Thailand's comments, as it had not previously appreciated that Thailand did not regard the "fall back" method as a "separate" valuation method. The Philippines states that, based on all Thailand's previous submissions, in all of the proceedings in this dispute, the Philippines understood that the parties agreed that Article 7 set forth a "separate" valuation method. The Philippines' considers that Thailand's latest comments merely underscore – indeed, deepen – the "persistent ambiguity" in Thailand's position. In addition to inviting the Panel to reject Thailand's proposal to delete this paragraph, the Philippines observes that the Panel's statements in paragraph 7.87 constitute the Panel's own assessment of Thailand's arguments set forth in paragraph 7.81, and for that reason the Philippines considers that these statements should precede the Panel's assessment whether, as a matter of law, the Philippines set forth its arguments under Article 7.1 in a timely manner. The Philippines, therefore, proposes elevating this paragraph to follow paragraph 7.81.

3.40. The Panel recalls that in paragraphs 7.85 and 7.86, the Panel explains why it does not consider that Thailand's due process rights would be violated if the Panel were to rule on the Philippines' alternative claim under Article 7.1 of the CVA. In paragraph 7.87, the Panel then explains that this conclusion is reinforced by the fact that it is still not clear whether Thailand is of the view that any customs valuation determination made by its authorities was made on the basis of Article 6, or instead on the basis of Article 7. The Panel has retained this paragraph because it constitutes a substantive part of the Panel's assessment of whether the Philippines' alternative claim under Article 7 was raised in a timely manner. Furthermore, the Panel has not moved this paragraph to follow the chronology of events at paragraph 7.81, as the Philippines proposes, because the content of paragraph 7.87 is linked to the Panel's consideration of due process, which is addressed at paragraphs 7.85 to 7.87.

3.41. Having decided to retain paragraph 7.87, the Panel has revised it to reflect Thailand's comments. First, the Panel has added additional text indicating that the persistent ambiguity in Thailand's position is apparently linked to its uncertainty as to whether there is any clear binary distinction between the methods under Articles 6 and 7. Second, the Panel has added text indicating that, given the way that Thailand's arguments on this issue have unfolded – including its apparent

[38] Thailand's request to review the Interim Report, para. 2.1.
[39] Ibid (referring to Thailand's Response to the Panel's Question 155, para. 8.3.)
[40] Ibid (referring to Thailand's Response to the Panel's Question 157, para. 8.4.)
[41] Thailand's request to review the Interim Report, para. 2.1.
[42] Thailand's request to review the Interim Report, para. 2.1.

uncertainty of the existence of any clear binary distinction between the methods under Articles 6 and 7 – the Panel does not consider that Thailand's due process rights would be violated if the Panel were to rule on the Philippines' alternative claim under Article 7.1 of the CVA. The revised text of paragraph 7.87 reads:

> 7.87. This conclusion is reinforced by another consideration. There has been a persistent ambiguity in Thailand's position**, apparently linked to its uncertainty as to whether there is any clear binary distinction between the methods under Articles 6 and 7,** and **as a result** it is actually still not clear whether it is of the view that any customs valuation determination made by its authorities was made on the basis of Article 6, or instead on the basis of Article 7. In its responses to the post-hearing questions sent by the Panel, Thailand formulated its position in terms that circled back to the idea that any revised customs value was determined on the basis of Article 6, incorporating the reasonable flexibilities of Article 7. It stated that the authorities "applied the computed method under Article 6, taking advantage of the flexibilities allowed under Article 7.1"; and that as it "has previously explained, the values were calculated on the basis of the methodology in Article 6, using the flexibilities allowed under Article 7.1". **In its comments on the Interim Report, Thailand stated that it "repeatedly (and accurately) described the determination as having been made using the Article 6 method as a base and using the flexibilities under Article 7", and "made clear that it was for the Panel to decide whether, as a legal matter, such a determination should be characterized as made under Article 6 or Article 7".[new FN] Given the way that Thailand's arguments on this issue have unfolded – including its apparent uncertainty of the existence of any clear binary distinction between the methods under Articles 6 and 7 – the Panel does not consider that Thailand's due process rights would be violated if the Panel were to rule on the Philippines' alternative claim under Article 7.1 of the CVA.**
>
> **[new FN] Thailand's request to review the Interim Report, para. 2.12.**

3.5 The Philippines' standing to challenge measures concerning PM Thailand's imports from Indonesia

3.5.1 Paragraph 7.89

3.42. The Philippines notes that in the last sentence of **paragraph 7.89** the Panel characterizes the issue of standing as one of "jurisdiction", but queries whether that characterization is legally correct or necessary. The Philippines makes two comments: first, that the panels and the Appellate Body in the case law cited by the Panel, including the Appellate Body in *EC – Bananas III*, do not expressly characterize standing as a jurisdictional issue; instead, the issue is characterized as a "prerequisite for requesting a panel", or as a requirement "to bring a case"; second, that the concept of standing does not appear explicitly in any of the covered agreements, and the characterization of this issue is not essential to the Panel's analysis in this section. In the light of the foregoing, the Philippines suggests that the Panel take out the words characterizing the issue of standing as a "jurisdictional" matter; alternatively, the Philippines invites the Panel to characterize this as a "preliminary issue" relating to a Member's right to bring a case.

3.43. Thailand does not comment on this request.

3.44. The Panel recalls that the Appellate Body has referred to "certain issues of a fundamental nature" that a panel must deal with, if necessary on its own motion, in order to satisfy itself that it has the "authority" to proceed.[43] The point of the sentence in question was only to convey that this is an issue of a fundamental nature that the Panel considers appropriate to consider on its own initiative. The Panel has revised the wording of paragraph 7.89, and its accompanying footnote, accordingly. The revised text of paragraph 7.89 reads:

> 7.89. While some of the measures at issue in the original proceeding and the first recourse to Article 21.5 concerned imports into Thailand from the Philippines, the

[43] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – United States)*, para. 36.

measures at issue in this proceeding relate exclusively to cigarettes that PMTL imported from Indonesia. The Panel asked Thailand whether it accepts that the Philippines has standing to challenge the measures, notwithstanding that they pertain exclusively to entries that PMTL imported into Thailand from the supplier based in Indonesia. Thailand responded that "this is a matter for the Panel to resolve concerning its jurisdiction, in light of the existing jurisprudence". In the light of Thailand's response, and given that a panel must consider **on its own initiative** any issues of jurisdiction**, and any other issues of a "fundamental nature"**~~**on its own initiative**~~**[FN]**, the Panel addresses this issue below.

> **[FN]** **The Appellate Body has referred to "certain issues of a fundamental nature" that a panel must deal with, if necessary on its own motion, in order to satisfy itself that it has the "authority" to proceed. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – United States)*, para. 36.)** As the Appellate Body has observed **with respect to jurisdictional issues in particular**, "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it". (Appellate Body Report, *US – 1916 Act*, footnote 30) See also Decision by the Arbitrator, *US – COOL (Article 22.6 – United States)*, paras. 2.6-2.7.

3.5.2 Paragraph 7.93

3.45. The Philippines understands that **paragraph 7.93** identifies certain ways in which the Philippines' interests are prejudiced by Thailand's measures. The Philippines invites the Panel to add a sentence stating that the burden of the 2002-2003 Charges and the 1,052 NoAs falls on an importer whose revenues are earned through the sale of goods produced in the Philippines.

3.46. Thailand asks the Panel to reject the Philippines' request. In its view, by suggesting this additional language, the Philippines tries to make a point that is already made in paragraph 7.93. After explaining that PMTL currently imports substantial volumes of cigarettes into Thailand from the Philippines, the Panel states that "any measure that relates to the customs valuation practices of the Thai importer that now sources from the Philippines has the very real potential to affect future exports of cigarettes from the Philippines to Thailand". For this reason, the language proposed by the Philippines would not add anything to the idea already expressed by the Panel in paragraph 7.93.

3.47. The Panel agrees with Thailand that the proposed sentence involves a degree of unnecessary repetition with what is already expressed in paragraph 7.93. Therefore, the Panel has not added the sentence proposed by the Philippines.

3.6 Good faith Relevance of the presumption of good faith on the part of Thailand and its authorities

3.48. The Philippines disagrees with the Panel's statement that "in the light of the presumption of good faith on the part of Thailand, the Panel accepts the veracity of Thailand's representations that its authorities received the pricing and cost information reported by PM Indonesia in the CK-21A forms". It submits that "the Panel should conduct an objective assessment of the evidence before it, based on the usual rules on the burden of proof, without relying on presumptions derived from good faith".[44] In the Philippines' view, the Panel's reliance on a presumption of good faith to sustain an unsupported assertion is at odds with the rules on burden of proof[45], and creates risk for how respondent's may argue their case in future proceedings.[46] The Philippines also argues that the earlier decisions referred to in footnote 209 of the Interim Report (now footnote 213 of the Final Report) do not support the Panel's approach to the burden of proof.[47] Furthermore, the Philippines queries whether Thailand's own actions in seeking and insisting on a non-disclosure order in the domestic proceedings – which deprives the Panel of information in these proceedings that is now part of the court's record on the factual basis for the Charges - are consistent with the Panel's

[44] Philippines' request to review the Interim Report, para. 50.
[45] Philippines' request to review the Interim Report, paras. 39-43.
[46] Philippines' request to review the Interim Report, para. 44.
[47] Philippines' request to review the Interim Report, paras. 45-49.

application of a presumption in favour of Thailand's unsupported assertions regarding the basis of those measures.[48]

3.49. The Philippines also takes issue with the Panel's statements that the parties agree on the factual basis for Thailand's measures. The Philippines accepts that Thailand "had certain pricing and cost information reported by PM Indonesia to the Indonesian government in CK-21A forms".[49] It states that "[a]lthough the precise nature of this information is unclear, the evidence shows that this information enabled Thailand to construct aggregate production costs, based on the producer's HJE retail selling price, the Indonesian taxes due on that price, and a standard amount for the costs and profits of others in the supply chain".[50] However, the Philippines "does not accept, without evidence, that Thailand had access to all of the information reported by the Indonesian producer in any CK-21A form from the relevant period".[51] The Philippines takes that view on the basis of: the exchanges between the DSI and PM Thailand, including the DSI's requests for CK-21A forms; Thailand's approach to constructing the producer's aggregate production costs (Exhibit THA-74); and, Indonesia's statement that it did not provide Thailand with CK-21A forms (Exhibit PHL-295).[52] Furthermore, the Philippines submits that Thailand has itself never asserted (less proved) that it calculated the actual price / actual value using information "on the individual line items reflected in a CK-21A form", and "has never asserted that it possesses all of the relevant line-by-line CK-21A information".[53]

3.50. The Philippines asks that the Panel, in the remainder of its findings, provide consistent statements regarding the nature of the factual basis for Thailand's measures, without over- or understating the Indonesian cost structure information possessed by Thailand. In the Philippines' view, a finding that Thailand had access to "*certain pricing and cost information" reported by PM Indonesia to the Indonesian government in CK-21A forms* would be consistent with the Panel's current findings regarding the factual basis for the actual price / actual value, "albeit with reasoning premised on evidence rather than presumption".[54] To ensure consistency, the Philippines requests that the Panel use a defined term, such as "certain Indonesian pricing and cost information".[55]

3.51. Thailand asks the Panel to reject the Philippines' comments and requests for four reasons. First, because the Philippines' comments not only reargue points it made at length during the proceedings, but consist of general comments that apply to Section 7.1.4.2 in its entirety, lacking any reference to specific paragraphs of the Interim Report of which the Philippines seeks review.[56] The Philippines' detailed challenge against the Panel's references to jurisprudence relating to the presumption of good faith amounts to "enter[ing] into a debate with the Panel"[57] on the merits of the Panel's analysis. Second, because the Philippines' argument incorrectly asserts that Thailand refused to provide or allow disclosure of the requested information, whereas Thailand indicated that it would be willing to provide all the requested information to the Philippines and to the Panel, on the condition that the Panel adopt special procedures to protect the confidentiality of the information. Third, because the Philippines previously explained that it did not need access to the CK-21A information obtained by Thailand from Indonesian authorities to make its own *prima facie* case, and as noted by the Panel, the Philippines' own claims under the CVA are premised on the understanding that Thailand did rely on information reported by PM Indonesia to Indonesian authorities in CK-21A forms. Fourth, because acquiescing to the Philippines' request would raise serious due process concerns, as the Panel did not request Thailand to provide the information and could not "now

[48] Philippines' request to review the Interim Report, paras. 66-70.
[49] Philippines' request to review the Interim Report, para. 75.
[50] Philippines' request to review the Interim Report, para. 72.
[51] Philippines' request to review the Interim Report, para. 75.
[52] Philippines' request to review the Interim Report, paras. 50-65.
[53] Philippines' request to review the Interim Report, para. 65.
[54] Philippines' request to review the Interim Report, para. 73.
[55] Philippines' request to review the Interim Report, para. 74.
[56] According to Thailand, "[the most specific part of the Philippines' request is its assertion that "it believes that the Panel could find that Thailand had access to *certain pricing and cost information submitted by the Indonesian producer to the Indonesian government in CK-21A forms".* The Philippines' statement that it 'believes that the Panel could find' falls short of being a request that addresses precise aspects of the interim report." (Thailand's comments on the Philippines' request to review the Interim Report, para. 2.18.)
[57] Panel Report*, Japan – Alcoholic Beverages II*, para. 5.2.

reverse itself on this issue without re-opening the proceedings and requesting Thailand the opportunity to provide the information".[58]

3.52. The Panel considers that the Philippines' concerns regarding the Panel's findings justify a clarification to ensure that the Panel's finding and reasoning are not misread. The Philippines states that it accepts that the Thai authorities "had *certain* pricing and cost information reported by PM Indonesia to the Indonesian government in CK-21A forms", but stresses that it does not accept that "Thailand had access to *all* of the information reported by the Indonesian producer in any CK-21A form from the relevant period". However, the Panel's findings are not intended to imply otherwise. Specifically, the Panel has not made any finding that the Thai authorities received copies of all of the CK-21A *forms*; nor has the Panel made any finding that the Thai authorities had access "to *all* of the information reported by the Indonesian producer in any CK-21A form from the relevant period"; nor has the Panel made any finding that the Thai authorities calculated the actual price / actual value using information "on the *individual line items* reflected in a CK-21A form". Rather, throughout its findings, the Panel has referred more generally to the Thai authorities' reliance on "the pricing and cost information reported by PM Indonesia in the CK-21A forms". The Panel does not consider that it would bring more clarity, or be an improvement in drafting, to replace references to "the" with the word "certain", as the Philippines' suggests, so as to repeatedly refer to "*certain* pricing and cost information reported by PM Indonesia to the Indonesian government in CK-21A forms". The Panel considers it more straightforward to simply delete the definite article "the". The Panel has implemented this change throughout the Report, except in those instances where deleting the word "the" would alter the meaning of the sentence in question.

3.53. Additionally, given that the Panel's reasoning at paragraphs 7.100 to 7.105 for accepting the veracity of Thailand's representations relies on the fact that Thailand's representations "aligned with the assumptions underlying the Philippines' own claims", and the Panel's understanding that the Philippines' claims under the CVA rest on the premise that "the Thai authorities relied on the pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the 'actual price' in the 2002-2003 Charges and the 'actual value' in the 1,052 revised NoAs", the Panel considers that it is important to reflect, in the Philippines' own words, what it does and does not accept in this regard. The Panel has made the following revision to paragraph 7.100:

> 7.100. The Philippines' claims under the CVA are premised on the understanding that the Thai authorities relied on ~~**the**~~ pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the "actual price" in the 2002-2003 Charges and the "actual value" in the 1,052 revised NoAs. Thailand has repeatedly represented to the Panel that ~~**this understanding is correct**~~**its authorities did indeed rely on the pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the "actual price" in the 2002-2003 Charges and the 1,052 revised NoAs**. ~~**However, i**~~**I**n the course of the proceeding the Philippines raised doubts about whether Thailand had actually received **all** the information contained in CK-21A forms from Indonesia. **However, the Philippines accepts that Thailand "had *certain* pricing and cost information reported by PM Indonesia to the Indonesian government in CK-21A forms", and that "[a]lthough the precise nature of this information is unclear, the evidence shows that this information enabled Thailand to construct aggregate production costs, based on the producer's HJE retail selling price, the Indonesian taxes due on that price, and a standard amount for the costs and profits of others in the supply chain".[new FN]**
>
> > **[new FN] However, the Philippines "does not accept, without evidence, that Thailand had access to all of the information reported by the Indonesian producer in any CK-21A form from the relevant period". (Philippines' request to review the Interim Report, paras. 72 and 75.)**

3.54. Having made these revisions, the Panel does not consider it necessary to separately address the Philippines' extended argument relating the appropriateness of relying on a presumption of good faith. As the Panel understands it, the Philippines' argument is aimed at establishing the impermissibility of relying on a presumption of good faith to support a factual finding that leads to a conclusion on a disputed issue that is at odds with the evidence. The conclusion that the Philippines accepts, and which it considers to be consistent with the evidence, is that Thailand had access to

[58] Thailand's comments on the Philippines' request to review the Interim Report, para. 2.23.

"*certain pricing and cost information" reported by PM Indonesia to the Indonesian government in CK-21A forms.* As explained above, that is simply another way of expressing the conclusion which the Panel has reached. Accordingly, and with the further clarification noted above (in particular, the deletion of the word "the"), the Philippines' concerns relating to the Panel's reliance on the presumption of good faith do not relate to a live issue. Furthermore, the Panel recalls that its reliance on the presumption of good faith – along with the circumstances set forth at paragraphs 7.107 and 7.108 of the Report – together comprise only one of the two independent, alternative bases that the Panel has relied upon to arrive at the conclusion that the Thai authorities had access to, and relied upon, pricing and cost information reported by PM Indonesia in the CK-21A forms, and determined the "actual price" in the 2002-2003 Charges and the "actual value" in the 1,052 revised NoAs on that basis. The first basis, as explained above, is the parties' agreement on this point, i.e. that Thailand's representations aligned with the assumptions underlying the Philippines' own claims.

4 THE THAI AUTHORITIES' RELIANCE ON THE INFORMATION IN THE CK-21A FORMS

4.1 The nature of the cost information reported in the CK-21A forms

4.1.1 Paragraphs 7.129 and 7.340

4.1. The Philippines notes that in the first sentence of **paragraph 7.340**, the Panel describes certain factual aspects underpinning the Philippines' claims as "fundamental premises" of the Philippines' claims. To describe the same factual aspects, the Panel previously used the words "essential factual premises" in **paragraph 7.129**. In the interest of consistency, the Philippines invites the Panel to use the term "essential factual premises" in both paragraphs.

4.2. Thailand does not comment on this request.

4.3. The Panel agrees that the same expression should be used in the interest of consistency and has revised the wording of paragraphs 7.129 and 7.340 to consistently refer to the "fundamental factual premises" of the Philippines' claims. This terminology aligns to the terminology used in paragraphs 7.152, 7.213 and 7.237 of the Report, each of which refers to "fundamental" premises of a party's arguments. It also aligns more closely to paragraphs 7.794 and 7.800 of the Report in the first recourse to Article 21.5, where the Panel observed that "the Philippines' claims under Article X:1, X:3(a) and III:4 rest on a number of factual premises", which the Panel characterized as "fundamental factual issues". Furthermore, the Panel wishes to avoid any suggestion that three premises referred to in paragraph 7.340 are "essential premises" in the sense that all three premises would necessarily have to be established, i.e. cumulatively, in order to uphold any of the Philippines' legal claims.

4.1.2 Footnotes accompanying paragraphs 7.132-7.139

4.4. The Philippines notes that at **paragraphs 7.132-7.139**, in its analysis of the Indonesian regulatory requirements regarding the pricing and cost information reported in CK-21A forms, the Panel refers to the Philippines' and Indonesia's submissions; and at the end of this analysis, in paragraph 7.140, the Panel refers to exhibits containing relevant Indonesian regulations. To highlight the evidentiary basis for its analysis, the Philippines requests that the Panel move its references to the exhibits to the footnotes accompanying paragraphs 7.132-7.139. The Philippines has proposed citations.

4.5. Thailand does not comment on this request.

4.6. The Panel has added the footnote citations proposed by the Philippines.

4.1.3 Paragraph 7.139

4.7. Thailand notes that in **paragraph 7.139**, "the Panel explains that the costs and profits reported by PM Indonesia in the CK-21A form to Indonesian authorities could not represent the actual costs and profits of the producer and other parties in the supply chain". Thailand states that, "[a]s indicated by the Panel, this stems from the requirement that the figures reported in CK-21A form had to add up to the total HJE being requested, coupled with the requirement that the proposed

HJE had to exceed certain regulatory thresholds".[59] In the light of these particular regulatory aspects of Indonesian law, Thailand considers that it would be appropriate to add language reflecting the Philippines' own description of how producers in Indonesia derived the costs and profits that were reported to Indonesian authorities in CK-21A form. Thailand proposes to add a sentence which reads, "[t]he Philippines explains that, to fulfill these regulatory requirements, 'the producer had to '*reverse-engineer*' the figures that it reported in form CK-21A, *working backwards* from the level of the requested HJE, and fabricating a series of arithmetical 'plugs' designed to serve the Indonesian regulatory purpose of adding up to the requested HJE".

4.8. The Philippines sees no reason for the Panel to add Thailand's proposed sentence to paragraph 7.139. In this paragraph, the Panel presents a summary of several aspects of the Philippines' arguments regarding Indonesia's regulatory requirements governing the completion of the CK-21A forms. Thailand proposes to add a single sentence, quoting just one aspect of the Philippines' arguments. However, that aspect of the Philippines' arguments is already expressed in the existing formulation of paragraph 7.139. Furthermore, even if the Panel rejects Thailand's request to add an additional selective and redundant quote from the Philippines' arguments in paragraph 7.139, the Panel's report would in any event explain in paragraph 7.141 (if the Panel makes the corresponding addition suggested by both parties) that the numbers in the CK-21A forms were arithmetic "plugs", relying on an uncontested expert statement as supporting evidence.

4.9. The Panel notes that, contrary to what is suggested by Thailand's comment, paragraph 7.139 is by its own terms a statement of what the Philippines asserts, not an explanation on the part of the Panel. Furthermore, the Panel agrees with the Philippines that the sentence Thailand proposes to add involves a degree of unnecessary repetition with both the existing content of paragraph 7.139, and with the addition made to paragraph 7.141(a) as discussed below. Therefore, the Panel has not added the sentence proposed by Thailand.

4.1.4 Paragraph 7.141(a)

4.10. The Philippines notes that, in **paragraph 7.141(a)**, the Panel summarizes the content of Dr. Joko Wiyono's expert statement on the operation of the Indonesian regulatory requirements regarding CK-21A forms. In the interest of completeness, the Philippines suggests adding the following uncontested points made by Dr. Wiyono in his expert statement that are pertinent to the analysis: Dr. Wiyono noted that CK-21A forms "clearly lacked sufficient detail to allow verification against a company's GAAP compliant accounts"; that the DGCE had "no procedure or methodology" to verify the reported information; and that the information in form CK-21A did not account for "differences" in costs and profits as between goods sold domestically and for export.

4.11. Thailand also suggests some additions to paragraph 7.141(a). First, to fully and accurately reflect the content of the statement by Dr. Wiyono, Thailand suggests quoting his statement that "it was common knowledge at the DGCE that manufacturers would 'plug-in' numbers to show their justification for a proposed HJE above the 'minimum HJE' required by the DGCE". Second, Thailand also suggests adding a footnote indicating that the terms "estimates" and "approximations" used in connection with form CK-21A derive from the Philippines' witness statements rather than from Indonesia's laws or regulations.

4.12. The Philippines does not object to Thailand's request that the Panel include additional material from the Wiyono statement in paragraph 7.141(a) of its report and recalls that it has likewise requested the inclusion of additional material from this expert report in the same paragraph. The Philippines does, however, object to Thailand's request that the Panel add a footnote to paragraph 7.141 stating that Indonesian law does not expressly refer to "estimates" or "approximations", the two terms used by Mr. Wiyono and Ms. Siswani, respectively, to describe the operation of the CK-21A requirements in practice. The Philippines sees no need for this proposed footnote, because neither the Panel, nor the two experts, suggest that the terms in question are expressly reflected in Indonesian law. Further, an expert statement addressing municipal law is not confined to using terms that are expressly reflected in municipal law; indeed, if an expert statement on municipal law were so confined, the statement would serve no purpose beyond merely repeating the terms of municipal law. Instead, the purpose of such an expert statement is to explain the meaning and operation of municipal law, which the Wiyono and Siswani statements do in detail.

[59] Thailand's request to review the Interim Report, para. 2.3.

4.13. The Panel has revised paragraph 7.141(a) to quote the additional uncontested points made by Dr Wiyono, as identified by the parties in their comments on paragraph 7.141. The Panel has not added the footnote suggested by Thailand, because such clarification is unnecessary for the reasons stated by the Philippines. The revised text of paragraph 7.141(a) reads:

> a. The Wiyono statement characterizes these figures as "the manufacturer's estimated values of the components" which constituted the proposed retail selling price. The statement explains that there was no requirement that the DGCE consider "the estimated costs, profit and taxes" listed in the CK-21A form, and that it was well aware that the form did "not consist of actual costs". **The statement indicates that "it was common knowledge at the DGCE that manufacturers would 'plug-in' numbers to show their justification for a proposed HJE above the 'minimum HJE' required by the DGCE".[new FN]** The statement contrasts "actual costs" with "the approximate values" in the form. In the context of explaining why the figures cannot be relied upon to compute a revised customs value, the statement again states that the data in the form "is based on estimates". **The statement noted that CK-21A forms "clearly lacked sufficient details to allow verification against a company's GAAP compliant accounts"[new FN] and the DGCE had "no procedure or methodology" to verify the reported information.[new FN] Further, the statement also explains that the information in form CK-21A did not account for "differences" in costs and profits as between goods sold domestically and for export.[new FN]**
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> **[new FN] Witness statement of Dr. Joko Wiyono, p. 4, para. 5.5(a)(iii).**
> **[new FN] Witness statement of Dr. Joko Wiyono, p. 4.**
> **[new FN] Witness statement of Dr. Joko Wiyono, p. 3.**
> **[new FN] Witness statement of Dr. Joko Wiyono, p. 4.**

4.1.5 Paragraph 7.142

4.14. The Philippines notes that the information set out in **paragraph 7.142** is also based on a witness statement from Dr. Joko Wiyono. Accordingly, the Philippines suggests including a reference to Dr. Wiyono's statement in the footnote to this paragraph.

4.15. Thailand does not comment on this request.

4.16. The Panel has added the reference to the footnote accompanying paragraph 7.142 as proposed by the Philippines.

4.1.6 Paragraphs 7.147 and 7.148

4.17. The Philippines requests two changes to **paragraph 7.148**. First, the Philippines recalls that in this paragraph, the Panel addresses Thailand's arguments that the Philippines is, in effect, asserting that Indonesia's tax system violates Article X:3(a) of the GATT 1994. The Philippines states that it has been at pains to emphasize that it makes no such assertion and would welcome a statement by the Panel that the Panel does not understand the Philippines to assert, implicitly or otherwise, that Indonesia violates WTO law. Second, the Philippines queries the need for the Panel's *obiter dicta* in the second sentence of this paragraph to the effect that Indonesia's excise tax system would violate Article X:3(a), if it imposed regulatory requirements that were impossible for PM Indonesia to meet. Although the Philippines agrees with the legal logic of the Panel's *obiter dicta*, there is no apparent need for the Panel to make a statement about hypothetical circumstances in which Indonesia – which is not a party to this dispute – might violate WTO law. In the interests of comity, and to avoid potential misunderstandings, the Philippines requests that the Panel delete this sentence.

4.18. Thailand considers that this deletion should not be made. Paragraph 7.148 reflects correctly the nature and consequences of the Philippines' legal strategy in this dispute. The Philippines structured its argumentation against Thailand's measures in such a way that required it to state that Indonesia's tax system imposes requirements on importers with which it is impossible to comply. As found by the panel in the first compliance proceedings, a legal system with these characteristics could be inconsistent with the obligation under Article X:3(a) of the GATT 1994 to administer trade

measures in a reasonable manner. Thailand, therefore, considers that paragraph 7.148 must be left as it is. Thailand states that "[i]t is clear, in any event, that Indonesia's measures are outside the Panel's terms of references and that the Panel is not competent to pronounce, one way or the other, on their WTO consistency".[60] Thailand submits that, for similar reasons, the Panel should also reject the Philippines' request to add a sentence saying that the Panel "does not perceive the Philippines' description of Indonesia's tax system to be an assertion that this system violates Article X:3(a) of the GATT 1994". In Thailand's view, the Panel's report "must include an objective description of the Philippines' assertions and their consequences", and Thailand states that had the Philippines been concerned about this possible perception of its arguments, "it could have chosen not to structure its arguments in the manner" that it did.[61]

4.19. The Panel considers it appropriate to reflect the Philippines' strong rejection of Thailand's view that the Philippines has asserted, implicitly or otherwise, that Indonesia violates WTO law. The Panel does not consider that the Philippines' view should be reflected in paragraph 7.148 however, as this paragraph contains the Panel's own assessment and reasoning. Instead, the Panel has reflected the Philippines' position on this issue by adding a new sentence at the end of the preceding paragraph, given that **paragraph 7.147** sets forth the arguments of Thailand (and, as revised, the response of the Philippines). The Panel declines the Philippines' request to delete the second sentence of **paragraph 7.148** on the basis that there is "no apparent need for the Panel to make a statement about hypothetical circumstances in which Indonesia … might violate WTO law", because the Panel considers doing so would undermine the clarity of the reasoning in this paragraph. Furthermore, the Panel sees no potential for this paragraph to be misread as suggesting that Indonesia's measures might have violated WTO law, given the Panel's statement that its reasoning in this paragraph relies "on the presumption that Indonesia would not impose impossible legal requirements in violation of Article X:3(a)". Accordingly, the Panel has made no change to paragraph 7.148. The revised text of paragraphs 7.147 reads:

> 7.147. First, Thailand submits that the Philippines' assertion that the information reported by manufacturers in form CK-21A was necessarily inaccurate as a result of the operation of Indonesia's tax system should not be "considered or accepted" by the Panel, because that assertion implies that Indonesia's tax system was in violation of Article X:3(a) of the GATT 1994, and the Panel "cannot make findings that would call into question the WTO-consistency of Indonesia's laws or how they are administered". Thailand suggests that the Panel is not in a position to make findings on the regulatory requirements identified by the Philippines, "unless and until they have been properly challenged and found to be inconsistent in WTO dispute settlement proceedings". In response to a question from the Panel, Thailand reiterates the idea that because "the Philippines has not challenged Indonesia's method of determining the tax base of cigarettes in the WTO", it follows that "Indonesia's method, and reporting requirements, enjoy a presumption of WTO consistency". **The Philippines responds by stating that with "this absurd argument, Thailand seems to be engaged in an effort to distract attention from the shortcomings in its own measures", and clarifying that "[f]or the record, the Philippines makes no such allegations about Indonesian law".[new FN]**
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> **[new FN] Philippines' second written submission, para. 107.**

4.2 The circumstances surrounding the Thai authorities' reliance on the CK-21A forms

4.2.1 Paragraphs 7.174-7.175

4.20. The Philippines proposes three sets of changes to section 7.2.3 of the Report. These proposed changes partially overlap, and for that reason are addressed together below.

4.21. First, the Philippines observes that in section 7.2.3, the Panel treats the question whether Thailand could presume that the relevant CK-21A information was accurate and reliable as a threshold issue, to be addressed before it analyses specific CVA provisions, and "tackles this threshold issue without any structured discussion of the applicable *CVA* provisions".[62] The Philippines

[60] Thailand's comments on the Philippines' request to review the Interim Report, para. 2.27.
[61] Thailand's comments on the Philippines' request to review the Interim Report, para. 2.28.
[62] Philippines' request to review the Interim Report, para. 84.

observes that, in its analysis, the Panel does occasionally mention elements of the legal standard under the CVA; in particular, the Panel makes reference to an authority's examination of the circumstances of sale under Article 1.2(a) of the CVA. The Philippines states that the Panel's reference to elements of the legal standard is to be expected, as the "reliability" of given information "cannot be assessed in the abstract but must be considered in light of the applicable legal requirements".[63] It states, for example, that "whereas CK-21A information is acceptable in light of Indonesia's regulatory requirements, it is not acceptable under the *CVA*". The Panel notes that later in its reasoning with respect to Article 6, the Panel indicates that an authority is obliged, under that provision, to "verify" cost information, which the Philippines understands would suggest that "the Panel considers that the presumption of reliability does not apply under Article 6".[64] Given the relationship between the reliability of information, and the relevant legal standards, the Philippines "requests that the Panel ground its reasoning on this point more firmly, and in more detail, in the relevant elements of the legal standards in the *CVA*".[65]

4.22. Concerning the Philippines' first comment, Thailand observes that the Philippines, once again, is making a general comment that does not address any specific paragraphs of the Interim Report. The Philippines requests that "the Panel ground its reasoning on this point more firmly, and in more detail, in the relevant elements of the legal standards in the CVA".[66] The Philippines fails to identify any "precise aspects of the interim report" as required by Article 15.2 of the DSU. It appears that the Philippines' comment addresses generally Section 7.2.3 of the Interim Report. As noted above, parties cannot use the interim review stage to "question[] large sections of the interim report".[67] Hence, the Panel must dismiss the Philippines' general comment as it does not fall within the scope of the interim review.

4.23. The Panel is not persuaded by the Philippines' request that the Panel should, in this section of the Report, "ground its reasoning on this point more firmly, and in more detail, in the relevant elements of the legal standards in the *CVA*". As a general principle, panels have a degree of discretion to structure the order of their analysis as they see fit, subject to the requirements of Article 11 of the DSU.[68] The Report already explains the Panel's reasons for structuring its Report as it has: (i) at paragraph 7.127, the Panel notes that the Philippines considers that the Thai authorities' reliance on the CK-21A forms violate fundamental CVA principles over an "overarching nature" regarding the required "nature and quality of cost and profit information used for customs valuation purposes [that] apply equally to determinations made under Articles 1.1, 1.2(a), 6 and 7", and the Panel observes that "its distinct claims under these provisions are all founded on essentially the same objections to the Thai authorities' reliance on the information in the CK-21 forms"; (ii) the Panel then explains, at paragraph 7.129, that "[t]he Panel will address the [fundamental] factual premises of the Philippines' legal claims below, before turning to those specific legal claims", and that "[t]he Panel will refer back to these findings later in the context of its analysis of the Philippines' specific legal claims". The Panel further notes that there is nothing unique in a Panel making findings on fundamental disputed factual issues in one section of its Report, and then proceeding to link those findings to the applicable legal standards under the relevant WTO provisions at issue in one or more subsequent subsections of its Report. That is, for instance, the manner in which the Panel presented its findings on the VAT notification requirement in the Report in the first recourse to Article 21.5: after first addressing a series of "fundamental factual issues" regarding the operation of the VAT notification requirement in subsection 7.4.2 of its Report, then Panel then proceeded to relate those factual findings to the applicable legal standards in Articles X:1, X:3(a) and III:4 of the GATT 1994. Finally, while the Panel accepts that the assessment of certain types of questions of a partially factual nature "cannot be assessed in the abstract but must be considered in light of the applicable legal requirements", the question addressed in this section is not one of them. The Panel recalls that section 7.2.3 of its Report address the question of whether "the Thai authorities knew, or should have known, that the information in the CK-21A forms was inaccurate".

4.24. Second, the Philippines notes that in the last sentence of **paragraph 7.154**, the Panel states that it "is inclined to agree with Thailand" that the authorities of an importing country can treat

[63] Philippines' request to review the Interim Report, para. 85.
[64] Philippines' request to review the Interim Report, para. 103.
[65] Philippines' request to review the Interim Report, para. 86.
[66] The Philippines' comments on the Panel's Interim Report, para. 86.
[67] Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 7.21 (referring to Panel Report, *Australia – Salmon*, para. 7.3).
[68] Appellate Body Report, *Colombia – Textiles*, para. 5.20.

information received from a foreign government as "presumptively reliable". The Philippines notes that the Panel seems inclined to accept that this "presumption" applies when a customs authority is examining "the circumstances of sale" under Article 1.2(a) of the CVA. The Philippines queries whether it is helpful for the Panel to make "apparently sweeping *obiter* statements"[69] in the abstract that a customs authority can, in general, presume that information received from a foreign government is "presumptively reliable". If Panel decides to retain its broad *obiter* pronouncements, the Philippines requests that the Panel address this aspect of its findings through a careful textual assessment of the relevant provisions of the CVA, taking account, for example, of the Panel's own prior findings that the duty to "examin[e]", under Article 1.2(a) of the CVA, requires an "active, critical review" of all information before an authority. The Philippines is also concerned that the Panel's "broad pronouncements"[70] may not adequately address the many factual scenarios that could arise in the future, bearing in mind the many different kinds of information that could be provided.

4.25. Thailand disagrees with the Philippines that the second sentence of paragraph 7.154 is unnecessary. It is in the interest not only of Thailand, but of WTO Members at large, to obtain a full explanation by the Panel as to the correct interpretation of obligations under the covered agreements. Additionally, Thailand does not share the Philippines' characterization of the Panel's remarks as *obiter*. As the first words of paragraph 7.154 make clear, the Panel's statement responds directly to the argument put forward by Thailand that a government is entitled to rely on information provided by fellow governments by saying that, while generally the Panel would agree with the proposition, it disagrees with Thailand on certain points. Thus, the Panel's statement is directly on point. Finally, the Philippines omits to mention that, in the paragraphs and pages that follow paragraph 7.154, the Panel qualifies its statement about the authorities' right to assume the accuracy of information provided by foreign authorities. The Panel elaborates in detail why this does not entitle an authority to deem information to be accurate without taking into account explanations offered by the importer. Hence, far from being "sweeping" statements, the Panel's remarks are tempered by explanations on the limits of authorities' right to assume the accuracy of this type of information, again directly in response to Thailand's arguments.

4.26. As to the Philippines' second comment, the Panel does not consider the statement made at paragraph 7.154 to be a statement that is either gratuitous or sweeping. As Thailand observes in its comments, the Panel's statement responds directly to the argument put forward by Thailand. And as Thailand observes in the paragraphs and pages that follow paragraph 7.154, the Panel qualifies its statement about the authorities' right to assume the accuracy of information provided by foreign authorities, and elaborates in detail why this does not entitle an authority to deem information to be accurate without taking into account explanations offered by the importer. Accordingly, the Panel is not persuaded that any change is warranted.

4.27. Third, the Philippines states that even if the Panel considered that a "presumption of reliability" were appropriate under Article 1.2(a) and other *CVA* provisions, the Panel appears to find, in **paragraph 7.155**, that a customs authority is entitled to presume that information obtained from a foreign government is reliable, *unless the importer rebuts that presumption*. The Philippines considers that the Panel may draw too narrowly the grounds on which a presumption may be rebutted. For example, if information that an authority receives from a foreign government is doubtful on its face, then the authority must critically review the information under Article 1.2(a), irrespective of the views of the importer. Additionally, an importer may not be given access to information obtained by the customs authority from a foreign government, and might be unable to alert an authority to factors creating doubts about the reliability of information. If the information in question is not shared with the importer in a transparent communication of grounds, the importer will be unable to identify a shortcoming in the information that the authority should see for itself. Therefore, should the Panel decide to retain its "broad pronouncements" about the presumptive reliability of information received from a foreign government, the Philippines requests "that the Panel make clear that this presumption may be rebutted in a variety of ways, including, but not limited to, the provision of information by an importer".[71]

4.28. Thailand does not specifically comment on the third comment above.

[69] Philippines' request to review the Interim Report, para. 91.
[70] Philippines' request to review the Interim Report, para. 93.
[71] Philippines' request to review the Interim Report, para. 102.

4.29. The Panel observes that it did not state or imply that, in all cases in which the authorities of the importing country receive information from a foreign government, rebuttal by the importer is the exclusive and narrow ground upon which presumptive reliability may be rebutted. Rather, paragraph 7.155 merely states that "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". This statement, and those which follow in this paragraph and subsection, reflect the particular focus of the Panel's analysis in this case, and the particular factual configuration of this case (i.e. a case in which 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). The Panel has not purported to articulate, in the abstract, any general legal framework governing the use, for customs valuation purposes, of information received from a foreign government.

4.2.2 Paragraphs 7.161 and 7.177

4.30. The Philippines notes that, in **paragraphs 7.161 and 7.177**, the Panel states that "the DSI issued a Memorandum of Allegations ('MoA') against PMTL and certain of PMTL's former and current employees". The Philippines notes that the DSI, in fact, issued two MoAs with respect to the 2002-2003 Charges. The Panel's statement refers to the first MoA, which was issued *only* to PMTL. The DSI issued a second MoA, on 7 October 2016, to a former employee of PMTL. In the interests of accuracy, the Philippines requests that the Panel adapt its reasoning accordingly.

4.31. Thailand does not comment on this request.

4.32. The Panel has revised paragraphs 7.161 and 7.177 to reflect the fact that the DSI issued the MoA against PMTL on 22 September 2016 and then separately issued an MoA against a former employee separately on 7 October 2016. The revised text common to paragraphs 7.161 and 7.177 reads in relevant part as follows:

> On 22 September 2016, i.e. a decade after launching its initial investigation and 13-16 years after the entries at issue cleared Thai Customs, the DSI issued a Memorandum of Allegations ("MoA") against PMTL~~ and certain of PMTL's former and current employees~~. **One former employee of PMTL was informed of the allegations by way of a second Memorandum of Allegations, dated 7 October 2016.** …

4.2.3 Paragraph 7.163

4.33. The Philippines notes that the Panel's language in **paragraph 7.163** may be read to incorrectly imply that PMTL was in possession of the CK-21A information that the Indonesian government allegedly provided to the Thai authorities. PMTL was not granted access to the Indonesian pricing and cost information in question by the DSI, the Public Prosecutor, or the Customs Department. The Philippines requests that the Panel make this point clear. Further, the Panel notes, in the last sentence of this paragraph, that an importer may change its mind with respect to submissions made to a customs authority. Although the Philippines agrees, this quote may be read to incorrectly suggest that the importer changed its mind in some respect regarding the Indonesian pricing and cost information apparently obtained by Thailand. The Philippines requests that the Panel delete this sentence.

4.34. Thailand does not comment on this request, beyond making the point that it "agrees only with the Philippines' typographical corrections" in paragraphs 7.49 and 7.163.

4.35. The Panel has revised paragraph 7.163 to avoid wording that could be read as implying that PMTL (as opposed to PM Indonesia alone) was in possession of the CK-21A information that the Indonesian government allegedly provided to the Thai authorities. In the same vein, the Panel deleted the last sentence of this paragraph to avoid implying that PMTL (or PM Indonesia) "changed its mind" in some respect regarding the CK-21A forms and the information contained therein. The Panel has revised the final sentence to draw out the point more clearly. The revised text of paragraph 7.163 reads:

> 7.163. First, the fact that PM Indonesia itself provided the CK-21A information to the Indonesian tax authorities does not, in the light of the explanations provided by PMTL and its experts to the Thai authorities, sustain an assumption that the figures reported therein are correct. To the contrary, the fact that the figures were provided by PM Indonesia itself means that that PM Indonesia and PMTL, the affiliated importer, would have been uniquely well positioned to explain to the Thai authorities whether and if so why the information reported was inaccurate. Insofar as Thailand's arguments are to be taken as suggesting that PM Indonesia or PMTL were somehow estopped from subsequently disputing the accuracy of the information because that information originated from ~~**them**~~ **PM Indonesia**, there is nothing in the CVA or the findings of the original or first compliance panel to sustain the suggestion that an importer is somehow barred from pointing out errors or inaccuracies in the information that it previously submitted **or, as in the case with respect to the CK-21A information, that an affiliated company/producer previously submitted to another government for purposes unrelated to customs valuation**. ~~**To the contrary, in the first recourse to Article 21.5, the Panel noted that, subject to the requirement to act in good faith, "a declaration by an importer that it does not intend to claim or substantiate a particular deduction does not necessarily preclude an importer from changing its mind and subsequently requesting the relevant deduction".**~~

4.2.4 Paragraph 7.170

4.36. The Philippines notes that in **paragraph 7.170**, the Panel responds to Thailand's arguments that the Wiyono and Siswani expert reports "do not explain *how*, in these circumstances, could Thai authorities have overcome the problem of the alleged inaccuracy [in the CK-21A information]" and "do not provide the accurate information on costs and profits that would be necessary for Thailand to properly apply the 'cost plus profit' benchmark". In paragraph 7.170, the Panel explains that Thailand's argument "appears to assume" wrongly that its authorities were entitled to rely on the computed value method. The Philippines agrees fully with the Panel's reasoning. For the sake of completeness, the Philippines requests that the Panel add three additional sentences clarifying that, even if a customs administration has properly determined that it can resort to a computed value method, that method may not be suitable in the circumstances, for example, because reliable cost and profit information is not available. In that respect, Article 6.2 of the CVA clarifies that a foreign producer cannot be compelled to provide its accounting records.

4.37. Thailand does not comment on this request.

4.38. The Panel considers that the additional text proposed by the Philippines is relevant to the point being made in paragraph 7.170 and has revised this paragraph accordingly. The revised text of paragraph 7.170 reads:

> 7.170. In the Panel's view, the principal difficulty with this argument is that it appears to assume that the Thai authorities were entitled to rely on the computed value method of customs valuation for purposes of examining the circumstances of sale, and/or determining a revised customs value. It is thus worth recalling that the primary basis for determining the customs value is the transaction value; that the fact that the buyer and seller are related is not in itself grounds for regarding the transaction value as unacceptable; that it is only where the authorities determine, on the basis of a proper examination of the circumstances of sale, that the relationship influenced the price that they may proceed to determine the customs value on an alternative method; and that those methods must then be applied sequentially, such that the determination of a revised customs value on the basis of the computed value method is only permissible where the customs value cannot be determined on the basis of any of the preceding methods. **Further, even if a customs authority determines that the customs value cannot be determined under Articles 2-5, recourse to Article 6 may raise difficulties. For example, Article 6.2 of the CVA clarifies that a foreign producer cannot be compelled to provide its accounting records. If Article 6 is not available, an authority can resort to the fall-back method under Article 7.** Thus, 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.

5 THE 2002-2003 CRIMINAL CHARGES

5.1 General

5.1.1 Paragraph 7.175

5.1. The Philippines notes that **paragraph 7.175** provides that "[t]he customs values of the 780 entries were all assessed by *other Thai government* agencies". The Philippines suggests clarifying that the Thai agency which assessed the 780 entries in the first place is the DSI, and that the agencies being referred to here are those "other than the DSI". Additionally, the Philippines suggests two changes to the table in paragraph 7.175 to improve comprehension of the table for its purposes in the Panel's report. First, the Philippines suggests adding a sentence to the first column in rows 3-4 to explain which of the entries mentioned in these rows are subject to the 2002-2003 Charges. Second, with regard to the second bullet in the second column of row 2, the Philippines suggests explaining, in a footnote, that the Panel found that the BoA Ruling of 16 November 2012 was inconsistent with several provisions of the CVA.

5.2. Thailand does not comment on this request.

5.3. The Panel has revised the first sentence of paragraph 7.175 as per the Philippines' suggested clarification, so as to read, "The customs values of the 780 entries were all assessed by Thai government agencies other than the DSI, based either on those agencies' acceptance of PMTL's declared transaction values, or based on the application of the deductive method pursuant to Article 5 of the CVA." The Panel has also added language to the table, and one of accompanying footnotes, reflecting the second and third points above. In the Panel's view, these additions aid in facilitating the reader's comprehension of the information in the table.

5.1.2 Paragraph 7.187

5.4. The Philippines notes that in **paragraph 7.187**, the Panel states that "[t]here is no information before the Panel on whether PMTL sought any further explanation following the issuance of the Charges in January 2017". As the Panel indicates in paragraph 7.191, on 24 July 2017, the Public Prosecutor successfully obtained a court order preventing information regarding the 2002-2003 Charges from being shared with the Philippines and, hence, the Panel. The Philippines states that due to this far-reaching non-disclosure order, the Philippines was unable to provide the Panel with information on any additional efforts made by PM Thailand to clarify the basis for the determination of the "actual price" in the 2002-2003 Charges. Nor can the Philippines indicate whether, if such efforts were made, they were successful. Given that Thailand has prevented the Philippines from placing this information before the Panel, the Philippines requests that the Panel delete this sentence; alternatively, should the Panel wish to retain the sentence, the Philippines requests that the Panel make clear that the Philippines was unable to provide the information in question because of the court's non-disclosure order.

5.5. Thailand does not comment on this request.

5.6. The Panel has retained the sentence in question because even accepting what the Philippines states about the effect of the non-disclosure order, it remains the case that "there is no information before the Panel" on this point. However, the Panel has added an accompanying footnote stating that the Philippines may have been unable to provide the information in question because of the court's non-disclosure order. Paragraph 7.187 with its accompanying footnote reads:

> 7.187. On 14 November 2016, PMTL addressed the same questions to the Public Prosecutor, with respect to the MoA. PMTL received no response. There is no information before the Panel on whether PMTL sought any further explanation following the issuance of the Charges in January 2017.**[new FN]**
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> **[new FN] In its comments on the Interim Report, the Philippines states that "As the Panel indicates in paragraph 7.191, on 24 July 2017, the Public Prosecutor successfully obtained a court order preventing information regarding the 02-03 Charges from being shared with the Philippines and, hence, the Panel. Due to this far-reaching non-disclosure**

order, the Philippines was unable to provide the Panel with information on any additional efforts made by PM Thailand to clarify the basis for the determination of the "actual price" in the 02-03 Charges. Nor can the Philippines indicate whether, if such efforts were made, they were successful." (Philippines' request to review the Interim Report, para. 117.)

5.1.3 Paragraph 7.188

5.7. The Philippines suggests adding a transitional sentence to the beginning of **paragraph 7.188**, stating that "[a]lthough the 2002-2003 Charges do not provide any indication of the factual basis for the 'actual price', certain information can be gleaned from the Customs Department's explanation regarding the basis used to determine the "actual value" set out in the 1,052 NoAs."

5.8. Thailand does not comment on this request.

5.9. The Panel considers that this transitional sentence is useful and has therefore added it.

5.2 Existence of a challengeable measure

5.10. The Philippines considers that the Panel's findings in this proceeding might be read to imply that the Panel sees no meaningful differences between Thailand's "insufficient information" arguments in this proceeding, and its "ripeness" arguments in the first compliance proceeding, which Thailand said did not include "insufficient information" arguments. Based on the content of Thailand's submissions, the Philippines understands that there is a difference between Thailand's arguments on this issue in the first and second compliance proceedings. Based on this understanding, the Philippines invites the Panel to expand its reasoning in addressing the "insufficient information" arguments in sub-section 7.3.2.3.5; to restructure the analysis so that this expanded sub-section precedes the Panel's earlier findings in sub-sections 7.3.2.1-7.3.2.4; to explain why the Panel decides to use the same analytical framework to address the "insufficient information" arguments that it used to address "ripeness" arguments in the first compliance proceeding; to make various amendments to the manner in which the Panel summarizes and describes Thailand's arguments, including at paragraphs 7.203-7.205, 7.215, 7.217, and 7.218; and to quote from Thailand's submissions in both the first and second compliance proceedings in a manner that would more clearly reveal the differences in its arguments. The Philippines also invites Thailand to confirm, in its comments on the Philippines' request for review of the Interim Report, that the Panel has properly understood, and reflected, Thailand's arguments in paragraph 7.217.

5.11. Thailand submits that the Philippines' comments and suggestions should be rejected, for the following five reasons. First, Thailand states that the Philippines' set of comments on this section of the Panel's reasoning "reflects (the Philippines' own view of) Thailand's appellant's submission to the Appellate Body" in the context of the first recourse to Article 21.5, and suggests that this "stretch[es] the bounds of propriety by relying on confidential submissions to the Appellate Body as the basis for arguments to this Panel". Second, because the Philippines is once again making "general comments" that apply to "large sections of the interim report". Third, because the Philippines' request that "the Panel explain why" its framework is more appropriate than the Philippines' suggested framework is an invitation for the Panel to "defend [its] findings and conclusions during the interim review stage", and the Panel need not engage in the debate suggested by the Philippines nor defend its conclusions regarding the analytical approach it followed. Fourth, because the Philippines is seeking major structural changes to the interim report with a view to aligning the Panel's reasoning with the Philippines' arguments in an ongoing appeal, which the Panel is not obliged to assist the Philippines with. Finally, Thailand adds that the Panel cannot consider these arguments without re-opening its proceedings and allowing both parties an opportunity to defend their interests fully.

5.12. Before turning to the substance of the Philippines' comments, the Panel addresses Thailand's statement that this set of comments "reflects (the Philippines' own view of) Thailand's appellant's submission to the Appellate Body" in the context of the first recourse to Article 21.5, which according to Thailand "stretch[es] the bounds of propriety by relying on confidential submissions to the Appellate Body as the basis for arguments to this Panel".[72] The Panel considers that insofar as a

[72] Thailand's comments on the Philippines' request for review of the Interim Report, footnote 71 and para. 2.49.

party suggests changes to precise aspects of the Report, and insofar as a party's suggested changes are based on objectively justifiable reasons, the party's motivation in suggesting those particular changes is more or less irrelevant. In the context of this second recourse to Article 21.5, neither party has disclosed the contents of the parties' submissions in the ongoing appeal in the first recourse to Article 21.5.

5.13. Turning to the substance of the Philippines' comments, the Panel has carefully reviewed its reasoning and findings in this section of its Report in the light of the Philippines' comments, and concludes that no changes are necessary. The basic thrust of the Philippines' comments on this section seems to be that the Panel has not correctly understood Thailand's core argument, and that as a result, the Panel has not properly addressed that argument. In the Panel's view, as elaborated in detail in this section, a careful examination of Thailand's argument that the 2002–2003 Charges do not contain "sufficient factual" information to allow the Philippines to make a *prima facie* case of inconsistency raises in essence the same issues raised by the "ripeness" argument advanced by Thailand in relation to the 2003–2006 Charges, and already addressed – in considerable detail – by the Panel in the first recourse to Article 21.5. As the Panel observes at paragraph 7.212 of its Report, it "does not consider that Thailand has developed a substantively novel legal argument different in substance from its 'ripeness' argument made in the first recourse to Article 21.5". The Panel has carefully considered the Philippines' view, i.e. there is a meaningful difference between Thailand's "insufficient information" arguments in these proceedings and its "ripeness" arguments in the first compliance proceedings, but for the reasons elaborated in detail in this section of the Report, the Panel is not convinced that it has misunderstood Thailand's argument. As a consequence, the Panel sees no need to expand, restructure, or revise its reasoning in the ways proposed by the Philippines.

5.3 Applicability of the CVA to the Charges

5.3.1 Paragraphs 7.245, 7.247, and 7.287

5.14. Thailand requests the addition of the word "intentionally" in **paragraphs 7.245, 7.247 and 7.287**, to describe Thailand's arguments concerning the customs fraud allegation contained in the 2002-2003 Charges. This would reflect that customs fraud accusations, including in the case of the 2002-2003 Charges, concern situations in which the importer "intentionally" declares a price that is not the price actually paid. Thailand submits that this would also be consistent with its proposed change to paragraph 7.254 (discussed further below).

5.15. The Philippines objects to Thailand's requested addition of the word "intentionally" in the cited paragraphs. It notes that in paragraph 7.245, the Panel addresses the CVA characterization of the term "actual price", as used in Thailand's measure. Specifically, the Panel considers whether the "actual price" is the "price actually paid or payable" under Article 1.1 of the CVA, as Thailand asserts. Although "intention" to "defraud" is an element of the offense under Section 27 of Thailand's Customs Act, the "intention" element does not relate to the characterization of the "price actually paid or payable" under the CVA. An importer's intention is not relevant, under the CVA, to the characterization of an authority's determination, here, of the "actual price". Nothing in the treaty text of the CVA incorporates the "intention" of an importer into the assessment of the "price paid or payable". There is, therefore, no basis under the legal standard in the CVA to add the word "intentionally" to the Panel's assessment. The same is true in paragraphs 7.247 and 7.287(b) of the Interim Report. In these paragraphs, the Panel summarizes Thailand's arguments that the CVA does not apply to the Public Prosecutor's determination. Again, the applicability of the CVA does not turn on an importer's alleged intentions, but on the nature and content of an authority's determination. Finally, the Philippines notes that there is no evidence before the Panel to suggest that the importer had any intention to engage in customs fraud.

5.16. The Panel considers that inserting the word "intentionally" in these three paragraphs has the potential to invite confusion. **Paragraph 7.245** lists Thailand's four main lines of argument as to why the CVA is not applicable to the Charges. The last of the four listed arguments in this paragraph already states Thailand's argument that "the Appellate Body's findings in *US -1916 Act* do not support the conclusion that the CVA applies to measures that have, as their core element, the 'intention to defraud' the government". If the word "intentionally" were also added to the second of the four listed arguments in paragraph 7.245, as Thailand proposes, it would summarize Thailand's second main line of argument as being that "the 2002-2003 Charges do not satisfy the first element of the definition of 'customs valuation' in Article 15.1(a) of the CVA, because the reference to the 'actual price' in the 2002-2003 Charges is to be understood as merely establishing an approximate

value of the goods made in the context of setting out the accusation that PMTL *intentionally* declared a price that *is not* the price actually paid, and merely identifying a possible benchmark for a fine". The addition of the word "intentionally" in the context of this second line of argument does not aid in understanding Thailand's argument. The same considerations lead the Panel to decline to add the word "intentionally" in **paragraph 7.287(b)**, which refers to the same argument. Finally, if the word "intentionally" were inserted in **paragraph 7.247**, the relevant sentence would read, "Thailand argues that in this case, the 2002-2003 Charges accuse PMTL of *intentionally* declaring an import value that is not the price actually paid by the buyer to the seller, and therefore constitute the kind of 'customs fraud' that the Panel in the first recourse to Article 21.5 said, at paragraph 7.649 of its Report, that it was inclined to agree fell outside of the scope of application of the CVA." Such a formulation, with the second sub-clause being introduced with the word "therefore", could be misunderstood to suggest that, at paragraph 7.649 of its Report, the Panel considered the importer's "intention" relevant to the applicability of the CVA. For these reasons, the Panel declines Thailand's request.

5.17. The Philippines notes that in **paragraph 7.247,** the Panel summarizes Thailand's arguments that "the 2002-2003 Charges do not determine 'the value of goods' imported by PMTL in the sense of the first element of Article 15.1(a)". For the sake of completeness, the Philippines invites the Panel to add a sentence to this paragraph, summarizing the repeated shifts in Thailand's position on how the reference to the "actual price" in the 02-03 Charges is to be understood. The Philippines recalls that these shifts in position are analysed, at great length, in paragraphs 7.286-7.287.

5.18. Thailand does not comment on that request.

5.19. The Panel notes that the brief summaries of the parties' arguments that it has included under the subheadings "Main arguments of the parties" are not meant to be exhaustive. Having said this, as currently drafted, the summary of Thailand's argument presented in paragraph 7.247 does not completely align to the Panel's analysis at paragraphs 7.286-7.287. Accordingly, the Panel has added a brief indication that the summary in paragraph 7.247 reflects Thailand's argument as it was presented in its first written submission, which then evolved in the course of the proceeding. The revised text of paragraph 7.247 reads:

> 7.247. Thailand argues that the 2002-2003 Charges do not determine "the value of goods" imported by PMTL in the sense of the first element of Article 15.1(a). Thailand recalls that at paragraph 7.649 of its Report in the first recourse to Article 21.5, the Panel stated, in the context of determining whether the 2003-2006 Charges involved a determination of "the value of goods" imported by PMTL, that the Panel would have been inclined to agree with Thailand and answer that question in the negative if Thailand had been able to substantiate "its interrelated assertions that the Charges allege customs fraud based on a determination that the price that PMTL *declared* to have paid to PMPMI was not the *actual* price that was paid to PMPMI, and that the references to King Power's prices in the Annex merely serve as a possible benchmark for the purposes of a fine and not as a basis for determining the actual customs value of PMTL's imported goods". **In its first written submission,** Thailand argues that in this case, the 2002-2003 Charges accuse PMTL of declaring an import value that is not the price actually paid by the buyer to the seller, and therefore constitute the kind of "customs fraud" that the Panel in the first recourse to Article 21.5 said, at paragraph 7.649 of its Report, that it was inclined to agree fell outside of the scope of application of the CVA. **In the course of the proceeding, Thailand also developed other arguments on the first element of Article 15.1(a), as elaborated below in paragraphs 7.286-7.287.**

5.3.2 Paragraph 7.254

5.20. Thailand notes that in **paragraph 7.254**, the Panel recalls the definition of "customs fraud" that it previously articulated in its report of the first Article 21.5 proceedings. According to the Panel's definition of "customs fraud", the notion of deception is a central element of "customs fraud". The Panel observed that, pursuant to Article 1(c) of the WCO's International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (the Nairobi Convention), "customs fraud" is defined as "a Customs offence by which a person deceives the Customs [Department] and thus evades, wholly or partly, the payment of import or export duties and taxes […]". The Panel further noted that "[t]he general definition of 'customs fraud' contained in Article 1(c) does not elaborate on the kinds of 'deception' that are embraced by this concept, but

examples of 'customs fraud' reiterated in the Nairobi Convention are 'forgery, falsification or counterfeiting'". For these reasons, Thailand suggests certain modifications to paragraph 7.254 to incorporate the element of deception into the Panel's observations regarding its previous definition of "customs fraud".

5.21. The Philippines objects to Thailand's requested additions in paragraph 7.254. In the sentence that Thailand proposes to alter, the Panel is simply describing its *own* earlier explanation of the concept of "customs fraud", set forth in paragraph 7.631 of the Panel Report in the first compliance proceedings. In so doing, the Panel faithfully describes its earlier explanation of the concept of "customs fraud". Thailand's comments, therefore, effectively seek to change the Panel's earlier statements about the concept of "customs fraud". It is not appropriate for Thailand to use the interim review in the second compliance proceedings to seek revision of the Panel's findings from the first compliance proceedings. The Panel should, therefore, reject Thailand's request.

5.22. The Panel recalls that in paragraph 7.631 of the Report in the first recourse to Article 21.5, which contains the statement which the Panel refers to in paragraph 7.254 of its Report, the Panel stated that "[w]e understand both parties to agree that, in the context of customs valuation, the concept of customs fraud concerns the situation in which 'the customs value declared by the importer does not represent the price actually paid'." The quoted phrase reproduced the wording used by a previous panel, and which had been quoted in paragraph 7.630 of the Report. The purpose of this sentence, and of paragraph 7.631 more generally, was to distinguish an essential element of the concept of "customs fraud", i.e. a difference between the *declared* price and the price *actually* paid. It sought to make clear that an importer does *not* commit "customs fraud" simply "by declaring a transaction value that a customs authority subsequently decides was influenced by the importer's relationship with the supplier, as this situation merely reflects the anticipated operation of Articles 1 to 7 of the CVA". The point of paragraph 7.631 was thus to identify this *essential* element of the concept. The point was not to provide a *complete* definition of all of the requisite elements of the concept of customs fraud, such as the existence of deception, intention, or the other elements that Thailand has stressed in its arguments (likewise, and for the same reason, paragraph 7.631 does not allude to other forms of customs fraud, such as under-declaring the quantities of imported products, or mispresenting the nature of the imported goods, or falsely declaring the country of origin). Accordingly, while it would not be incorrect to state that the concept of customs fraud concerns the situation in which the importer "deceives" (or even "intentionally deceives") the customs authorities by declaring a customs value that does not represent the price actually paid of payable, those elements are not germane to the point that the Panel was making in paragraph 7.631 of its Report. Accordingly, the Panel does not consider it appropriate to revise the wording of paragraph 7.254 of this Report, and by extension paragraph 7.631 of the Report, in the manner proposed by Thailand.

5.3.3 Paragraph 7.266

5.23. The Philippines notes that in **paragraph 7.266**, the Panel explains that Thailand's argument regarding the definition of "Customs" in the Revised Kyoto Convention is moot, because "the Panel did not take a position on the meaning of the terms 'customs administration' in the CVA, but instead simply rejected the underlying premise that the CVA obligations invoked by the Philippines apply only to those state organs that are a part of the 'customs administration'". In the interest of assisting the reader, the Philippines requests that the Panel clarify why Thailand's argument relating to the definition of the term "Customs" was rendered moot. The Philippines understands that the Panel's response is that, whatever the meaning of the defined term "Customs" in the Revised Kyoto Convention, that defined term does not change the Panel's understanding that the term "customs administration" in the CVA applies to State entities that are not part of the domestic customs administration. The Philippines considers that it would be helpful to clarify and expand this aspect of the Panel's reasoning.

5.24. Thailand does not comment on this request.

5.25. The Panel notes that, contrary to what is suggested by the Philippines' comment, the Panel does not state that the term "customs administration" in the CVA "applies to State entities that are not part of the domestic customs administration". What the Panel found in the first recourse to Article 21.5, and reiterated in paragraphs 7.257, 7.266, and 7.269, is more precisely that "the Panel took no definite position on the precise meaning of the term 'customs administration'," because the Panel "rejected the underlying premise that the substantive CVA obligations invoked by the

Philippines apply only to those state organs that are a part of the 'customs administration'". In the interest of ensuring maximal clarity on this point, which has now been subject to extensive arguments by the parties in the first recourse to Article 21.5 and reargued again this proceeding, the Panel has added additional text in paragraph 7.266 restating the same point in other words, drawing upon existing text in the Report in the first recourse to Article 21.5 that is referenced in paragraph 7.257. The revised text of paragraph 7.266 reads:

> 7.266. However, even assuming *arguendo* that Thailand is correct that the definition of "Customs" contained in the Revised Kyoto Convention is relevant to the interpretation of the term "customs administration" in the context of the CVA, and even assuming further that this definition supports a restrictive interpretation of the terms "customs administration" in the CVA, this would still not alter the Panel's existing conclusion or analysis. As recalled above **at paragraph 7.257**, the Panel did not take a position on the meaning of the terms "customs administration" in the CVA, but instead simply rejected the underlying premise that the CVA obligations invoked by the Philippines apply only to those state organs that are a part of the "customs administration". **Specifically, the Panel concluded that the substantive CVA obligations invoked by Philippines "apply to any organ of the state that makes a 'customs valuation' determination", and was therefore "unable to agree with Thailand that the CVA is inapplicable to the Charges on the grounds that they were issued by the Public Prosecutor, which is not a part of the 'customs administration'".[new FN]** This **reasoning, i.e. 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",** rendered moot Thailand's argument regarding the definition of "Customs" in the Revised Kyoto Convention and obviated any reason for the Panel to specifically address that definition in the reasoning. The Panel sees no reason to go further than the Panel in the first recourse to Article 21.5 did in seeking to define the term "customs administration" in the context of the CVA. There is no obligation upon a panel to make findings on every argument put forward by the parties in support of their respective cases, insofar as acceptance or rejection of an argument would not alter the conclusion arrived at.
>
> **[new FN] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.644.**

5.3.4 Paragraphs 7.286 and 7.287

5.26. The Philippines notes that in **paragraph 7.286**, the Panel seeks to give an overview of the repeated shifts in Thailand's position on how the reference to the "actual price" in the 2002-2003 Charges is to be understood. The Philippines agrees that this is a worthwhile, if challenging, exercise. To facilitate the reader's ability to follow Thailand's shifting arguments, the Philippines suggests that the Panel clarify, at each step, its understanding of Thailand's position on the interpretation of the term "actual price" at that moment in the proceedings. The Panel may also wish to simplify the current version of its summaries to improve readability – the detail might be included in footnotes. In some sub-paragraphs, the Panel adds a parenthetical statement that attempts to distil Thailand's arguments, and in others it does not. The Philippines suggests that the Panel adopt a consistent approach in all sub-paragraphs. In making the Panel's summaries consistent across sub-paragraphs, the Philippines suggests that the Panel delete the parenthetical remarks in favour of a more direct statement of the Panel's understanding. Additionally, the Philippines queries whether the Panel's reasoning in the passages preceding the parenthetical remarks is uniformly sufficient to support the implication drawn in the parenthetical (e.g., sub-paragraph (a)).

5.27. For its part, Thailand also suggests additional language in the Panel's description of Thailand's arguments on the reference to "actual price" in the 2002-2003 Charges in paragraph 7.286. Specifically, Thailand requests the Panel to clarify that it argued that the CVA does not apply to the 2002-2003 Charges because this measure constitutes an allegation of customs fraud. Thailand also proposes language clarifying that its arguments under Articles 1.1 and 1.2(a) of the CVA were presented in the alternative, that is, assuming *arguendo* that the CVA applies to the 2002-2003 Charges. Finally, in relation to the Panel's observations at the end of sub-paragraphs (a) and (b), Thailand proposes language explaining that these observations are based on the Panel's interpretation of Thailand's argument rather than on Thailand's own description of its arguments.

5.28. In addition to its substantive comments, the Philippines identified what it considered to be a typographical error in paragraph 7.286(b). In this paragraph, the Panel describes Thailand's argument, stated in Thailand's first written submission, that the Charges reflect a revised customs value computed consistently with "Article 7.1 of the CVA"; the Philippines proposes changing this so that it reads "Article 6.1". In its comments, however, Thailand states that it "does not agree with this suggested change as it does not represent the argument made by Thailand in its submissions".[73]

5.29. The Panel observes that the parties have provided almost a dozen comments to improve the clarity of paragraph 7.286 and its subparagraphs (a) to (e), which are aimed at giving an overview of Thailand's position on how the reference to the "actual price" in the 2002-2003 Charges has unfolded in the course of the proceeding. Given the number of comments, and the fact that most speak for themselves and pertain to stylistic issues, the Panel will not discuss them individually. The Panel agrees with many of these comments of the parties and has implemented them accordingly. The revised text of paragraph 7.286 reads:

> 7.286. Thailand disagrees with both aspects of this understanding of the Charges. Thailand's position on how the reference to the "actual price" is to be understood in the context of the 2002-2003 Charges has unfolded in the course of the proceeding, as follows:
>
> a. In the context of arguing that the CVA does not apply to the Charges **as this measure constitutes an allegation of customs fraud**, Thailand argued in its first written submission that PMTL's declared value was not the price that PMTL actually paid to PM Indonesia for the goods**. The Panel notes that this argument ~~(which~~** implies that the reference to the higher "actual price" in the Charges was **"**the price actually paid or payable**" in the sense of Article 1.1 of the CVA~~)~~**.
>
> b. Also in its first written submission, **Thailand presented alternative arguments assuming *arguendo* that the CVA applies to the Charges. As part of these alternative arguments,** Thailand responded to the Philippines' claims under Articles 1.1 and 1.2(a) by arguing that the Thai authorities were justified in rejecting the price PMTL paid to PM Indonesia as the basis for valuing the goods because the authorities found that this price was influenced by the relationship between PM Indonesia and PMTL, and **by** suggesting that the Charges reflect a revised customs value computed consistently with Article**s 6.1 and/or** 7.1 of the CVA**. The Panel notes that this argument ~~(which~~** presupposes that the Thai authorities assumed that the declared price *was* the price actually paid or payable, and that the "actual price" in the Charges refers to the revised customs value determined in accordance with Article**s 6.1 and/or** 7.1**~~)~~, and does not represent "the price actually paid or payable"**.
>
> c. In its second written submission, in the context of arguing that the CVA does not apply to the Charges, Thailand clarified that "the reference to 'actual value' [in the 2002-2003 Charges] refers to the price actually paid or payable for the goods in question" and not to "alternative" values as alleged by the Philippines, and explained that its contradictory assertions made in the context of rebutting the Philippines' claims under Articles 1.2(a) and 6 were to be construed as arguments in the alternative. **The Panel notes that this clarification implies that the reference to the higher "actual price" in the Charges was "the price actually paid or payable" in the sense of Article 1.1 of the CVA, and that the authorities never proceeded to examine the circumstances of sale under Article 1.2(a), or to determine a revised customs value under Articles 6.1 and/or 7.1.**
>
> d. In its response to Panel question No. 139, Thailand confirmed that "the 02-03 Charges allege that the transaction value declared by PMTL was not the price actually paid", but Thailand then submits that the Charges do *not* determine the "price actually paid or payable" for the goods in the sense of Article 1.1 of the

[73] Thailand's comments on the Philippines' request to review the Interim Report, para. 3.1, second bullet point.

> CVA, or any other revised customs value, because the Charges are an accusation of customs fraud, and in cases of customs fraud the authorities are not necessarily required to determine "the correct customs value" and "need not calculate exactly the price actually paid"**. The Panel notes that this implies (~~implying~~** that the "actual price" does not refer to either the transaction value or a revised customs value, but without specifying what the "actual price" refers to**~~)~~**.
>
> e. In its opening oral statement at the meeting of the Panel, Thailand stated that in cases where penalties for customs fraud are determined by reference to the value of the goods, the value of the goods "is a simple benchmark for a penalty" and not "a customs valuation determination"; and in response to Panel question Nos. 166 and 167, Thailand stated that its position is that the reference to the "actual price" in the 2002-2003 Charges refers to a determination by Thai authorities of a possible benchmark for the imposition of a fine that does not represent any determination by Thai authorities of the price actually paid or payable by PMTL to PM Indonesia, or of the revised value that was determined after concluding that the price actually paid or payable was influenced by the relationship between PMTL and PM Indonesia. **The Panel notes that this argument implies that the "actual price" does not reflect a determination of the "price actually paid or payable", or a revised customs value determined pursuant to Articles 6.1 and/or 7.1.**

5.30. The Philippines further proposes, as a complement to the sub-paragraphs, that the Panel add a concise summary of Thailand's shifting arguments at the end of paragraph 7.286. The Philippines also suggests a revision to the first sentence to the chapeau of **paragraph 7.287**, to replace "In the light of Thailand's clarifications, the Panel understands Thailand's position to be …" with "Although Thailand's position has shifted during the course of the proceedings, the Panel understands Thailand to argue …".

5.31. Thailand does not specifically comment on this request.

5.32. The Panel does not see the need for the additional summary paragraph, as it would involve a degree of repetition with what would immediately precede it in subparagraphs (a) through (e) of paragraph 7.286. Furthermore, the Panel is not persuaded that it adds to the clarity of paragraph 7.287 or what follows to revise its first sentence. In the Panel's view, it makes no difference to the remainder of paragraph 7.287 if Thailand's position is characterized as "shifting", or the subject of "clarifications", or having "unfolded in the course of the proceeding" (the latter expression having been used in the chapeau of paragraph 7.286). Accordingly, the Panel declines to make this change.

5.3.5 Paragraph 7.298

5.33. The Philippines notes that in **paragraph 7.298**, the Panel explains that there are "circumstances in which a determination of customs fraud *could* be made without ever seeking to determine the customs value of the importer's goods"; and to illustrate how that could be, the Panel recalled that it had already given an example of a particular set of circumstances in which that might be the case at paragraph 7.659 of the Report in the first recourse to Article 21.5. To assist the reader, the Philippines suggests adding additional examples of such instances. The Philippines provided this list of relevant examples: (1) the importer fails to declare the importation of the goods to the customs administration (i.e., smuggling); (2) the importer fraudulently declares the number of units of the goods entering the customs territory; (3) the importer fraudulently declares the type (classification) of the goods; or, (4) the importer fraudulently declares the origin of the goods.

5.34. Thailand makes a related request, stating that "in the interest of providing security and predictability concerning the scope of the CVA, it would be extremely useful if the Panel could provide a hypothetical example illustrating the manner in which, in the event of suspicion of customs fraud, an authority could make an allegation of customs fraud in a way that neither the constituent elements of the customs fraud accusation nor the associated penalty would be covered by the CVA or, alternatively, that both aspects would be covered by the CVA but would be adopted in a manner consistent with the CVA."[74] Thailand submits that "WTO Members in general would welcome the

[74] Thailand's request to review the Interim Report, para. 2.14.

Panel's clarification in this respect in order to fully understand the manner in which customs fraud accusations could be made and consequent penalties imposed without infringing WTO obligations".[75] Thailand suggests that this example be included by the panel as a new paragraph after paragraph 7.316.

5.35. In its comments on the Philippines' request, Thailand states that the examples suggested by the Philippines do not illustrate the Panel's point. That is because the Philippines' examples constitute *types* of customs fraud, whereas the Panel's point addresses the *circumstances* in which an accusation of customs fraud, regardless of the type, could be made without seeking to determine the customs value of the imported merchandise. In this context, the relevant *circumstances* would cover aspects such as the availability of evidence of the price actually paid by the buyer. These particular *circumstances* could be present in any type of customs fraud, including those indicated by the Philippines. Conversely, it is possible that, even in the types of customs fraud listed by the Philippines, the *circumstances* could allow authorities to make a customs fraud accusation and also determine the price actually paid by the buyer. Hence, providing examples of *types* of customs fraud in no way illustrates the Panel's statement concerning the *circumstances* that customs authorities could encounter in import operations. In fact, Thailand considers that the Philippines' examples would obfuscate, rather than clarify, the Panel's explanation.

5.36. In its comments on Thailand's request, the Philippines notes that it is "common ground that the parties would appreciate such additional examples". The Philippines submits that its proposed examples address Thailand's request for examples of situations in which an allegation of customs fraud would *not* be subject to the CVA and encourages the Panel to include these examples in its report. Recalling that Thailand also asks for an example of a fine that would *not* be subject to the CVA, the Philippines states that "[e]xamples would include any fine where the base for the fine is not set relative to the customs value, for instance, when the fine is based on: the importer's annual sales revenue; a fixed amount; or the maximum retail price."[76] Recalling that Thailand also requests that the Panel provide an example of a situation in which the CVA would apply to an allegation of customs fraud and the calculation of the associated fine, and in which the domestic authority would be able to comply with the *CVA*, the Philippines suggests the following example: (1) an importer declares that the price of an imported machine is CHF 10,000; (2) upon examination of the circumstances of sale, the customs authority ascertains that the importer had received two receipts from the related seller, one for CHF 10,000 and a second for CHF 3,000 (a so-called "hidden" receipt[77]); (3) the authority verifies the importer's bank records, which show a total payment of CHF 13,000 to the seller; (4) the authority determines that the "price actually paid" by the importer was CHF 13,000, pursuant to Article 1.1 of the CVA; (5) the public prosecutor issues charges alleging that the importer intentionally under-declared the customs value to evade the payment of ad valorem customs duties; and (6) municipal law requires a fine of four times the actual customs value determined by the authority (i.e., 4 x CHF 13,000 = CHF 52,000). Thailand submits that the authority's determination and the fine are consistent with Article 1.1 of the CVA, because the price actually paid was CHF 13,000, with no adjustments required under Article 8 of the CVA.

5.37. The Panel recalls that at paragraph 7.659 of the Report in the first recourse to Article 21.5, the Panel offered a simple hypothetical to illustrate the point that in cases of customs fraud, the authorities may not know the price actually paid:

> We agree with Thailand that in cases of customs fraud, the authorities may not know the price actually paid. We further agree with Thailand that an allegation of customs fraud could be made without ever seeking to determine the customs value of the importer's goods, and the making of such an accusation does not necessarily presuppose that the authorities would have engaged in a customs valuation determination in order to reach the conclusion that the declared transaction value was not "truthful or accurate". Using Thailand's example, if an importer presents an invoice

[75] Thailand's request to review the Interim Report, para. 2.15.

[76] Philippines' comments on Thailand's request for review of the Interim Report, para. 31.

[77] The Philippines notes that the "hidden invoice" was mentioned by Thailand, during the first compliance proceedings, as a situation in which fraudulent under-declaration of the customs value might arise. *See* first compliance Panel Report, para. 7.659. In the second compliance proceedings, Thailand has expressly accepted that it has no "direct" evidence, such as hidden invoices, suggesting that the importer committed fraud. Instead, Thailand described the Indonesian pricing and cost information that it allegedly possesses as "indirect" evidence of fraud. *See* Thailand's first written submission, para. 3.150 and the Philippines' second written submission, para. 282.

> indicating a purchase price of 100 for the imported merchandise, but the customs authorities find in the importer's luggage a second invoice of 50 for that same merchandise, the necessary conclusion is that the declared value of 100 is not the price actually paid by the importer, but the authority may never discover the totality of the invoices related to this purchase and, hence, may never have conclusive evidence of the price actually paid by the importer.

5.38. The Panel recalls that in paragraph 7.298 of this Report, the Panel explains that there are "circumstances in which a determination of customs fraud *could* be made without ever seeking to determine the customs value of the importer's goods"; and to illustrate how that could be, the Panel recalled that it had given the above example of a particular set of circumstances in which that might be the case at paragraph 7.659 of the Report in the first recourse to Article 21.5. The Panel is not persuaded providing additional hypothetical examples is a useful exercise.

5.3.6 Paragraph 7.303

5.39. The Philippines recalls that in this section, the Panel addresses the parties' positions on the correct understanding of the term "actual price" in the 2002-2003 Charges. In paragraph 7.290, the Panel explains that, in the subsequent sub-sections of its analysis, it will first address whether the "'actual price' [] fixes or determines the actual and exact monetary value of PMTL's imported cigarettes, as the Philippines contends, or is instead merely an 'approximate' value included for other purposes, as Thailand contends" (Section 7.3.3.3.3.3). The Panel indicates that, in a second sub-section, it will address the second disputed issue, which is "whether the 'actual price' is to be understood as a revised customs valuation following the rejection of the transaction value, as the Philippines contends, or instead refers to the 'price actually paid or payable' as Thailand contends" (Section 7.3.3.3.3.4). In paragraph 7.302, the Panel concludes the first part of its analysis. The Panel then turns to the second part, starting in paragraph 7.303. For clarity, the Philippines suggests inserting a transitional sentence in paragraph 7.303, reminding the reader that it now turns to the second part of its analysis of the term "actual price". Additionally, the Philippines suggests explaining, in paragraph 7.303, that the Panel is addressing an alternative argument made by Thailand.

5.40. Thailand does not comment on this request.

5.41. The Panel considers that the transitional sentence proposed by the Philippines would add clarity, in helping to more clearly distinguish the two different parts of the Panel's analysis of the term "actual price". The Panel also considers that it would add to the clarity of its analysis to recall that this second part of its analysis relates to an argument that Thailand has made in the alternative. The Panel has revised the text of paragraph 7.303 accordingly, to read:

> 7.303. **Having found that the reference to the "actual price" in the 2002-2003 Charges fixes or determines the actual and exact monetary value of PMTL's imported cigarettes, t**~~**T**~~he Panel ~~**will**~~ now **turns to** assess the question of whether the references to the "actual price" in the Charges and their Annex refer to the "price actually paid or payable" for the imports at issue, as Thailand maintains, or whether they refer instead to a revised customs value that does not call into question the price actually paid or payable by PMTL, as the Philippines maintains. **The Panel recalls that Thailand made this argument in the alternative.**

5.3.7 Paragraphs 7.308 to 7.310

5.42. The Philippines notes that in **paragraphs 7.308 to 7.310**, the Panel finds that Thailand's use of certain Indonesian pricing and cost information "suggests that [the Thai authorities] were constructing a benchmark value, and not attempting to discover the 'price actually paid or payable'". The Philippines believes that it would be helpful if the Panel were to state, explicitly, that a constructed benchmark value, based on a maximum domestic retail selling price used as the excise tax base, is not apt to reveal the "price actually paid or payable". The Philippines also points out that, in its reasoning in these paragraphs, the Panel refers to the relevant (but unknown) Indonesian pricing and cost information as "meta-data". The Philippines queries whether the term "meta-data" captures the relationship between this Indonesian information and the transaction price. The

Philippines understands that, broadly speaking, "meta-data" is a set of data that describes and gives information about another set of data.

5.43. Thailand does not comment on this request.

5.44. The Panel agrees that a constructed benchmark value would not be apt to reveal the "price actually paid or payable", insofar as it was based on a maximum domestic retail selling price used as the excise tax base. However, this point is not directly relevant to the reasoning at paragraphs 7.308 to 7.310 of the Report. In this sub-section of the Report, the Panel is addressing the question of whether the references to the "actual price" in the Charges and their Annex refer to the "price actually paid or payable" for the imports at issue, as Thailand suggests, or whether the references to the "actual price" refer instead to a revised customs value that does not call into question the price actually paid or payable by PMTL, as the Philippines maintains. As the Panel's findings elsewhere in its Report make clear, the Thai authorities' reliance on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms was equally inapt to reveal whether the relationship between the buyer and seller influenced the price in the context of Article 1.2(a) second sentence, or to reveal the "price actually paid or payable". Accordingly, stating that a constructed benchmark value would not be apt to reveal the "price actually paid or payable", insofar as it was based on a maximum domestic retail selling price used as the excise tax base, does not shed any light on the question being addressed in this sub-section of the Report. Therefore, the Panel has not made this revision.

5.45. The Panel agrees that "meta-data" is not the ideal word to use to describe a company's pricing and cost information. In the first sentences of paragraph 7.309, the word appears in a direct quote from the European Union's third-party submission, and therefore the Panel has not modified it. The Panel has replaced "meta-data" with the word "data" in the first and second sentences of paragraph 7.310, which set forth statements by the Panel.

5.4 Claims under Articles 1.1 and 1.2(a), second sentence, and Articles 6 and 7

5.4.1 Introduction

5.4.2 Claim under Article 1.2(a), second sentence

5.4.2.1 Paragraph 7.353(b)

5.46. The Philippines observes that in **paragraph 7.353(b)**, the Panel summarizes the Philippines' arguments regarding the relevance of Article 6 of the CVA and its Interpretative Notes to the interpretation of Paragraph 3 of the Interpretative Notes to Article 1.2. The Philippines argued that Article 6 and its Interpretive Notes are "important context" for how a cost-plus benchmark must be determined under Article 1.2(a) of the CVA. In the interests of accuracy, the Philippines asks that the Panel amend this passage.

5.47. Thailand does not comment on this request.

5.48. The Panel has amended paragraph 7.353 as proposed by the Philippines, in the interest of accuracy. The revised text of paragraph 7.353 reads:

> b. the "detailed rules" of Article 6 of the CVA and its Interpretative Notes, which regulate the construction of a cost-plus value also known as the "computed value", **are important context in interpreting and** apply**ing** ~~to~~ Paragraph 3 of the Interpretative Note to Article 1.2;

5.4.2.2 Paragraphs 7.359, 7.362, 7.368 and 7.375

5.49. The Philippines finds the Panel's use of the term "insofar as" in the conclusions in **paragraphs 7.368 and 7.375** to be unclear. Earlier in its Report, the Panel found that Thailand used certain Indonesian pricing and cost information as the basis for its determination of the alternative customs value of PM Thailand's cigarettes. However, the addition of the term "insofar", in paragraphs 7.368 and 7.375, casts doubt on the Panel's earlier finding that Thailand used Indonesian pricing and cost

information as the basis for its determination. The Philippines, therefore, invites the Panel to resolve this doubt by deleting, or further clarifying, the term "insofar as".

5.50. Thailand does not comment on this request.

5.51. The Panel notes that the wording in paragraphs 7.368 and 7.375 was not intended to cast doubt on the Panel's earlier finding that Thailand relied on pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the "actual price". Rather, the wording of these paragraphs was intended to make a conditional statement about the nature of the determination that the Thai authorities made on the basis of that information. More specifically, and as stated in the Panel's overall conclusion in paragraph 7.376, the Panel finds that it was improper for the DSI and the Public Prosecutor to rely on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms for purposes of determining the customs value of PMTL's imports into Thailand, regardless of whether said information was relied upon for the purpose of determining: (1) whether the transaction value was influenced by the relationship between the buyer and the seller pursuant to Article 1.2(a), second sentence, of the CVA; or (2) the "price actually paid or payable" within the meaning of Article 1.1 of the CVA; and/or (3) a revised customs value based on Article 6 of the CVA; or (4) a revised customs value based on Article 7 of the CVA. Having offered the foregoing clarification, the Panel does not consider it necessary to revise the wording of these paragraphs (or the conditional conclusions set forth in **paragraphs 7.359 and 7.362**).

5.4.3 Alternative claim under Article 1.1

5.4.3.1 Paragraph 7.360

5.52. The Philippines observes that, in the second sentence of **paragraph 7.360**, the Panel recalls its earlier finding that the Philippines has made a *prima facie* case that the "actual price" refers to a revised customs value, and not the "price actually paid or payable" as Thailand asserted. In the third sentence of the paragraph, the Panel explains its decision, in this part of its findings, to make alternative findings under Article 1.1 and Article 1.2(a) of the CVA. The Panel suggests that it makes alternative findings because "the facts are not entirely clear" on whether the "actual price" is a revised customs value or the "price actually paid or payable". The Philippines considers that the Panel's remarks that "the facts are not entirely clear" may be read to indicate a degree of uncertainty on the Panel's part as to the strength of its own earlier findings that the "actual price" refers to a revised customs value, and not the "price actually paid or payable". The Philippines invites the Panel to reconsider the remarks in question, which do not appear to be necessary. The Philippines notes that the Panel is entitled to make alternative findings, for the sake of completeness, to address positions taken by Thailand, including in view of a potential appeal.

5.53. Thailand does not comment on this request.

5.54. The Panel notes that the Philippines' comment concerns the Panel's statement at paragraph 7.360 that "the facts are not entirely clear" as to whether the "actual price" in the 2002-2003 Charges reflects the Thai authorities' determination of a revised customs value that was calculated using the computed value methodology under Article 6 and/or 7 of the CVA following a determination that the transaction value was influenced by the relationship between the parties, or reflects instead a determination of the "price actually paid or payable" for the goods in question. The Panel notes that the Philippines has made a similar comment in relation to the Panel's overall conclusion, at paragraph 7.377, that "it is impossible to say with any certainty which of these determinations was made". The Panel addresses the comment on paragraph 7.377 further below.

5.55. With respect to paragraph 7.360, the Panel notes that its acknowledgement that the "the facts are not entirely clear" is indeed meant to indicate a degree of uncertainty, on the Panel's part, as to whether the "actual price" refers to a revised customs value, or instead the "price actually paid or payable". The Panel acknowledges this uncertainty again at paragraph 7.377, when it states that "it is impossible to say with any certainty which of these determinations was made". The Panel also acknowledges this uncertainty in its earlier analysis of this issue, when it states at paragraph 7.305 that the circumstances surrounding the 2002-2003 Charges "suggest" that "the 'actual price' in the 2002-2003 Charges refers to a revised customs value calculated using the computed value methodology under Article 6 and/or 7 of the CVA" and not "a determination of the 'price actually paid or payable' for the goods in question", but acknowledges that "the 2002-2003 Charges are not

free of ambiguity on this point". The Panel does not consider it problematic to acknowledge uncertainties where they exist.

5.56. Furthermore, it is clear from the Panel's reasoning and findings that, while acknowledging the lack of certainty on this point, the Panel concludes (by operation of the rules on burden of proof) that the "actual price" in the 2002-2003 Charges refers to the revised customs value that was calculated using the computed value methodology under Article 6 and/or 7 of the CVA, and not, as Thailand suggests, a determination of the "price actually paid or payable" for the goods in question. The Panel's earlier reasoning set forth in paragraphs 7.303 to 7.317 leads the Panel to conclude, in paragraph 7.317, that the "actual price" does not refer to the "price actually paid or payable", as Thailand maintains, so as to make clear that the Panel's findings under Article 1.1 are thus being made on an *arguendo* basis. In paragraph 7.360, the Panel introduces its findings on the Philippines' alternative claim under Article 1.1 by recalling that conclusion, and stating that it "makes the following alternative finding under Article 1.1, based on the *arguendo* assumption that the 2002-2003 Charges determine the 'price actually paid or payable'".

5.57. For these reasons, the Philippines' comments on the Panel's reasoning do not persuade the Panel that there is any need to revise the Report in this regard.

5.4.3.2 Paragraph 7.361

5.58. The Philippines observes that in **paragraph 7.361**, the Panel draws certain parallels between Articles 1.1 and 1.2(a) of the CVA. The Panel correctly notes that, in both cases, a customs administration enjoys a margin of discretion in determining an appropriate method of enquiry. Further, in both cases, the method of enquiry must be fit for its particular treaty purposes. However, the nature of the respective treaty purposes differs in each case. Thus, under Article 1.1, the enquiry must be apt to reveal *whether the declared value is the price actually paid or payable*; whereas, under Article 1.2(a), the enquiry must be apt to reveal *whether the transaction value is influenced by the relationship between the buyer and seller*. The Philippines is concerned that the Panel's reasoning in paragraph 7.361 does not adequately address these differences in purpose between the two provisions, and the implications of these differences for the enquiry to be undertaken under the respective provisions. A reader of the paragraph may mistakenly understand, from the parallelism drawn by the Panel, that the methods of enquiry used under Article 1.2(a) are equally appropriate under Article 1.1. This point is important because the calculation of a computed value – such as that at issue – is an appropriate method of enquiry under Article 1.2(a) to test whether the transaction value is influenced by the relationship between the buyer and seller. However, it is not apt to reveal whether the declared value is the price actually paid or payable under Article 1.1. Indeed, the Panel itself explains, in paragraphs 7.308 to 7.310, why the determination of a cost-based benchmark value is not apt to shed light on the price actually paid or payable. In the light of the above, the Philippines invites the Panel to revise, and expand, its reasoning in paragraph 7.361.

5.59. Thailand does not comment on this request.

5.60. The Panel considers that, in the light of the Philippines' comment, it would be useful to add a sentence to paragraph 7.361 clarifying that the existence of certain parallels in the minimum requirements for each provision does not mean that the methods of enquiry used under Article 1.2(a) are equally appropriate under Article 1.1. The Panel recalls that the Philippines' comments reiterate some of the comments that it made in response to a question from the Panel on this issue; and that the European Union also provided relevant comments in response to a related question to the third parties. The Panel has added a reference to these comments in a footnote accompanying the sentence which has been added to paragraph 7.361.

> 7.361. The Panel considers that an authority enjoys a margin of discretion in how it determines the "price actually paid or payable" within the meaning of Article 1.1, just as the authority enjoys a margin of discretion in how it conducts its "examination of the circumstances of sale" in the context of Article 1.2(a). **The existence of certain parallels in the minimum requirements for each provision does not mean that the methods of enquiry used under Article 1.2(a) are equally appropriate under Article 1.1.[new FN]** However, the 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. In this regard, it bears recalling that Article 1.2(a) and Article 1.1 not only comprise part of the same article, but are interrelated such that a violation of Article 1.2(a) necessary implies a violation of 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". Accordingly, the Panel's reasoning above regarding the claim under Article 1.2(a) second sentence applies *mutatis mutandis*.

[new FN] See Philippines' response to Panel question No. 142; the European Union's response to Panel question No. 15 to third parties.

5.4.4 Claim under Article 6.1

5.4.4.1 Paragraph 7.365

5.61. The Philippines observes that in **paragraph 7.365**, the Panel explains why it finds it unnecessary, in these proceedings, to engage in a comprehensive interpretation of the requirements of Article 6 as relevant to an examination of the circumstances of sale under Article 1.2(a). As justification, the Panel refers to the parties' agreement that the examination of the circumstances must "be based on the producer's actual costs, and that when applying Article 6, the authority … is under an obligation to verify the accuracy of those costs". The Panel does not give citations to submissions setting forth the parties' respective positions on this issue. Nor does the Panel indicate its own agreement with the parties' stated positions. The Philippines makes three comments. *First,* the Philippines invites the Panel to cite passages in the parties' respective submissions where they made the relevant statements on which the Panel relies. To assist, the Philippines has added relevant cites to its own submissions in the annotated version. *Second*, the Philippines invites Thailand to confirm its agreement with the Panel's characterization of its arguments in paragraph 7.365. *Third*, in order to provide an appropriate basis for the Panel's findings going beyond the parties' agreement, the Philippines requests that the Panel adds wording to the second sentence of paragraph 7.365, marking its own agreement with the parties' stated positions.

5.62. Thailand does not comment on this request.

5.63. The Panel notes that its analysis of the Philippines' claim under Article 6.1 is developed in paragraphs 7.363 to 7.368, and the points developed in paragraphs 7.365, 7.366 and 7.367 are interrelated. Paragraph 7.365 states in general terms that both parties seem to agree that an authority's examination of the circumstances of sale under Article 1.2(a) must, at minimum, be based on the producer's actual costs, and that when applying Article 6, the authority in the importing country is also under an obligation to verify the accuracy of those costs, and that in the circumstances of this case, the nature of the CK-21A information and the Thai authorities' examination of that information clearly did not meet that minimum standard, regardless of whether other detailed requirements of Article 6 were complied with. Paragraphs 7.366 and 7.367 then elaborate, with paragraph 7.366 articulating more precisely the Panel's view on the minimum standards that apply under Article 6, and paragraph 7.367 explaining that the logical implication of Thailand's argumentation is that it accepts that, but for the "reasonable flexibility" in Article 7 that Thailand seeks to rely on, the subsequent verification in terms of the accuracy of the information would have been required pursuant to Article 6. Given the relation between these paragraphs, the Panel does not consider it necessary to revise paragraph 7.365 in the manner proposed by the Philippines.

5.4.5 Conclusion

5.4.5.1 Paragraph 7.377

5.64. The Philippines observes that in **paragraph 7.377**, the Panel finds that "it is impossible to say with any certainty" whether Thailand's authorities made a determination that falls under Articles 6 or 7 of the CVA, and finds it unnecessary to decide this issue because "ultimately it makes no difference to the Panel's assessment". The Philippines notes that the Panel is able to reach this conclusion because it has found that the Philippines has properly made and argued a claim under Article 7 of the CVA; however, if the Appellate Body were to reverse the Panel's findings that the

Philippines has properly made and/or argued a claim under Article 7, the question whether Thailand's measures fall under Article 6 or Article 7 becomes important to the Appellate Body's assessment, in particular its ability to resolve this aspect of the dispute. The Philippines, therefore, requests that the Panel make an affirmative finding as to whether Thailand's measures fall under Article 6 or Article 7. As for the Panel's statement that it finds it difficult to resolve the question whether Thailand's measures fall under Article 6 or Article 7 "in the absence of any contemporaneous explanation from the Thai authorities", the Philippines submits that if there is no contemporaneous indication that the Thai authorities resorted to Article 7 – as the Panel rightly finds – the Panel must find that Article 6 applies. The Philippines submits that this follows from the rules in Articles 6 and 7, the applicable standard of review, considerations of transparency, and the procedural requirement in Article 7.3.[78] Having said this, the Philippines submits that the Panel "should also make an alternative finding, under Article 7, to address the eventuality that the Appellate Body disagrees with the Panel's finding that Article 6 applies".[79]

5.65. Thailand does not comment on this request.

5.66. The Panel considers it may be useful to provide several clarifications in response to the Philippines' comments and request pertaining to paragraph 7.377, to ensure that there is no misunderstanding as to what consequence the Panel's decision to make conditional, alternative findings has in terms of Thailand's implementation of the DSB recommendations and rulings arising from this proceeding.

5.67. The Panel recalls that paragraph 7.376 sets out its overall conclusion that it was improper for the DSI and the Public Prosecutor to rely on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms for purposes of determining the customs value of PMTL's imports into Thailand, regardless of whether it was relied upon for the purpose of determining: (1) whether the transaction value was influenced by the relationship between the buyer and the seller pursuant to Article 1.2(a), second sentence, of the CVA; or (2) the "price actually paid or payable" within the meaning of Article 1.1 of the CVA; and/or (3) a revised customs value based on Article 6 of the CVA; or (4) a revised customs value based on Article 7 of the CVA. The Panel observes that when it states in paragraph 7.377 that "it is impossible to say with any certainty which of these determinations was made", the words "these determinations" refer back to the alternative determinations listed in (1) through (4), and not simply (3) and (4). In other words, the uncertainty referred to in paragraph 7.377 does pertain to, but is not limited or specific to, the question of whether Thailand's authorities made a determination that falls under Article 6 or 7 of the CVA; the meaning of paragraph 7.377 is that it is also impossible to say with any certainty whether the Thai authorities determined a revised customs value under either of those provisions, as opposed to determining the "price actually paid or payable" within the meaning of Article 1.1 of the CVA. With this clarification, the Panel turns below to the Philippines' comments on this paragraph, which invite the Panel to reconsider its statement that it is "impossible to say with certainty" whether the Thai authorities made a determination under Article 6 or Article 7, and instead make an affirmative finding that Article 6 applies, and then proceed to make an alternative finding under Article 7 on an *arguendo* basis.

5.68. The Panel recalls that it has already explained, in paragraph 7.377, that while "it is impossible to say with any certainty which of these determinations was made", it "ultimately makes no difference to the Panel's assessment". That is so, the Panel continues, because "[r]egardless of which of these types of alternative determinations the 'actual price' is supposed to represent, the Panel reaches the same conclusion of WTO-inconsistency, for essentially the same reasons" and "[t]herefore, the Panel considers it unnecessary to rule on which of these alternative determinations the 'actual price' represents in the context of the 2002-2003 Charges". In the accompanying footnote, the Panel recalls that it "followed a similar course in the first recourse to Article 21.5, when it found that the 2003-2006 Charges reflected a revised customs value that was inconsistent with Articles 2 and/or 3 of the CVA", observing that "[a]lthough that revised customs value could only be based on one of these provisions, the Panel considered it unnecessary to rule on whether the Public Prosecutor used the method in Article 2, or instead Article 3. Thus, the Panel made alternative findings." In its comment, the Philippines notes that the Panel is able to reach this conclusion because it has found that the Philippines has properly made and argued a claim under Article 7 of the CVA, but that if the Appellate Body were to reverse the Panel's findings that the Philippines has properly

[78] Philippines' request to review the Interim Report, paras. 195-200.
[79] Philippines' request to review the Interim Report, para. 201.

made and/or argued a claim under Article 7, then the question whether Thailand's measures fall under Article 6 or 7 becomes important to the Appellate Body's assessment, in particular its ability to resolve this aspect of the dispute.

5.69. The Philippines' has not elaborated on why the possibility of a finding by the Appellate Body that no claim under Article 7 was properly before the Panel makes it important for the Panel to make a more definitive finding that the Thai authorities applied Article 6; and it is not self-evident why it would make any difference, let alone be important, given that the Panel has made the finding that, insofar as it was for the purpose of determining a revised customs value using the computed value method under Article 6 that the Thai authorities relied on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms, this was inconsistent with Article 6 of the CVA. The Panel understands the Philippines' concern could be that such a conditional finding under Article 6 can only be made and continue to stand if a corresponding conditional finding under Article 7 is also made and also continues to stand, such that if the latter is declared moot and of no legal effect, the conditional finding under Article 6 somehow collapses too. Alternatively, the Philippines' concern could be that because the Panel has made conditional findings under Articles 6.1 and 7.1 of the CVA, without making a definitive ruling on which of these two provisions and methods the Thai authorities actually used, a finding by the Appellate Body that the claim under Article 7.1 was outside of the Panel's terms of reference could lead to a scenario in which all that remains is a conditional finding of inconsistency under Article 6.1, which Thailand might then seek to evade implementation of by maintaining that the determination was actually made pursuant to Article 7.1 (and not Article 6.1), and taking the position that in the absence of any finding under Article 7.1, the remaining DSB recommendations and rulings would mean that if it maintained that the measure was taken pursuant to Article 7.1, it would be under no obligation to modify or withdraw the measure.

5.70. Insofar as the Philippines' request for an affirmative finding that Article 6.1 was applied is motivated by such concerns, it is important and relevant to recall that the Panel's conditional findings under the CVA extend as well to Article 1.1 and Article 1.2(a), second sentence, of the CVA. The nature of the Panel's conditional findings under those provisions – which raise no terms of reference issues – means that even if there were no findings under Article 6.1 or 7.1, this would have no practical consequences in terms of implementation. Specifically, the Panel has found that it was improper for the DSI and the Public Prosecutor to rely on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms for purposes of determining the customs value of PMTL's imports into Thailand, regardless of whether it was relied upon for the purpose of determining: (1) whether the transaction value was influenced by the relationship between the buyer and the seller pursuant to Article 1.2(a), second sentence, of the CVA; or (2) the "price actually paid or payable" within the meaning of Article 1.1 of the CVA. As a consequence, even if there were no findings under either Articles 6.1 or 7.1 regarding the manner in which the Thai authorities determined a revised value, the 2002-2003 Charges would have to be modified or withdrawn because of the Panel's findings that the Public Prosecutor's rejection of PMTL's declared transaction values based on pricing and cost information reported by PM Indonesia in the CK-21A forms constitutes a failure to conduct a proper "examination of the circumstances surrounding the sale", and/or a proper determination of "the price actually paid or payable".

5.71. As the Panel stated at paragraph 7.76 of the Report in the first recourse to Article 21.5, "[w]here a customs authority improperly rejects the transaction value, inconsistently with the requirements of Article 1 of the CVA, it becomes a moot point whether the customs authority's determination of a revised customs value was conducted in accordance with the requirements of Articles 2 to 7." The Panel nonetheless made findings on the BoA's determination of a revised customs value under Article 5, and the Public Prosecutor's determination of a revised customs value under Articles 2 and/or 3, instead of simply exercising judicial economy, on account of the Philippines having urged the Panel to do so and considering that doing so was in the interest of assisting the parties in resolving their dispute. The Panel has followed the same approach in this case. However, the Panel does not consider it necessary to go further and make a definitive finding on whether the Thai authorities determined a revised value and, if so, whether it was determined pursuant to Article 6.1 or instead Article 7.1. For these reasons, the Philippines' comments on the Panel's reasoning do not persuade the Panel that there is any need to revise the Report in this regard.

5.5 Claim regarding sequential application of valuation methods

5.5.1 Paragraphs 7.390 to 7.397

5.72. The Philippines observes that in **paragraph 7.390**, the Panel begins by noting that "there is no direct, contemporaneous or documentary evidence as to whether the Thai authorities sought to apply the methods of customs valuation sequentially", and states that "the question arises as to how the Panel can assess whether one or more of the customs valuation methods in Articles 2, 3 or 5 of the CVA could have been used to value PMTL's imports, without engaging in a *de novo* review beyond the scope of its mandate." In the very last sentence of the section, at **paragraph 7.397**, the Panel observes that "it is not inconceivable that the Thai authorities could provide a reasoned explanation as to why the methods in Articles 2, 3 and 5 (and/or 6 itself) are not applicable to value PMTL's imports. In this case, however, that kind of reasoned explanation is missing". In the Philippines' view, the answer to the question posed by the Panel in paragraph 7.390 is found in the standard of review: if Thailand's authorities have failed to offer any kind of explanation for not sequentially applying the customs valuation methods in Articles 2, 3 or 5 of the CVA, the Panel can – and must – find, on this objective basis, that Thailand has failed to comply with the sequential ordering obligations in the CVA. In the light of the standard of review, the Philippines suggests that the Panel structure its reasoning by elevating its discussion in the last sentence of paragraph 7.397 by noting that no explanation has been given and conclude on that basis that Thailand has violated its sequential ordering obligations. The Philippines submits that the Panel could then dismiss Thailand's *ex post* rationalizations to justify its authorities' conduct in relation to the sequential ordering obligations, such as the alleged "special circumstances" referenced in paragraph 7.395, or address them on a secondary basis, noting that these explanations cannot cure the violation.

5.73. Thailand does not comment on this request.

5.74. The Panel notes that the Philippines' comment reiterates the arguments it expressed in response to a question from the Panel, and which were not clearly addressed in the Interim Report. The Panel has amended paragraph 7.390 to make more explicit how the applicable standard of review bears on the issue before the Panel in relation to this particular claim. The revised text of paragraph 7.390 and new accompanying footnote reads:

> 7.390. In this case, there is no direct, contemporaneous or documentary evidence as to whether the Thai authorities sought to apply the methods of customs valuation sequentially. **Under the applicable standard of review, it is not for a panel to decide which of the six recognized customs valuation method(s) should have been used in relation to a particular set of imports.** ~~**Accordingly, the question arises as to how**~~ **However,** the Panel **considers that in the circumstances of this case, it** can assess whether one or more of the customs valuation methods in Articles 2, 3 or 5 of the CVA could have been used to value PMTL's imports, without engaging in a *de novo* review beyond the scope of its mandate.**[new FN]**
>
> > **[new FN] In a case involving the review of a customs valuation determination by the domestic authorities, the applicable standard of review may confine the scope of a panel's analysis to the reasons communicated to the importer in the contemporaneous explanation(s) provided to the importer, and/or to the information forming part of the record of the determination. In such cases, if the written determination fails to adequately explain how the authority addressed an issue that it was required to consider, that may compel a panel to find that the issue in question was not properly examined and refuse to consider any *ex post* rationalizations. (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.108-7.121. See also paragraphs 7.146-7.147.) However, neither the MoA nor the 2002-2003 Charges purport to provide any explanation of the customs valuation methodology that was applied to determine the "actual price". For this reason, the Panel is not persuaded by the Philippines' argument that under the applicable standard of review, the absence of any direct, contemporaneous or documentary evidence as to whether the Thai authorities sought to apply the methods of customs valuation sequentially in relation to the 2002-2003 Charges compels the Panel to**

conclude that the Thai authorities failed to comply with the obligation to apply the methods of customs valuation sequentially.

5.75. With respect to paragraph 7.397, the Panel considers it useful to clarify that, contrary to what may be suggested by the Philippines' comment above, the Panel did not find that Thailand's authorities "have failed to offer any kind of explanation for not sequentially applying the customs valuation methods in Articles 2, 3 or 5 of the CVA". The Panel stated that its finding and reasoning "does not imply that the Customs Department and the BoA's longstanding practice of applying the deductive method in Article 5 to value PMTL's imports of *Marlboro* and *L&M* cigarettes precludes any Thai authority from ever having recourse to the computed value method in Article 6, or making use of the reasonable flexibilities in Article 7", and that "it is not inconceivable that the Thai authorities could provide a reasoned explanation as to why the methods in Articles 2, 3 and 5 (and/or 6 itself) are not applicable to value PMTL's imports". Such an explanation as to why the methods in Articles, 2, 3 and 5 (and/or 6 itself) "are not applicable to value PMTL's imports" would not be an explanation "for not sequentially applying the customs valuation methods" in those provisions; it would be an explanation of why an authority had, in discharging its obligation to apply those methods sequentially, concluded that these methods could not be used in the circumstances. Such a reasoned explanation would constitute proof that the authorities had discharged the obligation to apply the customs valuation methods sequentially, and not, as the Philippines' comment may suggest, constitute some kind of excuse for not sequentially applying those methods.

5.6 Claim under Article 1.2(a), third sentence, of the *CVA*

5.6.1 Paragraph 7.403

5.76. The Philippines observes that, in this paragraph, the Panel notes that "[t]he Philippines accepts that the DSI informed PMTL that it had obtained copies of the CK-21A forms and had doubts or suspicions based on these forms to the effect that the importer had under-declared the customs values on entries in 2001-2003". The Philippines requests that the Panel amend this statement, which does not accurately reflect the Philippines' position. The Philippines has encouraged the Panel, above, to assess objectively Thailand's asserted factual basis for its measures, on the basis of the available evidence on record in these proceedings, and not on the presumption of good faith. The Philippines has also offered its views on what that evidence does and does not show. The Philippines contests that the evidence shows that the DSI "obtained copies of the CK-21A forms"; rather, the evidence shows that the DSI has access to *certain* pricing and cost information submitted by the Indonesian producer to the Indonesian government in CK-21A forms; the precise nature of that information is not, however, clear.

5.77. Thailand does not specifically comment on this request. However, the Panel recalls that Thailand objected to the Philippines' related request, and extended argument, that the Panel modify the reasoning in paragraphs 7.104 and 7.105 of the Report (concerning the two bases for the Panel's acceptance of the veracity of Thailand's representations that its authorities received the pricing and cost information reported by PM Indonesia in the CK-21A forms).

5.78. The Panel notes that the wording of the first sentence of paragraph 7.403 does accurately reflect the Philippines' statements in paragraphs 95 and 96 of its first written submission, which respectively state that "the DSI informed PM Thailand that it had obtained, from the Government of Indonesia, copies of certain Indonesian administrative forms, known as CK-21A forms", and that "[o]n the basis of information in the CK-21A forms obtained from the Government of Indonesia, the DSI informed the importer of suspicions that the importer had under-declared customs values on entries in 2001-2003." Having said that, the Panel considers it appropriate to reflect the fact that the Philippines' view on this issue has evolved since its first written submission. The revised footnote includes a cross-reference to paragraph 7.100, where the Panel addresses this issue directly. The Panel has revised the first sentence of paragraph 7.403 and its accompanying footnote as follows:

> 7.403. **In its first written submission, t**~~T~~he Philippines accepts that the DSI informed PMTL that it had obtained copies of the CK-21A forms and had doubts or suspicions based on these forms to the effect that the importer had under-declared the customs values on entries in 2001-2003.**[FN]** …

> **[FN]** Philippines' first written submission, paras. 95-96. **In its subsequent submissions, the Philippines argued that the evidence casts doubt on its earlier understanding that the DSI had obtained copies of those forms, but nonetheless shows that the DSI had access to certain pricing and cost information submitted by the Indonesian producer to the Indonesian government in CK-21A forms. See paragraph 7.100 above.**

5.7 Article XX of the GATT 1994

5.7.1 Paragraphs 7.454 and 7.455

5.79. The Philippines observes that the Panel's conclusion in **paragraph 7.455** is styled in the negative: "the disputed issues under Article XX do not raise the kinds of factual issues on which further findings by the Panel would be a necessary precondition for the Appellate Body to complete the analysis". To eliminate misunderstandings and disagreement before the Appellate Body as to the meaning of the Panel's findings, the Philippines requests that the Panel add a sentence at the end of this paragraph to clarify the Panel's conclusion in a positive manner. In particular, the Philippines invites the Panel to explain that: there is no need for the Panel to make any additional findings to enable the Appellate Body to complete the analysis of Thailand's Article XX defences, because the Panel's earlier findings are already sufficient to address the factual matters that would be necessary for the Appellate Body to complete the analysis. Additionally, to eliminate misunderstandings and disagreement before the Appellate Body, the Philippines requests that, in **paragraph 7.454**, the Panel cite and describe in a footnote – in a very specific manner – its own earlier findings on which the Appellate Body could rely if it finds it necessary to complete the analysis under Article XX of the GATT 1994.

5.80. Thailand does not comment on this request.

5.81. The Panel considers that the sentence which the Philippines proposes to add at the end of this paragraph is useful in clarifying the meaning of this paragraph and has therefore added it. On the other hand, the Panel does not consider it necessary or appropriate to specify the findings on which the Appellate Body could rely if it finds it necessary to complete the analysis. It is doubtful that doing so would actually assist the Appellate Body, given that it would necessarily be confined to repeating a handful of the findings elaborated at length earlier in the Report. Furthermore, it would be difficult to conduct such an exercise – i.e., specifying the key findings that would enable the Appellate Body to complete the analysis of the merits of Thailand's defence – without that exercise quickly transforming itself into an actual assessment of the merits of Thailand's defences under Article XX, which the Panel considers there is no practical reason for it to proceed with. Therefore, the Panel declines this aspect of the Philippines' request. The revised text of paragraph 7.454 reads:

> 7.454. The Panel sees no distinguishing circumstances. Thailand's defences under Article XX(d) and XX(a) of the GATT 1994 in this second recourse to Article 21.5, concerning the 2002-2003 Charges, reiterate essentially the same arguments that the Panel has already addressed in the context of addressing whether the Charges contained insufficient information and the applicability of the CVA, and in the context of addressing the CVA-consistency of the Charges. Specifically, Thailand reiterates its argument that the Charges are a mere allegation of customs fraud and not a final determination, an argument that the Panel has already addressed in the context of examining Thailand's argument concerning the "insufficient information" contained in the Charges. Thailand reiterates its argument that "it was reasonable to suspect", and the Public Prosecutor "had reasonable grounds to assume", that PMTL had engaged in customs fraud on the basis of the cost information reported in form CK-21A, an argument that the Panel has already thoroughly addressed in the context of assessing the CVA-consistency of the Thai authorities' reliance on the cost information reported in the CK-21A forms. Thailand reiterates its argument that the procedural obligations in Article 1.2(a), third sentence, of the CVA cannot be applied in the context of criminal investigations, an argument that it is not necessary to consider in the context of Article XX because the Panel has found that the DSI discharged any obligation arising under that provision in respect of the 2002-2003 Charges. **In sum, the Panel considers that it need not make any additional factual findings to enable the Appellate Body to complete the analysis under Article XX(d) and (a) of the GATT 1994, because its earlier**

findings, set out in the previous Sections of this Report, are sufficient for those purposes.

6 THE 1,052 REVISED NOTICES OF ASSESSMENT (NOAS)

6.1 The termination of the measures

6.1.1 Paragraphs 7.481 and 7.489

6.1. The Philippines expresses concern that the Panel has not applied the usual rules on the burden of proof in making its findings, in **paragraphs 7.481 and 7.489**, that "it is unclear exactly when the 256 revised NoAs were terminated" and the evidence "casts a reasonable doubt on the exact date of revocation" of the 256 NoAs; and that "it is clear that the 256 NoAs were terminated no later than 30 August 2018". The Philippines states that the rules on the burden of proof are designed to address the consequences of the facts being "unclear", and serve "to allocate to one party or the other the legal consequences of certain facts not being established with sufficient clarity".[80] In the Philippines' view, the rules on the burden of proof are, therefore, "intended to avoid a panel leaving open or undecided whether a fact occurred as asserted", such as whether a measure was withdrawn in municipal law before panel establishment.[81] In the Philippines' view, a panel cannot simply remain "agnostic" in the face of doubts or uncertainties in the evidence; rather, if a party does not meet its burden of proof, the panel must treat the event as *not* having occurred as asserted. In this case, Thailand is the party asserting that the NoAs were withdrawn *before* the Panel was established, and as the party asserting this fact, Thailand bears the burden of proving it. The Philippines requests that the Panel address the factual question of the date of the withdrawal of the 256 NoAs on the basis of the usual rules regarding the burden of proof and, if the facts are "unclear" or shrouded in "reasonable doubt", conclude that Thailand has failed to meet its burden of proving its assertion that these measures were withdrawn before the date of the Panel's establishment.

6.2. Thailand does not comment on this request.

6.3. The Panel agrees with the Philippines that the rules on the burden of proof are designed to address the consequences of facts being unclear, in the sense that those rules serve "to allocate to one party or the other the legal consequences of certain facts not being established with sufficient clarity". However, the Panel does not agree that it follows from this that the rules on the burden of proof are necessarily "intended to avoid a panel leaving open or undecided whether a fact occurred as asserted", in the sense that the rules on burden of proof would preclude the possibility of a panel leaving a factual issue undecided. As a general principle a panel is not required to rule on arguments or issues that are not strictly necessary to resolving the dispute in the light of the findings that it has made. That principle applies equally to questions of fact and to questions of law and legal interpretation. In Section 7.4 of the Report, the Panel addresses the question of whether it should decline to rule on the 1,052 revised NoAs. At paragraph 7.468, the Panel explains that when dealing with expired, terminated, revoked or repealed measures, Panels have attached importance to several different considerations, including most notably (1) whether the measure at issue was withdrawn prior to, or only after, the establishment of the panel by the DSB; (2) whether there was a risk of reintroduction of the same or materially similar measure; and (3) whether findings on the withdrawn measure would have any practical value for implementation in the light of other findings on materially similar measures. The Panel then explains that "[n]one of these three considerations is decisive in and of itself". The Panel then proceeds to apply that framework to the evidence and arguments before it, and makes the intermediate conclusions that: (i) the Thai Customs Department terminated at least 796 of the 1,052 revised NoAs before DSB established the Panel; (ii) the Thai Customs Department may have also withdrawn the remaining 256 revised NoAs prior to the Panel's establishment, and in any event terminated them no later than 30 August 2018; (iii) there is no reason to consider that any future NoAs which the Thai Customs Department may issue, whether to implement the Supreme Court Ruling which modifies the November 2012 BoA Ruling or otherwise, would use either the same valuation methodology, or the same CK-21A information, as was used in the withdrawn NoAs; (iv) even if Thai Customs did reintroduce some or all of the NoAs using that same methodology and information, separate findings by the Panel concerning the WTO-consistency of the withdrawn NoAs would provide no guidance beyond the findings that the Panel has already made on the Philippines' identical substantive claims in relation to the 2002-2003 Charges; and

[80] Philippines request for review of the Interim Report, para. 226.
[81] Philippines request for review of the Interim Report, para. 227.

(v) in the light of those findings, the issues raised by the Philippines' procedural claims in relation to the revised NoAs are rendered largely academic. At paragraph 7.506, the Panel concludes that "[t]aken together", the foregoing considerations "lead the Panel to decline to rule on the 1,052 revised NoAs that have now all been terminated". It is evident from the Panel's reasoning that a definitive ruling on whether the 256 revised NoAs were withdrawn before or after the establishment of the Panel is not necessary to arrive at an overall conclusion and would not alter that conclusion one way or the other. Accordingly, the Panel makes no definitive ruling on that issue. For these reasons, the Philippines' comments on the Panel's reasoning do not persuade the Panel that there is any need to revise the Report in this regard.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE PHILIPPINES

I. INTRODUCTION

1. The Philippines initiated this dispute in 2008 because Thailand had consistently subjected Philip Morris (Thailand) Limited ("PM Thailand") – an importer which sources virtually all of its cigarettes from the Philippines – to prejudicial and protectionist regulatory conduct, in order to protect the monopoly of a Thai producer of cigarettes, the Thailand Tobacco Monopoly.[1] The original panel and Appellate Body found that the Thai measures at issue violated the *CVA* and the GATT 1994. Following the original proceedings, the situation for the Philippines' export interests only grew worse, forcing the Philippines to initiate the first compliance proceedings in June 2016. The Panel in the first compliance proceedings found that the measures at issue, again, violated Thailand's obligations under the *CVA* and the GATT 1994.

2. Despite the findings of the Panel in the first compliance proceedings, the situation for PM Thailand continues to worsen. Thailand recently took two further WTO-inconsistent measures regarding imported cigarettes, which re-assess the customs values of some of the very same entries that were at issue in the original and first compliance proceedings. These two measures are: *first*, Notices of Assessment ("NoAs"), which re-assess the customs value of 1,052 entries imported between 2001-2003 and demanded payment of approximately USD 800 million within 30 days; and, *second*, criminal charges that allege under-declaration of PM Thailand's transaction values in respect of 780 entries from 2002-2003, and seek fines of approximately USD 13.6 million and the imprisonment of one of PM Thailand's former employees ("02-03 Charges"). Under Thailand's official scheme of "bribes" and "rewards", the officials and informants responsible for bringing the 02-03 Charges would share in a substantial portion of any fines levied.

3. At the time of these entries, PM Thailand imported cigarettes from a related supplier in Indonesia, PT Philip Morris Indonesia ("PTPMI"). In 2003, PM Thailand switched supply from Indonesia to the Philippines, and it continues to source virtually all of its cigarettes from a Philippines producer. Hence, although the entries at issue in these proceedings are historical, the measures threaten the viability of PM Thailand now, and – because PM Thailand now sources its imports from the Philippines – the Philippines' exports.

II. THE 1,052 NOTICES OF ASSESSMENT ARE INCONSISTENT WITH THE *CVA*

4. On 29 November 2017, Thailand issued 1,052 NoAs covering customs entries imported between January 2001 and July 2003. The Customs Department did not inform PM Thailand that it was conducting this reassessment and, therefore, *entirely failed to consult* the importer before issuing the notices. The only explanation that the Customs Department provided for the basis of its valuation was that it rejected the declared transaction value based on "actual values", which were calculated using information related to the "cigarette cost structure" of the producer, PTPMI. The Customs Department then established the "actual values" as the alternative customs values.

5. The importer was – to say the least – surprised to be suddenly presented with new assessments for goods that were imported some 15 years earlier, along with a demand for payment of approximately USD 800 million, payable within 30 days. Moreover, the customs values of many of the 1,052 entries covered by the NoAs had already been definitively assessed by the Customs Department or its Board of Appeals ("BoA") many years ago, with taxes and duties definitively collected at that time.

6. On 14 December 2017, following the receipt of the 1,052 NoAs, PM Thailand sent a letter to the Customs Department requesting an explanation of the customs valuation determinations in the NoAs. In a letter of 10 January 2018, the Customs Department responded to this request by simply referring the importer to the Department of Special Investigation ("DSI"), because the latter was in possession of information relating to the customs valuation determinations made in the 1,052 NoAs. On 25 January 2018, PM Thailand wrote again to the Customs Department, repeating its request for an explanation. The Customs Department did not respond.

[1] In 2018, the Thailand Tobacco Monopoly changed its name to "Tobacco Authority of Thailand".

7. In sum, the Customs Department failed to provide even basic information on its methodology for examining the circumstances of sale, or the basis for rejecting the transactions values and for determining alternative "actual" customs values.

8. In this section, the Philippines explains, *first*, that the 1,052 NoAs constitute a "measure taken to comply". *Second*, the Philippines demonstrates that, contrary to Thailand's assertions, not all 1,052 NoAs have been withdrawn before the establishment of this Panel, and there is a risk of reintroduction for certain of the withdrawn entries. *Third*, the Philippines explains that the Customs Department violated various provisions of the *CVA*.

A. The 1,052 Notices of Assessment constitute "measures taken to comply"[2]

9. The Philippines challenges the 1,052 NoAs as "measures taken to comply" under Article 21.5 of the DSU. A measure constitutes an undeclared measure taken to comply if it has a "close nexus" in terms of *nature*, *timing* and *effects* with the DSB's recommendations and rulings in the original proceedings, and with the declared measures taken to comply. A panel must undertake a holistic examination of the substantive connections, in order to prevent a responding Member of "negating" steps towards compliance through adoption of further measures.[3]

10. The 1,052 NoAs have the requisite nexus with the DSB's recommendations and rulings, and with Thailand's declared measures taken to comply. Thailand has not contested that the 1,052 NoAs are a measure taken to comply.

11. Regarding *timing*, the 1,052 NoAs post-date both the expiry of the reasonable period of time for implementation of the DSB's recommendations and rulings (which ended in May 2012), and Thailand's adoption of two declared measures taken to comply (two rulings of the BoA dating from November 2012 and September 2012).[4] Accordingly, the timing of the NoAs is such that they are capable of undermining Thailand's compliance.

12. With respect to *nature*, the 1,052 NoAs share a close nexus with the November 2012 BoA Ruling, which is a declared measure to comply. In particular, the 1,052 NoAs involve: (i) the same importer and exporter (PM Thailand and PTPMI); (ii) the same importing and exporting country (Thailand and Indonesia); (iii) the same product, brands and producer (*L&M / Marlboro cigarettes* and PTPMI); (iv) the same transaction values, imported under the same supply contract; (v) the same type of legal determination; and (vi) the same grounds for doubting the declared customs values.

13. The 1,052 NoAs also share a further connection with the dispute: 208 of the entries subject to the NoAs are the subject of the DSB's recommendations and rulings and the 2012 November BoA Ruling, a declared measure taken to comply, both of which addressed a series of 210 entries from 2002.[5] Further, the entries covered by the 1,052 NoAs and the entries covered by the 03-06 Charges – which the Panel found is a WTO-inconsistent measure taken to comply in the first compliance proceedings – are contiguous. There is, therefore, a "chronological 'connection' and 'link'" stretching from the entries covered by the 1,052 NoAs, through the 03-06 Charges, to the entries covered by the September 2012 BoA Ruling.[6]

14. With respect to *effects*, the 1,052 NoAs involve, just like the 03-06 Charges, "PMTL-specific determinations" relating to the "valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes".[7] For the 208 NoA entries that overlap with the 210 entries subject to the November 2012 BoA Ruling, the NoAs have the effect of superseding and replacing the BoA's own assessment.

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[2] The Philippines' first written submission, Section IV.A; the Philippines' response to Panel Question 127.

[3] First Compliance Panel Report, para. 7.510, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71. This statement has been repeated by panels and the Appellate Body in several subsequent cases (*see*, e.g. Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 250).

[4] The Philippines refers to the rulings as the "September 2012 BoA ruling" and the "November 2012 BoA ruling".

[5] These same 206 entries are also subject to the 02-03 Charges.

[6] *See* First Compliance Panel Report, para. 7.543.

[7] First Compliance Panel Report, para. 7.549.

15. In essence, in all of the same circumstances, Thailand continues to engage in the very conduct that the DSB's recommendations and rulings are intended to address.

B. Thailand's alleged withdrawal of the 1,052 Notices of Assessment[8]

16. Thailand requests the Panel to find that all 1,052 NoAs are excluded from its terms of reference on the grounds that these NoAs were "revoked or terminated" prior to the Panel's establishment on 27 March 2018. The Customs Department has consistently divided the 1,052 NoAs in two groups: one covering 256 NoAs, and the other the remaining 796 NoAs. The Philippines does the same for purposes of the analysis below.

1. The 256 Notices of Assessment

17. Shortly before the establishment of this Panel, the Customs Department sent two letters to the importer, stating that it would not "proceed" to enforce payment of the 256 NoAs. In response to clarifications requested by the importer and the Philippines, respectively, the Customs Department sent two letters, one to the Philippines and one to the importer, each containing a statement from the Director-General of the Customs Department ("DG Statement"), indicating that the 256 NoAs themselves had been "terminated". However, both cover letters stated that the importer is prohibited from relying on the DG Statement in any Thai domestic proceedings or before any Thai government agencies.

18. On 30 August 2018, the BoA issued a ruling regarding the 1,052 NoAs, addressing them in two groups, just as the Customs Department had consistently done. For the 256 NoAs, the BoA said it was "revoking the assessments" in its ruling, and did not mention any prior communication to the importer by which these NoAs had already been cancelled, terminated, or revoked.

19. The Customs Department had never previously communicated to the importer that the 256 NoAs had been cancelled, terminated, or revoked, except in the DG Statement, on which the importer was prohibited from relying. Instead, the Customs Department consistently expressed its commitment not to enforce payment of the 256 NoAs, without actually nullifying the 256 NoAs themselves, or the customs value determination on which they were based.

20. In light of the 30 August 2018 BoA Ruling, the Philippines accepts that the 256 NoAs have been definitively revoked. However, that BoA ruling was issued several months after the Panel's establishment.

21. The timing of withdrawal is legally significant for the scope of the Panel's jurisdiction to rule on the 256 NoAs. It is well-established that a panel is entitled to make findings on any measures that exist at the time of a panel's establishment, even if that measure is withdrawn during the proceedings.[9]

2. The 796 Notices of Assessment

22. The Philippines accepts Thailand's factual assertion that the 796 NoAs were withdrawn on 21 March 2018, shortly before establishment of the Panel. However, the Panel must take into account additional facts relating to 208 out of these 796 NoAs.

23. In November 2012, the BoA issued a ruling regarding the customs value of these 208 import entries. The importer successfully appealed this ruling to the Thai Tax Court. The Customs Department then appealed the Tax Court decision to the Thai Supreme Court.

24. In November 2017, when the 208 NoAs were issued by the Customs Department, the Supreme Court was still considering the Customs Department's appeal. On 7 May 2018, the Supreme Court overturned the November 2012 BoA Ruling ("Supreme Court Ruling"), without calculating replacement values.

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[8] *See* the Philippines' second written submission, Section III.A; the Philippines' opening statement, Section II; the Philippines' responses to Panel Questions 128, 129, 161 and 162; the Philippines' comments on Thailand's responses to Panel Questions 161 and 162.

[9] Appellate Body Report, *EU – PET (Pakistan),* para. 5.28, and paras. 5.38-5.40, citing Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179; Panel Report, *EU – PET (Pakistan)*, para. 7.13 and fn 35 (referring to Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; *China – Electronic Payment Services*, para. 7.227; *EC – Approval and Marketing of Biotech Products*, paras. 7.1307-7.1308).

25. In implementing the Supreme Court Ruling, the Customs Department must now re-assess the entries, *including* the 208 entries already covered by the 1,052 NoAs. Hence, although these 208 NoAs have been withdrawn, there is a risk that the Customs Department will adopt a new valuation measure for the 208 entries in question that relies on the "cost-plus" methodology underlying the 208 NoAs.

26. The withdrawal of a measure at issue, before panel establishment, does not *automatically* exclude the measure from a panel's jurisdiction. When a measure has been withdrawn – either before or after panel establishment – a panel must determine whether, notwithstanding withdrawal, there remains a "prospect of reintroduction".[10] Importantly, contrary to Thailand's argument, the issue is not, therefore, the risk that *the exact same measure*, in formal terms, would be reintroduced. Rather, the issue is whether there is a risk that a *new and distinct measure, with substantive similarities* to the challenged measure, would be introduced. This is, in substantive terms, a reintroduction of the withdrawn measure.[11]

27. Hence, in assessing jurisdiction over these 208 NoAs, the Panel must take into account the Customs Department's impending re-assessment of the value of the 208 entries addressed in these NoAs, pursuant to the Supreme Court Ruling.

C. The Philippines' claims regarding the 1,052 Notices of Assessment

28. In these proceedings, the Philippines claims that the 1,052 NoAs are inconsistent with:

- Articles 1.1 and 1.2(a) of the *CVA*, because the Customs Department failed to properly examine the circumstances of sale and improperly rejected the transaction value;
- Articles 2 to 7 of the *CVA*, because the Customs Department failed to respect the sequential ordering of valuation methods;
- Article 6 of the *CVA*, because the Customs Department determined alternative customs values through an improper "cost-plus" or computed value methodology;
- Article 7 of the *CVA*, because the Customs Department determined alternative customs values through "unreasonable" flexibilities;
- Article 1.2(a) (third sentence) of the *CVA*, because the Customs Department failed to communicate grounds, and to provide the importer with a reasonable opportunity to respond; *and*
- Article 16 of the *CVA*, because the Customs Department failed to provide, upon written request, a written explanation as to how the customs values of the imported goods were determined.

1. Standard of review[12]

29. Before turning to the substance of its claims, the Philippines recalls the appropriate standard of review for the Panel's assessment of these claims, by recalling the Panel's own findings:

> Regarding the CVA specifically, [t]he original panel [] explained that the standard of review under the CVA requires a panel to "critically examine a domestic authority's explanation 'in depth, and in the light of the facts before the panel'"13

30. Thus, a customs administration's explanation is central to a panel's assessment of whether the administration has complied with its *CVA* obligations.

31. Further, both the original panel and this Panel emphasized that, in the event an authority fails to provide a reasoned and adequate explanation for its customs valuation determinations, a panel

[10] Panel Report, *US – Gasoline*, 6.19. *See also* the Philippines' comments on Thailand's response to Panel Question 161, para. 29.

[11] Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.47-5.48. The Philippines' comments on Thailand's response to Panel Question 161, para. 30.

[12] The Philippines' first written submission, Section IV.B.2.b.i; the Philippines' second written submission, paras. 140-141.

[13] First Compliance Panel Report, paras. 7.85 and 7.86 (emphasis added, footnotes omitted).

must find that the authority has failed to comply with the relevant obligations. Recalling the Appellate Body's approach in other instances where a panel was called on to review the determination of a domestic authority, the original panel and the Panel explained that:

> [W]here 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 … [and] the panel has no option but to find that the competent authority has not performed the analysis correctly.14

32. In other words, if a Member rejects transaction value without proper explanation, the Panel has "no choice" but to find a violation of Articles 1.1 and 1.2(a) of the *CVA*. Similarly, if a Member establishes an alternative customs value without proper explanation, the Panel has "no option" but to find a violation of the obligation in the *CVA* to base the alternative customs value on one of the methodologies in Articles 2-7.

2. The Customs Department violates Articles 1.1 and 1.2(a) (second sentence) of the *CVA* by failing to properly examine the circumstances of sale and improperly rejecting the transaction values

33. In this section, the Philippines demonstrates that the Customs Department's rejection of PM Thailand's declared transaction values is inconsistent with Articles 1.1 and 1.2(a) of the *CVA*.

a. Legal standard[15]

34. The primary and preferred basis of customs valuation under the *CVA* is the "transaction value", defined as the "price actually paid or payable" by the buyer to the seller, adjusted in accordance with Article 8 of the *CVA*. The term "price actually paid or payable for the goods" is further defined in Paragraph 1 of the *Interpretative Note* to Article 1 as "the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods".

35. Article 1.1(d) of the *CVA* recognizes that a relationship between the buyer and the seller may influence the "price paid or payable". To this end, Article 1.2(a) of the *CVA* sets forth rules that allow a customs administration to examine the circumstances of sale to establish whether the parties' relationship influenced the "price actually paid or payable".

i. CVA requirements regarding the examination of the circumstances of sale under Article 1.2(a)

36. The original panel found that, under Article 1.2(a), the terms "examination of the circumstances of sale" require "an active, critical review and consideration of the information before [the customs administration]".[16]

37. According to Thailand however, there is a carve-out that applies when an authority is relying on information officially provided by a foreign government. Thailand argues that, in these circumstances, a customs administration is entitled to assume that information is reliable, without taking any steps to verify the information. However, Thailand fails to point to any relevant treaty language to support its interpretation.

38. Contrary to Thailand's argument, the obligation to review information critically, when examining the circumstances of sale, flows *directly* from the wording of Article 1.2(a) (second sentence). Further, there is nothing in the text of Article 1.2(a), or related context, that limits or qualifies this obligation, depending on the source or nature of the information in question. Nor is there any basis in a "good faith" interpretation to suspend an obligation that flows directly from the treaty terms.

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[14] First Compliance Panel Report, para. 7.117, citing Appellate Body Report, *US – Steel Safeguards*, para. 303 (emphasis added). *See also* Original Panel Report, fn 499 (emphasis added).

[15] The Philippines' first written submission, Section IV.B.2.a; the Philippines' second written submission, Section III.B.1.b; the Philippines' responses to Panel Questions 148, 164 and 170; the Philippines' comments on Thailand's responses to Panel Questions 164-165 and 169.

[16] Original Panel Report, para. 7.171 (underlining added); *see* also First Compliance Panel Report, paras. 7.104-7.106.

39. In short, it is *never* permissible under Article 1.2(a) for a customs administration, when examining the circumstances of sale, to take no steps whatsoever to review the suitability of information used for customs valuation purposes.

ii. CVA requirements for an "examination" using a cost-plus benchmark

40. The Customs Department explained that it calculated the "actual values" at issue on the basis of information relating to the "cigarette cost structure" of the producer, PTPMI. Thus, the Customs Department rejected transaction values on the basis of a comparison with a "cost-plus" customs benchmark value.

41. The Philippines accepts that a comparison between transaction value and a "cost-plus" benchmark is, in theory, a valid method of examining whether the parties' relationship influenced the price. Indeed, this method is listed in Paragraph 3 of the *Interpretative Note* as an example of how an examination of the circumstances of sale may be conducted.

42. However, to be "apt to reveal" whether the parties' relationship influenced the price, a cost-plus benchmark must be properly constructed. To this end, Article 6 provides context, as it sets out the rules for properly determining a cost-plus customs value. In sum, the *CVA* imposes the following requirements when applying a cost-plus benchmark for the purpose of examining the circumstances of sale:

43. *First*, a "cost-plus" benchmark value calculated under Article 1.2(a) must be read in light of the related obligations under Article 6. Article 6 provides for three components to be included in a "cost-plus" customs value: (1) the cost of producing the imported goods, which is calculated from individual cost elements; (2) an amount for profit and general expenses; and (3) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8.[17]

44. Further, in addition to the overarching requirements in the *CVA* relating to the *nature* and *quality* of information, Article 6 requires that information relating to "costs" and "profits" must be: (1) related to the "goods being valued"; (2) provided "by or on behalf of the producer"; and (3) "based on the commercial accounts" of the producer.

45. *Second*, an administration must adhere to the overarching *CVA* obligations to use information that is "*objective*", "*accurate*", "*truthful*", "*quantifiable*", "*complete*" and "*correct*", and prepared consistently with Generally Accepted Accounting Principles ("GAAP"), so that the result is "*fair*", "*neutral*" and "*equitable*".

46. The *CVA* recognizes that, due to these requirements, Article 6 poses particular challenges to customs administrations seeking to rely on the computed value methodology.

b. Application to the facts: the Customs Department failed to properly examine the circumstances of sale[18]

47. In this section, the Philippines demonstrates that the Customs Department violates Articles 1.1 and 1.2(a) (second sentence) by rejecting PM Thailand's transaction values in the 1,052 NoAs, without conducting a proper examination of the circumstances of sale and without valid basis.

i. The basis for the Customs Department's customs valuation determination is entirely unsubstantiated

48. In its first written submission, the Philippines understood that, in making the customs valuation determinations at issue, Thailand relied on certain information reported in 2002-2003 by the producer in an Indonesian regulatory form called "CK-21A" ("CK-21A information"). This understanding was based on certain representations from Thailand to the importer. However, the Thai authorities never provided the CK-21A information itself, or confirmed that it was, in fact, the basis for the customs valuation determinations at issue. Nonetheless, the Philippines' first written submission explained that, if CK-21A information was indeed the basis, it was not fit for customs

[17] The *Interpretative Note* to Article 6 provides further detail on the costs that must be included in a computed value, including those mentioned in Article 8.1.

[18] The Philippines' first written submission, Section IV.B.2.b; the Philippines' second written submission, Section III.B.1.v; the Philippines' opening statement, Section IV; the Philippines' responses to Panel Questions 143-146 and 148-149; the Philippines' comments on Thailand's responses to Panel Questions 164(a) and (b), 165 (a)-(c) and 169.

valuation purposes, because the information was inaccurate, given its role in the Indonesian regulatory system. These arguments are summarized in Section II.C.2.b.ii below.

49. In its first written submission, Thailand asserted that it relied on CK-21A information, and agreed that the information was, in fact, inaccurate. Thailand's defense was based on an assertion that its authorities were entitled to assume that the CK-21A information was accurate, because it had been provided officially by the Indonesian government. Thailand failed to provide the CK-21A information in question, or any communications from Indonesia providing the information.

50. As the Panel proceedings unfolded, evidence came to light that raises a *prima facie* case that the Thai authorities have never received the producer's CK-21A information for the relevant period.

51. *First*, on 17 October 2018, the Philippines became aware of an official statement from Indonesia's Ministry of Law and Human Rights relating to Thailand's request for CK-21A information.[19] The statement explains that Indonesia could not provide Thailand with the producer's CK-21A information because the documents had been "destroyed" pursuant to Indonesia's 10-year record-keeping requirements. Despite asserting that its authorities used the producer's CK-21A information, Thailand has provided no evidence to show that it ever received that CK-21A information from Indonesia.

52. *Second*, in response to Panel Question 143, Thailand submitted Exhibit THA-74, purportedly a "sample calculation" showing how it determined the "actual value" used in the 1,052 NoAs and the 02-03 Charges. The "sample calculation" shows that Thailand constructed alleged costs of production indirectly, through a deductive calculation, working backwards "from the [Indonesian] retail price". This is puzzling, because, in form CK-21A, the Indonesian producer purportedly provides figures for each element of its costs, meaning that there is no need to calculate the costs indirectly using a deductive calculation based on the Indonesian retail price. Had Thailand relied upon the producer's CK-21A information, the Philippines would have expected Thailand to provide a calculation based on this CK-21A information.

53. Thailand has failed to provide any evidence to substantiate what information it relied on in adopting its measures, *or* any evidence as to the source of that information. Thailand instead asserts that it relies on the Philippines' arguments, in the Philippines' first written submission, that CK-21A information underlies the valuation determinations at issue. However, as noted, the evidence now suggests that the Philippines had been misled in its initial understanding.

54. The Panel cannot allow Thailand to escape the consequences of its choice not to provide evidence by accepting an unsubstantiated assumption that Thailand relied on CK-21A information provided by Indonesia, when that assumption is contradicted by evidence on the record. It is for Thailand to substantiate the basis for its customs valuation determinations, and it has not done so.

55. Consistent with the standard of review, where Thailand has failed to provide an explanation of the basis of its customs valuation determinations, the Panel has "no option" but to find it has not performed its obligations correctly. Nonetheless, to assist the parties in resolving this ongoing dispute effectively, the Philippines urges the Panel to address the Philippines' arguments that CK-21A information is not a proper basis for customs valuation, which is addressed next.

ii. **Even if the Customs Department relied on CK-21A information from the Indonesian government, it failed to properly examine the circumstances of sale as required by Article 1.2(a) (second sentence) of the CVA**

56. In the Philippines' first written submission – when it understood that the customs valuation determinations at issue were based on CK-21A information – the Philippines explained why Thailand's reliance on CK-21A information violated the *CVA*.

57. Form CK-21A was an Indonesian regulatory form, in which cigarette producers had to report certain "costs" and "profits". However, due to Indonesian regulatory requirements, these figures bore no genuine relationship to the producer's actual costs and profits. Thus, to the extent that Thailand relied on CK-21A information, it violates Articles 1.1 and 1.2(a), because:

58. *First*, the Customs Department compared the declared value with a benchmark value that was improperly constructed, and "inapt to reveal whether the relationship influenced the price". In

[19] Official Statement from the Indonesian Ministry of Law and Human Rights dated 13 May 2016 (English translation), (Exhibit PHL-295-B).

examining the circumstances of sale, the Customs Department compared the declared values with a benchmark value based on CK-21A information which, due to Indonesian regulatory requirements, had no genuine relationship to the producer's actual costs and profits. The benchmark value did not adhere to the overarching requirements in the *CVA* regarding the nature and quality of information relied on for customs valuation purposes; *and* it did not adhere to the requirements in Article 6 for calculating a cost-plus value. In sum, the benchmark value reveals nothing about whether the parties' relationship influenced the price.

59. *Second*, the Customs Department failed to conduct its examination with the required rigor. The Customs Department failed to take active steps to gather the relevant information, and, by Thailand's admission, took no steps to review critically the information before it. This is notwithstanding that it was on notice, due to expert statements submitted by the importer, that the CK-21A information was inaccurate.

60. In response, Thailand admits that its authorities did not critically review the information underlying the customs valuation determinations at issue. Thailand has also not contested that CK-21A information is inaccurate, and does not confirm to the standards in the *CVA* generally, and Article 6 specifically.

61. As noted above, Thailand's argument is that its authorities were, in the circumstances, entitled to assume the information in question was accurate. Thailand also submits Exhibit THA-74, which it argues demonstrates a *CVA*-consistent "cost-plus" valuation determination, based on CK-21A information. Below, the Philippines addresses both points.

(1) **There was no basis for the Customs Department to assume the CK-21A information was accurate**

62. Thailand argues that its authorities were entitled, under Article 1.2(a), to assume that the alleged CK-21A information was accurate for its customs valuation purposes, because it was provided officially by the Indonesian government.

63. Hence, Thailand pleads for an assumption of reliability, even though it accepts that the alleged CK-21A information was not accurate, and acknowledges that the Thai authorities did not take steps "to confirm the veracity of the information in the tax forms".[20] According to Thailand, the Thai authorities were nonetheless entitled to rely on the alleged CK-21A information, because the information was "supposed to be accurate" and the inaccuracies were of PTPMI's "own making".

64. As explained above, Thailand's arguments are wrong as a matter of law: interpretatively, there are no circumstances in which it is permissible to do *nothing* when reviewing information under Article 1.2(a).

65. Thailand's arguments are also wrong as a matter of fact. The Philippines has explained, with supporting evidence, that the inaccuracies in the CK-21A information were a necessary consequence of Indonesia's regulatory requirements.

66. Specifically, in 2002-2003, the producer was required to report information in form CK-21A in order to obtain a figure known as the "HJE", which served as the tax base for the domestic sale of cigarettes, and the maximum retail selling price. The "cost" and "profit" reported in form CK-21A had to add up to the producer's requested HJE. However, the HJE had to exceed a mandated regulatory threshold, which was regularly increased, in order to meet Indonesia's revenue collection targets. It was understood, in the context of this system, that the figures reported in the CK-21A form were "plugs" that did not represent accurate, GAAP-consistent costs and profits from the producer's own "commercial accounts". Indeed, the producer was required to report CK-21A information before even beginning production. Indonesia also never verified whether the CK-21A information was accurate – in fact, it had no system to do so. The Philippines' description[21] of the Indonesian regulatory system was confirmed in Indonesia's third party submission.[22]

[20] Thailand's first written submission, paras. 3.96, 3.29, 3.37 and 1.4.

[21] *See* the Philippines' first written submission, Sections IV.A.2.b and IV.B.2.b.ii; the Philippines' responses to Panel Questions 144, 145 and 164; the Philippines' comments on Thailand's response to Question 165.

[22] *See* Indonesia's third party submission; the Philippines' response to Panel Question 145.

67. Thus, although the CK-21A information was suitable for its limited Indonesian regulatory purposes, it was not suitable for Thailand's customs valuation purposes. Thailand has entirely failed to engage with the Philippines' arguments and evidence on this point.

(2) **Thailand's own evidence demonstrates that its customs valuation methodology was inconsistent with the CVA**

68. The Panel requested that Thailand provide "actual examples to illustrate how the benchmark for a given entry was calculated on the basis of the information in CK-21A".[23] Prior to the Panel's question, Thailand had never provided any information or calculations underlying its customs valuation determinations.

69. In response to the Panel's question, Thailand submitted Exhibit THA-74 ("THA-74"), which it described as "a sample calculation based on information reported in form CK-21A of a constructed CIF price for Marlboro cigarettes".[24]

70. As noted above, this "sample calculation" shows that Thailand constructed alleged costs of production indirectly, through a deductive calculation, working backwards "from the [Indonesian] retail price". The "retail price" corresponds to the HJE, or maximum retail selling price.

71. *First*, THA-74 does not substantiate that Thailand relied on CK-21A information. In fact, for the reasons described above, THA-74 suggests that Thailand did not rely on CK-21A information. The CK-21A information consisted of line-items for individual "costs" and "profits". THA-74 does not, however, show any individual line-item figures for costs or profits.

72. Thailand contends that it "sought to use the computed method but did not have cost information from the company's books."[25] Instead of information from the company's books, Thailand claims it "relied on the information provided by the Indonesian authorities, based on which it was able to identify a cost of production, in part by adjusting the sales price in the country of exportation (Indonesia)".[26] In other words, Thailand admits that the Thai authorities did not use the producer's GAAP-consistent "commercial accounts", which violates the *CVA* requirements that apply to the calculation of a cost-plus value.

73. *Second*, leaving aside the information used, Thailand's "sample calculation" reveals that Thailand has applied *two* valuation methodologies that are prohibited under Article 7.2 of the *CVA*.

74. The first prohibited methodology is Article 7.2(c). Article 7.2(c) prohibits a valuation based on the retail selling price in the exporting country's domestic market. Thailand's sample calculation is expressly based on Indonesia's maximum retail selling price, which is a form of domestic retail selling price under Article 7.2(a). As Thailand itself says, the Thai authorities calculated the "actual values" by "subtracting [certain amounts] from the [Indonesian] retail price" in order to "obtain[] the cost of production".[27]

75. The second prohibited methodology is Article 7.2(d). Article 7.2(d) prohibits a valuation based on a computed value that is not calculated in accordance with Article 6. Article 6 requires, at a minimum, that a computed value be based on a "bottom-up" calculation which addresses each element of costs incurred, and profits earned, in producing the relevant goods. However, as revealed in THA-74, Thailand did not calculate PTPMI's costs of production based directly on the producer's various costs of producing and selling the goods, such as the costs of raw materials, labor, utilities, and transport. Instead, Thailand constructed alleged costs of production *indirectly*, through a *deductive* calculation, working backwards "from the retail price".[28]

76. Thus, Thailand constructed a single aggregate amount for the producer's costs, general expenses and profits, by subtracting, from the Indonesian retail price, domestic taxes and a margin for distributors/retailers. The resulting value is simply a residual amount left at the end of this deductive calculation, which Thailand calls the "cost of production".

77. This approach masks the figures used for each of the myriad cost elements that must make up a computed value under Article 6. Thailand's proposed approach also entirely fails to calculate

[23] Panel Question 143.
[24] *See* Thailand's response to Panel Question 143, para. 5.1; the Philippines' opening statement, para. 66.
[25] Thailand's comments on the Philippines' response to Panel Question 171, para. 5.14.
[26] Thailand's comments on the Philippines' response to Panel Question 171, para. 5.14.
[27] Thailand's response to Panel Question 143, para. 5.2.
[28] *See* Thailand's response to Panel Question 143, para. 5.2.

the costs, general expenses and profits based on the producer's GAAP-consistent "commercial accounts".

78. The Philippines relies on Article 7.2 as context for its claims under other *CVA* provisions. A customs administration *cannot* resort to valuation methods prohibited under Article 7.2 when it makes valuation determinations under *any* provision of the *CVA*, including when undertaking an "examination of the circumstances of sale" contemplated by Article 1.2(a).

3. The Customs Department violates Articles 2 to 7 of the *CVA* by failing to respect the sequential ordering of valuation methods[29]

79. If the transaction value is properly rejected under Article 1 of the *CVA*, a customs administration must proceed sequentially through the subsequent provisions, seeking first to use Article 2 (transaction value of identical goods), before turning to Article 3 (transaction value of similar goods), through Article 5 (deductive value), Article 6 (computed value), and, finally, Article 7 ("reasonable flexibility").

80. The Customs Department calculated the "actual" customs values in the 1,052 NoAs using the computed value methodology set out under Article 6, or the fallback method under Article 7.[30] The Customs Department failed, however, to provide any explanation as to why it could not use the methodologies in Articles 2 to 6, and made no mention, at any stage, of its sequential valuation obligations.

81. The only explanation provided by Thailand related to the methodologies required under Articles **2**, **3** and **5**. However, this explanation was provided *ex post* by Thailand in its submissions. As this Panel noted in the first compliance proceedings, citing to the Appellate Body, "a Member may not rely on *ex post* rationalizations of an authority's conduct in WTO dispute settlement".[31]

82. Further, in the event the Panel finds that the Customs Department applied Article 7, it failed to provide *any* explanation as to why it could not resort to Article **6**.

83. Since the Thai authorities have not provided a "reasoned and adequate explanation" to support its decision to determine an alternative customs value under Article 6 and/or 7, or its decision to dispense with any consideration of the methodologies in Articles 2, 3, 5 or 6, the Panel "has no option but to find that the competent authority has not performed the analysis correctly".[32]

4. The Customs Department violates Article 6 of the *CVA* by determining alternative customs values through an improper "cost-plus" or computed value methodology[33]

84. Turning to its claims in respect of Thailand's determination of an alternative customs value, the Philippines explains, *first*, that the Customs Department relied on Article 6 of the *CVA,* not Article 7*,* in its customs valuation determination. *Second*, the Philippines demonstrates that the Customs Department violates Article 6 by determining the new "actual" customs value of the goods through an improper "cost-plus" methodology. *Third*, even if the Panel finds that the Customs Department relied on Article 7 instead, or if the Panel wishes to make alternative findings, the Philippines explains that the Customs Department nevertheless violates Article 7.1 by determining the new "actual" customs values through "unreasonable" flexibilities not permitted by Article 7.

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[29] The Philippines' first written submission, Section IV.B.3; the Philippines' second written submission, Section III.B.2; the Philippines' responses to Panel Questions 152 and 153.

[30] The Philippines' primary position is that the Thai authorities relied on Article 6. *See* Section II.C.4.a below.

[31] First Compliance Panel Report, para. 7.121, citing Appellate Body Reports, *Japan – DRAMs (Korea)*, para. 159; and *US – Tyres (China)*, para. 329.

[32] First Compliance Panel Report, para. 7.117, citing Appellate Body Report, *US – Steel Safeguards*, para. 303 (emphasis added). *See* also Original Panel Report, fn 499.

[33] The Philippines' first written submission, Section IV.B.4; the Philippines' second written submission, Section III.B.3; the Philippines' responses to Panel Questions 149, 155 and 170; the Philippines' comments on Thailand's response to Panel Question 169.

a. **Correct characterization of the measure under the CVA[34]**

85. In determining which WTO obligations apply to a measure, a panel should focus on the "content and substance" of the measure, examined in light of relevant evidence.[35] Further, a respondent's own characterization of its measure is not determinative.[36] In other words, a respondent cannot decide for itself which WTO obligations apply to its measure.

86. In these proceedings, Thailand contended that its determinations were *consistent* with Article 6. In defending its determinations under Article 6, Thailand also made confusing arguments that sought to read Article 6 in light of the flexibilities in Article 7: it argued that its authorities complied with Article 6, because they "applied the computed value method with a 'reasonable flexibility'" under Article 7.[37] Thus, Thailand appeared to argue that it adopted its measures under Article 6 using the flexibilities in Article 7.

87. Late in the proceedings, namely in its *responses to the Panel's pre-hearing questions*, Thailand asserted, for the first time, that "the WTO-consistency of the valuation [methodology at issue] must be assessed under Article 7.1, not Article 6".[38]

88. However, Article 7 applies solely when a customs administration attempts to apply Articles 2 through 6, but is unable to do so. Thailand has presented no evidence at all to prove that its authorities considered affirmatively whether they could apply Article 6, and concluded that they could not do so. Indeed, Thailand argued, in these proceedings, that its authorities could not rely on the methodologies required under Articles **2**, **3** and **5** of the *CVA*, *without* even mentioning that its authorities had been unable to apply Article 6.

89. The evidence, therefore, shows that the Thai authorities calculated computed customs values using the producer's purported "costs" and "profits", without any evidence that they could not use Article 6 and had used, instead, Article 7. Absent any such evidence, the Panel must assess the *CVA*-consistency of Thailand's customs valuation determination under Article 6.

b. **The Customs Department violates Article 6 of the CVA by determining the new "actual" customs value through an improper "cost-plus" methodology**

90. In Section II.C.2.a.ii above, the Philippines summarizes the legal standard, under Article 6, for the calculation of a cost-plus customs value. In sum, Article 6 of the *CVA* provides for three components to be included in a "cost-plus" customs value: (1) the cost of producing the imported goods; (2) an amount for profit and general expenses; and (3) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8. Further, in addition to the overarching requirements in the *CVA* relating to the *nature* and *quality* of information used for customs valuation purposes, Article 6 requires that "cost" and "profit" information used for a computed value must: (1) relate to "the goods being valued"; (2) be provided "by or on behalf of the producer"; (3) be "based upon the commercial accounts" of the producer; and, (4) be "prepared" in a manner consistent with GAAP.

91. For the reasons explained above, Thailand has failed to provide any evidence to substantiate its assertion that it relied on CK-21A information, or any evidence as to the source of that information.[39] Further, evidence has come to light suggesting that the Thai authorities never received CK-21A information from Indonesia.[40]

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[34] The Philippines' response to Thailand's communication of 2 November, Section III ("the Philippines' response to Thailand's communication"); the Philippines' reply to Thailand's comments on the Philippines' response to Thailand's communication of 2 November, Section II ("the Philippines' reply to Thailand's comments"). This issue arose in the context of Thailand's communication requesting the Panel to decline to rule on the Philippines' claims under Article 7.1 ("Thailand's objection of 2 November 2018"). The Philippines addresses the two grounds for Thailand's request in Section II.C.5, below.

[35] *See* Appellate Body Report, *US – Softwood Lumber IV*, para. 65; Appellate Body Report, *Colombia – Textiles*, para. 5.18.

[36] *See* Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 65; Appellate Body Report, *China –Auto Parts*, fn. 244; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn. 87 to para. 87.

[37] Thailand's first written submission, paras. 3.104-3.111; Thailand's second written submission, paras. 3.78-3.81. The quoted passage refers to the Public Prosecutor. However, consistent with Thailand's arguments, it has been amended *mutatis mutandis* to reflect that the Customs Department adopted the 1,052 NoAs.

[38] Thailand's response to Panel Question 156, para. 8.1.

[39] *See* Section II.C.2.b.i.

[40] *See* para. 8 above.

92. In the absence of an explanation of how Thailand calculated its computed values, including the information on which it relied, the Panel has "no option" but to find that Thailand has not complied with the obligations in Article 6.

93. Moreover, even if Thailand substantiated that its authorities relied on CK-21 information, the Philippines explained in Section II.C.2.b.ii above that (i) CK-21A information is not suitable for customs valuation purposes, and (ii) Thailand's own evidence demonstrates that its customs valuation methodology is inconsistent with Article 6.

94. Thailand argues that its methodology was "not inconsistent" with Article 6, because the Customs Department relied on the reasonable flexibilities in Article 7. In other words, Thailand seeks to import the "reasonable flexibility" allowed under Article 7 into Article 6 as a basis to excuse its measure from a finding of violation under Article 6.

95. However, the six valuation methodologies provided for in Articles 1 to 7 of the *CVA* must be applied in a sequential order. Article 7 is a "fallback" to be used only in the event that an authority cannot make a proper determination under the five prior valuation methods set forth in "Articles 1 through 6". To permit an authority to import "reasonable flexibility" into Articles 1 through 6 would fundamentally alter the architecture of the valuation methods in the *CVA*, making Article 7 a permanent exception to the other valuation rules.

96. Finally, even if Thailand could have recourse under Article 6 to "reasonable flexibility" allowed for under Article 7, it would not justify the flaws in the Customs Department's customs valuation determination under Article 6 because, for the reasons explained in the next section, the determination does not respect the "reasonable flexibility" in Article 7.

5. The Customs Department violates Article 7 of the *CVA* by determining alternative customs values through "unreasonable" flexibilities[41]

97. In this section, the Philippines explains that, if the Thai authorities did rely on Article 7.1 of the *CVA*, the customs valuation determinations at issue are not consistent with the "reasonable flexibility" allowed for under that provision. The Philippines *first* addresses Thailand's request that the Panel decline to make findings on the Philippines' claim under Article 7.1. *Second,* the Philippines summarizes its *prima facie* case under Article 7.1.

a. Thailand's objection to the Philippines' Article 7.1 claims is without grounds

98. Following the substantive meeting between the parties, Thailand made a belated request that the Panel decline to make findings under Article 7.1, on the grounds that: (1) the Philippines' claims under Article 7.1 are outside the Panel's terms of reference; and (2) the Philippines failed to make a *prima facie* case of inconsistency with Article 7.1 ("Thailand's objection").

99. At the outset, the Philippines emphasizes that Thailand's objection is moot, because, as explained in Section II.C.4.a above, the evidence demonstrates that the Thai authorities calculated computed customs values under Article 6, and did not rely on Article 7.1. If the Panel agrees with the Philippines, it need not consider Thailand's objection, because its objection is premised on Thailand's self-serving and incorrect contention that its authorities applied Article 7.1.

100. Should the Panel disagree, or wish to make alternative findings under Article 7.1, this section: (1) explains that the Philippines' claims under Article 7.1 are within the Panel's terms of reference, because the Philippines' panel request clearly identifies claims under Article 7.1; and (2) explains that the Philippines made a timely, *prima facie* case of inconsistency with Article 7.1.

[41] The Philippines' second written submission, Section III.B.3; the Philippines' responses to Panel Questions 155 and 157; the Philippines' response to Thailand's communication; the Philippines' reply to Thailand's comments.

i. The Philippines' claims under Article 7.1 are within the Panel's terms of reference[42]

101. The Philippines' panel request narrates that each of the measures is inconsistent with:

> Articles 2, 3, 4, 5, 6 and 7 of the CVA because, among others, Thailand failed to comply with the relevant valuation rules in establishing the "actual values" of the relevant goods.

102. Thailand argues that this does not sufficiently identify a claim under Article 7.1 specifically, because Article 7 contains multiple subparagraphs. Thailand accepts that a panel request need not identify a specific subparagraph using numbers but can do so using words. However, Thailand maintains that the Philippines' panel request is "overly vague", because the narrative is broad enough to cover other paragraphs of Article 7, besides Article 7.1. Thailand's argument misses the point. The reference to Article 7 in the panel request, read with the narrative language, clearly presents a claim under Article 7.1.

103. Under the *CVA*, a Member is required to establish the customs value of imported goods by complying with the valuation rules under one of the six valuation methods set forth in Articles 1 through 7. Article 7.1 evidently sets forth "relevant valuation rules". Indeed, it is the only paragraph in Article 7 that sets forth affirmative valuation rules that may be used "in establishing" the customs value of goods. Thus, the words in the panel request **necessarily** identify, and establish a connection to, the "valuation rules" in Article 7.1.

104. Thailand has not responded to the Philippines' argument that the reference to Article 7 in the panel request, coupled with the narrative language, clearly – indeed necessarily – presents a claim under Article 7.1.

105. If the Philippines' panel request includes a claim under Article 7.1, Thailand cannot exclude this claim by showing that the language in the panel request may be broad enough to include an additional claim under Article 7. As long as the panel request clearly identifies, at a minimum, Article 7.1, it need not do so to the exclusion of claims under other paragraphs in Article 7. In any event, the Philippines' panel request was not formulated to cover claims under Articles 7.2 or 7.3, and the Philippines makes no claims under those provisions.

ii. The Philippines made a timely, prima facie case of inconsistency under Article 7.1[43]

106. Thailand argues that the Philippines has failed to make a *prima facie* case in a timely manner, because the Philippines did not pursue its claim under Article 7.1 in its first written submission. In Thailand's view, Thailand's due process rights would be compromised if the Panel were to rule on the Philippines' Article 7.1 claims in these circumstances.

107. As this Panel explained, "ensuring due process requires a balancing of interests of both parties, and not merely the interests of the responding party".[44] Thus, in assessing Thailand's due process objections regarding the timely submission of arguments under Article 7 of the *CVA*, the Panel must weigh the Philippines' right to pursue its case, on the one hand, against Thailand's right to pursue its defense, on the other, in light of the relevant circumstances.

108. The circumstances are as follows. As explained, the evidence demonstrates that the Thai authorities calculated computed customs values under Article 6, and did not rely on Article 7.1. Absent any indication from the Thai authorities that they could not use Article 6, it was neither necessary, nor appropriate, for the Philippines to burden the Panel with alternative arguments under Article 7.1 in its first written submission.

109. As soon as Thailand asserted that its authorities had used the flexibilities in Article 7.1, the Philippines' second written submission presented a *prima facie* case of inconsistency with the "reasonable flexibility" in Article 7.1. Thailand's due process rights would not be violated if the Panel were to address these arguments. Thailand had five submissions to respond to these arguments, and did, in fact, respond in its second written submission.[45]

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[42] The Philippines' response to Panel Question 157; the Philippines' response to Thailand's communication, Section IV; the Philippines' reply to Thailand's comments, Section III.

[43] The Philippines' response to Thailand's communication, Section V; the Philippines' reply to Thailand's comments, Section IV.

[44] First Compliance Panel Report, para. 150.

[45] *See* Thailand's second written submission, paras. 3.79-3.80.

110. By contrast, *the Philippines*' due process rights to pursue its case would be compromised if the Panel accepted Thailand's objection. The timing of the Philippines' arguments under Article 7 is due entirely to the failure by Thailand and its authorities to explain in timely fashion that their customs valuation determinations were made under Article 7, because Article 6 could not be used.

b. The Customs Department's determination of "actual" values is not "reasonable" under Article 7.1

111. Turning now to the substance under Article 7, Thailand states that "[t]he specific flexibility is that the [Thai authorities] relied on information" which "was not subsequently verified in terms of its accuracy".[46] In other words, Thailand argues that the failure to take any steps to review the alleged CK-21A information is within the "reasonable flexibility" allowed under Article 7.

112. However, there is nothing "reasonable" about a customs administration using inaccurate information, without taking any steps to review the information critically. Article 7 states that the customs value shall be determined "consistent with the principles and general provisions of this Agreement and of Article VII of the GATT 1994 for its customs valuation determination".

113. One of the fundamental principles flowing from the provisions of the *CVA* is that the customs value must be determined on the basis of "*objective*", "*accurate*", "*truthful*", "*quantifiable*", "*complete*" and "*correct*" information. In that respect, it is a general principle that the customs administration "shall utilize information" prepared consistently with GAAP. Furthermore, customs valuation must be "*fair*", "*neutral*" and "*equitable*", and not lead to "*arbitrary*" or "*fictitious*" values. A second principle is that the *CVA* requires "active" conduct, through which the authority must satisfy itself that the information it uses is fit for its specific customs valuation purposes.

114. As a result, it is *never* "reasonable" under Article 7 for a customs administration to rely on inaccurate information; it is also *never* "reasonable" for a customs administration simply to do nothing by way of critical review of the reliability of information before it.

6. The Customs Department violates Article 1.2(a) (third sentence) of the *CVA* by failing to communicate grounds, and failing to provide a reasonable opportunity to respond [47]

115. Article 1.2(a) (third sentence) embodies a "due process" objective relating to the manner in which the customs administration conducts its examination: the administration is required to communicate its grounds for considering that the parties' relationship influenced the price, and to give the importer a reasonable opportunity to respond.[48] This process must take place before a decision to reject transaction value is reached.[49]

116. The Customs Department failed to inform PM Thailand altogether that it was conducting an examination of the circumstances of sale. In so doing, the Customs Department failed to inform PM Thailand of its grounds for doubting PM Thailand's declared transaction values, prior to making its determination. Since there was no communication of grounds, PM Thailand was further deprived of the opportunity to provide a response.

117. Moreover, Article 1.2(a) (fourth sentence) states that, if the importer so requests, the customs administration shall communicate the grounds "in writing". This obligation presupposes that a customs administration informs an importer that its examination of the circumstances of sale is ongoing. Hence, the Customs Department's secretive conduct of the examination of the circumstances of sale also deprived PM Thailand of the opportunity to request a statement of grounds.

118. Thailand accepts that the Customs Department did not perform the obligations in Article 1.2(a) (third sentence). According to Thailand, the Customs Department was effectively relieved of these obligations because "the DSI and the Public Prosecutor, not the Customs Department, were the relevant Thai agencies that would have been in a position to communicate" grounds.[50] Yet, Thailand also argues that the Public Prosecutor and the DSI were not subject to the obligations in Articles 1.2(a).

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[46] Thailand's first written submission, para. 3.110.

[47] The Philippines' first written submission, Section IV.B.5.b; the Philippines' second written submission, Section III.B.4; the Philippines' responses to Panel Questions 150, 151 and 171; the Philippines comments on Thailand's response to Panel Question 163.

[48] Original Panel Report, para. 7.191.

[49] Original Panel Report, para. 7.155.

[50] Thailand's response to Panel Question 163, para. 2.12.

119. Thus, in Thailand's view, no government agency bears any responsibility, under Article 1.2(a) of the *CVA*, for the procedural failings of two sets of identical customs valuation determinations, in the 1,052 NoAs and the 02-03 Charges. Thailand's argument also highlights the absurdity of Thailand's position, addressed in Section III.B.2, that the DSI and the Public Prosecutor were not involved in customs valuation.

7. The Customs Department violates Article 16 of the *CVA* by failing to provide, upon written request, a written explanation as to how the customs values of the imported goods were determined[51]

120. Article 16 requires a customs authority to provide "an explanation" of its customs valuation determination upon written request. The original panel held that this explanation must "*make clear and give details* of how the customs value of the importer's good was determined, including *the basis for rejecting the transaction value*", and "*how the [alternative valuation] method [used] was applied* in reaching the final customs value".[52]

121. In this regard, the Philippines explained that Article 6 provides useful context as to the nature of the required explanation under Article 16 in circumstances where an authority used Article 6 to value the imported goods.

122. With regard to the interpretation of the obligation under Article 16, although Thailand agrees that, to some extent, the valuation method used is relevant for this examination, it claims that the Philippines' interpretation goes too far, because it asks the Panel "to transpose verbatim specific obligations in an interpretative note to an Article [6] into another Article [16]".[53]

123. This is incorrect. The obligation in Article 16 is *functional* – that is, it must fulfill the functional objectives set forth in Article 16. In particular, the explanation must serve the transparency and due process objectives in Article 16.[54] To this end, the Philippines explained that the written explanation must provide sufficient detail so as to enable the importer to decide whether to appeal the decision, and if so, on what grounds.[55] As a result, the nature of the explanation must take into account the valuation method used.

124. Accordingly, where a customs administration uses a cost-plus value – both to reject transaction value under Article 1 *and* to determine an alternative value under Article 6 – the authority's explanation must be tailored to provide a full understanding of how the cost-plus value was calculated, taking account of the obligations in Article 6 and its associated *Interpretative Notes*, including the requirements in Paragraph 6 regarding the *source* of the information used to calculate costs and profits, the *data* used, and the *calculations* based upon such data.[56]

125. Applying Article 16 to the facts, the Customs Department failed to provide an adequate explanation of its determination, following the importer's written request.

126. Thailand argues that the Customs Department satisfied its obligation under Article 16, because: (1) it pointed PM Thailand to the 02-03 Charges, which "make clear that the basis for rejecting the declared transaction value was the suspicion that PMTL had engaged in customs fraud", and (2) the 1,052 NoAs state that the "'correct' customs values were 'calculated from the cigarette cost structure of PT Philip Morris Indonesia obtained from the Indonesian government'".[57]

127. The Philippines disagrees. Communicating in general terms that the customs valuation was based on an investigation by another government agency does not explain, in any way, *how* and *why* the transaction values were rejected by the Customs Department, and *how* the Customs Department determined alternative values.

III. THE 02-03 CHARGES ARE INCONSISTENT WITH THE *CVA*

126. On 26 January 2017, the Thai Public Prosecutor filed criminal charges against PM Thailand and one of its former employees, concerning 780 entries of cigarettes that cleared Thai customs in

[51] The Philippines' first written submission, Section IV.B.5.c; the Philippines' second written submission, Section III.B.5.

[52] First Compliance Panel Report, para. 7.416 (emphasis added), citing Original Panel Report, para. 7.238.

[53] Thailand's second written submission, para. 2.35.

[54] First Compliance Panel Report, paras. 7.382 and 7.432; Original Panel Report, paras. 7.234-7.237.

[55] Original Panel Report, para. 7.234. The explanation must also enable domestic courts and WTO panels to understand an authority's determination for the purposes of scrutinizing it.

[56] Paragraph 6 of the *Interpretative Note* to Article 6.

[57] Thailand's first written submission, para. 2.49.

the period 2002-2003 ("02-03 Charges"). The 02-03 Charges embody a determination that PM Thailand's declared transaction values are lower than the correct customs value, in violation of Section 27 of Thailand's Customs Act. The 02-03 Charges reject the importer's declared transaction values inconsistently with Articles 1.1 and 1.2(a) of the *CVA*, and determine alternative values inconsistently with Article 6 or, in the alternative, Article 7 of the *CVA*.[58]

127. In defending the 02-03 Charges, Thailand repeats a number of arguments that were rejected by this Panel in the first compliance proceedings. In response to Thailand's arguments, the Philippines summarizes below why: (1) the *CVA* is applicable to the 02-03 Charges; (2) the Philippines is able to make – and has made – a *prima facie* case with respect to the 02-03 Charges; (3) the 02-03 Charges violate the *CVA*; and (4) the 02-03 Charges are not justified by Article XX of the GATT 1994.

A. The 02-03 Charges constitute a "measure taken to comply"[59]

128. The Philippines challenges the 02-03 Charges as "measures taken to comply" under Article 21.5 of the DSU. In Section II.A, the Philippines described the legal standard for determining whether a measure constitutes an undeclared measure taken to comply, and is thus within the scope of compliance proceedings. To recall, this legal standard requires a "close nexus" between the measure at issue and the recommendations and rulings of the DSB in the original proceedings, or with declared measures taken to comply.

129. The 02-03 Charges have the requisite nexus with the DSB's recommendations and rulings and declared measures taken to comply. Again, Thailand does not contest that the 02-03 Charges are a "measure taken to comply" under Article 21.5 of the DSU.

130. The Philippines recalls that this Panel in the first compliance proceedings found that the 03-06 Charges were a "measure taken to comply".[60] The 02-03 Charges share the same "set of connections" in terms of their timing, nature and effects with the DSB's rulings and recommendations, and Thailand's declared measures taken to comply, as the 03-06 Charges.[61]

131. In addition, and unlike the 03-06 Charges, the 02-03 Charges also cover 206 entries that overlap with entries covered by measures within the scope of the DSB's recommendations and rulings, and which also overlap with the November 2012 BoA Ruling, a declared measure taken to comply.[62] This additional connection strengthens the "close nexus" between the recommendations and rulings and the measure taken to comply. Further, the entries covered by the 02-03 Charges and the 03-06 Charges are contiguous. There is, therefore, a "chronological 'connection' and 'link'" stretching from the entries covered by the 02-03 Charges, through the 03-06 Charges, to the 06-07 entries covered by the September 2012 BoA Ruling.[63]

132. In sum, just like the 03-06 Charges, the 02-03 Charges "aggravate the WTO-inconsistencies" that Thailand was instructed to resolve, and "potentially undermine compliance and circumvent the DSB's recommendations and rulings".[64]

B. The *CVA* applies to the 02-03 Charges[65]

133. Article 15.1(a) provides that the *CVA* applies whenever a Member: (1) determines the value or monetary worth of imported goods; and (2) does so for the purposes of levying *ad valorem* customs duties. In the first compliance proceedings, the Panel found that the second limb of the test under Article 15.1(a) is not limited to the *actual levying* of *ad valorem* customs duties at the border,

[58] The Philippines' first written submission, Sections I and V.A.1.c.

[59] The Philippines' first written submission, Section V.B.1; the Philippines' comments on Thailand's response to Panel Question 127.

[60] First Compliance Panel Report, para. 7.556.

[61] *See* paras. 10-13 above.

[62] For a detailed explanation, *see* the Philippines' first written submission, para. 373.

[63] First Compliance Panel Report, para. 7.543.

[64] First Compliance Panel Report, para. 7.549.

[65] The Philippines' first written submission, Section V.B.2; the Philippines' second written submission, Section IV.A; the Philippines' responses to Panel Questions 137, 140 and 141; the Philippines' opening statement, Section III; the Philippines' comments on Thailand's responses to Panel Questions 163(a) and (b), 166, 167 and 171.

but "embrace[s] any determination of the value of imported goods for the purposes of determining the amount of *ad valorem* duties *due* on those imported goods".[66]

134. *First*, the 02-03 Charges determine the monetary value of PM Thailand's imported cigarettes, because they establish the alleged "actual price" for each of the 780 entries. *Second*, the 02-03 Charges do so for the purposes of levying *ad valorem* customs duties, because they rely on the "actual price" as the base for rejecting the declared transaction value, and for calculating the "amount of tax and [*ad valorem* customs] duty under customs law" that the importer was "liable to pay".[67] Thus, the 02-03 Charges constitute a customs valuation determination under Article 15.1(a) of the *CVA*.

135. Thailand makes two counter-arguments. *First*, Thailand argues that the *CVA* does not apply to the Public Prosecutor, because the Public Prosecutor is not part of Thailand's "customs administration". *Second*, Thailand argues that the 02-03 Charges do not entail a customs valuation determination under Article 15.1(a), because they entail an accusation of "customs fraud". Below, the Philippines explains why these arguments are unavailing.

1. The *CVA* applies to the Public Prosecutor

136. Thailand argues that the *CVA* obligations are limited to a Member's "customs administration", which, according to Thailand, constitutes only those entities formally tasked with customs administration matters. Because the Public Prosecutor is not formally tasked with customs administration, Thailand argues that the procedural and substantive obligations in the *CVA* are inapplicable to the 02-03 Charges.

137. In the first compliance proceedings, the Panel rejected these same arguments. The Panel found that the term "customs administration" is essentially *functional*, and focuses on the *substance* of a measure, namely whether the measure entails a customs valuation determination. More specifically, the Panel found that the references to the term "customs administration" in the *CVA* do not include "a clear and explicit indication" "limiting [the *CVA's*] applicability to a narrow subset of government officials".[68] Thus, the *CVA* applies to *any* state organ that engages in the determination of the monetary worth of goods for the purposes of levying *ad valorem* customs duties.

2. The 02-03 Charges determine the monetary worth of goods for the purposes of levying *ad valorem* customs duties

138. Thailand argues that the 02-03 Charges do not determine the monetary value of goods for the purposes of levying *ad valorem* customs duties, because they allege "customs fraud". According to Thailand, "to substantiate an accusation of customs fraud in the form of fraudulent under-declaration of the customs value, the authorities need only establish that the declared customs value is not the price actually paid or payable".[69] Specifically, Thailand contends, finding that the declared value was less than the "actual price" gave rise to "grounds to suspect that the declared transaction value may not reflect the price actually paid".[70]

139. Thailand argues that this finding does not "require a determination of the price actually paid or payable [under Article 1.1 of the *CVA*], nor a determination of a revised value [under Articles 2-7]. [71] On this basis, Thailand asserts that *CVA* does not apply to the 02-03 Charges.

140. Thailand's characterization of the 02-03 Charges bears no relation to the terms of the measure itself. The terms of the 02-03 Charges demonstrate that the "actual prices" constitute: (1) a benchmark to reject the importer's declared transaction values on the grounds that the parties' relationship influenced the price under Article 1.2(a) of the *CVA*; *and* (2) alternative customs values under Article 6 of the *CVA*.

141. To explain, the Philippines: *first* sets out the legal standard governing the applicability of Articles 1.1, 1.2(a) and/or 2-7 of the *CVA*; *second*, demonstrates that the 02-03 Charges fall under Articles 1.2(a), and 6, of the *CVA*; and, *third*, explains that, even if Thailand were correct that the 02-03 Charges determine only that the declared value did not reflect the "price actually paid or

[66] First Compliance Panel Report, para. 292.
[67] The Criminal Court, Case Black No. OR. 232/2560, 26 January 2017 (English Translation) (Exhibit PHL-14-B); *see* also the Philippines' first written submission, paras. 404-410.
[68] First Compliance Panel Report, para. 7.641.
[69] Thailand's response to Panel Question 167(a), para. 4.5 (emphasis added).
[70] Thailand's first written submission, para. 3.21; Thailand's second written submission, para. 3.4.
[71] Thailand's response to Panel Question 167(a), para. 4.5.

payable" (*quod non*), the 02-03 Charges would still be subject to the *CVA,* namely Article 1.1 of the *CVA*.

a. Legal standard for determining the applicability of Articles 1.2(a) and/or 2-7 of the CVA

142. In this subsection, the Philippines sets out the legal standard for determining the applicability of Articles 1.1, 1.2(a) and 6 of the *CVA.* In determining which, if any, *CVA* provisions are applicable, a panel should focus on the "content and substance" of the relevant measure, considered in light of surrounding evidence.

143. As it applies to related-party transactions, the *CVA* may involve a series of three steps in the customs valuation process, each disciplined by different legal provisions. The distinction between each step is instructive in understanding which, if any, provisions of the *CVA* are applicable to a given measure. The Philippines summarizes these steps below.

144. Step 1 is governed by Article 1.1 of the *CVA*. At Step 1, a customs administration may assess whether the importer's declared value is, indeed, the "price actually paid or payable" by the buyer to the seller, i.e., the "transaction value". The *CVA* defines the "price actually paid or payable" as an amount that exists in the real world: it is the "total" amount of financial consideration, in all forms, given by the buyer to the seller, for the goods.

145. Given this definition, a customs administration does not have freehand to decide, using any method/evidence it chooses, the "price actually paid or payable". Instead, the legal standard has important implications for the evidence that a customs administration can use to discover the "price actually paid or payable". A customs administration could discover that "price" using, for example, the following evidence: contracts between the buyer and seller, such as licensing and distribution agreements; purchase orders; and invoices.[72]

146. Step 2 is governed by Article 1.2(a). At Step 2, the administration has established the "price actually paid or payable" and now assesses whether this figure is *acceptable* as the customs value, in a related-party transaction. Step 2 involves an examination of the circumstances of sale to establish whether the "price actually paid or payable" is consistent with *normal commercial principles.* At Step 2, an authority may *construct benchmark values* to answer this question, for example by computing the producer's costs and profits.

147. Importantly for present purposes, a constructed benchmark value under Article 1.2(a) (Step 2) does *not* represent the "price actually paid or payable" under Article 1.1 (Step 1). This is because the "price actually paid or payable" is the real-world price actually agreed between buyer and seller, which may not be an amount of consideration that the customs authority *deems* to be an *appropriate* sales price for the goods being valued. This holds especially true in a related-party transaction, which is precisely why the *CVA* provides, in Article 1.2(a), for a process to test the acceptability of the transaction value, through an examination of the circumstances of sale.

148. Step 3 is governed by Articles 2-7. At Step 3, the administration has rejected the "price actually paid or payable" as the customs value, and it must now determine an alternative customs value using the methods in Articles 2 through 7.

149. The "price actually paid or payable" under Article 1.1 (Step 1) may be contrasted with a customs value determined under Articles 2-7 (Step 3). At Step 3, the customs administration is not interested in *discovering* or *verifying* the "price actually paid or payable". Instead, the methodologies in Articles 2-7 each involve the *construction* of a value that is *deemed*, under the *CVA* to be an *appropriate* customs value for the goods being valued.

150. With this framework in mind, the Philippines explains which *CVA* provisions apply to the 02-03 Charges.

b. The 02-03 Charges are subject to Articles 1.2(a) and 6 of the CVA

151. In the 02-03 Charges, the "actual price" is a constructed benchmark value under Article 1.2(a) (Step 2); *and* a constructed cost-plus value under Article 6 (Step 3).

[72] Other appropriate evidence could include accounting records from the buyer and seller, including from their internal financial systems or ledgers; bank statements; letters of credit; negotiable instruments, and evidence of indirect transfers.

152. In establishing the "actual price", the Public Prosecutor engaged in the exercise under Step 2/Article 1.2(a). Specifically, the Public Prosecutor constructed a benchmark value, based on the producer's purported "costs" and "profits", in an effort to reveal whether the parties' relationship influenced the price. As a "cost-plus" benchmark value, the "actual price" purportedly indicated that the transaction value was inconsistent with usual commercial principles in an unrelated transaction. Having rejected the declared value on this basis, the Public Prosecutor then engaged in the exercise under Step 3/Article 6, replacing the rejected declared value with the "actual price" as a constructed cost-plus customs value.

153. As a constructed value, the "actual price" does not purport to be the real-world "price actually paid or payable" under Article 1.1. A producer's costs and profits do not provide evidence of the actual selling price, because there is no necessary relationship between a producer's costs and profits, and its selling price.

154. Thailand *admits* that the Public Prosecutor did not rely on evidence that reveals the real-world "payment made or to be made" by the buyer. Nothing indicates that the Public Prosecutor assessed the "total payment" through evidence such as contracts, purchase orders, invoices, accounting records, banks statements, etc. To the contrary, Thailand acknowledges that the Public Prosecutor has no "direct evidence of customs fraud, such as hidden invoices between the related parties".[73] Thailand has failed to point to any evidence to suggest that PM Thailand paid (or was liable to pay) more to PTPMI than the declared value.

155. The Public Prosecutor's actions mirror those of the Customs Department in issuing the 1,052 NoAs. Indeed, the same calculation underlies the two measures. For the 1,052 NoAs, Thailand accepts that these measures are subject to Articles 1.2(a) and 6/7 of the *CVA*. However, Thailand maintains that the 02-03 Charges are not subject to these provisions, because they allege "customs fraud". It is absurd for Thailand to accept that the "actual prices" constitute customs values in the NoAs, but that the identical "actual prices" do not constitute customs values in the 02-03 Charges.

156. Thailand cannot reconcile its characterization of the "actual price" with the *content* and *substance* of the 02-03 Charges. Indeed, as explained in the next subsection below, Thailand has given shifting and contradictory explanations of the "actual price" during the proceedings, which fail to ascribe the proper meaning to the term "actual price", as used in the measures.

c. Even if Thailand's characterizations of the "actual price" were correct, the CVA still applies to the 02-03 Charges

157. Thailand provides a variety of explanations of the role of the "actual price" in the 02-03 Charges, in an attempt to escape the applicability of the *CVA*. These explanations are, for the reasons explained above, not consistent with the way the term "actual price" is used in the measure itself. However, even if Thailand's characterizations were accurate, the legal consequence that Thailand draws – that the *CVA* is inapplicable – is incorrect.

158. *First,* Thailand stated in its second written submission that "the reference to 'actual [price]' refers to the 'price actually paid or payable' for the goods in question".[74] In its responses to questions, Thailand shifted position, stating that the "actual price" does not refer to the "price actually paid or payable", but is a benchmark to reject the declared "price actually paid or payable". Thailand contends that a determination that the declared value is not the price paid or payable is not subject to the *CVA.*

159. Article 1.1 of the *CVA* necessarily applies to the exercise of deciding, at the first step of the process, whether the declared value is – *or is not* – the "price actually paid or payable". The "price actually paid or payable" is a defined treaty term and determinations regarding that "price" must be consistent with the treaty. The treaty definition applies as much to a determination that a given amount is the "price actually paid or payable" as it does to a determination that a given amount is not the "price actually paid or payable". Both constitute a determination as to what *ad valorem* the importer is – or is not – liable to pay.

160. If this exercise were not subject to the *CVA*, a customs administration could choose whatever means it wished, however spurious, to reject the importer's declared transaction value, easily circumventing the principle that "[t]he primary basis for customs value under this Agreement is 'transaction value' as defined in Article 1", that is, the "price actually paid or payable". The *Ministerial*

[73] Thailand's first written submission, para. 3.150.
[74] Thailand's second written submission, para. 3.14.

Decision confirms that, contrary to Thailand's argument, the *CVA* applies where the "truth or accuracy" of the declared value is doubted.[75]

161. *Second*, in its opening statement, Thailand again shifted its position, stating that the "actual prices" served *only* as a benchmark to calculate the penalty. Section 27 of the Customs Act provides for a fine up to "four times of the duty additionally payable". Thus, the basic building block of the fine is an alternative "actual value", determined for the purpose of calculating the alleged duty shortfall, i.e. the correct amount of customs duties due, multiplied by four. Therefore, in substance, the fine incorporates – and collects – the *ad valorem* customs duties allegedly due on an alternative customs value.

C. The Philippines is able to make – and has made – a *prima facie* case that the 02-03 Charges are inconsistent with the *CVA*[76]

162. In its second attempt to escape scrutiny of the 02-03 Charges, Thailand argues that "the 02-03 Charges do not contain sufficient factual information to allow the Philippines to make a *prima facie* case of inconsistency under the *CVA*".[77] According to Thailand, this is because: (1) the "precise content" of the 02-03 Charges is unknown, so to make findings on the 02-03 Charges would require the Panel to make a *de novo* review;[78] and (2) the 02-03 Charges are merely an allegation of customs fraud, and the Panel cannot "engag[e] in speculation on future measures or events".[79] Both arguments are unavailing.

163. *First*, the "precise content" of the 02-03 Charges is clear. The Public Prosecutor: (1) rejected the importer's declared transaction value for 780 entries; and (2) determined alternative "actual" customs values for each of these entries. Consistent with the standard of review, the Panel must critically examine the domestic authority's explanation in depth, and in light of the facts before the panel. In the absence of a proper explanation of Thailand's customs valuation determination, the Panel has, in the words of the original panel, "no option to find but that the competent authority has not performed the analysis correctly".[80] This does not require the Panel to make a *de novo* review, because the Panel is not making *its own* determination under Article 1.2(a). There is ample information for the Panel to conclude that the Public Prosecutor's customs valuation determination is *CVA*-inconsistent.

164. *Second*, Thailand's argument that the 02-03 Charges are a mere "allegation of customs fraud" simply repackages Thailand's unsuccessful "ripeness" argument from the first compliance proceedings. To recall, the Panel found that the 03-06 Charges involved a "'final' decision" by the Public Prosecutor, had "legal status in and of themselves", and could be ruled upon "without engaging in speculation on future measures or events".[81] Thailand does not explain, in relation to these aspects, how the 02-03 Charges are substantively different from the 03-06 Charges, such that these findings do not apply.

D. The Philippines' claims regarding the 02-03 Charges

165. As the Philippines has explained, a single calculation underlies the customs valuation determinations in both the 02-03 Charges and the 1,052 NoAs. Therefore, in claiming that the 02-03 Charges are inconsistent with Articles 1.1, 1.2(a) (second sentence), and 6 and/or 7, the Philippines makes the same arguments as it does with respect to the 1,052 NoAs. Rather than repeat these arguments, the Philippines provides a brief summary, and cross-references to the relevant sections above.

1. The Public Prosecutor violates Articles 1.1 and 1.2(a) (second sentence) of the *CVA* by failing to properly examine the

[75] The *Ministerial Declaration Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value.*
[76] The Philippines' second written submission, Section IV.B.
[77] Thailand's first written submission, paras. 3.31 and 3.33.
[78] Thailand's first written submission, paras. 3.29.
[79] Thailand's first written submission, paras. 3.31 and 3.33.
[80] First Compliance Panel Report, paras. 7.85 and 7.86 (emphasis added, footnotes omitted).
[81] First Compliance Panel Report, para. 7.605.

circumstances of sale and improperly rejecting the transaction values[82]

166. In Section II.C.2 above, the Philippines *first* explains that Thailand has failed to provide any evidence to substantiate what information the Public Prosecutor relied on in adopting its measures, or any evidence as to the source of that information. Consistent with the standard of review, in the absence of any evidence, the Panel has "no option" but to find it has not performed its obligations correctly.

167. *Second,* even if Thailand had substantiated the factual basis of its customs valuation determination (*quod non*), Thailand's reliance on CK-21A information would have violated the *CVA.* The Philippines also explains that Thailand's argument that there is a carve-out under Article 1.2(a) (second sentence), which allows a customs administration to "assume" that information provided by authorities is reliable for customs valuation purposes, is erroneous. Finally, the Philippines indicates that even Thailand's *own* evidence demonstrates that its customs valuation methodology was inconsistent with the *CVA*.

2. The Public Prosecutor violates Articles 2 to 7 of the *CVA* by failing to respect the sequential ordering of valuation methods[83]

168. In Section II.C.3 above, the Philippines explains that, if the transaction value is rejected under Article 1 of the *CVA*, the authority must, in calculating an alternative customs value, respect the sequential ordering of the alternative valuation methods in Articles 2 to 7.

169. The Public Prosecutor has failed to respect the sequential valuation obligation. Thailand asserts in its submissions that "none of the alternative methods in Articles 2-**5** could be used to determine customs value".[84] However, Thailand's explanation constitutes an improper and unsubstantiated *ex post* justification of the Public Prosecutor's actions.

170. Additionally, in the event the Panel finds that the Public Prosecutor relied on the methodology under Article 7, instead of Article 6 of the *CVA*, neither Thailand nor its authorities *even mentioned* whether Article 6 was available.

3. The Public Prosecutor violates Article 6 of the *CVA* by determining the alternative customs values through an improper "cost-plus" or computed value methodology[85]

171. In Section II.C.4 above, the Philippines, *first*, sets out the legal standard for the correct characterization of a measure. Further, the Philippines indicates that Thailand has presented no evidence at all to support its belated assertion that the Public Prosecutor relied on Article 7. The Philippines, by contrast, has explains, with accompanying evidence, that the Public Prosecutor relied on Article 6, not Article 7.

172. *Second*, the Philippines sets out the legal standard, under Article 6, for the calculation of a cost-plus customs value. In the application of the legal standard under Article 6, the Philippines explains that, *even if* Thailand had substantiated that the alleged CK-21A information was the basis for the Public Prosecutor's determination, that information is not suitable for customs valuation purposes, and Thailand's *own* evidence demonstrates that its customs valuation methodology was inconsistent with Article 6 of the *CVA.*

4. The Public Prosecutor violates Article 7 of the *CVA* by determining alternative customs values through "unreasonable" flexibilities[86]

173. In Section II.C.5 above, the Philippines explains that even if the Public Prosecutor used Article 7, the flexibilities exercised were not "reasonable" under Article 7.1. Specifically, the Philippines: *first* explains that Thailand's request that the Panel decline to make rulings under Article 7 is without grounds; and *second* summarizes the Philippines' *prima facie* case as to why the

[82] The Philippines' first written submission, Section V.B.3; the Philippines' second written submission, Section IV.C.1; *see* also above, Section II.C.2.

[83] The Philippines' first written submission, Section V.B.4; the Philippines' second written submission, Section IV.C.2; *see* also above, Section II.C.3.

[84] Thailand's first written submission, para. 3.102; Thailand's second written submission, para. 3.74.

[85] The Philippines' first written submission, Section V.B.5; the Philippines' second written submission, Section IV.C.3; *see* also above, Section II.C.4.

[86] The Philippines' second written submission, Section IV.C.3; *see* also above, Section II.C.5.c.

Customs Department did not use "reasonable flexibility" when determining the alternative "actual" customs values.

5. The Public Prosecutor violates Article 1.2(a) (third sentence) of the *CVA* by failing to communicate grounds, and failing to provide a reasonable opportunity to respond[87]

174. In Section II.C.6 above, the Philippines set out the legal standard applicable under Article 1.2(a) (third sentence). This provision sets forth two connected obligations: (1) the customs administration must, during the course of its examination, communicate to the importer its "grounds" for considering that the parties' relationship influenced the price, and (2) it must allow a "reasonable opportunity" for the importer to respond to those grounds.

175. The Public Prosecutor never communicated its grounds for considering the parties' relationship influenced the price. By failing to provide *any* indication of the "grounds" for considering the relationship influenced the price, the Public Prosecutor also necessarily failed to provide PM Thailand with an opportunity to address those grounds in a response.

176. Thailand does not dispute that the Public Prosecutor failed to perform the obligations in Article 1.2(a) (third sentence). Thailand argues, however, that if the *CVA* applies to the Public Prosecutor, only the *substantive* obligations apply, and the *procedural* obligations do not.

177. The Philippines disagrees. As explained above, the first compliance Panel found that the *CVA* – including Article 1.2(a) – applies to the Public Prosecutor in the context of criminal proceedings. The Panel found no treaty basis to limit the application of *any* of the *CVA* obligations to a "narrow subset of government officials".[88]

178. There is also no basis in the text to apply the *substantive CVA* obligations to *all* government officials engaged in customs valuation, but to apply the *procedural* obligations to only a *subset* of them. The text of Article 1.2(a) reveals the fallacy of this distinction. In successive sentences, Article 1.2(a) imposes closely entwined procedural and substantive obligations. The procedural obligations in the third sentence (to communicate grounds/provide an opportunity to respond) arise during, and as an integral part of, the examination of the circumstances of sale under the second sentence. Further, the procedural obligations are relevant in assessing whether an administration has conducted a proper examination of the circumstances of sale under the second sentence.

179. As the procedural and substantive obligations in the *CVA* are closely entwined, failure to perform one has consequences for the other. As a result, the procedural obligations in Article 1.2(a) (third sentence) cannot be artificially cleaved from the substantive obligations in Article 1.2(a) (second sentence).

E. The 02-03 Charges are not justified by Article XX of the GATT 1994[89]

180. In the first compliance proceedings, Thailand argued that the 03-06 Charges could be justified under Article XX(a) or Article XX(d) of the GATT 1994. The Panel found that Article XX was not available as a defense to violations of the *CVA*, because there is no textual basis in the *CVA* to apply Article XX to that *Agreement*. Thailand repeats the same arguments with regard to the 02-03 Charges. Thailand does not invoke this defense with regard to the 1,052 NoAs. Below, the Philippines explains that: (1) Article XX does not apply to the *CVA*; and (2) in any event, the 02-03 Charges are not provisionally justified under Article XX.

1. Article XX of the GATT 1994 does not apply to the *CVA*

181. Article XX is not available as a defense to violations of the *CVA*. The Appellate Body has explained, as noted by this Panel, that there must be "a clear and sufficient textual link between provisions of the GATT 1994, especially Article XX, and the agreement to which Article XX applies".[90] No such link exists in the *CVA*.

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[87] The Philippines' first written submission, Section V.B.6; the Philippines' second written submission, Section IV.C.4; the Philippines' comments on Thailand's response to Panel Question 163 (a) and (b); *see* also above, Section II.C.6.

[88] First Compliance Panel Report, para. 7.641.

[89] The Philippines' second written submission, Section IV.D; the Philippines' comments on Thailand's response to Panel Question 163(c).

[90] First Compliance Panel Report, para. 7.750, citing, *inter alia*, Appellate Body Report, *China – Raw Materials*, paras. 270-307.

182. Thailand again argues that the application of Article XX to the *CVA* is the only way to "balance" Members' obligations with their right to regulate. However, the Panel has already rejected this argument, finding that this balance is already achieved in "the relatively limited scope of the substantive and procedural obligations" in the *CVA*, including in the "degree of discretion accorded to the customs authority in implementing those obligations".[91] Thailand has not identified any basis for the Panel to change course, and find that Article XX applies to the *CVA*.

2. The 02-03 Charges are not provisionally justified under either Article XX(d) and/or Article XX(a) of the GATT 1994

183. *Even if* Article XX were applicable to the *CVA*, the 02-03 Charges could not be justified under either Article XX(d) or Article XX(a) of the GATT 1994.

184. If the Panel were to reach Thailand's argument under Article XX, it would have already determined that the rejection of PM Thailand's declared transaction values is inconsistent with Articles 1.1 and 1.2(a) of the *CVA*, and the determination of alternative customs values is inconsistent with Articles 6 and/or 7 of the *CVA*.

185. It is well established that the aspect of a measure that must be "necessary" in order for a measure to be justified under Article XX is *the aspect that gives rise to the finding of WTO inconsistency*.[92] Accordingly, the *specific element* of a measure that is found to be WTO-inconsistent, and that is sought to be justified under Article XX, must be "necessary" to secure compliance with WTO-consistent domestic laws or regulations.

186. Thailand has, however, offered nothing to support its view that a WTO-inconsistent customs valuation is "designed" and "necessary" to ensure that PM Thailand pays the correct amount of customs duties. In fact, the opposite is true: a customs valuation determination that is inconsistent with the substantive obligations of the *CVA* cannot be justified as a measure *necessary to secure enforcement of customs laws or protect public morals* under Article XX of the GATT 1994. Rather, the proper enforcement of customs laws requires a *WTO-consistent* customs valuation, and not a WTO-inconsistent one.

3. Assuming that the 02-03 Charges are provisionally justified under Articles XX(d) and/or XX(a), they are not consistent with the *chapeau* of Article XX

187. The *chapeau* of Article XX provides that GATT-inconsistent measures are permitted as long as they "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". In the Philippines' view, the 02-03 Charges constitute a disguised restriction on international trade.

188. In determining whether a measure is applied consistently with the *chapeau* to Article XX, ultimately the question is whether the measure "is in fact only a disguise to conceal the pursuit of trade-restrictive objectives".[93] Thailand argues that "a fine may or may not be imposed, and the amount of that potential fine is still to be determined by the Court" and that, therefore, "it cannot be said that the 02-03 Charges 'are applied' as a disguised restriction on international trade".[94]

189. The Philippines disagrees. The 02-03 Charges threaten significant criminal fines, and the imprisonment of a former PM Thailand employee. In this way, the 02-03 Charges create legal consequences for PM Thailand. Further, if the 02-03 Charges were ultimately to lead to a fine of the magnitude sought by the Public Prosecutor, that fine would threaten the very survival of PM Thailand, and hence the Philippines' exports of cigarettes to Thailand.

190. These facts demonstrate that the 02-03 Charges are being applied as a "disguised restriction on international trade" in the sense of the chapeau. For this reason also, the 02-03 Charges cannot be justified under Article XX of the GATT 1994.

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[91] First Compliance Panel Report, para. 7.756.
[92] *See* Appellate Body Report, *EC – Seals*, para. 5.185.
[93] Panel Report, *EC – Asbestos*, para. 8.236; Panel Report, *Brazil – Retreaded Tyres*, para. 7.330.
[94] Thailand's first written submission, para.3.171.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

1 INTRODUCTION

1.1. This integrated executive summary contains the arguments presented by Thailand in its written submissions, oral statements, responses to questions and comments thereto.

1.2. In this dispute, the Philippines challenges the Notices of Assessment (NoAs) issued by Thailand's Customs Department on 10 November 2017 and the Criminal Charges issued by the Public Prosecutor on 26 January 2017 (02-03 Charges). In Thailand's view, the Philippines' claims against the NoAs and the 02-03 Charges are without legal merit. With respect to the NoAs, Thailand submits a procedural ruling request that the Panel exercise its discretion to not rule on the Philippines' claims under the Customs Valuation Agreement (CVA) because the NoAs were withdrawn before the establishment of this panel and there is no evidence that they will be reintroduced.

1.3. With respect to the 02-03 Charges, Thailand submits that the CVA is not applicable as these charges constitute an accusation against Philip Morris (Thailand) Limited (PMTL) of "customs fraud", which, as the first compliance panel suggested, is not covered by the CVA. In Thailand's view, the Philippines' claims are a clear attempt to use WTO dispute settlement proceedings to undermine or prejudge the on-going legal proceedings before the Thai Criminal Court. Rather than letting the domestic criminal proceedings run their course, the Philippines is seeking to use WTO dispute settlement proceedings to pre-empt the court's eventual ruling. This is fundamentally not the purpose for WTO dispute settlement.

1.4. In any event, the Philippines has failed to make a *prima facie* case of WTO-inconsistency in relation to the 02-03 Charges because the precise content of the 02-03 Charges simply does not show any WTO inconsistency. The factual matters on which the Philippines bases its claims, the alleged unreliability of information provided by Philip Morris' Indonesian subsidiary, have not been fully addressed or resolved by any Thai governmental agency or Thai court. Therefore, the Panel should dismiss the Philippines' claims because, at this point in time, there is insufficient clear information concerning the 02-03 Charges to establish that any WTO violation has taken place.

1.5. Despite these circumstances, if the Panel were to examine the substance of the Philippines' claims, the Panel must reject the Philippines' contentions as they are premised on interpretations of the CVA that are not in accordance with the general rule of interpretation under Article 31 of the Vienna Convention. A correct interpretation of the CVA provisions invoked by the Philippines indicates that authorities must be entitled to rely in good faith on information furnished by authorities of the exporting country.

1.6. In the event that the Panel nonetheless finds that the 02-03 Charges are inconsistent with certain provisions of the CVA, the 02-03 Charges are justified under Articles XX(a) and XX(d) of the GATT 1994. WTO Members' criminal enforcement authorities must retain appropriate policy space to investigate and prosecute alleged customs fraud. This requisite policy space must be found in Article XX of the GATT 1994, which, by reason of Article VII, was clearly intended to apply to customs valuation matters. Any departure from the rules in the CVA was necessary to secure compliance with Thai customs laws by allowing the Public Prosecutor to prosecute customs fraud effectively. It was also necessary to protect public morals, as it contributed to fight smuggling and contraband by prosecuting customs fraud efficiently.

1.7. Moreover, in its opening statement at the substantive meeting, the Philippines referred to the alleged claims of inconsistencies under Article 7 of the CVA, arguing that Thailand used valuation methods that are prohibited under those provisions. However, the Philippines had not ever put forward such claims before, either in its Panel request or its first and second written submissions. In Thailand's view, it is too late, and the Panel should not make any findings under Article 7 of the CVA. In any event, the Philippines' claims under Article 7 are outside the Panel's terms of reference because the Philippines' vague reference to Article 7 in its request for the establishment of a panel does not meet the basic standards of Article 6.2 of the DSU.

2 THE NOTICES OF ASSESSMENT

2.1. This section concerns 1,052 NoAs issued by Thailand's Customs Department on 10 November 2017. The NoAs requested the importer, which is PMTL, to pay additional taxes and duties, a penalty and a surcharge in relation to 1,052 entries that were imported from Indonesia between January 2001 and July 2003. On 14 March 2018, the Philippines filed a request for the establishment of a panel, including the claims relating to these NoAs.

2.2. On 21 and 23 March 2018, the Thai Customs Department sent two letters to PMTL explaining that 756 of the 1,052 NoAs had been revoked on 21 March 2018 and the remaining 256 NoAs had been terminated on 22 March 2018. Furthermore, during bilateral discussions that took place at the WTO on 26 March 2018 between the Permanent Mission of Thailand and officials from the Government of the Philippines, Thailand informed that the NoAs had been withdrawn and also provided a copy of the letters to PMTL dated 21 and 23 March 2018 to the Philippines' officials.

2.3. On 27 March 2018, the Panel was established with standard terms of reference during the Dispute Settlement Body (DSB) meeting. In its statement to the DSB, Thailand explained that the NoAs had been withdrawn prior to the establishment of the Panel. Subsequently, on 13 June 2018, Thailand sent to the Philippines a statement from the Director-General of the Customs Department confirming that the NoAs had ceased to have any legal effect as of the dates of their revocation and termination (21 and 22 March 2018).[1]

2.4. Thailand requests the Panel to make procedural ruling regarding the Philippines claims against the 1,052 NoAs issued by the Thai Customs Department, which were revoked or terminated by Thailand before the establishment of the Panel. Even if the Panel were to rule on the NoAs, Thailand considers that the Philippines' claims under the CVA against the NoAs are without merit.

2.1 Request for a procedural ruling

2.5. Thailand requests that the Panel exercise its discretion and find that it cannot rule on the Philippines' claims regarding the NoAs because the measures at issues were withdrawn before the establishment of the Panel. In doing so, Thailand will first explain that all the NoAs were withdrawn prior to the establishment of the Panel and ceased to have legal effect under Thai law. Thailand will thereafter proceed to confirm that a ruling on the NoAs would not contribute to a positive solution to the dispute and that there was no evidence that Thailand would reintroduce them.

2.1.1 Thailand withdrew all the NoAs before the establishment of the Panel

2.6. On 21 March 2018, the Customs Department revoked 796 of the 1,052 NoAs because the customs value for these entries was already assessed by the Thai Customs Board of Appeals (BoA) in previous rulings. According to Section 47 of the Thai Customs Act B.E. 2560 (2017), decisions of the BoA shall be considered final. These NoAs should not thus have been issued in the first place. The 18 May statement by the Director-General of the Customs Department sent to the Philippines further confirms that they ceased to have any legal effect as from the date of their revocation. In addition, according to Section 21 of the Customs Act B.E. 2560 (2017), there is a limitation period of 10 years from the date of importation for civil actions in customs matters. As these 796 entries had been imported in 2001-2002, the 10-year statute of limitation had already been expired when the NoAs were issued in November 2017.[2]

2.7. On 22 March 2018, the Thai Customs Department terminated the remaining 256 NoAs because of the 10-year statute of limitations contained in Section 21 of the Customs Act B.E. 2560 (2017). Since the entries covered by the 256 NoAs were imported in 2003, the 10-year statute of limitation had already passed when the NoAs were issued in November 2017. The statement by the director-General of the Customs Department further makes clear that the 256 NoAs thereby ceased to have any legal effect under Thailand.[3]

[1] Thailand's first written submission, paras. 2.3-2.9.
[2] Thailand's first written submission, paras. 2.11-2.12.
[3] Thailand's first written submission, para. 2.13.

2.8. Nonetheless, the Philippines remains questioning the withdrawal of the remaining 256 NoAs. In the Philippines' view, the various communications from the Thai Customs Department to PMTL and to the Philippines were not entirely consistent. The statement by the Director-General of the Customs Department addressed to the Philippines provides that the NoAs were "terminated". In contrast, the letters from the Thai Customs Department to PMTL of 23 March 2018 and 28 May 2018 provide that the Customs Department has ordered "not to proceed" with the civil law lawsuit with respect to the NoAs, which, according to the Philippines, fails to clarify whether the 256 NoAs were terminated or whether they continue to exist but would not be enforced.[4]

2.9. In Thailand's view, the Philippines' arguments essentially depend on quibbling about the meaning of a variety of synonyms. The Philippines' translation of the 23 March 2018 letter sent to PMTL differs from Thailand's own translation of that letter. According to the translation provided by Thailand, the relevant communications to PMTL and the Philippines consistently explain that the NoAs were "terminated". This was further confirmed in a statement by the Director-General of the Customs Department, which clearly states, in English this time, that the 796 NoAs were "revoked", and the 256 NoAs were "terminated". Thailand also sent this statement both to the Philippines and to PMTL, in June and August, respectively in an effort to avoid any remaining doubt on the status of the NoAs. [5]

2.10. In any event, the fact that the Customs Department ordered "not to proceed" with the 256 NoAs implies that the civil action regarding those NoAs was, as Thailand's translation indicates, terminated. As the Customs Department explained to PMTL in its 28 May 2018 letter, "the action for collecting duties of the 256 notices of assessment was terminated".[6] This further confirms that the 256 NoAs were indeed withdrawn. Even the Philippines' own translation of that letter makes clear that the statute of limitation "resulted in the cessation of the proceedings to collect taxes and duties".[7] Therefore, as from the date that the Customs Department decided not to proceed with or to terminate the 256 NoAs, the Customs Department had no legal basis to collect any duties or taxes that PMTL was required to pay under these NoAs.[8]

2.11. Furthermore, the Philippines mentions that the cover letter to the statement by the Director-General of the Customs Department indicated that the statement could not be used in the context of Thai domestic proceedings. Thailand notes that this clause was specifically destined to the Philippines, to prevent any use of confidential documents by the Philippines without Thailand's express consent. It is not meant to undermine the Director-General's statement that all the NoAs were withdrawn and ceased to have legal effect under Thai law.[9] Thailand wished solely to ensure that the confidentiality of its bilateral discussions would be respected.[10]

2.12. With respect to the statement of the Director-General of the Customs Department transmitted to PMTL on 21 August 2018, the accompanying letter did not contain any similar caveat with that of the cover letter sent to the Philippines, but the document transmitted to PMTL was stamped "confidential". This is because the Director-General's statement was issued following bilateral discussions between Thailand and the Philippines in the context of confidential WTO dispute settlement proceedings, to which PMTL is not a party. Therefore, Thailand wanted to ensure that any document circulated to a non-party to the WTO proceedings would be treated as confidential, in accordance with the DSU. [11] Thailand notes that the letters directly sent to PMTL by the Customs Department do not have the "confidential" mark and do not contain language similar to that used in the cover letter accompanying the documents transmitted to the Philippines. The essence of the letters that were sent to PMTL and to the Philippines is the same, i.e. that all the NoAs had been withdrawn.[12]

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[4] Thailand's second written submission, para. 2.10; See The Philippines' second written submission, paras. 22-23.

[5] Thailand's opening statement at the substantive meeting, para. 4.3.; See also Thailand's second written submission, para. 2.11.

[6] Letter from the Thai Customs Department to PMTL, 28 May 2018, Exhibit THA-66-B.

[7] Letter from the Customs Department to PM Thailand, 28 May 2018, Exhibit PHL-293-B.

[8] Thailand's second written submission, para. 2.12.

[9] Thailand's second written submission, para. 2.16.

[10] Thailand's response to Panel Question 130(a), para. 2.6.

[11] Thailand's response to the Panel's question 130(a), para. 2.7.

[12] Thailand's second written submission, para. 2.16.

2.13. In any event, it is clear by now that whether one considers that the NoAs were "revoked", "terminated", or that the Customs Department "would not proceed" to collect the duties, the fact remains that all the NoAs had indeed been withdrawn before the establishment of the Panel. A recent ruling by the BoA confirms this. This ruling was issued on 30 August 2018, further to PMTL's appeal dated December 2017 contesting the legality of the NoAs. In that ruling, sent to PMTL on 3 September 2018, the BoA confirmed the withdrawal of 256 NoAs at issue, for the same reasons the Customs Department explained to PMTL.[13]

2.14. For the reasons mentioned above, Thailand submits that all the 1,052 NoAs challenged by the Philippines were withdrawn before the establishment of the Panel and ceased to have any legal effect as of the date of their withdrawal (21 March 2018 for 796 NoAs and 22 March 2018 for 256 NoAs).

2.1.2 There is no evidence that the NoAs will be reintroduced

2.15. Article 7.1 of the DSU establishes that the terms of reference of panels are to "examine, in the light of the relevant provisions […] the matter referred to the DSB […] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s). In cases where a measure is no longer in effect at the time of the establishment of the panel, however, panels have a margin discretion in deciding whether to make findings with respect to expired measures.[14] On several occasions, panels have used this discretion to decide not to rule on a measure that was withdrawn before the establishment of the panel.[15] In doing so, previous panels have considered (i) whether a ruling would contribute to secure a positive solution to the dispute and (ii) whether there was a risk of re-introduction of the measure at issue.[16] In some limited instances, panels considered whether the measure at issue had any "lingering effects".[17][18]

2.16. Applying this legal standard to the present case, Thailand finds none of the grounds mentioned above that previous panels have used to decide whether they should rule on expired measures would support a decision to rule on the NoAs. First, ruling on these NoAs would do nothing to further a positive solution to the dispute. The NoAs have been withdrawn and cannot be reintroduced under Thai law. PMTL requested the revocation of the NoAs and obtained that outcome prior to the establishment of the Panel. The importer/the Philippines cannot thus credibly argue that further action by the Panel is required to achieve a positive solution to this aspect of the dispute. The NoAs have also no lingering effects under Thailand. A ruling on the NoAs would not impose any implementation obligation on Thailand and could not be the basis for any claim of nullification or impairment by the Philippines. Moreover, to the extent that the legal and factual arguments put forward by the Philippines regarding the NoAs mirror very closely those regarding the 02-03 Charges, a decision not to rule on the NoAs would not materially limit the Philippines' case.[19]

2.17. Based on certain conditions, The Philippines seems to agree with Thailand that the Panel should not rule on the NoAs as it "invites the Panel to confirm Thailand's representations to this Panel regarding the [] NoAs and, in that event, not to rule on the [] NoAs on the basis that: *first*, Thailand has withdrawn them; and, *second*, there is no risk that Thailand will reintroduce these [] NoAs, or the customs valuation methodology in these [] NoAs, through subsequent actions to apply

[13] Board of Appeal Ruling, No. KorOrRor.12/2561/Por3/2561 (3.3), 30 August 2018, Exhibit THA-83-B; See Thailand's opening statement at the substantive meeting, para. 4.4.

[14] Appellate Body Report, *EU – PET (Pakistan)*, para.5.13; Panel Report, *EU – PET (Pakistan)*, para. 7.13, referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270; and *China – Raw Materials*, para. 263; and Panel Reports, *US – Poultry (China)*, para. 7.54; and *EC – IT Products*, para. 7.165.

[15] See e.g. Panel Reports, *China – Electronic Payment Services*, paras. 7.221 – 7.229; *EC – Approval and Marketing of Biotech Products*, paras. 7.1648-7.1654; *Argentina - Textiles and Apparel*, paras. 6.12-6.14; *US – Gasoline*, paras. 6.18-6.19.

[16] See e.g. Panel Reports, *China – Electronic Payment Services*, paras. 7.224 – 7.229; *EC – Approval and Marketing of Biotech Products*, paras. 7.1648-7.1654; *Argentina - Textiles and Apparel*, paras. 6.12-6.14. See also *Thailand – Cigarettes (Philippines)*, where the original panel in this dispute referred to the criteria used in *Argentina - Textiles and Apparel*. Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.64-7.65.

[17] See Panel Report, *US – Upland Cotton*, paras. 7.104-7.122; Panel Report, *EC – Poultry*, paras. 250-252.

[18] Thailand's first written submission, paras. 2.16-2.28.

[19] Thailand's first written submission, paras. 2.32-2.33.

or enforce them".[20] In response to a question posed by the Panel, the Philippines clarified that it considers that the Panel must conduct its own objective assessment to determine whether and when the NoAs were withdrawn, and whether there is any risk of reintroduction, and based on this assessment, whether to make findings and recommendations with respect to the NoAs.[21] Thailand considers that this assessment must be based on the arguments and evidence presented by both parties in the proceedings. As the Member imposing the measure at issue, the Panel should accord particular weight to Thailand's description of the legal status of the NoAs, and to Thailand's factual description of how all the NoAs were withdrawn before the establishment of the Panel.[22]

2.18. Thailand recalls that panels have proceeded with caution in determining that a measure that was withdrawn before the establishment of the panel would be reintroduced. A finding that the measure could be reintroduced must be based on "clear evidence". To Thailand's knowledge, the only case where a panel found that there was a risk of reintroduction of a measure that expired before panel establishment was in *EEC – Apples (Chile I)*, because the measures was a seasonal measure.[23] In the present case, the nature of the NoAs simply does not warrant a similar conclusion.[24] There is no evidence that the NoAs will or even could be reintroduced by Thailand as the Customs Department is legally barred under Thai law from reintroducing the NoAs for the same reasons they were withdrawn. As explained above, the totality of the 1,052 NoAs should not have been issued and cannot be re-introduced in light of the statute of limitation of 10 years under Section 21 of the Customs Act B.E. 2560 (2017). Moreover, 796 of the NoAs should not have been issued at the first place because they were already subject to decisions by the BoA, which is considered as final under Section 47 of the Thai Customs Act B.E. 2560 (2017). Therefore, there is no legal basis under Thai law by which Thailand could reintroduce the withdrawn measures. [25] The fact that the BoA ruling of 30 August clearly states that all the NoAs are revoked further supports this, because, pursuant to Section 47 of the Thai Customs Act B.E. 2560 (2017) this ruling constitutes a final decision that the Customs Department must follow.[26]

2.19. In addition, as the panel in the original proceedings explained, citing to the panel in *Argentina – Textiles and Apparel*, a panel "must assume that WTO Members would perform their treaty obligations in good faith, as they were required to do by WTO Agreement and by international law pursuant to Article 3.10 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties (*Pacta Sunt Servanda*)".[27] This approach was confirmed by the Appellate Body stating that the "terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party".[28] Accordingly, the risk of reintroduction must be clearly shown by the complainant.[29] In this respect, the Philippines has failed to do so. The Philippines' argument that "Thailand has a long history of WTO-inconsistent customs valuation actions"[30] cannot thereby constitute credible evidence that Thailand will reintroduce the specific measure at issue.[31]

2.20. Furthermore, the Philippines asserts that the Customs Department must implement the Supreme Court ruling of 7 May 2018 concerning a subset of the 796 NoAs (208 entries that are also subject to the November 2012 BoA ruling). However, the fact that the 796 NoAs were revoked means that the Customs Department cannot reintroduce any of them, and the fact that they exceeded the statute of limitation further confirms this. Any action that the Customs Department might take to implement the Supreme Court ruling must be considered as a new and distinct measure from the NoAs, with a different customs valuation determination.[32] In this case, the Customs Department

[20] The Philippines' second written submission, pars. 35, 42; See Thailand's second written submission, para. 2.18.
[21] The Philippines' response to the Panel question 129, para. 12.
[22] Thailand's opening statement at the substantive meeting, para. 4.6.
[23] GATT Panel Report, *EEC – Apples (Chile I).*
[24] Thailand's response to Panel question 161(b), para. 2.7.
[25] Thailand's first written submission, para. 2.34.
[26] Thailand's response Panel question 161(a), paras. 2.2-2.4.
[27] Panel Report*, Thailand – Cigarettes (Philippines)*, footnote 448, citing to Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.
[28] Appellate Body Report, US – Anti-Dumping and Countervailing Duties (China), para. 326.
[29] Thailand's opening statement at the substantive meeting, para. 4.5.
[30] The Philippines' second written submission, para. 34.
[31] Thailand's second written submission, para. 2.20.
[32] Thailand's second written submission, para. 2.23.

shall send an official letter to PMTL informing of the changes to the calculation of the customs value, thereafter which PMTL would need to file a request for a refund for the amount of duties paid in excess.[33] Therefore, the implementation of the Supreme Court ruling does not depend on the reintroduction of the NoAs by the Customs Department.[34]

2.21. In any event, the factor of the risk of reintroduction should be seen as being of limited use in this context. As the United States pointed out during the meeting with the Panel, "any measure would seem to be capable of being reintroduced". [35] However, this does not mean that there is clear evidence that a particular measure will be reintroduced. In these circumstances, Thailand considers that the Panel should accord limited weight to this factor.[36]

2.22. In light of the foregoing, it is clear that Thailand withdrew all the NoAs that are the subject of the Philippines' claims in this dispute. In addition, a ruling on the NoAs would do nothing to further a positive solution to this dispute and there is no evidence, let alone any "clear evidence", that Thailand will reintroduce any of these NoAs. For these reasons, Thailand requests that the Panel exercise its discretion and find that it cannot rule on the Philippines' claims with respect to all the NoAs.

2.2 The Philippines has failed to demonstrate that the NoAs are inconsistent with the CVA

2.23. For the reasons stated above, Thailand is of the view that the Panel should decline to rule on the Philippines' claims regarding the NoAs because they were withdrawn before the establishment of the Panel and there is no evidence that they will be reintroduced. However, in the event that the Panel nonetheless decides to rule on the NoAs, Thailand's arguments in respect to the Philippines' claims on the 02-03 Charges also apply *mutatis mutandis* to the Philippines' corresponding claims on the NoAs.[37] This is so because the NoAs are linked to the 02-03 Charges. As such, they were issued in the context of the same criminal proceedings of which the 02-03 Charges form part.[38]

2.24. It bears emphasizing that, if the Panel were to make findings on the WTO consistency of the 02-03 Charges, this would not have any implications on the WTO-consistency of the NoAs because the findings of a panel apply to a specific measure.[39] Article 6.2 of the DSU provides that a panel request must identify the specific measures at issue and provide a brief summary of the claims. These two elements form the matter referred to the DSB, which forms the basis of a panel's terms of reference.[40] In the present dispute, the NoAs and the 02-03 Charges are distinct measures, identified by the Philippines separately under Sections A and B of its panel request, respectively, in respect of which the Philippines brought separate claims. Thailand also notes that, in case the Panel rules that the measures at issue are WTO-inconsistent, the consequences in terms of implementation would be different for both measures. This is so because the NoAs and the 02-03 charges were issued in two different contexts, by different Thai agencies.[41]

2.25. Consequently, if the Panel were to decide to rule on the NoAs notwithstanding their withdrawal, the Panel would be required to make separate findings in respect of each measure. Moreover, if the Panel were to rule on the Charges but not the NoAs, its ruling would have no bearing on the WTO consistency of the NoAs, irrespectively of any similarity that they may share.[42] The Panel's reasoning with respect to one measure cannot and should not apply automatically to the other.[43]

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[33] Thailand's comment on the Philippines' response to Panel question 160, para. 1.3.
[34] Thailand's second written submission, para. 2.23.
[35] Third part oral statement by the United States at the substantive meeting with the Panel, para. 9.
[36] Thailand's response to Panel question 161(b), para. 2.8.
[37] Thailand's first written submission, para. 2.38; Thailand's second written submission, 2.27.
[38] Thailand's second written submission, 2.27. (footnote omitted)
[39] Thailand's response to Panel Question 128, para. 2.1.
[40] Appellate Body Report, *EU - PET (Pakistan)*, para. 5.13, referring to Appellate Body Reports, *US - Countervailing Measures (China)*, para. 4.6; *US - Carbon Steel*, para. 125: *Guatemala - Cement I*, paras. 69-76.
[41] Thailand's response to Panel Question 128, para. 2.2.
[42] Thailand's response to Panel Question 128, para. 2.3.
[43] Thailand's opening statement at the substantive meeting, para. 4.7.

2.2.1 The Philippines' claim under Article 16 of the CVA

2.26. Thailand now turns to the Philippines' claim under Article 16 of the CVA, which the Philippines made with respect only to the NoAs. For the reasons explained above, Thailand considers that the Panel should decline to examine the consistency of the NoAs with the CVA. In any event, Thailand submits that the Philippines has failed to demonstrate that Thailand acted inconsistently with Article 16 of the CVA. In effect, the Philippines submits that the obligation in Article 16 of the CVA should be read together with paragraph 6 of the Interpretative Note to Article 6, which provides that the authorities shall provide, upon request, the source of the information, the data used and the calculation based upon such data. Based on this legal standard, the Philippines asserts that the response provided to the importer by the Thai Customs Department does not satisfy these requirements.[44]

2.2.1.1 The legal standard put forward by the Philippines is not supported by the text of Article 16

2.27. The Philippines attempts to add legal obligations to the standard developed by the panel in the original proceedings in this dispute by importing into Article 16 the requirements found in paragraph 6 of the Interpretative Note to Article 6. To recall, in the original proceedings in this dispute, the panel explained that Article 16 sets forth two elements: a written request for explanation by the importer and the customs authority's obligation to provide a written explanation of how the customs value of the good at issue was determined.[45] More specifically, the customs authorities' explanation must include the basis for rejecting transaction value, what method was used and how it was applied.[46]

2.28. In the Philippines' view, the authority also has an obligation under Article 16 to explain "the source of the information, the data used, and the calculation based upon such data", even though these requirements are included in the Interpretative Note to Article 6 and not in Article 16, and that no reference whatsoever is made to Article 6 or its Interpretative Note in Article 16. Article 16 simply provides that the importer shall have the right to an explanation of how the customs value of the goods was determined. Therefore, there is no textual basis to justify adding obligations put forward by the Philippines to Article 16.[47]

2.29. The Philippines further asserts that Thailand is proposing to analyse the content of the Customs Department's explanation "in the abstract".[48] Thailand disagrees with the Philippines' assertion. Thailand understands that to some extent, the valuation method used is relevant for this examination: it is part of identifying the method used and explaining how it was applied, as the original panel clearly stated. However, the Philippines' attempt to add to Article 16 the requirements of Paragraph 6 of the Interpretative Note to Article 6 goes beyond taking into account the methodology used in assessing the explanation from the customs authority. The Philippines would like the Panel to transpose *verbatim* specific obligations in an interpretative note to an Article into another Article.[49] This should not be accepted by the Panel as it is well established that a treaty interpreter may not impute into a treaty "words that are not there" nor "concepts that were not intended".[50] However, this is exactly what the Philippines is trying to do by reading additional requirements in Article 16 that are simply not there.[51]

2.30. In light of the above, Thailand considers that the Panel should dismiss the Philippines' attempt to expand the scope of the obligation of Article 16 by adding to it the requirements under paragraph 6 of the Interpretative Note to Article 6. Instead, the Panel should follow the approach taken by the panels in the original proceedings in this dispute and in the first compliance proceedings that under

[44] Thailand's first written submission, para. 2.40.
[45] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.231; See Thailand's first written submission, para. 2.43.
[46] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.238: Panel Report in the first compliance proceedings, para. 7.416; See Thailand's second written submission, para. 2.32.
[47] Thailand's second written submission, para. 2.32.
[48] The Philippines' second written submission, para. 215.
[49] Thailand's second written submission, paras. 2.34-2.35.
[50] Appellate Body Report, *India – Patents (US)*, para. 45; Appellate Body Report, *India – Quantitative Restrictions*, para. 94.
[51] Thailand's first written submission, para. 2.44.

Article 16, the customs authorities' explanation must include the basis for rejecting transaction value, what method was used and how it was applied.[52]

2.2.1.2 The Customs Department did not act inconsistently with Article 16 of the CVA

2.31. The Philippines argues that the Thai Customs Department's explanation is not sufficiently clear as to the reason why the transaction value was rejected and how the alternative value were determined. In effect, in its response dated 10 January 2018 to PMTL's letter requesting "an explanation as to the basis for sending the NoAs, rejecting the company's declared transaction values, and calculating the alleged alternative values"[53], the Customs Department informed PMTL that the NoAs were issued in connection with the Department of Special Investigations (DSI) investigation that led to the prosecution order black case No. Or.232/2560, i.e. the 02-03 Charges. It added that the DSI prepared a "table summarizing the CIF prices of Marlboro and L&M cigarettes for the Customs Department to assess the value and calculate the taxes and duty which were not fully paid". Finally, it suggested PMTL to contact the DSI directly for more information.[54]

2.32. Therefore, the Customs Department clearly explained that the NoAs were based on the DSI investigation and the resulting Charges. To recall, at the time the NoAs were issued, PMTL already had access to the 02-03 Charges and its Annex. These make clear that the basis for rejecting the declared transaction value was the suspicion that PMTL had engaged in customs fraud. The NoAs, in turn, indicate that the "correct" customs values were "calculated from the cigarette cost structure of PT Philip Morris Indonesia obtained from the Indonesian government".[55] In these circumstances, it was perfectly acceptable for the customs authorities to explain that the basis was the DSI investigation that led to the 02-03 Charges, and to refer PMTL to the DSI for more information. [56] However, to Thailand's knowledge, PMTL did not subsequently contact the DSI to ask for more information.[57]

2.33. Moreover, the Philippines claims that the Customs Department did not provide the information required under the Interpretative Note to Article 6, including "the source of the information, the data used, and the calculation based upon such data". Thailand reiterates that the requirements under the Interpretative Note to Article 6 should not be read into Article 16. In any event, Thailand notes that customs authorities must provide the information under the Interpretative Note to Article 6 at the request of the importer. None of these was explicitly requested by PMTL, which simply asked for "an explanation as to the basis for sending the Notices of Assessment, rejecting the company's declared transaction values, and calculating the alleged alternative values".[58]

2.34. In response, the Philippines argues that, under Article 16, the importer is not obliged to identify the precise aspects of the required information.[59] In other words, the Philippines would like the Panel to add to Article 16 the obligations under the Interpretative Note to Article 6, but to ignore the fact that this obligation is triggered by the importer's request to the customs authority for that information. This "picking and choosing" of obligations cannot be accepted by the Panel and the customs authorities cannot be held accountable for not providing specific information that the importer failed to request.[60]

2.35. In light of the above, Thailand submits that the Philippines has failed to demonstrate that the Thai Customs Department acted inconsistently with the requirements under Article 16 of the CVA.

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[52] Thailand's second written submission, para. 2.36.

[53] Letter from PM Thailand to the Director General of the Customs Department, 14 December 2017, Exhibit PHL-247-B.

[54] Letter from the Customs Department to PM Thailand, 10 January 2018, Exhibit PHL-250-B; See Thailand's first written submission, paras. 2.47-2.48.; Thailand's second written submission, para. 2.39.

[55] Sample Notices of Assessment, Exhibit PHL-240-B; See Thailand's first written submission, para. 2.49.; Thailand's second written submission, para. 2.39.

[56] Thailand's first written submission, para. 2.49.

[57] Thailand's second written submission, para. 2.39.

[58] Letter from PM Thailand to the Director General of the Customs Department, 14 December 2017, Exhibit PHL-247-B; See Thailand's first written submission, para. 2.50.

[59] The Philippines' second written submission, paras. 231-233.

[60] Thailand's second written submission, para. 2.41.

3 THE 02-03 CHARGES

3.1. This section concerns criminal Charges that were issued by the Public Prosecutor in January 2017 and relating to 780 entries of cigarettes imported by PMTL. In the Philippines' view, in bringing these charges, the Public Prosecutor effectively engaged in customs valuation and did so in a manner inconsistent with the CVA. Relying on the Panel's findings in the first compliance proceedings, the Philippines asserts that the CVA applies to the 02-03 Charges. The Philippines then argues that, by relying on cost and profit information contained in certain tax forms submitted by PT Philip Morris Indonesia (PTPMI) to Indonesian authorities as a basis for suspecting possible fraud, the Public Prosecutor incorrectly rejected PMTL's declared transaction value and improperly established alternative customs values.[61]

3.2. The Philippines' claims are without merit. First, the 02-03 Charges concern an allegation of customs fraud which is a matter not covered by the CVA. Second, the Philippines cannot make a *prima facie* case that the 02-03 Charges are CVA-inconsistent because the information available at this point does not permit the identification of the precise content of a conduct that can be declared WTO-inconsistent. Even if the Panel were to examine the merits of the Philippines' claims, the 02-03 Charges are not inconsistent with the CVA. In the event that the Panel were to find that the 02-03 Charges are inconsistent with certain provisions of the CVA, these Charges are justified under Articles XX(a) and XX(d) of the GATT 1994. Therefore, Thailand requests that the Panel dismiss *ab initio* the Philippines' claims regarding the 02-03 Charges. [62]

3.3. Furthermore, in its opening statement at the substantive meeting, the Philippines referred to the alleged claims of inconsistencies under Article 7 of the CVA, arguing that Thailand used valuation methods that are prohibited under those provisions.[63] However, the Philippines had not ever put forward such claims in either its Panel request or its first and second written submissions. To the extent that the Philippines attempts to correct this deficiency in its opening statement or subsequently in this proceeding, Thailand submits that the Philippines failed to make *prima facie* case in timely fashion and the Panel should not make any findings under Article 7 of the CVA. In any event, the Philippines' claims under Article 7 are outside the Panel's terms of reference because the Philippines' vague reference to Article 7 in its request for the establishment of a panel does not meet the basic standards of Article 6.2 of the DSU.

3.4. It is worth to stress at this point that while the issues in the two compliance proceedings may be similar, they are by no means identical, especially with respect to the facts. They concern different measures, with different factual backgrounds, with respect to which different legal arguments were presented, and separate panels were established by the DSB. A panel's duty under Article 11 of the DSU is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". The Panel's duty under Article 11 of the DSU applies even – or perhaps even especially – where it is considering issues similar to those addressed in the first compliance proceeding. In other words, the Panel is required under Article 11 of the DSU to examine separately and specifically the measures at issue in this proceeding in light of the claims and arguments presented by the parties.[64] It would, therefore, be incorrect to conclude that the Philippines has made a *prima facie* case only because the issues addressed in these compliance proceedings are similar to those in the first compliance proceedings.[65]

3.5. Moreover, Thailand fully agrees with the European Union's view that the fact that the Panel Report in the first compliance proceedings is still unadopted and might be subject to an appeal is of great relevance.[66] In particular, if this Panel incorporates the findings or reasoning by the Panel in the first compliance proceedings, it risks relying on an unadopted Panel Report that may later be reversed by the Appellate Body. This could give rise to a situation where contradictory panel and Appellate Body reports would be issued and, thus, raise serious concerns about the validity and legitimacy of the panel's reasoning and findings. This would also raise serious problems with respect

[61] Thailand's first written submission, para. 3.1.
[62] Thailand's first written submission, para. 3.2.
[63] The Philippines' opening statement at the substantive meeting, paras. 59-60, 66-89.
[64] Thailand's opening statement at the substantive meeting, para. 2.4.
[65] Thailand's first written submission, para. 3.3.
[66] The European Union's response to Panel question 10, paras. 5-7.

to how the responding Member would implement any contradictory findings. This situation would thus be detrimental to the security and predictability of the dispute settlement system, and should be avoided.[67]

3.1 The CVA does not apply to the 02-03 Charges

3.1.1 The Public Prosecutor is not part of Thailand's "customs administration"

3.6. Thailand reiterates its argument made in the first compliance proceedings that the disciplines of the CVA apply only to WTO Members' "customs administration". The revised Kyoto Convention of the World Customs Organization (WCO) defines "customs" as a government agency which is responsible for (i) the administration of customs law; (ii) the collection of duties and taxes; and (iii) application for other laws and regulations relating to importation, exportation, movement or storage of goods.[68] The WCO's definition confirms that entities responsible for enforcing criminal offences, such as the Public Prosecutor as in this dispute, are not considered part of "customs".[69]

3.7. For these reasons and Thailand's arguments made in the first compliance proceedings[70], Thailand requests the Panel to find that the CVA does not apply to the 02-03 Charges.

3.1.2 The accusation contained in the 02-03 Charges constitutes "customs fraud"

3.8. The 02-03 Charges contain an accusation of customs fraud pursuant to Section 27 of Thailand's Customs Act B.E. 2469 (1926), which falls within the definition of "customs fraud" articulated by the panel in the first compliance proceedings. To recall, the first compliance panel clarified that "customs fraud" concerns a situation in which the importer, by means of deception, declares a transaction value that does not correspond to the amount actually paid or payable to the seller.[71] In arriving at this definition, the Panel first found that "customs fraud" relates to the truth of any statement, document or declaration presented for customs valuation.[72] The Panel then confirmed that the bench mark for determining the truth of the declared value is the price actually paid or payable for the imported goods. In other words, customs fraud occurs when the importer declares a value that is not truthful in relation to the price actually paid or payable. The element of "price actually paid or payable is, thus, an important component of "customs fraud", as determined by the panel.[73]

3.9. In this dispute, the 02-03 Charges allege that PMTL committed an offence under Section 27 of Thailand's Customs Act B.E. 2469 (1926) with respect to 780 entries that cleared customs during the period 2002-2003. This provision makes it a criminal offence to evade, or attempt to evade, the payment of duties with the intention to defraud the Thai Government. The 02-03 Charges accuse PMTL of declaring an import value that is not the price actually paid by the buyer to the seller in Indonesia[74], and that was done with the intention to defraud the Thai Government.[75] In effect, where the transaction value reported by the importer into Thailand appears to reflect very different values than might be expected based on the exporter's declarations of its costs and profits to the Indonesian government, there are reasonable grounds to suspect that the declared transaction value may not reflect the price actually paid and any reasonable authority would have grounds to suspect that the importer might have committed customs fraud.[76] This is precisely what occurred with the 02-03 Charges. Therefore, the accusation presented in the Charges constitutes "customs fraud" in accordance with the first compliance panel's definition.

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[67] Thailand's opening statement at the substantive meeting, para. 2.5.

[68] See Kyoto Convention on the Simplification and Harmonization of Customs Procedures, Chapter 2, Exhibit THA-55.

[69] Thailand's first written submission, para. 3.6.

[70] See Thailand's first written submission in the first compliance proceedings, para. 6.29; Thailand's response to Panel question 48.

[71] Panel report in the first compliance proceedings, paras. 7.625-7.631; See Thailand's opening statement at the substantive meeting, para. 3.3.

[72] Panel Report in the first compliance proceedings, paras. 7.624; See Thailand's opening statement at the substantive meeting, para. 3.3.

[73] Thailand's opening statement at the substantive meeting, para. 3.3.

[74] Thailand's first written submission, para. 3.19; Thailand's second written submission, para. 3.4.

[75] Thailand's opening statement at the substantive meeting, para. 3.4.

[76] Thailand's first written submission, para. 3.21.

3.10. It bears emphasizing that although the Charges and the customs determination in the sense of Article 1.1 of the CVA refer to the same term "price actually paid or payable", these are two very different uses of the term. One pertains to a criminal offence of customs fraud, and another one to a determination of the customs value for purposes of levying customs duties.[77] To substantiate an accusation of customs fraud in the form of fraudulent under-declaration of the customs value, the authorities need only establish that the declared customs value is not the price actually paid and that this was carried out by means of deception. Consequently, in cases of suspected customs fraud, authorities need to answer a threshold question (whether the declared value represents the price actually paid). However, this does not require a determination of what is the price actually paid or payable for the purposes of levying *ad valorem* duties. As the first compliance panel acknowledged[78], there are cases where the authority may never know the price actually paid, something which does not prevent the authority from answering the binary question of whether the declared value represents the price actually paid.[79] Therefore, Thailand reiterates that the references to "price actually paid" in the Charges pertain to the context of customs fraud, not customs valuation under Article 1.1 or any other provisions of the CVA.

3.11. Once it is established that the 02-03 Charges are an allegation of "customs fraud", the next question is: what are the legal consequences under the CVA for the Charges? In the first compliance proceedings, the panel stated that it ""would be inclined to agree with Thailand that the Charges fall outside the scope of the CVA" should Thailand be able to demonstrate that Charges allege customs fraud as previously defined by the Panel.[80] Thailand understands the formulation "fall outside the scope of the CVA" to mean that allegations of customs fraud are not covered by the CVA.[81] This clarification by the panel is of utmost importance as it provides guidance on the possible limits of the scope of application of the CVA. More specifically, the panel did not foreclose the possibility that, in certain circumstances, the CVA would not apply to allegations of customs fraud.[82]

3.12. In most jurisdictions, the investigations into customs fraud conducted by law enforcement agencies follow a separate track from the normal customs formalities conducted by customs agencies, including customs valuation. These two tracks have fundamentally different natures. While the customs valuation track seeks to answer a question of "how much" is the customs value of the merchandise, the customs fraud track seeks to answer a separate, distinct question – "whether" the importer declared a different import value than the price actually paid with a view to defrauding the government. While both investigative exercises are related to act of importation, they address different conducts, one of which pertains to the administrative sphere and the other one pertains to the criminal sphere.[83]

3.13. In this respect, an analogue can be drawn to the concepts of tax evasion and tax avoidance. While both concepts refer to actions taken by the taxpayer to reduce his tax liability, tax avoidance involves using only legal means, while tax evasion involves using illegal means, which explains why it is a crime in all jurisdictions. Governments normally address tax avoidance matters through civil or administrative laws, whereas tax evasion is addressed through criminal law.[84] The fact that these two different tracks may have common features does not mean that they can be conflated. Applied to the present dispute, the fact that some features of both tracks are not incompatible cannot be interpreted to mean that an investigation into customs fraud has the same legal nature as an assessment of the customs value of imported merchandise.[85] It would, therefore, be erroneous to conflate these two notions.

3.14. In effect, to state that customs fraud accusations are subject to the CVA would effectively blur the distinction between customs value determination and customs fraud determination. It would mean that, once the customs official has completed the customs valuation procedure, authorities would be prevented from conducting a separate investigation into possible customs fraud. In other

[77] Thailand's opening statement at the substantive meeting, para. 3.4.
[78] Panel report in the first compliance proceedings, para. 7.659.
[79] Thailand's response to Panel question 167(a), para. 4.5.; See also Thailand's response to Panel question, 139, para. 4.5.
[80] Panel Report in the first compliance proceedings, para. 7.649.
[81] Thailand's opening statement at the substantive meeting, para. 3.7.
[82] Thailand's first written submission, para. 3.17.
[83] Thailand's opening starting at the substantive meeting, parap.3.28
[84] Thailand's opening statement at the substantive meeting, para. 3.10.
[85] Thailand's opening statement at the substantive meeting, para. 3.10.

words, the only way to address customs fraud would be by applying the CVA, an instrument that provides no disciplines for these situations.[86] For these reasons, Thailand considers that a customs fraud accusation, including the associated penalty that is based on the value of the goods, is not covered by the CVA.

3.15. The scope of the CVA covers only "customs valuation" determinations. Following the precedent in *Colombia – Ports of Entry*, the first compliance panel established that Article 15.1(a) of the CVA, which provides the definition of "customs value of imported goods", sets forth the legal standard for determining the measures that qualify as "customs valuation" that are subject to the CVA.[87] Based on Article 15.1(a) of the CVA, the concept of customs valuation comprises two elements: (i) the measure must determine the value of the goods; and this must be used (ii) for the purposes of levying *ad valorem* duties.[88]

3.16. With respect to the second element, the panel in *Colombia – Ports of Entry* ensured that the term "levy" was interpreted and applied narrowly by clearly distinguishing between valuation of goods used for the collection of customs duties (which constitutes customs valuation), and measures such as guarantees that consist of valuation of goods to secure the collection of customs duties (which do not constitute customs valuation).[89] Thailand agrees with the panel's reasoning. The scope of the term "for the purposes of levying *ad valorem* duties of customs on imported goods" cannot be extended to every valuation of imported goods but must cover only valuation determinations that have a direct repercussion on the amount of *ad valorem* customs duties collected from the importer.[90] Thailand thus contends that it is incorrect to assert that the concept for the purposes of levying *ad valorem* duties encompasses any valuation determination used to ascertain the amount of *ad valorem* duties "due" on imported goods.[91]

3.17. Therefore, some measures that entail a valuation of imported goods, even if they are part of enforcement actions adopted by customs administrations to secure the collection of *ad valorem* duties, cannot be regards as "customs valuation" because they are not used for the purpose of levying *ad valorem* duties. These measures include the use of reference prices as a risk assessment tool to detect fraud, which is routinely used by countries around the world, including the Philippines[92], and even recommended by the World Customs Organization. Although this measure involves a determination of the value that importers should declare for certain imported goods, it is not subject to the CVA rules on customs valuation to the extent that it is used solely for purposes of risk assessment.[93]

3.18. Another measure that does not constitute customs valuation is the guarantee that customs authorities require when importers wish to withdraw the goods pending a decision on the customs value pursuant to Article 13 of the CVA. Because this guarantee is required at a moment in time when the customs value examination has not concluded, authorities cannot be expected to base the guarantee on a value of those goods that follows Articles 1 through 7.[94] A panel in a recent dispute *Colombia – Textiles (21.5)* confirmed this, indicating that in the case of suspected under-invoicing, "the amount of the guarantee is understandably calculated on the basis of an approximate reference value".[95] This rationale would appear to apply equally in this case where, in the case of alleged

[86] Thailand's opening statement at the substantive meeting, para. 3.14.

[87] Panel report in the first compliance proceedings, para. 7.647; See Thailand's response to 171(a), para. 6.2.

[88] Thailand's opening statement at the substantive meeting, para. 3.15; Thailand's response to Panel question 171(a), para. 6.4.

[89] Thailand's response to Panel question 171(a), para. 6.8.

[90] Thailand's opening statement at the substantive meeting, para. 3.16.

[91] The Philippines' first written submission, para. 274; see also the Philippines' opening statement at the substantive meeting with the Parties, para. 37; See Thailand's response to Panel question 171(a), para. 6.9.

[92] Memorandum from the Commissioner of the Philippines' Bureau of Customs, 2018-06-18, 14 June 2018 (available at: http://customs.gov.ph/wp-content/uploads/2018/07/mem-2018-06018_ReferenceValuesforShipmentsunderChap10_12_13_16_19_29_and_40-2.pdf), Exhibit THA-85.

[93] Thailand's opening statement at the substantive meeting, para. 3.17; Thailand's response to Panel question 171(a), para. 6.12.

[94] Thailand's opening statement at the substantive meeting, para. 3.18; See also Thailand's response to Panel request 171(a), paras. 6.14-6.15.

[95] Panel Report, *Colombia – Textiles (Article 21.5)*, para. 7.609.

customs fraud, the potential fine may "understandably" be calculated on the basis of an "approximate" value.[96]

3.19. In this dispute, the charges of customs fraud do not meet the second element of Article 15(a) of the CVA because neither the accusation itself nor the related penalty has a direct repercussion on the amount of *ad valorem* duties that were levied. The 02-03 Charges contain an allegation that PMTL engaged in fraudulent behaviour that resulted in the declaration of an import value that does not represent the price actually paid or payable. As explained above, the Thai Public Prosecutor need not establish the exact amount of the price actually payable but only prove that the declared price is not the price actually paid, for which purpose it is unnecessary to quantify the exact amount of the price actually paid. In fact, there are many instances in which authorities will never be able to determine conclusively the price actually paid because the importer can refuse to disclose all relevant information about the payments made for the imported goods.[97]

3.20. In this context, Thailand asserts that the accusation itself of customs fraud does not meet the definition of "customs valuation" under Article 15.1(a) of the CVA. Indeed, this accusation does not even meet the first element of Article 15.1(a), as there is no valuation of imported goods, let alone the second element.[98] This assertion remains valid even in the scenario that the fine imposed on customs fraud is calculated on the basis of the value of the goods. In effect, the 02-03 Charges are not a re-assessment of the customs value previously determined by the Customs Department. Even if the 02-03 Charges were this type of determination, this determination was not made for the purposes of calculating the amount of *ad valorem* duties that must be collected from the importer. The references to the "actual price" in the 02-03 Charges serve to establish a benchmark for a possible fine for the purposes of punishing and deterring customs fraud, thereby enforcing customs laws. Therefore, Thailand maintains that the 02-03 Charges do not constitute "customs valuation" within the meaning of the CVA. [99]

3.21. This is why it is not uncommon for countries to expressly stipulate in their legislation that penalties for customs fraud shall be determined on the basis of the value of the goods which is calculated not in accordance with CVA rules.[100] This is the case, for example, of the United States legislation, which stipulates that, in the case of customs fraud, there shall be a penalty in an amount not exceeding the domestic value of the merchandise, that is, the value in the country of importation.[101] The same applies in Spain, where the penalties for customs fraud are based, depending on the product, on the maximum general public sale price, the value determined by an expert appointed by the court, the medium value for similar goods, or the official price.[102][103]

3.22. Finally, it is worth recalling that throughout these proceedings, the Philippines has not pointed to a single textual basis in the CVA, or even its negotiating history, to suggest that the CVA was intended to govern criminal enforcement of customs laws. In the absence of such a textual basis, the Panel should not read obligations into the CVA that are simply not there. This is confirmed by a reading of Article 6.3 of Section I of the Trade Facilitation Agreement (TFA), titled "penalty disciplines". This Article establishes very general rules regarding penalties imposed in connection with breaches of Member's customs laws, regulations, or procedural requirements.[104] In Thailand's view, these disciplines were intended to cover civil penalties, rather than criminal penalties.[105] Even if the wording is considered broad enough to apply also to criminal penalties, however, nowhere in Article 6.3 of Section I or in any other provision of the TFA did WTO Members suggest that the

[96] Thailand's response to Panel question 171(a), para. 6.15.
[97] Thailand's response to Panel question 171(a), para. 6.22.
[98] Thailand's response to Panel question 171(a), para. 6.24.
[99] Thailand's response to Panel question 171(a), paras. 6.25-6.28.
[100] Thailand's response to Panel question 171(a), para. 6.30.
[101] See 19 U.S. Code, Section 1952(c)(1), Exhibit THA-77.
[102] See Article 10 of *Ley Orgánica de Represión del Contrabando 12/1995* (Organic Act on the Repression of Smuggling 12/1995), Exhibit THA-78.
[103] See Thailand's opening statement at the substantive meeting, paras. 3.11-3.12; Thailand's response to Panel question 171(a), para. 6.30.
[104] For example, Article 6.3.3 provides that penalties "shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach".
[105] Thus, in discussing the penalty disciplines under Article 6.3, the Preparatory Committee on Trade Facilitation's "self-assessment guide" for Members describes these disciplines as regulating the "assessment of civil or administrative penalties for violations of the customs law". TN/TF/W/143/Rev.8, 17 November 2014, p. 44.

determination of penalties for criminal offences related to customs fraud was governed by the CVA. Instead, Members stipulated only that penalties must be reasonably related to the violation. This is a very different standard than the Philippines seeks to have the Panel read into the CVA.[106]

3.23. For these reasons explained above, Thailand reiterates that the CVA does not apply to the 02-03 Charges as this measure concerns an accusation of customs fraud and thus falls outside the scope of the CVA.

3.2 The Philippines has failed to make a *prima facie* based on the insufficient information contained in the 02-03 Charges

3.24. In the event that the Panel were to find that the CVA applies to the 02-03 Charges, Thailand argues that the 02-03 Charges do not contain sufficient factual information to allow the Philippines to make a *prima facie* case of inconsistency under the CVA. To recall, the panel in the first compliance proceedings indicated that panels must follow the standard of review of Article 11 of the DSU. This means that "a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities".[107] This standard of review has direct bearing on the complaining party's ability to make a *prima facie* case of violation. Because the panel cannot conduct a *de novo* review and must critically examine the authority's explanation in depth, a complaining party can make a *prima facie* case only if the precise content of the measure, at the time of the panel's examination, reflects a conduct that is inconsistent with the CVA.[108]

3.25. If a panel were to examine the CVA-consistency of a conduct whose "precise content" has not yet materialized or of facts not yet confirmed, that panel would risk conducting a *de novo* examination. This is because the panel would effectively be substituting its own judgement for the authority's judgement with respect to the facts. Furthermore, a panel would not be in a position to critically examine an authority's explanation in depth based on facts whose veracity has not yet been confirmed. In such circumstances, a panel would also risk making predictions about events or measures taken subsequent to the adoption of the challenged measure. [109] Thailand notes that the first compliance panel also reaffirmed the principle that "panels should refrain not only from making speculative findings on future measures, but also from making speculative findings on future events that may have a bearing on the specific measure being challenged."[110]

3.26. However, this is what precisely occurs in this dispute where the factual circumstances surrounding the 02-03 Charge do not allow the Philippines to identify the precise content of a measure that could be the object of a WTO-consistent analysis. In particular, the Philippines' claims are prominently premised on the allegation that the cost information provided by PTPMI to the Indonesian government is inaccurate and unreliable. The Philippines explains at length that the Indonesian excise tax system forced manufacturers to report figures that were "fabricated 'plugs'"[111], "arbitrary"[112] and "fictitious"[113]. In this regard, the Philippines' position is unusual as it seems to argue that it is inappropriate for the Thai authorities to harbour suspicions regarding declarations made to them by Philip Morris because the declarations to another government on which those suspicions were based were indeed "arbitrary" and "fictitious".[114]

3.27. Moreover, the veracity and reliability of the arguments now put before this Panel by the Philippines regarding the information provided by the Indonesian government is a factual matter that has not yet been fully addressed or resolved by any Thai governmental agency or Thai court.[115] Pursuant to section 158(5) of Thai Criminal Code, the Public Prosecutor's function, when issuing the criminal charges, is limited to bring forward the acts alleged to have been occurred, and the reasons why those facts may amount to a criminal offence. The final decision as to whether the alleged acts

[106] Thailand's response to Panel questions 171 (a) and (b), paras. 6.21 and 6.33.
[107] Appellate Body Report, *US – Steel Safeguards*, para. 299, quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
[108] Thailand's first written submission, para. 3.29.
[109] Thailand's first written submission, para. 3.30.
[110] Panel report in the first compliance, para. 7.601 (footnote omitted).
[111] The Philippines' first written submission, para. 116.
[112] The Philippines' first written submission, para. 446.
[113] The Philippines' first written submission, para. 110.
[114] Thailand's first written submission, para. 3.36.
[115] Thailand's first written submission, para.3.36.

took place as described in the criminal charges, and whether those acts amount to a criminal offence rests with the Criminal Court, not the Public Prosecutor.[116] Thailand has merely initiated a process to determine whether customs fraud took place. Therefore, just as the Public Prosecutor's suspicions remain unconfirmed, the assertions made by the Philippines on behalf of PMTL before this Panel also remain unexamined and unconfirmed.[117]

3.28. Therefore, at present, there is not enough information to identify the precise content of any conduct that could be declared WTO-inconsistent. In the event that the Panel were to rule on the Philippines' claims concerning the 02-03 Charges, the Panel would necessarily engage in an impermissible *de novo* review of these facts, thereby departing from the correct standard of review under Article 11 of the DSU insofar as it would "conduct[] its own assessment, relying on its own judgement" of the facts before the Thai criminal court.[118] The Panel would also inappropriately pre-empt the analysis to be conducted by the criminal court because by the time the Criminal Court issues its ruling, these issues will have already been decided by the Panel.[119]

3.29. However, the Philippines alleges that the Panel does not risk conducting a *de novo* review because the precise content of the 02-03 Charges is clear.[120] In the Philippines' view, the 02-03 Charges "involve customs valuation determinations with two distinct elements", namely that the Public Prosecutor rejected the importer's declared transaction values for 780 entries and that the Public Prosecutor determined alternative "actual" customs values for those entries.[121]

3.30. The premise of the Philippines' allegation is erroneous. As explained in the previous section, the accusation contained in the Charges refers to customs fraud. The reference to "actual value" in the 02-03 Charges refers to the price actually paid or payable, not to "alternative" values as alleged by the Philippines. Hence, the accusation that PMTL declared an import value that is lower than the actual value means that PMTL is accused of declaring a value that is lower than the price actually paid or payable. This constitutes customs fraud in accordance with the definition of this concept provided by the panel in the first compliance proceedings.[122]

3.31. Moreover, the nature of the accusation contained in the 02-03 Charges (customs fraud) and the extent of the information underlying that accusation are two separate issues. That the accusation concerns customs fraud does not alter the fact that the circumstances surrounding this allegation - which include the Philippines' concerns about the reliability of information contained in Indonesian tax forms – have not yet been fully examined by Thailand's Criminal Court. Consequently, contrary to the Philippines' assertions, while it is clear that the allegation is of customs fraud, the evidence regarding that allegation has not been tested in court.[123]

3.32. Finally, Thailand wishes to emphasize that the factual circumstances in these proceedings contrast with the factual circumstances in the first compliance proceedings, where the Panel found that the 03-06 Charges contained sufficient information to be adjudicated under the CVA.[124] This is not the case in these proceedings for the reasons just explained above. Therefore, the Panel cannot simply transpose the reasoning of the panel in the first compliance proceedings to these proceedings.[125] In addition, under Article 11 of the DSU, the Panel is required to make an objective assessment of the arguments and evidence in this case, and cannot merely rely on its prior findings in a separate proceeding with a separate record.[126]

3.33. In light of the foregoing, Thailand requests the Panel to find that the Philippines cannot make a *prima facie* case under the CVA given that the quantity and clarity of information concerning the

[116] Thailand's first written submission, para. 3.37.
[117] Thailand's first written submission, para. 3.36.
[118] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 190.
[119] Thailand's first written submission, paras. 3.39-3.40.
[120] The Philippines' second written submission, para. 295.
[121] The Philippines' second written submission, para. 295.
[122] Thailand's second written submission, para. 3.43.
[123] Thailand's second written submission, para. 3.44.
[124] Thailand's first written submission, para. 3.33.
[125] Panel report in the first compliance proceedings, para. 7.604; Thailand's opening statement, para. 3.28.; Thailand's response to Panel question 135, para. 3.11.
[126] Thailand's response to Panel question 135, para. 3.12.

02-03 Charges do not permit at this point the identification of a precise content of this measure that could be found to be WTO-inconsistent by this Panel.

3.3 The Philippines failed to demonstrate that the 02-03 Charges are inconsistent with the CVA

3.34. The Philippines contends that, in issuing the 02-03 Charges, the Public Prosecutor acted inconsistently with various provisions of the CVA by improperly rejecting PMTL's declared transaction value, failing to respect the sequential order of valuation methods, improperly applying the computed method, and failing to respect the procedural obligations for rejecting PMTL's declared transaction value.

3.35. As explained above, Thailand has requested the Panel to dismiss the Philippines' claims under the CVA on the ground that the CVA does not apply to the 02-03 Charges. However, in the event that the Panel decides to examine the merits of the Philippines' claims, Thailand considers that the Philippines' claims are without legal foundation as they rely on interpretations of the CVA that lack textual support. The Philippines' claims are even more troubling because they all rest upon its open admission that PMTL deliberately provided false information to Indonesian authorities when filing tax forms. In Thailand's view, the Philippines cannot base its claims of violation on this basis.[127]

3.3.1 The Public Prosecutor did not act inconsistently with Article 1.2(a), second sentence, of the CVA

3.36. The Philippines alleges that in issuing the 02-03 Charges, the Public Prosecutor failed to examine the circumstances of the sales as required by Article 1.2(a), second sentence, of the CVA because the Public Prosecutor's chosen means of examining the circumstances of the sales were based on a cost-plus value reported by PTPMI to Indonesian authorities in tax form CK-21A, which Indonesia subsequently provided to Thai authorities. The Philippines contends that the figures in forms CK-21A reported by PTML are "fabricated as arithmetical `plugs'" which are admittedly "arbitrary" and "fictitious". Therefore, the examination of the circumstances of the sales is "inapt to reveal whether the relationship influenced the price". Furthermore, the Philippines asserts that the Public Prosecutor failed to review "actively and critically the Indonesian `cost' information taken from form CK-21A".[128]

3.37. In support its argument, the Philippines proposes a series of elements that would inform the interpretation of the clause "all cost plus a profit" found in the last sentence of Paragraph 3 of the Interpretative Note to Article 1.2, which provides that if the declared transaction value is adequate to ensure recovery of all cost plus a representative profit, this would demonstrate that the relationship between the buyer and the seller did not influence the price. In doing so, the Philippines incorporates into the clause "all cost plus a profit" of Paragraph 3 of the Interpretative Note to Article 1.2 the disciplines of a number of CVA provisions. This includes Articles 2.1(b), 3.1(b), 6, 7.2, 8, 17, Paragraph 5 of the Interpretative Note to Article 5, Paragraphs 2 and 5 of the Interpretative Note to Article 6, Paragraph 1 of the Interpretative Note to Article 8.1(b)(iv), Paragraph 1 of the Interpretative Note to Article 8.3, Paragraph 6 of Annex III of the CVA, and an overarching obligation to use only information that complies with the Generally Accepted Accounting Principles (GAAP).[129]

3.38. However, in constructing its desired legal standard, the Philippines fails to mention that its expansive interpretation has absolutely no textual support in Paragraph 3 of the Interpretative Note to Article 1.2. As indicated the Appellate Body, a treaty interpreter may not impute into a treaty "words that are not there" nor "concepts that were not intended".[130] However, the Philippines' proposed interpretation would involve inserting into Article 1.2 not only words that are not there, but entire provisions of the CVA, along with their interpretative notes. The mere fact that the term "cost" in Paragraph 3 of the Interpretative Note to Article 1.2 is also used in other CVA provisions

[127] Thailand's first written submission, paras. 3.45-3.48.

[128] Thailand's first written submission, paras. 3.51-3.52; See The Philippines' first written submission, paras. 446 and 447.

[129] Thailand's first written submission, paras. 3.55 and 3.57.; See the Philippines' first written submission, paras. 164-168, 182-188, 189-194, 195-205, 206-212, 213-215.

[130] Appellate Body Report, *India – Patents (US)*, para. 45; See also, Appellate Body Report, *India – Quantitative Restrictions*, para. 94.

does not permit a wholesale incorporation of a number of disciplines that are nowhere mentioned or even implied in the text of Paragraph 3. Had the negotiators of the CVA intended to incorporate into Paragraph 3 of the Interpretative Note to Article 1.2 all of the provisions suggested by the Philippines, they would have done so explicitly as they had done with various CVA provisions, which contain explicit cross-references to other provisions. Moreover, it follows that where negotiators did not include similar cross-references, that "omission must have some meaning".[131]

3.39. In addition to this error of legal interpretation, Thailand also submits that the Philippines failed to interpret Paragraph 3 of the Interpretative Note to Article 1.2 under the rules of Article 31 of the Vienna Convention. To recall, according to Article 3.2 of the DSU, the WTO covered agreements must be interpreted "in accordance with customary rules of interpretation of public international law". The Appellate Body has held that Article 31 of the Vienna Convention is part of those customary rules of interpretation of public international law.[132] Hence, the WTO covered agreements must be interpreted in accordance with the rules of interpretation contained in Article 31 of the Vienna Convention.[133]

3.40. Article 31 of the Vienna Convention requires the treaty terms to be interpreted in "good faith" in accordance with their ordinary meaning in their "context" and in light of their object and purpose. Applying these interpretative rules to the present case, Thailand submits that it cannot be assumed that in calculating a cost plus profit under Paragraph 3 of the Interpretative Note to Article 1.2, the authority will use information that is arbitrary or unreliable with the intention to reject the declared transaction value of related parties. On the contrary, it should be assume that the authority of the importing country will do everything possible to rely on accurate information for purposes of calculating the costs plus profit. Moreover, a good faith interpretation must not allow parties to claim a CVA violation based on an illegal act of the company whose products were valued. This would happen if the interpretation would impose excessive restrictions on the authority's ability to gather information on the producer's costs and profits. It is imperative for authorities of the importing country should be allowed to assume that the information is accurate and truthful[134] and be able to rely in good faith on the information furnished by authorities of the exporting country on the producer's costs and profits. [135]

3.41. In this dispute, the Philippines' claim under Article 1.2(a), second sentence, of the CVA focuses specifically on Thailand's alleged failure to verify the accuracy of the information on costs and profits derived from form CK-21A that was provided by Indonesia. Interpreting Article 1.2(a), second sentence, of the CVA in the manner proposed by the Philippines would entail detrimental consequences for cooperation efforts between governments, which is crucial to customs valuation exercises, particularly when the companies in question are related parties. In fact, the cost and profit information furnished by Indonesian authorities was provided by PTPMI itself. Under Indonesian law, PTPMI had a legal obligation to provide truthful and accurate information. Further, Indonesian authorities had already processed and relied on this information for collecting local taxes. In these circumstances, Thailand had every reason to treat this information as accurate and truthful.[136] The interpretation proposed by the Philippines that the authorities must presume that information provided by foreign governments is not accurate, or even worse, that producers knowingly submitted fabricated information, would render meaningless any possible cooperation between the authorities of the importing country and those of the exporting country.[137] In this situation, the authorities in Thailand would face a roadblock to the extent that the information provided by the exporting country, which is based on tax filings of the related company, is inherently inaccurate because the company itself intentionally submitted inaccurate information.[138]

3.42. For these reasons, Article 1.2(a), second sentence, of the CVA should be interpreted in a way that gives authorities of the importing country sufficient flexibility to rely on presumptively reliable

[131] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18.; See Thailand's first written submission, paras. 3.58-3.63.
[132] Appellate Body Report, *US – Gasoline*, p. 17.
[133] Thailand's response to Panel question 164(a), para. 3.6.; Thailand's first written submission, paras. 3.69.
[134] Thailand's response to Panel question 164(a), para.
[135] Thailand's first written submission, para. 3.79.
[136] Thailand's second written submission, para. 3.65.
[137] Thailand's first written submission, paras. 3.79, 3.97.
[138] Thailand's response to Panel question 164(a), para. 3.14.

information obtained from foreign governments.[139] This also corresponds to the interpretation of Paragraph 3 of Interpretative Note to Article 1.2 in the context of Article 1.2. Following the Panel's observation of Article 1.2 in its final report to the parties, authorities enjoy discretion in choosing the means for examining whether the relationship influenced the price – neither specific principles nor methodologies apply. Even minor flaws or shortcomings would not invalidate the examination. The only requirement is that the chosen method is apt to reveal whether the relationship influenced the prince. This understanding of Article 1.2(a) informs the interpretation of Paragraph 3 of the Interpretative Note to Article 1.2.[140]

3.43. Applied to the facts of this dispute, the fact that Thai authorities relied on the cost and profit information provided by Indonesia, which, in turn, obtained from the tax form submitted by PTMPI under Indonesian law is a method perfectly apt to reveal whether the relationship between PMTL and PTPMI influence the price. Furthermore, the fact that Thai authorities proceeded on the basis that such information would be accurate and did not take any additional steps to confirm the veracity of the information in tax forms is not a flaw or shortcoming that renders the examination inapt to reveal whether the relationship influenced the price. More concretely, Thai authorities should not be put in a position where, every time they seek cooperation from foreign governments, they must second-guess the veracity of the information contained in declarations to those governments because of the possibility that the company might have knowingly provided "fabricated plugs".[141]

3.44. For these reasons, Thailand rejects the Philippines' interpretation of Paragraph 3 of the Interpretative Note to Article 1.2 whereby a producer can intentionally submit fabricated information to authorities of the exporting country and, on that basis, later claim that the authority of the importing country acted arbitrarily by relying on that same information.

3.3.2 The Public Prosecutor did not act inconsistently with Articles 2 to 6 of the CVA

3.45. The Philippines argues that the Public Prosecutor determined the customs value of PMTL's entries by using the computed value under Article 6 of the CVA. However, in the Philippines' view, the Public Prosecutor did so without following the sequential order of customs valuation methods in Articles 2 to 6 of the CVA.

3.46. The present case involves special circumstances, in which none of the alternative methods in Articles 2-5 could be used to determine a customs value. The fact that PMTL is the only major cigarette importer in Thailand places the authorities in the unusual situation of not having sufficient previously determined customs values for identical or similar goods. Moreover, the fact that declared value is insufficient to ensure the recovery of costs plus a reasonable profit means that the deductive method under Article 5 is not appropriate either because it would simply result in determining the same CIF price that was previously determined to have been affected by the relationship between the exporter and the importer. As the first compliance proceedings panel's ruling made clear, it is virtually impossible to identify an appropriate amount for profit and general expenses in the Thai market other than PMTL's own ratio. Using the deductive method, therefore, would result in deducting PMTL's profit and general expense ratio, its taxes and transportation costs, and other expenses from PMTL's price for the first sale to an unrelated party. This results in PMTL's own CIF. In these circumstances, the deductive value cannot reasonably be used to determine the customs value.[142]

3.47. For the reasons stated above, Thailand submits that there can be no violation of Articles 2-6 of the CVA given that, in the particular circumstances of PMTL, the customs valuation methods in Articles 2- are not available.

3.3.3 The Public Prosecutor did not act inconsistently with Article 6 CVA

3.48. The Philippines claims that the Public Prosecutor violated Article 6 of the CVA by determining alternative customs values through improper use of a cost-plus or computed method. As with its

[139] Thailand's response to Panel question 164(a), para. 3.15.
[140] Thailand's first written submission, paras. 3.81-3.86.
[141] Thailand's first written submission, paras. 3.94-3.97.
[142] The Philippines' first written submission, para. 3.102.

other legal claims, the Philippines' claim under Article 6 is related to Thailand's use of information taken from form CK-21A which The Philippines considers inaccurate.[143]

3.49. Thailand states that the 02-03 Charges are not inconsistent with Article 6 of the CVA because the Public Prosecutor relied on a valuation method that falls under Article 7 of the CVA. Read together, Article 7.1 and Paragraph 2 of the Interpretative Note to Article 7 stipulate that the customs value may be determined using "reasonable means", which can include the valuation methods laid down in Articles 1 through 6 applying "a reasonable flexibility". The original panel defined "reasonable" as "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason", "not greatly less or more than might be thought likely or appropriate".[144][145]

3.50. In this dispute, the Public Prosecutor applied the computed value method with a reasonable flexibility that consists of relying on information provided by Indonesian authorities without subsequently verifying its accuracy. In this respect, This flexibility is "in accordance with reason" and "not irrational or absurd" because this information was provided by the Indonesian authorities which, in turn, had received it from PTPMI. It is thus within reason and not irrational for the Public Prosecutor to assume that PTPMI provided truthful information because it had been provided in compliance with Indonesian law and the Indonesian government itself had relied on it for collecting taxes.[146]

3.51. Furthermore, in its response to post-hearing question, the Philippines explains that a computed value under Article 6 is based on a "bottom up approach" that "adds up separate amounts for each element of the producer costs, general expenses, and profits".[147] On the contrary, a "top-down"[148] approach is used in the deductive method under Article 5. As Thailand understands, the starting point, which is the sales price in the country of importation to the first independent buyer, is located at the "top", from which the authority then moves "down" by making certain permissible deduction, until arriving at a final amount that constitutes the deductive value. Based on this interpretation and Thailand's sample of calculation of CIF price, the Philippines asserts that Thailand used an impermissible "top-down" approach to calculate a computed value under Article 6. The Philippines alleges that "[t]here is no flexibility in article 6 to depart from [the 'bottom-up' approach] by, for example, using a deductive method (a so-called 'top-down' approach)".[149]

3.52. The Philippines' understanding of the calculation methods under Articles 5 and 6 is erroneous. The terms "bottom-up" and "top-down" are not treaty terms of the CVA. They may be useful as superficial descriptions to visually illustrate the differences between the deductive method and the computed method. But it would be erroneous to assume that the two methods involve the same calculation done in two different ways. In fact, the two methods are very different. Under Article 5, the deductive method seeks to work back from the retail price in the importing country to arrive at a CIF import price. The cost of production in the exporting country is simply irrelevant for the calculation. As for Article 6, the computed method seeks to work up from the cost of production in the exporting country to arrive at a CIF import price in the importing country. For this, the retail price in the importing country is irrelevant.[150]

3.53. The Philippines' assertion that Thailand used a deductive method to calculate a computed value under Article 6 is therefore incorrect. Thailand sought to use the computed method but did not have cost information from the company's books. Instead, it replied on the information provided by Indonesia, based on which it was able to identify a cost of production, in part by adjusting the sales price in the country exportation. Thailand did not use the sales price in the country of importation, as would be used in the Article 5 deductive method. Moreover, Thailand did not use the sales price in the country of exportation as the basis of its calculation, it simply used it to get to the

[143] The Philippines' first written submission, para. 494.
[144] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.919.
[145] Thailand's first written submission, paras. 3.105-3.108; Thailand's second written submission, para. 3.79.
[146] Thailand's first written submission, para. 3.110; Thailand's second written submission, para. 3.80.
[147] The Philippines' response to Panel question 170, para. 34.
[148] The Philippines' response to Panel question 170, para. 49.
[149] The Philippines' response to Panel question 143, para. 5.1-5.4; See Thailand's comments on the Philippines' responses to Panel question 170, paras. 5.7-5.9.
[150] Thailand's comments on the Philippines' responses to Panel question 170, paras. 5.10-5.12.

starting point required for the computed method under Article 6 – the cost of production. In effect, Thailand relied on the Indonesian retail price to obtain the cost of production by subtracting Indonesia's taxes and profits for agents and distributors. However, the mere fact that this involved a subtraction, arithmetically speaking, does not make it a deductive method under Article 5. Once the starting point of the cost of production was obtained. Thailand added an amount for freight and insurance, which gave CIF price per pack in Indonesian currency. This amount was then converted to Thai baht using the applicable exchange rates.[151] Therefore, Thailand reiterates that Thailand's sample calculation shows a constructed CIF price calculated using the methodology/flexibilities envisaged in Article 7.1, based on the computed method in Article 6.

3.54. In light of the above, Thailand argues that, by acting consistently with Article 7.1 of the CVA, the Public Prosecutor did not act inconsistently with Article 6 of the CVA.

3.3.4 The Public Prosecutor did not act inconsistently with Article 1.2(a), third sentence, of the CVA by failing to communicate the grounds to the importer or failing to give an opportunity to respond

3.55. The Philippines claims that the Public Prosecutor acted inconsistently with Article 1.2(a), third sentence, of the CVA, which states that authorities must communicate to the importer the grounds for considering that the parties' relationship influenced the price and must give the importer an opportunity to response. Thailand argues that the obligation in this Article is of a procedural nature. Hence, even if the CVA were applicable to the 02-03 Charges, this procedural obligation of the CVA would not apply as there are certain features of criminal procedures which prevent the application of the CAV procedural obligations. This is the case, for example, of the obligation to consult with the importer, which would be incompatible with the principle in criminal law that the accused has the right to remain silent. Therefore, even if criminal authorities would be obliged to follow the substantive rules of the CVA, the practical realities of criminal proceedings make it impossible to follow CVA procedural rules.[152]

3.56. For the reasons stated above, the Panel should reject the Philippines' claim under Article 1.2(a), third sentence, of the CVA as this provision does not apply to the Public Prosecutor.

3.4 The 02-03 Charges are justified under Articles XX(d) and XX(a) of the GATT1994

3.57. In Thailand's view, the Panel should find that the 02-03 Charges are not inconsistent with the provisions of the CVA invoked by the Philippines for the reasoned explained above. However, in the event that the Panel finds that the 02-03 Charges are indeed inconsistent with the CVA, Thailand is of the view that Members' criminal enforcement authorities must be able to retain some policy space in order to prosecute customs fraud effectively.

3.58. Thailand argues that Members retain policy space under Article XX of the GATT 1994 to justify such violations, and that the 02-03 Charges are justified under Article XX(d) and XX(a) of the GATT 1994.

3.4.1 Article XX applies to violation of the CVA

3.59. Thailand is of the view that were the procedures of the CVA to be applied to criminal investigations/prosecutions, it would be necessary to find the policy space required to conduct criminal proceedings elsewhere in the covered agreements. In Thailand's view, the requisite policy space would be found in Article XX of the GATT 1994, which, by reason of Article VII, was clearly intended to apply to customs valuation matters and which expressly provides that nothing in the general agreement – including necessarily the rules on customs valuation – prevents Members from taking measures necessary to enforce their customs laws.[153] In response to Thailand's assertions with respect to the applicability of Article XX, the Philippines briefly restated the first compliance panel's views which Thailand will address and presents its arguments on this issue here below.

[151] Thailand's comments on the Philippines' responses to Panel question 170, para. 5.14.

[152] Thailand's first written submission, par. 3.113; Thailand's second written submission, paras. 3.83 and 3.86.

[153] Thailand's first written submission, para. 3.118.

3.60. To support its arguments, Thailand first submits that there are several textual bases in the CVA. In particular, its title and preamble both refer to Article VII of the GATT 1994. This indicates a close relationship between the CVA and Article VII of the GATT 1994, showing that the former is an elaboration of the latter. Hence, since Article XX is available to justify inconsistencies with Article VII, it should also be available to justify inconsistencies with the CVA. Thailand respectfully disagrees with the first compliance panel's view that the title and the preamble of the CVA are only general links to the GATT 1994 and not direct textual links to Article XX.[154] In Thailand's view, rather than establishing a direct reference to Article XX, the title and the preamble of the CVA reveal, in a holistic approach, the close links in the architecture, design and structure of the provision at issue. In particular, they shed light on the close link between the CVA and Article VII, in that the CVA expressly elaborates and implements Article VII. Since it is undisputed that Article XX applies to Article VII, by extension, Article XX also applies to the CVA.[155]

3.61. Second, because of the nature of the relationship between the CVA and Article VII of the GATT 1994, it could lead to absurd situations if a Member could justify a violation of Article VII by invoking the exceptions in Article XX, but it could not do so with respect to its obligations under the CVA, notwithstanding that the CVA implements the obligations in Article VII.[156] However, the first compliance panel found that the CVA contains obligations that are additional to and different from those under Article VII.[157] In Thailand's view, by definition, any agreement that elaborates on a provision will necessarily contain more detailed provisions that are different from and additional to those of the original agreement. Logically, the content of the CVA cannot be identical to the content of Article VII. This does not mean that the drafters intended to exclude the policy space from the CVA that Members previously enjoyed under Article VII. Moreover, the CVA, Article VII, and Article XX are part of one single treaty and must be read harmoniously.[158]

3.62. In any event, Thailand is of the view that the applicability of Article XX should be considered with respect to the CVA in its entirety, not with respect to certain of its provisions. To analyse whether specific provisions of the CVA are different from specific provisions of Article VII would lead a compartmentalization of the CVA, whereby Article XX would be applicable to certain provisions of the CVA only to the extent that they are identical to the provisions of Article VII of the GATT 1994. Thailand would caution against such an approach.[159]

3.63. Third, Thailand argues that all WTO agreements contain a balance between a Member's obligations and its policy space, and that the CVA should be no different. However, the first compliance panel viewed that there already exists an inherent balance in the CVA between a Member's obligations and its policy space. More specifically, the balance is reflected in "the relatively limited scope of the substantive and procedural obligations contained in the CVA, including a degree of discretion accorded to the customs authority in implementing those obligations".[160] However, to some extent, almost all WTO agreements are limited in scope, which does not mean that they should lack policy space for WTO Members.[161] The question of where Members' policy space to address customs fraud is found under the covered agreements is central to this issue. In effect, the Philippines argues that efforts to pursue customs fraud must comply with the CVA, without recourse to exceptions under Article XX. In Thailand's view, the Philippines' argument lacks textual basis and would unduly and impermissibly restrict Members' right to pursue suspected or alleged customs fraud. If the Panel were to agree with the Philippines that the CVA applies to suspected or alleged customs fraud, therefore, it would be necessary to situate policy space for Members to take actions against customs fraud in Article XX, which expressly refers to customs enforcement.[162]

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[154] The Philippines' second written submission, para. 358.
[155] Thailand's second written submission, para. 3.98; Thailand's first written submission, paras. 3.124-3.128.
[156] Thailand's first written submission, para. 3.129.
[157] The Philippines' second written submission, para. 361.
[158] Thailand's second written submission, para. 3.93; Thailand's first written submission, paras. 3.129-3.133.
[159] Thailand's first written submission, para. 3.134.
[160] The Philippines' second written submission, para. 362, citing to Panel report int the first compliance proceedings, para. 7.756.
[161] The Philippines' first written submission, paras. 3.135-3.138.
[162] Thailand's second written submission, para. 3.94.

3.64. For the reasons above, Thailand finds the Philippines' effort insufficient to rebut Thailand's arguments as the Philippines briefly restated the first compliance panel's views, which Thailand has addressed above. Consequently, Thailand submits that the Panel should retain policy space under Article XX to prosecute customs fraud effectively because the architecture, design, and structure of the covered agreements indicate that Article XX of the GATT 1994 is available to justify measures that are inconsistent with the CVA.[163]

3.4.2 The 02-03 Charges are provisionally justified under Article XX(d) and XX(a) of the GATT 1994

3.65. For a measure to be provisionally justified under Article XX(d) or Article XX(a) of the GATT 1994, a panel must first examine whether the measure is designed and necessary "to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" or "to protect public morals", respectively. Then, under the *chapeau* of Article XX, a panel must address whether the application of the measure does not unjustifiably or arbitrarily discriminate among countries where the same conditions prevail or otherwise lead to a disguised restriction on international trade.[164]

3.66. With respect to Article XX(d), Thailand submits that the 02-03 Charges are "designed" to secure compliance with Section 27 of the Thai Customs Act B.E. 2469 (1926), a WTO-consistent provision which criminalizes the avoidance of the payment of taxes or duties with the intention to defraud the Thai government. These Charges expressly refer to Section 27 and constitute a necessary formal step to the prosecution of the alleged customs fraud perpetrator.[165] Moreover, the Charges are "necessary" to secure compliance with that provision, because, in order to prosecute customs fraud effectively, the Public Prosecutor must follow and apply criminal law instead of the rules contained in the CVA. In particular, the CVA establishes a complex and detailed set of rules for calculating the customs value of goods, and it would be unreasonable to expect the Public Prosecutor to go through all the sequential steps in the CVA when the evidence it is confronted with lead him to suspect that the importer engaged in fraudulent activities.[166] Notably, the evidence is not always clear, and the prosecution teams are often faced with more complex facts. This is the case that the Public Prosecutors had to confront in the investigation. Following the CVA rules would rather place an undue burden on the prosecution teams when prosecuting customs fraud.[167] Lastly, since the Charges do not contain any import restriction or import prohibition, nothing indicates that they are trade-restrictive.[168]

3.67. The Philippines, however, suggests a less trade-restrictive alternative to the 02-03 Charges by proposing that Thailand should perform a WTO-consistent customs valuation determination.[169] Thailand finds the alternative proposed by the Philippines invalid. The Philippines' logic cannot work because Members may never rely on the Article XX defences as the underlying alternative of not violating another provision is always available. This would render Article XX inutile. If Thailand would have performed or performs a WTO-consistent customs valuation, there would be no need to invoke the Article XX defences. The removal of the inconsistency in the original measure cannot be a reasonable alternative measure, because there would be no inconsistent measure to defend. Thailand thus reaffirms that since nothing indicates that the Charges are trade restrictive, there are no less trade-restrictive alternatives to that measure.[170]

3.68. With respect to Article XX(a), Thailand submits that the 02-03 Charges are "designed" to protect public morals because by prosecuting alleged customs fraud perpetrators in compliance with Section 27 which criminalizes tax and duty evasion, they are closely related to the fight against smuggling and contraband. These issues represent a real concern for Thailand. Smuggling of cigarettes causes significant losses to Thailand each year and, therefore, is subject to considerable

[163] Thailand's second written submission, para. 3.95.
[164] Thailand's first written submission, paras. 3.141-3.144, 3.154-3.159, 3.165-3.167.
[165] Thailand's second written submission, para. 3.96; Thailand's first written submission, paras. 3.145-3.148.
[166] Thailand's second written submission, para. 3.101.
[167] Thailand's first written submission, paras. 3.149-3.150.
[168] Thailand's first written submission, para. 3.151.; Thailand's second written submission, para. 3.104.
[169] The Philippines' second written submission, para. 390.
[170] Thailand's second written submission, para. 3.104.

enforcement efforts.[171] Moreover, the Charges are "necessary" to protect public morals. Any departure from the rules for customs valuation prescribed in the CVA is necessary in order to prosecute customs fraud effectively. Indeed, in order to fulfil the important objective of fighting smuggling through criminalizing tax evasion and customs fraud, the Public Prosecutor had to apply a different set of rules that are not always compatible with the CVA rules, for the same reasons elaborated in the context of Article XX(d). Lastly, as nothing indicates that the 02-03 Charges are trade restrictive, there is thus no less trade-restrictive alternative measure to the 02-03 Charges.[172]

3.69. The Philippines argues, as it did under Article XX(d)[173], that there can never be circumstance where an incorrect customs valuation decision is necessary to ensure the collection of the correct amount of customs duties, and that, therefore, Thailand's CVA-inconsistent measure cannot make any contribution to the protection of public morals.[174] The Philippines' arguments would in effect mean that Members can never prosecute customs fraud, except by following exactly the rules in the CVA, even though certain rules under the CVA are incompatible with the good conduct of criminal proceedings. Moreover, the Philippines' argument is circular, as it uses the same inconsistencies that would have been found by the Panel before reaching Article XX to claim that the measure at issue is not necessary under Article XX(a). This would render the justfification under Article XX(a) inutile and should not be accepted by the Panel.[175]

3.70. With respect to the requirements under the chapeau of Article XX, there is no indication that the 02-03 Charges are applied in an arbitrary or unjustifiable discriminatory manner, or as a disguised restriction on international trade. First, nothing suggests that Thailand's enforcement of its customs and criminal laws discriminates against imports of the Philippines compared to imports from other Members in which the same conditions prevail. A criminal allegation necessarily applies to an individual importer and cannot, as such, be considered to be discriminatory. Similarly, nothing indicates that the Charges are a disguised restriction on international trade. The Philippines argues that the fact that a fine may be imposed threatens the very survival of PM Thailand, and the Charges may therefore remove the largest source of import competition from the Thai market. However, that fine may or may not be imposed, and the amount of the fine is still to be determined by the Court after hearing and examining all the evidence. Therefore, it does not make any sense to argue that the Charges, as they stand today, are applied as a disguised restriction on international trade.[176]

3.71. In sum, in the event that the Panel were to find that the 02-03 Charges are inconsistent with certain provisions of the CVA, Thailand submits that the 02-03 Charges are justified under Articles XX(d) and XX(a) and applied consistently with the chapeau of Article XX of the GATT 1994.

3.5 The Philippines' alleged claims under Article 7 of the CVA

3.72. In its opening statement at the substantive meeting, the Philippines referred to the alleged claims of inconsistencies under Article 7 of the CVA, arguing that Thailand used valuation methods that are prohibited under those provisions.[177] However, the Philippines had not ever put forward such claims before, either in its Panel request or its first and second written submissions or its pre-hearing questions from the Panel where the Philippines (and Thailand) addressed questions relating generally to the relationship between Articles 6 and 7 of the CVA.

3.73. To the extent that the Philippines attempts to correct this deficiency in its opening statement or subsequently in this proceeding, Thailand submits that it is too late, and the Panel should not make any findings under Article 7. In any event, the Philippines' claims are outside the Panel's terms of reference because the Philippines' vague reference to Article 7 in its request for the establishment of a panel does not meet the basic standards of Article 6.2 of the DSU.

[171] Thailand's first written submission, paras. 3.160-3.161.
[172] Thailand's first written submission, para. 3.162.
[173] The Philippines' second written submission, paras. 376 and 389.
[174] The Philippines' second written submission, para. 403.
[175] Thailand's second written submission, para. 3.108.
[176] Thailand's first written submission, paras. 3.168-3.132.; Thailand's second written submission, paras. 3.110-3.113.
[177] The Philippines' opening statement at the substantive meeting, paras. 59-60, 66-89.

3.5.1 The Philippines failed to make *prima facie* case in a timely fashion for the alleged claims under Article 7 of the CVA

3.74. Thailand submits that the Philippines failed to make a *prima facie* case in a timely fashion for the alleged claims under Article 7 of the CVA. It is far too late to correct its deficiency of not advancing arguments or claims under Article 7 of the CVA prior to its opening statement at the substantive meeting. Moreover, the Philippines cannot allege that it did not have enough information available at the beginning of the dispute and could make its claims and/or *prima facie* case under Article 7 only after receiving Thailand's sample calculation of the constructed CIF price. This is not accurate. At the time it prepared its request for the establishment of the panel and first written submission, the Philippines possessed all the factual information on which it relies to make its claims under Article 7 of the CVA. Notably, the information contained in CK-21A which the Philippines used for its claim of inconsistency under Article 6 of the CVA. Despite being in a position to do so, the Philippines chose not to pursue such claims. In this context, the Philippines cannot cure that fault by belated developing its argumentation towards the end of the proceedings. [178]

3.75. Instead, the Philippines continued to insist that Thailand applied and violated Article 6.[179] This is because the Philippines believed that, if a Member avails itself of the flexibilities afforded by Article 7.1 and paragraph 2 of the Interpretative Note to Article 7, that WTO Member necessarily acts inconsistently with the obligations in Articles 1-6. This is an incorrect interpretation. Article 7.1 is a separate and distinct methodology that may be used when those in Articles 1-6 cannot. Therefore, when a complaining considers that a defending Member may have acted inconsistently with the obligations governing the Article 7.1 methodology, it must allege in its Panel Request and properly make its *prima facie* case. However, the Philippines did not do so.[180]

3.76. Thailand also notes that a panel cannot make a complaining Member's case for it.[181] References in the Panel's questions to Article 7, and the responses thereto, cannot be construed as giving rise to a prima facie case. Especially, the responses to the questions come after the complaining Member has already submitted both its first and second submissions. Even in its responses to pre-hearing questions from the Panel where were posed the questions to the relationship between Articles 6 and 7 of the CVA, the Philippines did not advance claims or seek findings with respect to Article 7 of the CVA.[182]

3.77. In addition, Article 7 of the CVA is not a defence that must be asserted by a defending Member in order to trigger a claim or arguments by a complaining Member.[183] Due process does not require the defending Member to go out of its way to help the complaining Member make its *prima facie* case. Where the Philippines chose to remain silent regarding Article 7 in its submissions, Thailand was not required to point this out to the Philippines to correct its error or omission.[184]

3.78. For all these reasons, the Panel should reject the Philippines' alleged claims under Article 7 of the CVA.

3.5.2 The Philippines' panel request does not properly identify its claims under Article 7 of the CVA

3.79. In any event, to the extent that the Philippines could be said to have advanced claims under Article 7, those claims cannot satisfy the standards of Article 6.2 of the DSU. To recall, the WTO jurisprudence has firmly established that Article 6.2 of the DSU imposes the obligation to identify the treaty provisions of which a violation is alleged. In the case of a treaty provisions that establish

[178] Thailand's communication regarding the scope of the claims advanced by the Philippines, paras. 2.7-2.8; Thailand's comments on the Philippines' response to Thailand's communication regarding the scope of the Philippines' claims, pars. 2.16-2.18; See Panel Report, *EC – Fasteners*, para. 7.522.

[179] Thailand's comments on the Philippines' response to Thailand's communication regarding the scope of the Philippines' claims, para. 2.14.

[180] Thailand's comments on the Philippines' response to Thailand's communication regarding the scope of the Philippines' claims, para. 2.13.

[181] Appellate Body Report*, US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 300, citing Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

[182] Thailand's communication regarding the scope of the claims advanced by the Philippines, para. 2.9.

[183] Thailand's communication regarding the scope of the claims advanced by the Philippines, para. 2.7.

[184] Thailand's communication regarding the scope of the claims advanced by the Philippines, para. 2.10.

multiple obligation, "the mere listing of treaty articles would not satisfy the standard of Article 6.2"[185] and "a panel request might need to specify which of the obligations contained in the provision is being challenged".[186] Moreover, the panel request must "explain succinctly how or why the measure at issue is considered by the complaining Member to be violated the WTO obligation in question".[187,188]

3.80. In this case, the Philippines' generally referred to Article 7 without specifying which of the three paragraphs of Article 7, or which of the seven subsections of paragraph 2 of Article 7, if any, it considered to have been violated. This is inadequate to provide a summary of the legal basis of the complaint sufficient to present the problem clearly as required under Article 6.2 of the DSU. Notably, Article 7 contains three sub-paragraphs with multiple obligations and there are considerable differences between these sub-paragraphs.[189]

3.81. Moreover, in order to "present the problem clearly", a panel request "must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the responding party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits".[190] Furthermore, a complaining party's written submissions "cannot have the effect of curing the failings of a deficient panel request".[191] In this case, the Philippines' Panel Request does not "plainly connect" the challenged measure with the individual CVA provisions invoked and contains no explanation as to "why and how" the 02-03 Charges are allegedly inconsistent with the individual CVA provisions, in particular Article 7.1. Therefore, these deficiencies in the Philippines' panel request cannot be cured by the Philippines' written submission.[192]

3.82. In light of the foregoing, Thailand requests that the Panel dismiss the Philippines' alleged claims under Article 7 of the CVA as being not properly within the Panel's terms of reference pursuant to Article 6.2 of the DSU.

4 CONCLUSION

4.1. For the reasons stated above, Thailand requests the Panel to reject the Philippines' claims.

4.2. With respect to the NoAs:

a. The Panel should exercise its discretion and decline to rule on the NoAs because Thailand withdrew the NoAs before the Panel was established.

b. In the event that the Panel decides to rule on the NoAs, it should reject the Philippines' claims under the CVA for the same reasons that it should reject those claims with respect to 02-03 Charges. In addition, the Panel should also reject the Philippines' claim under Article 16 of the CVA because the Thai Customs Department sufficiently explained the grounds for issuing the NoAs.

4.3. With respect to the 02-03 Charges, the Philippines' claims should be rejected for the following reasons:

a. The CVA does not apply to the 02-03 Charges as they allege that PMTL's declared value is not the price actually paid and, thus, the accusation qualifies as "customs fraud".

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[185] Appellate Body Report, *Korea – Dairy*, para. 124.

[186] Appellate Body Reports, *China – Raw Materials*, para. 220 and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

[187] Appellate Body Report*, EC – Selected Customs Matters*, para. 130.

[188] Thailand's comments on the Philippines' response to Thailand's communication regarding the scope of the Philippines' claims, para. 2.21; Thailand's communication regarding the scope of the claims advanced by the Philippines, para. 2.11.

[189] Thailand's comments on the Philippines' response to Thailand's communication regarding the scope of the Philippines' claims, paras. 2.25-2.26

[190] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

[191] Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 642.

[192] Thailand's comments on the Philippines' response to Thailand's communication regarding the scope of the Philippines' claims, paras. 2.27-2.28.

b. Even if the accusation qualifies as "customs fraud", the Philippines has failed to make a *prima facie* case because the 02-03 Charges simply lack sufficient information to allow the Philippines to do so.

c. In the event that the Panel nonetheless decides to examine the merits of the 02-03 Charges, it must reject the Philippines' contentions as they are premised on an incorrect legal interpretation of the invoked CVA provisions and because the Philippines' legal arguments are premised on admitted illegal acts committed by Philip Morris in Indonesia.

d. Even if the Panel were to agree that the Philippines' claims fall within the scope of and are inconsistent with the provisions of the CVA cited by the Philippines, Thailand's actions are justified under Article XX(d) and XX(a) of the GATT 1994.

e. With respect to the Philippines' alleged claims under Article 7 of the CVA, the Philippines failed to make *prima facie* case in a timely fashion. In any event, the Philippines' claims are not properly within the Panel's terms of reference pursuant to Article 6.2 of the DSU.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE 1052 NOA'S

1. Given the repeal of the measures at issue, the **EU** will not provide comments on the substantive claims concerning the NoAs (many of the comments provided on the substantive claims against the Charges under Section III. of this submission can be transposed in essence). It will just briefly comment on the preliminary question of repeal.

2. The EU would first like to stress that it does not share Thailand's understanding that where measures were withdrawn *after* the establishment of a panel, the panel would have generally made findings on these measures. This is simply an incorrect rendition of the existing case-law and the EU would therefore urge the Panel not to confirm in passing this position in any way (which is in any event not directly relevant to the present case). On the contrary, the Appellate Body has consistently stressed that, while panels can normally not make recommendations on terminated measures (regardless of whether the termination was before or after panel establishment), they have a margin of discretion in the exercise of their inherent adjudicative powers under Article 11 of the DSU as regards making findings, and that within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue in their decision to make findings or not – including where the expiry or repeal took place after panel establishment.

3. While the fact that expiry or repeal took place only after panel establishment may, depending on the circumstances of each case and alongside other factors, play a role in a panel's exercise of its discretion, it is clearly not a knock-out criterion which would mandate making findings on the expired measure, regardless of other relevant factors. On the contrary, Thailand's reading of the case-law that panels have normally only made findings on expired measures where there were specific reasons to do so, is true both for cases where measures expired or were withdrawn before and during the panel proceedings.

4. In this context, as Thailand rightly highlights, the by far most compelling reason for making findings despite expiry or repeal of the measure is the (real) risk of reintroduction of the measure, which is a matter for the complainant to substantiate; whether such a risk has been demonstrated in the current case is a matter for the Panel to assess on the basis of the evidence before it. In this respect, the EU fully agrees with Thailand that the risk of reintroduction *of the specific measure at issue* is something for the complainant to demonstrate with clear evidence. On the other hand, the EU would also join Thailand in cautioning against putting too much emphasis on the concept of "lingering effects" as a reason to make findings on terminated measures, at least outside the context of subsidies where this concept was introduced by *US – Upland Cotton*.

II. THE 2002-2003 CHARGES

5. The **EU** will address below the questions of applicability of the CVA to the Charges, the argument that the Philippines has not made a *prima facie* case and the legal standard for determining a "cost-plus benchmark" when examining the impact of a buyer-seller-relationship under Article 1.2(a) of the CVA, including the argument on the importer's alleged illegal behaviour towards the Indonesian authorities. By contrast, the EU considers that the First Compliance Panel has already addressed sufficiently the arguments under Article XX of the GATT 1994, which it rightly considered inapplicable to claims under the CVA. As the EU had already provided extensive arguments on this point in the First Compliance Proceedings, it will not comment any further on this issue.

A. Applicability of the CVA

6. The EU, in line with the findings of the First Compliance Panel, reiterates its position from the First Compliance Proceedings, that a functional understanding of the term "customs valuation" is warranted, which leads to the application at least of the substantive rules of the CVA on customs valuation whenever customs values are being determined. The CVA thus applies regardless of which authority does it (in line with Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, and in the absence of a clear and explicit limitation to certain types of authority in the text of the CVA), in which type of procedure. It is clear from previous case-law, and the First Compliance Panel recalled this at length, that the legal framework to be applied by a panel does not change when the measure at issue is adopted in the sphere of a Member's criminal law. Allowing

(criminal) enforcement of CVA-inconsistent valuation decisions by carving them out from the scope of application of the CVA would not only be at odds with this principle, but also undermine considerably the *effet utile* of the Agreement, and doesn't find any justification in this or other covered Agreements.

7. The EU also considers that the First Compliance Panel has provided valuable analysis on the question of when, actually, a "customs valuation" takes place, developing the principles set out by the panel in *Colombia – Ports of Entry*. Relying on Article 15 of the CVA, customs valuation thus takes place where an authority (i) determines the monetary worth or price of imported goods (ii) for the purposes of levying ad valorem customs duties. In applying this definition to the Charges, the First Compliance Panel found that the Prosecutor actually determines the monetary worth of the imported goods, because in order to sustain the allegation of false prices, it compared the actual price declared to a benchmark (as opposed to a comparison between the actual price declared and the actual price paid, established for instance on the basis of evidence for a false invoice). It also found that the second condition (for the purposes of levying duties) is fulfilled, in particular as this notion includes the determination of amounts of duties *due*. It seems to the EU that this is not about generally equating customs fraud with customs valuation, but simply about examining whether the Prosecutor's assessment implies valuation decisions.

8. In light of the guidance provided by the First Compliance Panel, the EU has difficulties in following Thailand's assertions that the 2002-2003 Charges, contrary to the 2003-2006 Charges dealt with by the First Compliance Panel, should be judged differently. Thailand alleges that these Charges were actually based on substantiated findings that the declared price was not the actual price paid. It seems *a priori* to the EU that the 2002-2003 Charges, in the same way as the Charges in the First Compliance Proceedings, compared the declared price with a benchmark price (and not the price actually *paid*), by calculating this benchmark on the basis of cost structure information received from the Indonesian government, which would qualify as meta-data rather than as actual prices paid in Thailand. In this case, the reasoning of the First Compliance Panel would remain valid with regard to the measure at issue here. However, the EU does not take a definitive position on this factual question which the Panel will have to thoroughly assess on the basis of the evidence before it.

B. Prima facie case

9. The EU does not concur with Thailand's arguments. The Panel's duty under Article 11 of the DSU, consisting in a comprehensive obligation to make an "objective assessment of the matter", embraces all aspects of a panel's examination of the "matter", both factual and legal. Thus, panels are to make an objective assessment of the facts, of the applicability and interpretation of the covered agreements, and of the conformity of the measure at stake with those covered agreements. As the EU has already pointed out in the First Compliance Proceeding, as regards the assessment of the facts, a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority, but rather assess whether the conclusions drawn by the national authority were reasoned and adequate, and how they were justified by the evidence on the record. The Appellate Body has also made it clear that "the injunction that panels should not substitute their own conclusions for those of the competent authorities does not mean that all a panel needs to do in order to comply with its duties when reviewing a determination is to consider whether the investigating authority's findings or conclusions appear to be 'reasonable' or 'plausible' in the abstract. To the contrary, a panel can assess whether an authority's explanation for its determination is reasoned and adequate only if the panel critically examines that explanation in the light of the facts and the alternative explanations that were before that authority."

10. In the present case, like in the First Compliance Panel, it is obvious that the Public Prosecutor actually made a determination on the basis of the evidence before it, namely the determination that the transaction values had to be rejected and that *therefore*, there was a suspicion of under-declaration of customs values. As the First Compliance Panel rightly stressed, the fact that this determination by the Prosecutor does not amount to a final judgement does not, in any way, diminish its own legal value and effects, and does not make it a "non-determination".

11. It is also clear that what the Prosecutor did to reach his determination was a circumstances of sale test pursuant to Article 1.2(a) of the CVA. Accordingly, Article 11 of the DSU requires the Panel to examine thoroughly whether the circumstances of sale test actually performed by the Public Prosecutor corresponded to the standards set by Article 1.2(a) of the CVA, and justified the conclusion that the transaction values were unacceptable. In the EU's understanding, this assessment would not be a *de novo* review of the facts, but simply the required critical examination

of whether the conclusions of the national authority were reasoned and adequate, and whether its reasoning was consistent.

C. Legal standard for establishing "cost-plus-benchmarks" under Article 1.2(a) CVA

12. Like in the First Compliance Proceeding, one of the key questions under the CVA is again the legal standard for rejecting a transaction value due to the allegation that the relationship between buyer and seller influenced the price. The First Compliance Panel considered that the benchmark for a customs authority's assessment under Article 1.2(a) must thus be the question whether the examination was apt to reveal whether the relationship between the buyer and the seller influenced the price; flaws or shortcomings in the analysis are only relevant insofar as they are "sufficiently serious or consequential" in this regard.

13. In the present proceedings, both Parties agree that the examination of circumstances of sale under Article 1.2(a) of the CVA can rely on a so-called "cost-plus-profit" benchmark, i.e. a comparison between the declared price and a benchmark prices constructed on the basis of the seller's costs plus a reasonable profit. They disagree however under which conditions this benchmark can be used and how it is to be constructed.

14. *Firstly*, a point of contention is whether the examination of the circumstances of sale must involve a process of consultation. The Philippines relies on the Original Panel Report and the First Compliance Panel Report which both stressed the importance of the process of consultation. Thailand seems to believe that this consultation requirement is only relevant under Article 2 and 3 of the CVA. The EU has difficulties in understanding Thailand's argument, as the findings of both the Original Panel and the First Compliance Panel explicitly related to the not less explicit text in Article 1.2(a). Thus, the process of consultation is indeed an essential, *inherent* element of the circumstances of sale examination; if the consultation is insufficient or even inexistent, the examination is flawed.

15. As Thailand highlights in this context, the EU had signalled in the First Compliance Proceeding that one might want to consider making a distinction between substantive obligations of the CVA, by which any authority functionally carrying out customs determinations is bound, and purely procedural provisions, for which the assessment might need to be more nuanced. The First Compliance Panel did not go down this route. In any event, even if one were to pursue this path, it would be absurd to draw the conclusion that a circumstances of sale test performed by an authority which is not a customs authority in the formal sense would have to abide by a lesser standard, in terms of thoroughness of the examination (which clearly is a substantive obligation). As the consultation with the importer is an essential element in guaranteeing the thoroughness of the examination, the EU takes the view that this consultation requirement cannot be "carved out" of the requirements for the circumstances of sale test for those cases where the valuation is performed by authorities other than customs administration in the formal sense. The EU therefore agrees with the Philippines that "the procedural obligation in the third sentence cannot be artificially cleaved from the substantive obligation in the second sentence".

16. *Secondly*, the Parties disagree on the concrete conditions for the use of the "cost-plus" benchmark. Paragraph 3, last sentence, of the Interpretative Note to Article 1.2 envisages recourse to such a benchmark. However, on the one hand, the positive formulation "if …this demonstrates that the price had not been influenced" refers in the first place to the use of such a benchmark to demonstrate "non-influence" and, at least textually, does not tell the reader much about the use to the contrary purpose, or the demonstration of influence. On the other hand, apart from the reference to a "representative profit over a representative period of time" and to "sales of goods of the same class or kind", it does not provide any further details on the concrete requirements for this cost benchmark test.

17. The Parties disagree in particular on how far requirements set out in other provisions of the CVA, and notably Article 6 thereof, should apply in this context. For the EU, it is clear that Article 6 as such concerns the determination of customs values of imported goods, and not the determination of benchmarks to which declared transaction values are compared under Article 1.2(a). Thus, they don't apply as such to this determination.

18. However, in the EU's view this cannot mean that the principles set out in Article 6 (as well as in other Articles of the CVA) are completely irrelevant for the interpretation of Article 1.2(a). In this respect, the EU would like to point to the key principle of harmonious interpretation which a treaty interpreter must always search for and prefer.

19. This is even more important where there is a close logical and systemic connection between the matters regulated in the provisions at stake, as here. The valuation methods under the CVA

have as their principal objective to arrive at values as close as possible to the "real" / "true" price – hence, the preference for actual transaction values, if reliable, and the sequencing in alternative valuation methods. The preamble of the CVA stresses this principle when it rejects "arbitrary or fictitious customs values". At the same time, the benchmark with which the transaction values are being compared in the circumstances of sales test are also supposed to be a close proxy of the "true price", absent the bias introduced by the relationship between the seller or buyer.

20. If both values, the alternative customs value as well as the benchmark, are thus supposed to be the closest possible proxy to the "real" price, it makes sense that the principles provided for by the CVA to ensure a maximum "real-ness" of the alternative customs value should also inform, as context, the search for a "real" benchmark to which transaction values would be compared in the circumstances of sale test. The CVA itself acknowledges this connection in Article 1.2(b)(iii), where it mandates that the transaction value be accepted in any event in case it corresponds to the customs value of identical or similar goods determined under Articles 5 and 6.

21. This does certainly not mean that all the rules on determining alternative customs values apply, in the sense of being "inserted into Article 1.2 of the CVA", as Thailand puts it - and Article 1.2(c) makes it clear that there is indeed a line to be drawn between what is done for comparison purposes and what is done for the purpose of establishing substitute values. Taken into account as context, the EU would however expect that where a customs authority goes fundamentally against those principles within the circumstances of sales test, it provides at least a substantiated explanation setting out convincing grounds for a different approach.

22. In this context, the EU would also like to recall the essential requirement of comparability inherent in Article 1.2(a) CVA that the First Compliance Panel rightly highlighted. This requirement should also ultimately guide the assessment of whether the cost-plus benchmark was correctly constructed – namely in a way that the data used were comparable to those of the actual sales. The reference in paragraph 3, last sentence, of the Interpretative Note to Article 1.2 to "sales of goods of the same class or kind" is exactly an expression of this principle of comparability.

23. *Thirdly*, regard should be had to the good faith principle. In the EU's opinion, Thailand has a point in claiming that an importing country's authorities must be able *a priori* to rely on information provided by a foreign government (*in casu*: the exporting country at the time, Indonesia). Indeed, it must be able to assume that this information is accurate and truthful, and not have to start from the assumption that the information provided by the foreign government has been "fabricated" by the importer. Or, as Thailand puts it: it cannot be that "a customs administration has a duty to assume that a company's declarations to other governments are inaccurate".

24. However, this cannot result in a situation where information of whatever kind and quality, if provided by a foreign government, has to be taken at face value, even in cases where it obviously does not reflect real values. Such a "blind-trust-approach" would go diametrically against a main objective of the CVA, which, as set out above, is to ensure that customs determinations are based on real and truthful values. It might be worth recalling that the Original Panel, quoting the Appellate Body in *US – Wheat Gluten*, underlined that "competent authorities have an independent duty of investigation and that they cannot 'remain[] passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties".

25. The EU would thus advocate a nuanced approach, where data provided by foreign governments could indeed be taken as a valid starting point; however, customs authorities would be obliged to take due account of any doubts that would be obvious from the data submitted or signalled by the importer. Again, due consultation with the importer before final determinations are taken is obviously a *conditio sine qua non* for this nuanced approach to yield fair results.

26. The European leaves it to the Panel to judge on the basis of the evidence before it whether *in casu* doubts on the reliability and suitability for customs purposes of the data received were warranted and whether the Thai authorities acted with the required circumspection and care.

* * *

27. With respect to the more horizontal questions under the DSU, the EU considers that the questions around the alleged reliance on own illegality in a foreign jurisdiction (with respect to CK-21A) are of particular interest from a systemic point of view. In addition to the general good faith principle that we discussed already in our reply to the Panel's Advance Questions, the Panel noted in its questions to the Parties that, more specifically, Thailand's arguments seem to be "couched in terms that evoke the notion of estoppel". Thailand has however clarified in its Replies to the Panel's

Advance Questions that Section 3.4.2 of Thailand's first written submission does not contain an argument of "estoppel".

28. Moreover, the Appellate Body has stated in *EC — Export Subsidies on Sugar* that "it is far from clear that the estoppel principle applies in the context of WTO dispute settlement". For principles inhibiting the right of Members to bring disputes, it would appear more appropriate to rely directly on limitations which are set out explicitly in the DSU, like in Article 3.7 (which refers to the exercise of judgement as to whether action under the DSU would be fruitful), and in Article 3.10 (which requires Members to engage in dispute settlement procedures in good faith). According to the Appellate Body, this latter obligation "covers the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU."

29. A priori, the EU would apply the same line of reasoning in the present case. Without affirming that the principle of estoppel can never be relevant as such in WTO disputes, the EU considers that a specific application of this principle is not needed in the present case, on top of the general principles set out in Articles 3.7 and 3.10 of the DSU.

30. Also, on substance, the EU would have doubts about the pertinence of such a principle in the current case. Recent doctrine and practice in public international law retain a rather focused notion of estoppel, according to which a State is not allowed to contest a situation contrary to a clear and unequivocal representation previously made by it to another State, who was entitled to and did rely on it, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself. Both conditions (clear and unequivocal representation and detriment/ prejudice) seem not to be fulfilled in the present case.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. Introduction

1. In this dispute, the Philippines challenged two measures at issue in these second compliance proceedings which are: (i) Notices of Assessment ("NoAs"), which re-assess the customs value of 1,052 entries of cigarettes that cleared Thai customs in the period 2001 to 2003; and (ii) criminal charges that allege under-declaration of Philip Morris Thailand's transaction value, which pertain in to 780 entries of cigarettes that cleared Thai customs from 2002-2003 ("02-03 Charges").[1] One of the main issues discussed by the parties to the dispute concerns Indonesian administrative CK-21A form that has been relied upon by the Thailand Customs Department as well as Thailand Department of Special Investigation ("DSI") to determine the measures at issue.

2. Government of Indonesia ("GOI") welcomes the opportunity to participate as a third party in these proceedings and to present its views to the Panel. GOI considers that this proceeding require Indonesia's intervention since it relates to Indonesia's excise tax system for tobacco products during the relevant period, i.e. 2001-2003.

3. In this submission, Indonesia will clarify its excise tax system for tobacco products, in particular, the applicable excise regime for tobacco products during the period of 2001 – 2003. Based on that, Indonesia is of the view that CK-21A form shall only be used for the purpose of calculating excise for tobacco products sold in Indonesia market.

II. Indonesia's Excise Tax Law for Tobacco Products During 2001-2003

4. Like any other country in the world, one of the sources of revenue for Indonesia to finance our state expenditures comes from taxes. Every year State Budget/Anggaran Pendapatan dan Belanja Negara ("APBN") is prepared by the government and must be approved by the House of Representative/ Dewan Perwakilan Rakyat ("DPR").[2] APBN consists of State Revenue, State Expenditures and Budget Financing.[3] Therefore, every year the government must set a target on how much revenue they have to obtain either from taxes or other sources to finance the state expenditures. This target is also applicable to excise tax, which is one of the forms of domestic tax revenues.[4]

5. Based on these targets, which is set annually, GOI will determine the amount of excise imposed on particular products.[5] Excise in Indonesia is only imposed towards 3 products category namely:

a. ethyl alcohol/ethanol;

b. drinks containing ethyl alcohol;

c. tobacco products including cigarette, cigar, cigarette leaves, sliced tobacco, and other tobacco processing products.[6]

6. For tobacco products, the excise tariffs and/or the tax base (HJE)[7] are stipulated usually once a year except for special occasion in order to achieve certain revenue target as stipulated in the

[1] The Philippines's first written submission, para. 9.
[2] Article 1(1) of the Law No. 15 of 2017.
[3] Article 2 of the Law No. 15 of 2017.
[4] Article 1(4) of the Law No. 15 of 2017.
[5] Article 2(1) of the Law No. 11 of 1995.
[6] Article 4 (1) of the Law No. 11 of 1995.
[7] The translation of "HJE" into English would be "retail selling price". However, although the GOI fixed the minimum tax base (HJE), it did not fix the actual retail selling price. Sellers could sell tobacco products at any price. When we refer to the HJE in this submission, we refer to the tax base.

APBN.[8] The excise tariffs and minimum HJE differ for different producers' classifications, different types of tobacco products, whether it is domestic production or imported or whether the producers export the products in such quantity more than their domestic sales. [9]

7. The determination of excise tax for tobacco product that must be paid by the producer or importer is calculated based on the multiplication of excise tariff with the base price.[10] The base price of tobacco product that used for excise tax calculation is HJE[11] submitted by the producers, and approved by the Directorate General of Customs and Excise ("DGCE"), which must not be lower than the minimum HJE predetermined by the government depending on, *inter alia*, the size of the producers and type of products.[12] Regulating minimum HJE is necessary in order to fulfill GOI's target for excise tax, which is already set annually.

8. Under Indonesian Excise Tax Law, the producers shall pay excise tax for excise goods when the products left the factory or the storage.[13] Payment of excise can be done by, *inter alia*, attaching excise tape on the packing of the related product.[14] Therefore, the determination of HJE has to be done first before the producer or importer orders excise tax tape through CK-1 form.[15]

9. The determination of HJE is made following an application submitted by cigarette producers.[16] In the application the producers must attach the CK-21A form containing items that need to be filled out by the producers to determine the producers' HJE.[17] It should be noted that the producers need to submit the application of HJE including the attachment CK-21A form prior to the production and sales of the tobacco products. Thus, the numbers stated in CK-21A form are pre calculation, which is used to calculate tax base to determine excise tax.

10. Although HJE for each producer is self-declared, there are several requirements that need to be complied with. For examples, first, as aforementioned, the producers' HJE shall not be below the minimum HJE that has been stipulated by the government. The purpose of stipulating minimum HJE is to achieve excise revenue target that has been set by the GOI. For this purpose, the GOI also has the authority to increase HJE that has been previously stipulated.[18] GOI also has an authority to determine the maximum HJE.[19] Therefore, when assessing an application for HJE determination as well as its attachment i.e. CK-21A form, DGCE only assesses: (a) whether HJE declared by the producer in the application has exceeded minimum HJE set by the GOI; (b) whether the producers

[8] Under the Indonesian Excise Tax Law, there are several implementing regulations concerning Indonesian excise system for tobacco products such as Minister of Finance Decree and Director General of Customs and Excise Decision. During the period between 2001 to 2003, the determination of excise tax tariff and the excise tax base price for tobacco products was regulated by Minister of Finance Decree of the Republic of Indonesia No. 89/KMK.05/2000 (MOF Decree 89/2000), as amended the last time with Minister of Finance Decree No. 384/KMK.04/2001 (MOF Decree 384/2001). On 1 December 2001, MOF Decree 89/2000 and its amendments were replaced by Minister of Finance Decree No. 597/KMK/09/2001 (MOF Decree 597/2001), as amended the last time with Minister of Finance Decree No. 121/KMK.04/2002 (MOF Decree 121/2002). On 1 November 2002, MOF Decree 597/2001 and its amendments were replaced by Minister of Finance Decree No. 449/KMK/04/2002 (MOF Decree 449/2002). Whereas, the retail price determination for tobacco products was regulated by the Decision of Director General of Customs and Excise No. KEP-17/BC/2000 (DGCE Decision 17/2000), as amended by the Decision of Director General of Customs and Excise No. KEP-27/BC/2000.

[9] Excise tariff and minimum HJE of domestic tobacco production for different producers classification was stipulated in: (i) Article 5(1) and Attachment II of MOF Decree 89/2000; (ii) Article 8 and Attachment III of MOF Decree 597/2001; and (iii) Article 7 and Attachment II of MOF Decree 449/2002.

[10] Article 2(1) of MOF Decree 89/2000.

[11] Article 2(2) of MOF Decree 89/2000; Article 2(2) of MOF Decree 597/2001; and Article 4 of MOF Decree 449/2002.

[12] Excise tariff and minimum HJE of domestic tobacco production for different producers classification was stipulated in: (i) Article 5(1) and Attachment II of MOF Decree 89/2000; (ii) Article 8 and Attachment III of MOF Decree 597/2001; and (iii) Article 7 and Attachment II of MOF Decree 449/2002. While, excise tariff and minimum HJE for imported tobacco was stipulated in: (i) Article 5(2) and Attachment III of MOF Decree 89/2000; (ii) Article 14 and Attachment V of MOF Decree 597/2001; and (iii) Article 12 and Attachment IV of MOF Decree 449/2002.

[13] Article 7 (1) of the Law No. 11 of 1995.

[14] Article 7 (3) of the Law No. 11 of 1995.

[15] Article 6 (2) of MOF Decree 89/2000; Article 5 (1) of MOF Decree 597/2001; and Article 1(8) of MOF Decree 449/2002.

[16] Article 2 (1) and (3) of DGCE Decision 17/2000.

[17] Ibid.

[18] Article 6 (1) of MOF Decree 89/2000.

[19] Article 4 of MOF Decree 453/2000 and Article 9 of DGCE Decision 17/2000.

or importers have decreased their HJE that is still in force.[20] There is no other verification or assessment performed by DGCE during the stage of application for HJE determination.

11. Second, HJE for a new product from the same producer or importer may not be lower than the HJE that is still in force.[21] Third, the factory price stipulated in CK-21A form must not exceed 92.5% of the HJE.[22] Fourth, regardless of any different circumstances, the HJE amount that listed in the CK-21A form is also listed in the CK8 form (for export purposes) with the same value.[23] The purpose of this provision is aimed at securing domestic revenue in the event of a failed export product and re-entering the domestic market. If exports continue to be carried out, the excise of the product will not be collected or charged since excise tax is only imposed on certain products sold domestically.

III. CONCLUSION

12. In view of the above, GOI just want to reiterate that:

a. The role of administrative CK-21A form is an official document of which sole purpose was to determine HJE consistently with the prevailing regulation so that the collection of excise tax in appropriate amount can be done to achieve revenue target set by the government;

b. DGCE assessment is focused on whether HJE that has been self-declared by the producers exceeds minimum HJE stipulated by the government and whether the producers or importers have decreased their HJE that is still in force;

c. Excise tax is imposed for domestic sales and not for export sales. The purpose of stipulating HJE in CK 8 form is to anticipate the condition of a failed export product re-entering the domestic market;

d. Indonesia has been enforcing its excise system vigorously pursuant to the laws and regulations. DGCE has always been monitoring any illegal conduct by tobacco producers particularly in relation to the enforcement of excise collection.

e. Although it is for the Panel to determine whether CK-21A form could be the basis of customs valuation or not, Indonesia is of the view that under the Customs Valuation Agreement, information used for the purpose of making customs valuation determination should be objective and accurate and ensure that customs valuation is "fair, uniform and neutral".

[20] Article 6 (4) of MOF Decree 89/2000; Article 6 (1) of MOF Decree 597/2001; and Article 5(3) of MOF Decree 449/2002.

[21] Article 8 (2) of MOF Decree 597/2001; and Article 7(2) of MOF Decree 449/2002.

[22] Article 9 of MOF Decree 597/2001.

[23] This is in accordance with the provision in Article 6 of the Director General of Customs and Excise Regulation No. KEP-19/BC/1999 and Article 14 of Minster of Finance Decree No. 449/KMK/04/2002, where it is stated that HJE and excise duty of tobacco products for export purposes are the same with HJE and excise duty of tobacco products for domestic market purposes.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. APPLICABILITY OF ARTICLE XX OF THE GATT 1994 TO THE CVA

1. Concerning the applicability of Article XX of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("Customs Valuation Agreement" or "CVA"), Japan agrees with the conclusion of the first compliance panel that Article XX of the GATT 1994 is not available to justify measures that are found to be inconsistent with the CVA for two reasons.

2. First, Japan considers that the absence of a textual reference to Article XX of the GATT 1994 in the CVA weighs heavily against the applicability of Article XX to the CVA. Japan notes that the CVA does not provide an explicit textual link or cross-reference to Article XX of the GATT 1994, a common drafting technique to indicate the intention to make available in one agreement a provision in another agreement. Yet, specific cross-references to Article XX of the GATT 1994 are found in other agreements, and the CVA itself includes a cross-reference to Article X of the GATT 1994. These two considerations indicate that, had the drafters intended for Article XX of the GATT 1994 to apply to the CVA, they could have, and would have, included a cross-reference to the provision as they did for Article X. The panel and the Appellate Body reports in *China – Raw Materials* also make the point that drafters have incorporated the provisions of Article XX of the GATT 1994 into other agreements by cross-reference.[1] In Japan's view, the CVA's position as an implementing agreement of the GATT 1994 and its abstract mention of the "objectives of the GATT 1994" are also not sufficient to create a link between Article XX of the GATT 1994 and the CVA.

3. Second, Japan considers that Article XX of the GATT 1994 and the CVA are of different legal construct and nature. Article XX provides for general exceptions under the GATT 1994. In contrast, the CVA is a special agreement on how to implement a specific provision under the GATT 1994, namely, Article VII. Therefore, by its nature, the CVA constitutes a special law vis-à-vis the GATT 1994 that provides specific rules focusing on how WTO Members shall go about applying such rules to determine customs values. Considering this difference, Japan is of the view that Article XX of the GATT 1994 may be applicable to the CVA only when the latter provides for such application in its text. This is because general exceptions that are applicable to general rules are not necessarily applicable to specific rules unless the specific rules explicitly incorporate those general exceptions, which the CVA does not.

II. THE TREATMENT OF INFORMATION PROVIDED BY THE CUSTOMS ADMINISTRATION OF AN EXPORTING MEMBER UNDER ARTICLE 1.2 OF THE CVA

4. With regard to the treatment of information provided by the customs administration of an exporting Member under Article 1.2 of the CVA, Japan considers that the customs administration of an importing Member has an obligation to examine information provided by the customs administration of an exporting Member for three reasons.

5. First, as a general matter, Japan notes that the CVA recognizes some degree of cooperation between Members. While Japan notes that the CVA has no explicit provision on cooperation between customs administrations, Article 18 provides a framework for coordination between Members by establishing the Committee on Customs Valuation. One of the Committee's purposes is to provide an opportunity for Members to consult on matters relevant to the operation and objectives of the CVA. Furthermore, Japan considers that it may be generally useful for the customs administration of an importing Member to be provided with information by the customs administrations of other Members to implement the CVA.

6. Second, specifically considering the text of CVA Article 1.2(a), Japan considers that the third sentence of that provision allows the customs administration of an importing Member to use

[1] Appellate Body Report, *China – Raw Materials*, para. 303 (quoting Panel Report, *China – Raw Materials*, para. 7.153).

information provided by the customs administration of other Members, including, but not limited to, an exporting Member by the inclusion of the terms "or otherwise". Moreover, there is no provision which distinguishes information provided by the customs administrations of other Members from information provided by the importer. Nor is there a provision which exempts such information from examination by the customs administration of an importing Member under Article 1.2(a). In Japan's view, the use of the word "including" in paragraph 3 of the *Interpretative Note* to Article 1.2 also provides a basis to require the customs administration of an importing Member to examine a broad range of information and circumstances surrounding the relevant sale of goods, including information provided by the customs administration of the exporting Member.

7. Third, Japan notes that the second sentence of the CVA Article 1.2(a) states that the circumstances surrounding the sale between the related buyer and seller "shall be examined". As paragraph 2 of the *Interpretative Note* to Article 1.2 provides that "such examination" is only required when the price is in doubt, Japan considers that this implies that, whenever the customs administration of an importing Member has any doubts about the acceptability of the transaction value, it must examine the circumstances surrounding the sale by doing a critical review of the information before it, including information provided by the exporting Member.

III. THE SCOPE OF ARTICLE 21.5 PROCEEDINGS

8. Concerning the appropriate scope of Article 21.5 proceedings on the permissibility of incorporating by reference the relevant findings and reasoning ruled on in the first Article 21.5 proceedings, Japan notes that the measures at issue in the second Article 21.5 proceedings are different from the measures at issue in the first Article 21.5 proceedings. Therefore, Japan considers that the Panel must determine whether these measures at issue in this second 21.5 proceedings are "particularly closely connected to the measures the implementing Member asserts are 'taken to comply,' and to the recommendations and rulings of the DSB, so as to fall within the purview of the compliance panel."[2] Japan considers that the Panel must examine the links, specifically in terms of their nature, effects, and timing, between the alleged measure, the declared measure taken to comply, and the DSB recommendations and rulings. If the measures fall within the purview of the Panel, the Panel must independently examine the issues of law or legal interpretation that arise in this second recourse to Article 21.5.

IV. APPRICABILITY OF EQUITABLE MAXIMS SUCH AS THE "CLEAN HANDS" DOTRINE IN WTO DISPUTE SETTLEMENT

9. Lastly, with regard to the applicability of equitable maxims such as the "clean hands" doctrine in WTO dispute settlement, Japan's view is that such maxims could be applicable in WTO dispute settlement if recognized as general principles of law. Japan does not take a specific position on the particular circumstances in this dispute. Rather, Japan considers that the Panel must carefully assess: (i) whether there is any linkage between the equitable maxims and the term "good faith" as used in Article 31(1) of the Vienna Convention on the Law of Treaties or Article 3.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"); (ii) what the legal effects of such linkage are; and (iii) whether the application of the equitable maxims in question is indispensable for the prompt settlement of this dispute.

[2] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 - EC)*, para. 207.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. Procedural Issues

1. There is no provision in the DSU that requires a panel to follow legal interpretations in previous panel or Appellate Body reports. To the contrary, the WTO Agreement and the DSU explicitly reserve to the Ministerial Conference and General Council the "exclusive authority" to adopt an "authoritative interpretation" of a provision of the covered agreements. As such, it is only through appropriate action by *those* bodies (and not the DSB) that this Panel would be bound to follow a legal interpretation.

2. While this proceeding might present similar legal questions as the past proceeding, this Panel's special focus under Article 21.5 and its terms of reference under Article 7.1 do not change the role of the Panel. The DSB established the Panel to assess the disagreement as to the existence or conformity with the covered agreements of a measure taken to comply with a DSB recommendation. In making that assessment, the Panel is to apply customary rules of interpretation of public international law to the relevant provisions of the covered agreements. The Panel might consider and incorporate certain prior findings by reference, if it considers any underlying legal interpretation to remain appropriate under those customary rules.

3. The United States considers that the Panel must provide a rationale for its findings, including any findings it might incorporate by reference. Article 11 of the DSU describes the function of the panel to "make an objective assessment of the matter, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 12.7 requires the Panel's report to "set out . . . the basic rationale behind any findings and recommendations that it makes."

4. In determining whether the Notices of Assessment are within its terms of reference, the Panel should consider whether those measures as they existed at the time of panel establishment are consistent with the obligations asserted. Under Article 7.1 of the DSU, the DSB establishes a panel "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under Article 6.2, in turn, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."

5. Thus, the DSB has charged the Panel with assessing the "matter" as of the time of its establishment, including "specific measures at issue." If the Panel finds the Notices existed and were inconsistent with a WTO obligation as of panel establishment, Article 19.1 of the DSU requires the Panel to make a recommendation regarding those measures.

II. Scope of the Customs Valuation Agreement

6. Articles 1 through 6 of the CVA establish a sequential hierarchy of methods for determining the customs value of imported goods. Article 1.1 provides that the customs value "shall be the transaction value, that is the price actually paid or payable for the goods," except under certain specified circumstances. If, after taking the necessary procedural steps, the transaction value is determined not to be acceptable, the authority proceeds to the valuation methodologies set forth in Articles 2 through 7. The CVA makes clear that recourse to the method set forth in each of those Articles is available only when the valuation cannot be determined by the methods in the preceding Articles.

7. The CVA does not establish requirements with respect to determination of the "price actually paid or payable" itself, or task a Member with determining what price should have been paid. Under Article 1.1, the price paid or payable is the transaction value. If goods are valued using the transaction value, the disciplines of Article 1 apply, and there is no basis to proceed to any of the methodologies set out in the subsequent Articles.

8. Nothing in the CVA suggests that its disciplines do not apply in determining the customs value in transactions involving customs fraud. In establishing the hierarchy of permissible valuation methodologies, the CVA does not distinguish between valuation of legitimate and fraudulent transactions. The text of the CVA generally imposes obligations on WTO Members. These obligations are not limited only to subsets of a Member's government.

9. As such, the United States considers that the key interpretative question presented with respect to the charges at issue in this proceeding is whether those charges reflect a determination of customs value, and if so whether that valuation is consistent with CVA requirements.

III. Sources of Information

10. As this Panel observed in the original proceeding, valuation typically involves a degree of communication between the importer and the customs authority. In related party transactions, the CVA provides that the circumstances of sale shall be examined if there are doubts about the reliability of the price and the importer should be given an opportunity to provide information. The CVA further requires that, if the customs authority has grounds for considering that the relationship influenced the price, it communicate those grounds to the importer and provide an opportunity to respond. If the authority has grounds for doubting the truth or accuracy of the declared value, the *Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value* likewise requires the authority to communicate its grounds and provide the importer an opportunity to respond.

11. As such, the United States would expect the authority to communicate with the importer if it has doubts about the acceptability of the price, or the truth or accuracy of the declaration, including in a case where the doubts are created by information provided by a third country.

12. In addition, Article 7 of the CVA expressly prohibits the use of minimum prices or arbitrary or fictitious values. It is not relevant that the information that would establish those prices or values is provided by a third country government.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THIRD PARTIES AND THE PHILIPPINES' QUESTION TO THIRD PARTIES

THE 1052 REVISED NOTICES OF ASSESSMENT

13. A panel's terms of reference are set forth in Articles 7.1 and 6.2 of the DSU. Under Article 7.1, a panel's terms of reference (unless otherwise decided) are "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under Article 6.2, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis for the complaint." Consequently, the measures with a panel's terms of reference are defined by the complainant's panel request, and the relevant time for defining the measures within the terms of reference is the time of the DSB's establishment of the panel.

14. The question is whether the NoAs, as they existed at the time of the Panel's establishment, when the "matter" was referred to the Panel, are properly within the Panel's terms of reference. As a general matter, the United States would understand that a measure that has been "withdrawn" does not "exist," and cannot be "affecting the operation of any covered agreement."

15. Judicial economy is exercised at the panel's discretion, provided that all findings are made that are necessary for resolution of the dispute. Article 3.7 of the DSU provides that "[t]he aim of the dispute settlement system is to secure a positive solution to a dispute," while Article 3.4 provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter . . . ." Pursuant to Article 11, a panel "should make an objective assessment of the matter before it" – that is, the "matter" as defined in Article 6.2, which establishes the panel's terms of reference under Article 7.1.

16. Thus, under the DSU, the Panel is charged with making those findings that may lead to a recommendation by the DSB to a WTO Member to bring a WTO-inconsistent measure into conformity with WTO rules. While a panel should decline to make findings that are not necessary to resolve a dispute, a measure that has been withdrawn prior to the establishment of the panel would not be within the panel's terms of reference and not form part of the "matter" to be resolved.

ALLEGED ILLEGALITY

17. It is not necessary for the Panel to determine whether it can apply "equitable maxims" such as the "clean hands" doctrine. Rather, the Panel should conduct an objective assessment of whether the challenged measures are inconsistent with the identified provisions of the CVA, interpreted in accordance with customary rules of treaty interpretation.

ARTICLE XX OF THE GATT 1994

18. In resolving "the applicability of and conformity with the relevant covered agreements," the DSU establishes that the Panel is to apply "customary rules of interpretation of public international law" to the terms of those agreements. Prior reports do not form part of the customary rules of interpretation of public international law, and the DSU assigns no particular interpretive weight to prior reports.

19. The Panel may take into account the reasoning of the prior compliance panel, to the extent that the Panel, having conducted an objective assessment of the matter, finds that reasoning persuasive. However, the Panel is not "required" to reach the same conclusion as the previous panel, even absent any novel argument, circumstance, or development.

RESPONSE TO QUESTION FROM THE PHILIPPINES TO THE THIRD PARTIES

20. The CVA establishes disciplines with respect to the determination of "the customs value of imported goods." Article 1.1 provides that the customs value "shall be the transaction value, that is the price actually paid or payable for the goods," except under certain specified circumstances. Article 1.2 establishes disciplines with respect to how a customs authority examines the price actually paid or payable (that is, the transaction value) as reported by the importer for purposes of determining whether it is acceptable.

21. If the transaction value is determined not to be acceptable, the authority proceeds to the valuation methodologies set forth in Articles 2 through 7. None of Articles 2 through 7 requires the customs authority to determine the price paid or actually payable. If the customs authority is relying on the price actually paid or payable to determine the customs value, it is by definition operating within the scope of Article 1.