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THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

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/RW.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 25 January 2017

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

General

2. The Panel will provide the parties to the dispute (hereinafter "parties") and third parties to the dispute (hereinafter "third parties") with a timetable for panel proceedings.

3. The deliberations of the Panel and all documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party from disclosing statements of its own positions to the public. 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.

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.

4. 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.

5. 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. 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.

6. 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.

Submissions

7. 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.

8. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event on or before the date of the organizational meeting. If either party requests such a ruling, the other party shall submit its response to the request in accordance with the timetable adopted by the Panel. 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.

9. 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.

10. 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.

11. 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 Panel shall rule on any objection to the accuracy of a translation as promptly as possible thereafter.

12. 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.

13. 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.

14. 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, as attached to Appendix 1, to the extent that it is practical to do so.

15. 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. Exhibits submitted by the Philippines shall be numbered PHL-1, PHL-2, etc. and exhibits submitted by Thailand shall be numbered THA-1, THA-2, etc. If the last exhibit in

connection with the first submission was numbered, for example, PHL-5, the first exhibit of the next submission thus would be numbered PHL-6. 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.

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

Questions prior to the substantive meeting

17. Prior to the substantive meeting, the Panel shall 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

18. 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 will be fixed subsequently by the Panel, at least three 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, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined 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, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined 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

19. The Panel shall invite each third party to 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.

20. Each third party shall also be invited to 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.

21. 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 may be given the opportunity, through the Panel, 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, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined 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, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

22. 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.

23. 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, three weeks after the last submissions have been made, 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.

24. 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.

25. The Panel may revise the page limits upon request of a party. Paragraph 29 below shall apply to the service of executive summaries.

Interim review

26. 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.

27. 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.

28. 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

29. 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, *****@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.

30. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

APPENDIX 1

"EDITORIAL GUIDE FOR ENGLISH WTO PANEL SUBMISSIONS"

[SEE THE ATTACHMENT TO THE E-MAILS OF 25/01/2017 AND 02/02/2017 SENT BY THE SECRETARIAT ON BEHALF OF THE PANEL]

ANNEX A-2

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 on 24 May 2018

1. Following consultation with the parties, the Panel has adopted these additional procedures pursuant to its authority under Article 12.1 of the DSU and taking into account the particular circumstances of these proceedings.

2. Pending the translation and public circulation of the Final Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU (the Final Report), the Panel will provide an electronic copy of the Final Report to any Member participating as a third party in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines* (Philippines' second recourse to Article 21.5) subject to the following conditions:

(a) the electronic copy of the Report obtained under these procedures may be referenced by a third party only for the purpose of enabling it to prepare its third-party written submission, third-party oral statement, or responses to questions in the Philippines' second recourse to Article 21.5, and for no other purpose; and

(b) no person may have access to the Report except an employee of a third party, and an outside adviser acting on behalf of the third party for the purposes of this dispute, and each third party shall have responsibility in this regard for its employees as well as any outside advisers used for the purposes of this dispute.

3. Any Member participating as a third party in the Philippines' second recourse to Article 21.5 that wishes to receive a copy of the Final Report subject to these conditions shall request a copy of the Final Report from the Panel. To promote the orderly conduct of the proceeding, any interested third party is invited to make any such request promptly upon becoming aware of these additional procedures.

4. The parties and third parties are free to refer to the contents of the Final Report in their submissions to the Panel in the Philippines' second recourse to Article 21.5 of the DSU. Pending the translation and public circulation of the Final Report, any reference to the contents of the Final Report included in the parties' and third parties' written submissions, oral statements or responses to questions in the context of the Philippines' second recourse to Article 21.5 of the DSU shall be treated as confidential information by the parties and third parties and shall not be publicly disclosed. Accordingly, if a party or third party makes its submissions publicly available, any reference to the contents of the Final Report shall be redacted from the public version of its submission pending the translation and public circulation of the Final Report.

5. In accordance with paragraph 28 of the Working Procedures adopted by the Panel on 25 January 2017 in the context of the Philippines' first recourse to Article 21.5 of the DSU, the Final Report is strictly confidential and shall not be disclosed. For greater clarity, granting third parties access to the contents of the Final Report in accordance with paragraphs 2 to 4 of these additional procedures does not constitute "disclosure" within the meaning of paragraph 28.

6. These additional working procedures concerning third-party access to the Final Report of the Panel will be annexed to the Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, and have been incorporated by reference into the working procedures adopted by the Panel in the context of the Philippines' second recourse to Article 21.5 of the DSU.

ANNEX A-3

PROCEDURAL RULING CONCERNING THIRD-PARTY ACCESS TO THE FINAL REPORT OF THE PANEL IN THE PHILIPPINES' FIRST RECOURSE TO ARTICLE 21.5 OF THE DSU

24 May 2018

1 INTRODUCTION

1.1. The Philippines has requested that the Members participating as third parties in its second recourse to Article 21.5 of the DSU receive a copy of the confidential Final Report that was already issued to the parties in its first recourse to Article 21.5 of the DSU, and that is not expected to be translated and publicly circulated before the last quarter of 2018.

1.2. After consulting with the parties, the Panel has decided to grant the Philippines' request. This procedural ruling relates to the working procedures of both the first and second compliance panels, and will therefore be annexed to the Reports of the Panel in both the first and second compliance panel proceedings.

2 FACTUAL BACKGROUND

2.1. In the context of the Philippines' first recourse to Article 21.5 of the DSU, the Panel informed the Dispute Settlement Body (DSB) that it expected to issue its Final Report to the parties in the first quarter of 2018.[1] The Panel did so. Following the issuance of the Report to the parties, the Secretariat informed the parties that the translation of the Final Report into Spanish and French was not expected to be completed before the last quarter of 2018.

2.2. At its meeting on 27 March 2018, the DSB established a second compliance panel to examine the matter referred to by the Philippines in its second recourse to Article 21.5 of the DSU in this dispute. As set forth in its request for the establishment of a second compliance panel[2], the two sets of measures at issue in the Philippines' second recourse to Article 21.5 are related to the measures at issue in the first compliance proceeding:

a. The Philippines challenges Notices of Assessment that Philip Morris (Thailand) Limited (PMTL) received in November 2017 from Thailand's Customs Department, rejecting PMTL's declared transaction values, and determining revised customs values, for 1052 shipments of cigarettes imported over the period 2001-2003. These 1052 shipments include 208 shipments whose customs values were previously assessed by a ruling of the Board of Appeals that was issued on 16 November 2012. The November 2012 Board of Appeals Ruling is the subject of the Philippines' first recourse to Article 21.5 of the DSU.

b. The Philippines challenges a set of criminal charges filed by the Public Prosecutor against PMTL and one of its former employees on 26 January 2017, in respect of 779 shipments of cigarettes imported in 2002-2003. This second set of charges was filed one year after a first set of criminal charges was filed by the Public Prosecutor against PMTL and seven of its current and former employees on 18 January 2016, in respect of 272 shipments of cigarettes imported between 2003-2006. The first set of criminal charges is the subject of the Philippines' first recourse to Article 21.5 of the DSU.

2.3. With respect to both sets of measures at issue in the second compliance proceeding, the Philippines' panel request claims that the Thai authorities acted inconsistently with various obligations under the Customs Valuation Agreement (CVA) and the GATT 1994, including *inter alia*:

[1] WT/DS371/20, dated 15 May 2017.
[2] WT/DS371/22, dated 14 March 2018.

a. Articles 1.1 and 1.2(a) of the CVA, by rejecting PMTL's transaction values without conducting a proper examination of the circumstances of sale, by failing to communicate the grounds for considering that the relationship between the buyer and seller influenced the price, and by failing to give the importer any opportunity to comment on the information under consideration;

b. the relevant provisions of Articles 2 through 7 of the CVA, by failing to comply with the applicable valuation rules when determining the revised customs values of the imported goods; and

c. 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.

2.4. The Panel observes that these claims are similar, if not identical, to the legal claims raised in the first compliance panel proceeding pertaining to both the November 2012 Board of Appeals Ruling and the first set of criminal charges filed on 18 January 2016. These legal claims are the subject of the Panel's findings in the Final Report that was already issued to the parties in the first quarter of 2018.

2.5. The DSB was informed on 9 May 2018 that the second compliance panel is composed of the same individuals serving on the first compliance panel.[3] On 24 May 2018, the Panel adopted its timetable and working procedures, based on a draft timetable and a draft set of working procedures jointly agreed and proposed by the parties. In accordance with the timetable proposed by the parties and subsequently adopted by the Panel, the complainant is expected to file its first written submission before the end of May. The agreed timetable further provides that the parties' remaining written submissions, the third-party written submissions, and the written responses to any pre-hearing questions, will all be received before the last quarter of 2018. The timetable further provides that the substantive meeting with the parties (including the third-party session), and any post-hearing written questions and responses, will take place within the last quarter of 2018.

3 THE PHILIPPINES' REQUEST AND THAILAND'S RESPONSE

3.1. On 15 May 2018, the Philippines requested that the working procedures governing the conduct of the first compliance panel proceeding, which were adopted by the Panel on 25 January 2017, be amended so as to make the Final Report available to the third parties participating in this second compliance proceeding. In its request, the Philippines recalled that under paragraph 28 of those working procedures, the Final Report of the Panel is to be treated as "strictly confidential" and thus could not be shared with WTO Members, besides the Philippines and Thailand, until it is circulated. The Philippines presented this request at the same time that the parties presented the Panel with their agreed timetable and working procedures.

3.2. In its request, the Philippines confirmed that the interpretations developed by the Panel in its Final Report relate to issues that will also arise in the context of this second compliance proceeding. The Philippines observed that both proceedings concern criminal charges brought by the Thai authorities against the same importer, and that some of the claims that the Philippines brings in this case are identical to the claims that it made in the first compliance proceeding. The Philippines further noted that there is an overlap in the shipments of cigarettes covered by each of the two sets of measures at issue in the second compliance proceedings, on the one hand, and one of the measures at issue in the first compliance proceeding (namely, the November 2012 Board of Appeals Ruling). In its request, the Philippines informed the Panel that it intends to refer to the Final Report in its submissions in this second compliance proceeding, including in its first written submission due to be filed before the end of May.

3.3. The Philippines recalled that Article 10 of the DSU provides that the third parties must be given access to the submissions of the parties in order to participate in the second compliance proceedings, but observed that if paragraph 28 of the working procedures is left as it is, the Philippines would be obliged to prepare a redacted and incomplete version of its submissions for the third parties. In the Philippines' view, this would necessarily deny the third parties full access

[3] WT/DS371/23, dated 9 May 2018.

to the submissions and thereby prejudice their right to participate in the proceedings in a full and meaningful fashion. The Philippines noted that without access to the Final Report, the third parties would be denied the ability to make submissions informed by the Final Report because they would be unaware of, and unable to address, an important part of the jurisprudence relevant to the second compliance proceeding and also to the parties' arguments in that respect. In the Philippines' view, providing the Final Report to a limited number of Members participating in this proceeding as third parties would not be tantamount to the circulation of the Report, because those Members participating as third parties would still be subject to the obligation to preserve the confidentiality of the Report.

3.4. At the organizational meeting with the Panel held on 19 May 2018, Thailand indicated that it had serious reservations and concerns regarding the Philippines' request because of the systemic issues that it raised. Thailand considered that it was for the Panel to decide, but emphasized that if the Panel chose to grant the request, any such decision should be taken on the grounds that there are *sui generis* circumstances so as to avoid creating a broader precedent.

3.5. Thailand expressed its doubts whether there were circumstances in this case that would warrant a decision to sacrifice the important rule of "strict confidentiality" of the Final Report, and queried whether the Philippines was in effect proposing to advance the circulation date simply for its own convenience. Thailand emphasized two points. First, Thailand suggested that the present case was not so exceptional insofar as it is quite common for Members and legal counsel involved in multiple WTO dispute settlement proceedings to have access to a Report or ruling in one proceeding that, regardless of its relevance, cannot be shared or referenced in the context of another proceeding. Second, Thailand observed that delays in the translation of panel reports were not exceptional either. Therefore, Thailand suggested that if the Panel chose to grant the Philippines' request in this case, the delay in translation should not be treated as *sui generis* circumstance or otherwise given undue weight in the reasoning justifying that course of action.

3.6. As to the modalities for how access would be granted to the third parties if the Panel chose to do so, Thailand indicated that in its view it was too late to modify the working procedures governing the conduct of the first compliance panel. Thailand also noted that the Members participating as third parties in the first and second compliance panel were not identical. For these reasons, Thailand suggested that if the Panel were inclined to grant the Philippines' request, the issue should be addressed in the context of the working procedures of this second compliance panel.

4 EVALUATION BY THE PANEL

4.1. We would stress at the outset that this case involves a particular combination of circumstances, which are as follows:

a. there are two consecutive compliance panel proceedings in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371) between the same disputing parties and before two compliance panels composed of the same individuals;

b. the Final Report in the first compliance proceeding has already been issued to the parties, and therefore the Panel's findings and reasoning are no longer subject to any further modification by the Panel;

c. prior to filing its first written submission, the Philippines informed the Panel that by virtue of the overlapping subject-matter of the two compliance proceedings, its submissions will refer to the Final Report to an extent that will necessitate third-party access to the Final Report if they are to participate in the proceeding in a full and meaningful fashion;

d. the Secretariat has informed the parties and the Panel that the Final Report will not be circulated until some point (yet to be determined) in the last quarter of 2018, which is after the dates for the parties to file all of their written submissions and the date for the

filing of the third-party written submissions, and possibly also after the substantive meeting with the parties and the third-party session;

e. the Philippines has specifically requested that the Panel modify its working procedures to grant third-party access to the Final Report pending its translation; and

f. ten Members have already notified their third-party interest in these proceedings, and these third parties are therefore legally entitled to receive all of the parties' submissions filed prior to the substantive meeting.

4.2. Clearly, the Panel does not have the authority to unilaterally authorize the circulation of a panel report prior to its translation into all three official languages of the WTO. The General Council's Decision on Procedures for the Circulation and Derestriction of WTO Documents[4] states unequivocally that official WTO documents, including reports of panels[5], shall be made available via the WTO website to facilitate their dissemination to the public at large "[o]nce translated into all three official WTO languages".[6] It is true that the same decision states that the translation of panel reports shall be completed "expeditiously"[7], and the Panel notes that Article 15.2 of the DSU likewise envisages that the translation and circulation of a panel's final report shall be completed "promptly". However, that requirement does not serve to qualify the rule that panel reports may only be circulated once translated into the other official languages. Insofar as time periods being experienced for the translation of panel reports warrants a review of that rule and the existing procedures governing circulation, the authority to do so is vested with the Members.[8]

4.3. The issue presented by the Philippines' request is distinct from the question of whether the Final Report can be circulated prior to its translation. The Philippines has not requested that the Panel circulate the Report prior to its translation, nor has it requested that the Panel waive the confidentiality of the Final Report prior to its public circulation. Rather, the Philippines has requested that the Panel allow those Members participating as third parties in the Philippines' second recourse to Article 21.5 of the DSU to have access, on a confidential basis, to the contents of the Final Report that has already been issued to the parties in the Philippines' first recourse to Article 21.5 of the DSU, and to which the parties are undoubtedly going to refer in their submissions to the second compliance panel.

4.4. Furthermore, the question before the Panel is not whether it should adopt special procedures to deal with the situation that the parties find themselves in, but rather what special procedures the Panel should adopt to deal with this situation. If the Panel does not adopt a special procedure for granting third parties access to the contents of the Final Report on a confidential basis, the Panel will then have to adopt one of the following alternative sets of special procedures:

a. the Panel could decline to grant third parties access to the contents of the Final Report without modifying the timetable for the proceeding agreed by the parties, in which case the Panel would then have to adopt special procedures requiring the parties to redact all reference to the contents of the Final Report when they serve their submissions on the third parties in this second compliance panel proceeding[9]; or

b. the Panel could decline to grant the third parties access to the contents of Final Report, and deal with the situation by modifying the timetable proposed by the parties so as to postpone the dates for filing their written submissions until such time as the Final Report has been translated and circulated sometime in the last quarter of 2018.

4.5. With these preliminary considerations and the alternative options in mind, the Panel recalls that it is well established that "the DSU, and in particular its Appendix 3, leave panels a margin of

[4] WT/L/452, dated 16 May 2002.
[5] WT/L/452, dated 16 May 2002, paragraph 1 and footnote 1.
[6] WT/L/452, dated 16 May 2002, paragraph 3.
[7] WT/L/452, dated 16 May 2002, paragraph 3.
[8] WT/L/452, dated 16 May 2002, paragraph 5.
[9] Such additional procedures would also require the Panel to redact any references to the Final Report from any preliminary or procedural rulings made by the Panel and served upon the third parties prior the circulation of the Final Report.

discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated".[10] The Panel is required to deal with a situation that is not explicitly regulated by the DSU or any other applicable rules, and it falls within the authority of the Panel to adopt appropriate arrangements to deal with this situation in accordance with due process and following consultation with the parties pursuant to Article 12.1 of the DSU. The Panel is mindful that "due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations".[11] The Panel has given careful consideration to the particular circumstances of the case and the parties' views, while engaging in a balancing exercise taking into account how each of the alternative options before the Panel would impact on the rights and interests of the third parties, the Panel, the parties, and the WTO membership at large. In the particular circumstances of this case, the Panel considers that due process is best served by granting the third parties access to the contents of the confidential Final Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, subject to the conditions set forth in the enclosed additional procedures adopted by the Panel.

4.6. The Panel recalls that Article 10.1 of the DSU obliges it to ensure that the interests of the third parties are "fully taken into account during the panel process". Further, it is generally understood that "the third participants' interests lie mainly in the correct legal interpretation of the provisions of the WTO agreements".[12] Providing the third parties with versions of the parties' submissions that have not been redacted so as to remove all references to the contents of the Final Report, including the relevant legal interpretations contained therein and the parties' legal arguments based on those interpretations, would therefore ensure that the third parties are able to exercise their right to participate in these proceedings "in a full and meaningful fashion"[13], as guaranteed by Article 10 of the DSU. Conversely, requiring the parties to serve third parties with redacted versions of their submissions, which would remove all references to the Final Report including all of the parties' argumentation directly referencing any interpretations by the first compliance panel, may infringe upon the right of the third parties to receive "the submissions" of the parties prior to the first meeting with the panel as provided for in Article 10.3 of the DSU. As to the alternative option of delaying the proceedings until the Final Report of the Panel is circulated in both Spanish and French, the submissions of the parties in this proceeding are in English. It is not clear how any third party would be prejudiced by receiving access only to the English version of the Final Report while its translation is pending, given that the principal reason for granting third-party access to the Final Report is to enable the Members participating in this proceeding as third parties to have access to, understand, and meaningfully comment on the legal arguments contained in the submissions of the parties.

4.7. The Panel considers that meaningful third-party participation in this proceeding is instrumental to the Panel's own function of making an objective assessment of the matter before it, and in particular to ensuring that the Panel arrives at the correct legal interpretation of the provisions of the WTO agreements. This again favours granting third parties access to non-redacted versions of the parties' submissions, as a means of ensuring that the third parties can provide meaningful views on the parties' legal arguments. Conversely, if the third parties are

[10] Appellate Body Report, *EC – Hormones*, footnote 138. The Appellate Body made that statement in *EC – Hormones*, when reviewing the panel's decision to grant the United States access to all information in the proceedings initiated by Canada (and vice versa), in the context of Canada and the United States having initiated separate dispute settlement proceedings, and each participating as a third party in the proceeding initiated by the other. The Appellate Body considered that "[a]lthough Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law". The Appellate Body considered that "in the case before us, circumstances justified the Panel's decision", and recalled that in other cases, panels have considered that "particular circumstances justified the grant to third parties of rights somewhat broader than those explicitly envisaged in Article 10 and Appendix 3 of the DSU". (Appellate Body Report, *EC – Hormones*, paras. 154-155.)

[11] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

[12] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling and Additional Procedures to Protect Sensitive Information, para. 23.

[13] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 249. See also Appellate Body Report, *Japan – DRAMs (Korea)*, para. 279, cautioning panels against sweeping redactions that could render a report unintelligible to third parties.

unable to access the parties' argumentation, the Panel may receive a number of third-party submissions advancing argumentation on the interpretation of CVA obligations that were prepared without sufficient knowledge of what the parties are actually arguing before this second compliance panel, and without the knowledge of the jurisprudence that may serve as the basis for those arguments. The Panel considers that if it is denied the benefit of informed third-party submissions in this manner, this could compromise the Panel's own ability to make an objective assessment of the matter as required under Article 11 of the DSU. Alternatively, if the Panel were to stay the proceeding by at least four to six months against the wishes of the parties and leave all dates in the air pending the public circulation of the Report, the Panel would not be acting consistently with its general duty to conduct the proceedings in a fair and orderly manner, or with its specific obligation to fix the timetable as required by Article 12.3 of the DSU.[14]

4.8. The Panel does not consider that granting access to the contents of the Final Report on a confidential basis to the third parties would prejudice the interests of either the responding party or the complaining party in the circumstances of this proceeding. Thailand has indicated that its concerns and reservations are "systemic" in nature, and has not suggested that sharing the Final Report with third parties would prejudice its interests in the context of this proceeding. For its part, the Philippines specifically requested that the Final Report be shared with the third parties, and argued that its own due process rights may be affected if its request is not granted. In contrast, the Panel considers that prejudice to the due process rights of one or both parties would indeed arise if the Panel adopted special procedures providing for the redaction, or postponement, of the parties' written submissions. The first scenario would, as already explained, give rise to a very real possibility of the third parties preparing submissions without adequate knowledge of the parties' submissions, and in particular without adequate knowledge of the parties' arguments regarding the correct interpretation of the WTO obligations at issue in this proceeding, or the jurisprudence that may serve as an important basis for the parties' arguments. Requiring the parties to dedicate their time and resources to responding to third-party submissions prepared in such circumstances may entail an "uneconomical use of time and resources"[15] by the parties. Alternatively, the Panel considers that the prejudice visited upon the complaining party would be even greater if the Panel sought to deal with the situation confronting it by postponing the filing of the parties' submissions until the Final Report has been circulated. While this option for dealing with the delay in translation would fully safeguard the interests of the third parties and ensure their meaningful participation, it would do so at the expense of the complaining party's due process rights[16] and the overall object and purpose of the DSU.[17]

4.9. Finally, the Panel has considered the rights and systemic interests of the WTO membership at large, particularly from the perspective of contemplating how granting access to the contents of the Final Report to third parties in this proceeding could potentially affect other Members in their capacity as parties in any other parallel panel proceedings. In general, those Members receiving a confidential copy of the Final Report for the purpose of enabling them to develop their argumentation in this panel proceeding would enjoy no advantage over other Members in the context of any parallel proceeding, given that those Members who receive a copy of the Final Report would be prevented from referencing the contents of the Final Report outside of the context of the present proceeding.[18] Having said that, the Panel recognizes that if there are parallel

[14] Article 12.3 of the DSU provides that the timetable for the panel process is to be fixed "as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon".

[15] Appellate Body Report, *EC – Hormones*, para. 152. In this scenario, the potential burden on the parties could be compounded if the Final Report were circulated prior the conclusion of the briefing phase of the second proceeding, and at a late stage of this proceeding one or more the third parties requested leave from the Panel to provide a supplemental third-party submission prepared in the light of the information in the Final Report to which it finally had access.

[16] The Appellate Body has also stated that "due process" requires a panel to take appropriate account of the complaining party's "right to have recourse to an adjudicative process in which it can seek redress in a timely manner". (Appellate Body Report, Thailand – Cigarettes (Philippines), para. 150.)

[17] Article 3.3 of the DSU provides that the "prompt settlement" of disputes is "essential to the effective function of the WTO". The Appellate Body has confirmed that this is part of the "overall object and purpose" of the DSU. (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.)

[18] Furthermore, we understand that in the event of a breach of its confidentiality, another panel would be precluded from considering the contents of the Final Report prior to its circulation. See *China – Raw Materials*, Communication from the Panel, 18 May 2010, WT/DS394/9, WT/DS395/9, WT/DS398/8, paras. 43-44.

proceedings involving similar issues to those examined in the Final Report, and if one of the parties to those proceedings has access to the contents of the Final Report and the other disputing party does not, such knowledge could potentially inform that party's argumentation in a manner that could give rise to due process issues. However, the Panel considers that insofar as this is a concern for any Member, that concern is appropriately and fully addressed by circulating this procedural ruling enclosing the additional working procedures to the DSB, and thereby putting all WTO Members on an equal footing.

4.10. The Panel agrees with Thailand that preserving the confidentiality of the contents of the Final Report pending its circulation to all Members in the three official languages is an important principle. However, the Panel does not consider that its decision to grant interested third parties access to the contents of the Final Report on a confidential basis, for the sole purpose of allowing them to exercise their right to participate in a meaningful and full way in this second compliance panel proceeding, sacrifices that principle. The Report remains confidential. As elaborated in the enclosed procedures, which establish particularized arrangements for the purpose of this proceeding, the Panel has decided that the Final Report may be provided upon request to an interested third party on the basis of several interlocking conditions aimed at ensuring that the confidentiality of the Final Report is preserved.

4.11. The Panel agrees with Thailand that it is common for Members and legal counsel involved in multiple WTO dispute settlement proceedings to have access to a Report or ruling in one proceeding that, regardless of its relevance, cannot be shared or referenced in the context of another proceeding. This procedural ruling is not meant to suggest otherwise, or to open the door to panels, parties or third parties receiving advance copies of panel reports in translation whenever two different proceedings have overlapping subject-matter. In the circumstances of this case, the disputing parties and the Panel already have the Final Report, and will refer to it in their submissions to the Panel. The decision to grant third-party access to the Final Report has not been taken because of the degree of overlapping subject-matter as an autonomous consideration, but rather because the Panel expects that by virtue of the overlapping subject-matter between the two compliance proceedings, the parties' submissions in the second compliance proceeding will refer to the Final Report from the first compliance proceeding in a manner that will necessitate third-party access to the contents of the Final Report if they are to participate in the second compliance panel proceeding in a full and meaningful fashion. In order words, the principal reason for granting third-party access to the Final Report is simply to enable the third parties to have access to, understand, and meaningfully comment on the submissions of the parties.

4.12. The parties have provided the Panel with alternative views on the modalities for granting third parties access to the Final Report. In its request, the Philippines requested that the Panel amend paragraph 28 (regarding the strict confidentiality of both the Interim and Final Reports) of the working procedures adopted by the panel on 25 January 2017, in its capacity as the first compliance panel. The Philippines indicated that it could then attach the Final Report as an exhibit to its first written submission in this second compliance proceeding. However, Thailand considers that the modalities for implementing any decision to grant access to third parties should instead relate to the working procedures in this second compliance proceeding, because in its view it is too late for the Panel to amend the working procedures governing the first compliance proceeding. Thailand also notes that there is no identity between the third parties in the first and second compliance proceedings.

4.13. Having considered the parties' view on the modalities for providing third parties with access to the contents of the Final Report, the Panel has concluded as follows:

a. If third parties are to be given access to the contents of the Final Report, they should be given a copy of the Final Report rather than merely being able to receive non-redacted versions of the parties' submissions and the passages of the Report that are referenced or extracted therein. The reason is to avoid inducing one or both parties to insert lengthy, multi-page extracts from the Final Report in their submissions (which would erase the formal distinction between third parties having a copy of the Final Report versus not having one, and leave the parties, third parties and Panel having to work with needlessly long, extract-laden submissions).

b. The Panel accepts that either party attaching the Final Report to its submission could be one practical way of making it available to all of the third parties, but the Panel considers that it would be more appropriate for the Panel itself to provide a copy of the Final Report to the third parties, and to limit such provision to only those third parties that specifically request it.

c. The Panel considers that it is not necessary to amend the terms of paragraph 28 of the working procedures adopted in the first compliance panel proceeding, because the Panel considers that making the contents of the Final Report available to third parties, in accordance with the confidentiality and permissible use provisions of paragraphs 2 to 4 of the enclosed additional procedures, does not constitute "disclosure" of the Report within the meaning of paragraph 28 of the working procedures adopted by the Panel on 25 January 2017.

d. Only the Panel in the first proceeding has the legal authority to grant third-party access to the contents of its Final Report. The Panel considers that it still has the authority to take appropriate action in its capacity as the first compliance panel, notwithstanding that it has already issued its Final Report.[19] At the same time, the Panel agrees with Thailand that because the third parties are not identical in the first and second compliance proceedings, any procedures governing access to the Final Report cannot be made effective solely through a change to the working procedures of the first compliance panel. In the light of the foregoing, the enclosed additional working procedures will be annexed to the Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, and also incorporated by reference into the working procedures adopted by the Panel for the purposes of the Philippines' second recourse to Article 21.5 of the DSU.

[19] A panel's authority to take procedural decisions does not lapse upon the issuance of its final report to the parties. By way of illustration, a panel that has issued its final report to the parties still has the authority to suspend the proceedings upon request of a party pursuant to Article 12.12 of the DSU.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE PHILIPPINES

I. INTRODUCTION

1. The Philippines initiated this dispute in 2008 because Thailand had consistently subjected PM Thailand – an importer which sources virtually all of its cigarettes from the Philippines – to prejudicial and protectionist regulatory conduct. The original panel found, *inter alia*, that Thai Customs improperly rejected PM Thailand's transaction values, on entries between June 2006 and September 2007, in violation of both the procedural and substantive obligations in the *CVA*. Thailand did not appeal these findings, and informed the DSB that it intended to comply with its recommendations and rulings.

2. The Philippines had hoped that Thailand's implementation of the DSB's recommendations and rulings would bring about security and predictability for importers in Thailand, without further recourse to WTO dispute settlement. Regrettably, the situation confronting the Philippines' export interests today is considerably worse than it was when the original proceedings were brought. Indeed, not only has Thailand has failed to comply with the recommendations and rulings of the DSB, it has taken compliance measures that themselves give rise to WTO violations, as described below.

3. The Philippines raises claims in relation to three sets of compliance measures:

4. *First*, the Philippines challenges the rejection by the Board of Appeals ("BoA") of PM Thailand's declared transaction values for 210 *Marlboro* entries from 2002 and the determination of alternative deductive values (the "BoA Ruling"), as well as certain notices of assessment that result from the BoA Ruling.

5. *Second*, the Philippines challenges criminal charges, filed on 18 January 2016, against PM Thailand and seven of its current employees, concerning 272 entries of cigarettes imported from the Philippines in the period 2003-2006 ("the Charges"). The Charges reject PM Thailand's transaction value, and threaten vast criminal fines, on the basis of a spurious comparison with purchase prices paid by King Power, a Thai duty-free operator. The Philippines also challenges Thailand's failure to protect certain confidential information made public by Thai authorities.

6. *Third*, the Philippines challenges the notification requirement imposed in administering the amended base for value-added tax ("VAT"), which Thailand adopted to implement the DSB's original recommendations and rulings (the "VAT notification requirement"). The Philippines also challenges Thailand's failure to publish certain measures of general application relating to the VAT notification requirement.

II. THE BOA RULING IS INCONSISTENT WITH THE *CVA*

7. The BoA Ruling was the culmination of a process within the Thai customs administration for establishing the customs value of 210 *Marlboro* entries from 2002. The declared values were rejected at the time of entry. The customs value was initially set according to WTO-inconsistent reference prices. The importer appealed the initial assessment to the BoA, which is an appeal body within the Thai customs administration. The BoA's failure to rule on the appeal was the subject of findings by the original panel: the panel found that the undue delay in concluding the appeal violated Article X:3(a) and (b) of the GATT 1994.

8. In the BoA Ruling, the BoA undertook a *de novo* assessment of the customs value and decided to reject the transaction values. It determined an alternative customs value using a deductive value calculation. Thailand declared the BoA Ruling as a measure taken to comply with the DSB's recommendations and rulings in this regard.

9. In these Article 21.5 proceedings, the Philippines claims that the BoA Ruling is inconsistent with Articles 1.1 and 1.2(a) of the *CVA* because the BoA improperly rejected the transaction value, and with Article 5 of the *CVA* because the BoA failed to make appropriate deductions for Provincial tax and transport costs when calculating the alternative customs value.

A. The applicable factual and legal standards of review[1]

10. Thailand argues that, although Article 11 of the DSU is applicable, Article 17.6(i) of the *Anti-Dumping Agreement* ("ADA") provides the standard of review for the Philippines' substantive claims under Articles 1.1, 1.2(a), and 5.1 of the *CVA*. Thailand characterizes this as a deferential standard of "reasonableness", which it applies to the entirety of the Panel's evaluation of the claims regarding the BoA Ruling, including the assessment of the facts, and the interpretation and application of the law. Thailand's argument has no merit.

11. *First*, with respect to the Panel's evaluation of the facts, the standard of review is set forth in Article 11 of the DSU. The Appellate Body has consistently rejected Thailand's position that the standard in Article 17.6(i) of the ADA applies outside of the ADA. Under Article 11, the Panel must "make … an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", "in the light of the specific obligations of the relevant agreements that are at issue".[2] Thus, the precise contours of the standard of review under Article 11 must be understood in light of the relevant substantive obligations. Under this standard, the Appellate Body has required panels to conduct a critical review of a national authority's findings in light of the explanation given by an authority for its decision.[3] If an authority's explanation fails to demonstrate how the facts support its determinations under the obligations that govern its conduct, the Member violates those obligations.

12. *Second*, with respect to the Panel's evaluation of the law, pursuant to Article 3.2 of the DSU, a panel must interpret the treaty text using the "customary rules of interpretation of public international law". Contrary to Thailand's position, a panel cannot defer to a Member's interpretation of treaty language simply because the interpretation is allegedly "reasonable" in some abstract sense. Under this approach, each Member would decide for itself how to define the treaty terms, provided it acts "reasonably". The multilateral standard in the covered agreements would be replaced with diverse unilateral standards, subject only to a reasonableness requirement. That would not be consistent with the DSU.

B. The rejection of PM Thailand's transaction values on the basis of the BoA's circumstances of sale test violated Articles 1.1 and 1.2(a) of the *CVA*

13. The primary basis of valuation under the *CVA* is the transaction value. Article 1.2(a) provides that the fact that the buyer and seller are related "*shall not* in itself be grounds for regarding the transaction value as unacceptable".[4] Rather, where an authority has doubts about the transaction value's acceptability, it must examine the circumstances of sale to determine whether the relationship influenced the price. Specifically, an administration must undertake a "critical consideration of, inquiry into, and investigation of, the relevant situation", and "an active, critical review and consideration of the information before" it;[5] in other words, a *rigorous and critical* examination of the circumstances of sale.

14. The *CVA* does not prescribe a specific process for conducting an examination of the circumstances of sale. Examples in the *Interpretative Note*, however, contemplate a comparison between some aspect of the transaction under consideration, and a benchmark that represents normal commercial behavior between unrelated parties. When making such a comparison, the *CVA* requires the authority to respect two basic principles of comparability: (1) the goods involved must be comparable; and (2) full account must be taken of any factors that affect comparability. If these principles are not observed, a comparison provides neither an objective basis for reaching conclusions about whether the relationship influenced the price, nor a valid basis for rejecting the transaction value.

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[1] The Philippines' second written submission, paras. 38-84; the Philippines' response to Panel Questions 4, 5 and 94; the Philippines' opening statement, paras. 5-14.

[2] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 92. *See also* Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184. The Original Panel referenced this standard at paras. 7.68-7.72.

[3] *See* Appellate Body Report, *US – Lamb*, para. 106; Appellate Body, *Argentina – Footwear Safeguards*, para. 121.

[4] Emphasis added.

[5] Original Panel Report, para. 7.171.

1. The BoA's examination was based on a flawed industry comparator group

15. In the BoA Ruling, the BoA purported to examine the circumstances of sale by comparing P&GE rates of PM Thailand and those of an industry group. There were multiple flaws in the BoA's comparison.

a. The BoA selected companies that were not comparable to PM Thailand in terms of goods sold and commercial level[6]

16. The first flaw in the BoA's construction of its industry group relates to the companies that it *included* in the group. Specifically, the BoA selected companies that were not comparable to PM Thailand in terms of goods sold, and the commercial level at which the goods were sold. In doing so, the BoA failed to respect the principles of comparability required by the *CVA*.

17. The BoA itself accepted that its industry group must comprise companies that sold goods that were sufficiently comparable to those sold by PM Thailand. In particular, in the BoA Ruling, the BoA asserted that its industry group consisted of wholesalers of imported cigarettes with a brand reputation similar to *Marlboro*. Instead, however, the BoA selected an industry group comprised of the following five companies: (1) PM Thailand itself; (2) Chemical Resins (a domestic manufacturer of cigarette filters); KHS (a wholesaler of cut tobacco); Lee Intertrade (a wholesaler of cigars, tobacco, rolling paper and cigarette holders); and Piriyapul (a grocery store retailer). Apart from PM Thailand itself, none of these companies were wholesalers of imported cigarettes.

18. Nonetheless, while conceding that the BoA misrepresented the industry group and went "beyond the cigarette industry to establish a comparator group",[7] Thailand says that the BoA respected the first principle of comparability because the comparator companies all sell "goods of the same class or kind" as imported cigarettes. Specifically, the companies were selected on the basis of registrations made by companies under code 51233 of Thailand's SIC codes, *i.e.* "wholesale of tobacco and tobacco products". However, this rationalization of the BoA's approach does not remedy the flaws in the industry group.

19. *First*, Thailand's explanation is *not* based on a proper interpretation and application of the term "goods of the same class or kind". Article 15.3 of the *CVA* defines this term as "the range of goods produced by a particular industry or industry sector, and includes identical or similar goods". This requires an authority to identify the "*particular*" industry/sector that produces the goods being valued, and ascertain the "range" of goods produces by that "particular" industry/sector. In making this assessment, an authority should take into account a variety of factors, including the identity of the producers, the nature of the finished goods, the methods of production, the chain(s) of distribution, and the final consumers. There is no evidence that the BoA ever did so.

20. *Second*, not only was Thailand's SIC code system not a reliable way to identify "wholesale[rs] of tobacco and tobacco products", the BoA did not properly apply the SIC codes. In any event, there is a question whether "tobacco and tobacco products" constitutes the "particular industry", within the meaning of Article 15.3 of the *CVA*, producing the goods being valued. The "industry" selected by the BoA included finished and unfished tobacco products, as well as goods used to consume tobacco (*e.g.* cigarette holders). These goods are made by different producers, have different inputs, different methods of production, different supply chains, and different consumers. Thailand has never explained why these goods are all produced by "a particular industry" for purposes of Article 15.3.

21. *Third*, even if the BoA correctly identified "tobacco and tobacco products" as the "particular industry", the BoA included companies – namely, Piriyapul and Chemical Resins – that *did not sell* "tobacco and tobacco products" at the "wholesale" level, as Thailand alleges. Piriyapul is a retailer of over 3,000 different goods, and KHS is a domestic manufacturer of cigarette filters. These companies' P&GE rates were earned in respect of sales of goods *other than* "tobacco and tobacco products" at the wholesale level.

22. With respect to the second principle of comparability, the BoA also failed to take account of differences affecting the comparison. In particular, the BoA's industry group included companies

[6] The Philippines's first written submission, paras. 239-257; the Philippines' second written submission, paras. 110-153; the Philippines' response to Panel Questions 6, 7, 78 and 79; the Philippines' opening statement, paras. 17-22; the Philippines' comments on Thailand's responses to Panel Question 78.

[7] Thailand's first written submission, para. 5.31.

that sell goods at different commercial levels. Because prices differ depending on the commercial level at which they are sold, P&GE rates earned in sales cannot be used as a benchmark for P&GE rates earned in sales of goods at a different commercial level, without adjustments. The BoA made no such adjustments.

23. Thailand's defense of its failure to comply with the principles of comparability required under the *CVA* consists largely of repeated assertions regarding an expert witness statement submitted by the importer, PM Thailand, to Thailand's Public Prosecutor in the context of a criminal investigation unrelated to the BoA Ruling.[8]

24. Thailand's reliance on this statement is misplaced. The statement explicitly states that comparator companies in a P&GE comparison must be *"comparable"*.[9] In the portion of the statement highlighted by Thailand, the statement explains that, pursuant to Points of Understanding between PM Thailand and the Customs Department, a company could be considered comparable where it undertook the *same economic activities*, at the *same commercial level*, as PM Thailand. This statement therefore provides no support for the BoA's approach, which involved inclusion of companies engaged in *different economic activities*, at *different commercial levels.*

b. The BoA included PM Thailand itself in the industry group[10]

25. The second flaw in the BoA's construction of its industry group was that *the BoA included PM Thailand itself in the comparator industry group*. To recall, the purpose of the examination is to establish if the price paid by an *importer* in a related party transaction reflects normal commercial behavior between *unrelated parties*, in order to determine whether the relationship influenced the price. If the examination includes a comparison of the importer with the importer itself, in respect of transactions involving the same seller, that element of the examination cannot, by definition, shed light on whether the importer's pricing is consistent with pricing in *unrelated* transactions. Any decision to reject transaction value that is based on an examination that compares the importer with itself does not meet the requirements of Article 1.2(a).

c. The BoA inappropriately excluded certain companies from the industry group[11]

26. The next flaw in the BoA's construction of its industry group was its inappropriate exclusion of certain companies from the group. *First*, the BoA excluded BAT and JTI on the sole basis that they were loss-making. *Second*, the BoA excluded Classic Cigars and Macrorich, either because the BoA apparently lacked sufficient information, or because these companies' P&GE rates were too high.

27. With regard to BAT and JTI, lack of profitability is not, in itself, a sufficient basis for the exclusion of a company from the industry group. Rather, an administration must examine whether there are "valid commercial reasons" for losses. This is consistent with the logic of using a P&GE comparison in order to examine the circumstances of sale under Article 1.2(a): If there are "valid commercial reasons" for losses, these companies are part of, and representative of, the marketplace. Further, since P&GE combines both profits and general expenses, a company could have a positive P&GE rate, even where it makes losses.

28. Thailand argues that it is valid to exclude loss-making companies simply on the grounds that they are loss-making. In the case of BAT and JTI, Thailand suggests that it is valid to assume that they were loss-making because the cigarette import prices they paid were influenced by relationships with suppliers. In assuming this explanation for losses, Thailand implicitly concedes the Philippines' point that it is appropriate to consider the *reasons* for losses when considering whether companies with low P&GE rates should be included in a comparison. In any event, Thailand's explanation does not justify the exclusion of BAT and JTI from the BoA's comparator group. To the extent necessary, the Customs Department could easily have adjusted their respective P&GE rates, as it did for PM Thailand.

[8] Expert witness statement, 16 December 2010, **(Exhibit PHL-115)**.

[9] Expert witness statement, 16 December 2010, **(Exhibit PHL-115),** p. 7 (emphasis added).

[10] The Philippines' response to Panel Question 7; the Philippines' comments on Thailand's response to Panel Question 78.

[11] The Philippines' first written submission, paras. 258-268; the Philippines' second written submission, paras. 154-186; the Philippines' response to Panel Questions 8, 9, 10, 80 and 82; the Philippines' opening statement, paras. 23-26; the Philippines' comments on Thailand's responses to Panel Questions 80, 81 and 82.

29. With regard to Macrorich and Classic cigars, these companies made very similar sales to two companies that were *included* in the industry group, namely Lee Intertrade and KHS; all four companies import and distribute tobacco and cigars (but not cigarettes). If it was appropriate to include Lee Intertrade and KHS, it was also appropriate to include Macrorich and Classic Cigars. Thailand initially asserted that it excluded Macrorich and Classic Cigars because their P&GE rates were "abnormally" or "inexplicably" high.[12] However, if an authority chooses to make a P&GE comparison under Article 1.2(a), it cannot reject the P&GE rates "usually" made by other sellers simply because the authority believes – based on its own preconceived prejudices – that the amount is too low or too high. The P&GE rates "usually" made by other sellers *define what is normal* in selling the goods in question.

30. Thailand then changed its position, asserting that the BoA excluded Classic Cigars because no financial information about its operations (including its SIC code registration) and P&GE ratios for 2002 was available. Yet, in 2010, the BoA had enough information about Classic Cigars' operations to consider it as part of the group of 29 companies making up the industry at the time, and to characterize its activities as "import, wholesale, and retail of cigarette, cigar and cut tobacco". The BoA also *itself* calculated Classic Cigars' P&GE rate to be 34.01 percent.

d. The BoA did not account for important differences in sales volumes in composing the industry group[13]

31. A further flaw in the BoA's construction of its industry group was that the BoA calculated a simple average of the P&GE rates of the five companies included in the industry group, despite the group including companies with very different sales volumes.

32. PM Thailand's sales volumes were by far the largest of the five companies in the comparator group: Piriyapul's sales were a mere 2.4 percent of PM Thailand's net sales, and the remaining three comparator companies had combined sales revenues of *just over one percent* of PM Thailand's net sales. The BoA's failure to account for differences in sales volumes tainted the comparison, because any insight regarding the effect of the relationship between buyer and seller on the transaction values was masked by differences that flowed purely from the different sales volumes. The BoA could easily have overcome this problem by weighting the P&GE rates of the industry group when calculating the average and any measure of dispersion within the data. The BoA failed to do so.

2. The BoA's examination of the P&GE rates used in the comparison was flawed

a. The BoA inconsistently used adjusted and unadjusted P&GE rates for PM Thailand[14]

33. The BoA's comparison was also flawed in its decision to attribute three different P&GE rates to PM Thailand, and then use these different rates inconsistently when undertaking its comparison. Two of these P&GE rates were for PM Thailand as the subject of the comparison, one an *adjusted* rate of 9.22 percent, and the other an *unadjusted* rate of 18.47 percent. The third was for PM Thailand as a Member of the industry group, and was a different *adjusted* rate of 9.36 percent. There was, therefore, a lack of even-handedness in the treatment of PM Thailand's P&GE rate on each side of the comparison.

34. The BoA *should* have used the *adjusted* rate of 18.47 percent. Whereas the *unadjusted* rate is based on the uplifted customs values determined by the customs administration, the *adjusted* rate is based on PM Thailand's *declared transaction values*. The *adjusted* rate alone sheds light on whether the *declared transaction values* allowed the importer to earn a "normal" P&GE rate. Basing the P&GE rate on an uplifted alternative customs value would, by necessity, lower the importer's P&GE rate. A comparison based on such a P&GE rate would reveal only whether the uplifted customs value allowed the importer to earn a "normal" P&GE rate on its sales, which is not the object of the comparison.

[12] Thailand's first written submission, footnote 66.

[13] The Philippines' first written submission, paras. 269-279; the Philippines' second written submission, paras. 187-198; the Philippines' response to Panel Questions 12 and 38.

[14] The Philippines' first written submission, paras. 282-288; the Philippines' second written submission, paras. 199-212; the Philippines response to Panel Question 14.

b. The BoA failed to use a consistent approach when calculating P&GE rates for the five companies in the industry group[15]

35. The BoA's second flaw in comparing the various P&GE rates was to use inconsistent figures when calculating the P&GE rates attributed to the five companies in the industry group. To recall, Thailand stated that the BoA determined P&GE rates using the following formula: [N]umerator = net profit + selling and administrative expenses + corporate income tax (if any). The denominator was the income of the company.

36. As Thailand describes, in this fraction, a company's income is relevant in establishing both the numerator and the denominator. The Philippines accepts Thailand's clarification that the BoA calculated the companies' income using figures based on profits before tax, plus general expenses. There is, however, still an anomaly in the BoA's calculation. Specifically, the BoA was inconsistent in the figures it used for corporate income, as between the numerator and the denominator.

37. In the *numerator*, the BoA used *total income*, whereas in the *denominator*, the BoA used *main income*. While both *total income* and *main income* consist of *ordinary operating income*, *total income* also includes *extraordinary income* not earned through sales of the relevant goods, whereas main income does not. Although one company had no extraordinary income, the other four did. Thus, for one company, the income used in the numerator and the denominator was the same. However, for the four others, the income in the numerator was larger than the income used in the denominator.

38. The use of inconsistent income figures, within a single fraction, to calculate the P&GE rate for a single company, is not compatible with the requirement of a rigorous and critical "examination" of the circumstances of sale under Article 1.2(a).

3. The BoA used incorrect use of statistical methods to calculate the normal or reference P&GE range for the industry group that served as the comparison benchmark [16]

39. The BoA's examination of the circumstances of sale was also inconsistent with Article 1.2(a) because of its use of statistical tools. To recall, the BoA compared certain P&GE rates attributed to PM Thailand against a *range* of P&GE rates established for an industry group. The logic of the BoA's comparison was that any P&GE rate falling outside this supposedly "normal" industry range reflects transaction values influenced by the relationship between the buyer and seller.

40. In order to determine the normal range, the BoA: (1) determined the simple average of the P&GE rates of the five companies included in the industry group; (2) calculated the standard deviation for this data set; and (3) calculated a standard error of the mean. The supposedly normal range was then calculated by adding two standard errors to create the upper end of the range, and deducting two standard errors to create the lower end of the range. The resulting "normal" range was 9.80 percent to 15.08 percent.

41. *First,* with a group of only five observations, the BoA should not have used statistical tools *at all* to assess the "normal" P&GE range. A customs administration should only have recourse to statistical tools to assess the "normal" P&GE range when the number of observations is sufficiently large for statistical analysis to yield meaningful results. With a sample of only five observations, any resulting statistical analysis will have an unacceptably high level of uncertainty. In short, analysis of a sample of five observations produces results that are arbitrary and inaccurate.

42. *Second,* the BoA should not have used the standard error, which introduces distortion and bias into the assessment, both when the group constitutes the whole population, and when it constitutes a sample. This is because the range generated by the standard error is sensitive to the number of observations included within the group. The larger a sample, the smaller the range generated by the standard error. In effect, the use of the standard error tends to exclude P&GE rates that are properly regarded as – and, indeed, define – normal and usual P&GE rates for the

[15] The Philippines' first written submission, paras. 289-295; the Philippines' second written submission, paras. 213-225.

[16] The Philippines' first written submission, paras. 296-324; the Philippines' second written submission, paras. 226-260; the Philippines' response to Panel Question 16; the Philippines' opening statement, paras. 27-33.

industry. Comparing PM Thailand's P&GE rate with a "normal" P&GE range generated in this way cannot constitute grounds for rejecting transaction value.

43. In contrast to the standard error, the *standard deviation* is an appropriate statistical tool for identifying a normal range within a group of observations. In a normal distribution, 68 percent of the observations will fall within a range calculated by adding and subtracting one standard deviation to/from the average; and 95 percent of the observations will fall within a range calculated by adding and subtracting two standard deviations to/from the average. These proportions remain stable, regardless of the number of observations in the data set.

44. Thailand argues that, when using the standard deviation, only five percent of observations would be excluded from the range, meaning that the relationship between the parties could be deemed to have affected the transfer price in only 5 percent of all possible cases. This argument reveals a misunderstanding of the statistical tools.

45. The statistical tools seek to establish a "normal" range for one group of companies, *for which the transaction value is not influenced by a relationship between the buyer and seller*. This group's normal range serves as an independent benchmark for assessing the P&GE rates of a *distinct, second group* (including one or more companies) *where there is a relationship between buyer and seller*. Using standard deviations, all or none of the second group could fall outside the normal range of the first group. This statistical tool does not predict or dictate the outcomes of comparing the two distinct groups.

4. The BoA failed to undertake a proper examination in finding that PM Thailand's P&GE rates were "inconsistent with" those of the comparator group[17]

46. Finally, the BoA erred in determining whether PM Thailand's P&GE rates were "inconsistent with" the P&GE rates calculated for the industry group.

47. In making its comparison, the BoA looked only at quantitative factors and, using a bright line test, determined that because PM Thailand's P&GE rates fell outside of the range it had created, they were not consistent. It did so even though the quantitative gap was small.

48. When a comparison is used as part of an examination of the circumstances of sale, the value being tested need not match perfectly the comparator value in order to conclude that the price is acceptable. The legal standard accommodates a degree of difference between the figures being compared, particularly when the differences are explained by commercial considerations or are not commercially significant.

49. The purpose of an examination of the circumstances of sale is to ascertain whether the relationship influenced the price. In undertaking such an examination, the administration must "inquire into, investigate and critically consider" *all* of the information before it.[18] In any given case, a customs administration must consider all relevant facts, including both quantitative and qualitative elements.

50. When an administration compares an importer's P&GE rates with the range of an industry group, it makes a quantitative assessment only. It cannot then draw rigid, bright lines on the basis of that quantitative assessment alone, and conclude that the importer's P&GE rates are "inconsistent with" those of the industry group.

51. Further, the BoA's chosen methodology was tainted by numerous flaws that undermined the comparison. The more imprecise a comparison methodology, the more accommodating an administration must be of a degree of difference when assessing whether one figure is "not inconsistent with" another figure or range.

C. The BoA's determination of a new customs value using a deductive value method violated Article 5 of the *CVA*

52. Article 5.1 of the *CVA* sets forth requirements for the deductive valuation method. Article 5.1 bases the customs value on the unit price at which the imported goods are sold in the greatest aggregate quantity to unrelated parties. It then requires the valuing authority to make deductions

[17] The Philippines' first written submission, paras. 325-337; the Philippines' second written submission, paras. 261-276; the Philippines' response to Panel Question 19.

[18] Original Panel Report, 7.188.

to arrive at an import price. Deductions are based on the categories outlined in subparagraphs (i) -(iv).

1. The BoA failed to deduct the correct amount for P&GE in violation of Article 5.1(a)(i)[19]

53. The BoA deducted 12.44 percent for P&GE, *i.e.* the simple weighted average of the benchmark P&GE rates established for the industry group, which the BoA had previously constructed as part of its examination of the circumstances of sale.

54. Paragraph 6 of the *Interpretative Note* to Article 5 explains that the P&GE amount deducted under Article 5.1(a)(i) should be based on the importer's own figures. Where that is not possible, Paragraph 9 provides that the authority must deduct the usual P&GE amount earned in the sale of the "narrowest group or range of imported goods of the same class or kind".

55. The rejection of an importer's transaction value under Article 1.1 does not mean that, under Article 5.1(a)(i), its P&GE figures are inevitably "inconsistent with" the P&GE earned in the sale of goods of the same class or kind. Rather, because Article 5.1(a)(i), in principle, requires the use of the importer's own figures, an authority does not have license automatically to depart from the importer's own P&GE figures when determining a deductive value, even if it has rejected transaction value. An authority must undertake a separate analysis of this specific issue under Article 5.1 of the *CVA*.

56. The BoA had previously found that PM Thailand's P&GE rates of 9.36 percent and 18.47 percent were not consistent with the range of P&GE rates established for the industry group. On this basis alone, the BoA concluded that PM Thailand's figures were inconsistent with P&GE rates obtained in sales of goods of the same class or kind.

57. As summarized above, there are numerous flaws with the BoA's assessment of P&GE rates for the industry group.[20] These flaws vitiate the BoA's conclusion that PM Thailand's figures for P&GE were not consistent with those obtained from sales in Thailand of imported goods of the "narrowest group or range of imported goods of the same class or kind".

2. The BoA failed to deduct the correct amount for Provincial tax in violation of Article 5.1(a)(iv)[21]

58. Article 5.1(a)(iv) of the *CVA* requires deduction of customs duties and other "national taxes payable in the country of importation by reason of the importation or sale of the goods". Pursuant to the 1999 Excise Department's Guidelines, PM Thailand pays Provincial tax on behalf of retailers. An amount for Provincial tax must, therefore, be deducted under Article 5.1(a)(iv).

59. The original panel found that this deduction must be based on Provincial taxes *payable generally*, not on Provincial taxes actually paid on specific sales.[22] The BoA, however, deducted only a portion (around 60 percent) of the amount of Provincial taxes that PM Thailand had demonstrated, with evidence, was payable.

60. Because there is no Provincial tax payable in Bangkok, the BoA calculated an average, per-unit amount using a fraction in which the BoA divided: (1) the total amount of Provincial tax paid by PM Thailand in provinces collecting the tax (numerator) by (2) the total volume of all sales (including in Bangkok) (denominator).

61. PM Thailand provided extensive evidence in support of its claim that it paid THB 162,347,608.85 in total Provincial tax (*i.e.*, the numerator). Nonetheless, the BoA requested receipts for all payments of Provincial tax claimed in the period in order to prove the total amount of Provincial tax that had actually been paid in 2002. In response, PM Thailand provided all the receipts it had received from the Provincial authorities, which are still in Thailand's possession.

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[19] The Philippines' first written submission, paras. 380-399; the Philippines' second written submission, paras. 281-295; the Philippines' response to Panel Question 21.

[20] *See* above, paras. 15-51.

[21] The Philippines' first written submission, paras. 400-415; the Philippines' second written submission, paras. 296-331; the Philippines' response to Panel Questions 20(b), 22, 24, 86, 89 and 90; the Philippines' opening statement, paras. 34-39; the Philippines' comments on Thailand's responses to Panel Questions 86, 87, 88, 89 and 90.

[22] Original Panel Report, para. 7.359.

62. The BoA, however, accepted only a portion of these receipts. The Philippines cannot, at this stage, know precisely which receipts the BoA accepted, and which it rejected. What is clear, however, is that, whereas PM Thailand reported payment of Provincial tax of THB 162,347,609, the BoA deducted only THB 100,497,371.

63. Thailand has asserted that the BoA doubted PM Thailand's claim that it paid Provincial tax of THB 162,347,609 because a "test" calculation showed that the per stick amount claimed was THB 0.147, which exceeded the maximum per stick amount payable of THB 0.100. This test calculation was, however, faulty.

64. In the BoA's "test" calculation, the BoA sought to divide the claimed Provincial tax payment of THB 162,347,609 by the total number of sticks sold outside Bangkok, which would yield an average per stick amount of tax paid on sales subject to the tax. In the denominator of this "test" calculation, the BoA used a figure of 1.1 billion sticks as the number of sticks sold outside of Bangkok. In so doing, the BoA rejected, without explanation, PM Thailand's reported figure of 3.57 billion sticks sold outside of Bangkok. Using the reported figure, the per stick amount of tax paid is well within the maximum per stick amount payable.

65. Thailand asserted that the BoA's figure of 1.1 billion stick sales outside of Bangkok came from sales volumes shown on PM Thailand's monthly VAT returns. This is false. The Revenue Department's monthly VAT return form requires vendors to report *only* a single figure for all sales revenues earned for sales of all products/brands, in the relevant month, in the whole of Thailand. The information reported does not enable the BoA to derive the number of sticks sold. The provenance of the figure of 1.1 billion is, thus, *still* unknown.

66. In rejecting PM Thailand's reported figures, the BoA failed to give the importer any opportunity to comment, and failed to provide any explanation. The BoA's insistence on actual receipts, therefore, flowed directly from its own failure to consult PM Thailand. Irrespective of which specific receipts the BoA deducted, it violated Article 5 by rejecting PM Thailand's claimed amount of Provincial tax, without giving PM Thailand the opportunity to address the perceived deficiencies in the supporting evidence, and without properly engaging in the process of consultation required under the *CVA*.

3. The BoA failed to deduct any amount for transportation costs in violation of Article 5.1(a)(ii)[23]

67. Article 5.1(a)(ii) required the BoA to deduct "the usual costs of transport and insurance and associated costs incurred within the country of importation". Thailand argues that the BoA was excused from its obligation to make a deduction, because PM Thailand "waived its right to claim an adjustment for transportation costs".[24] This is incorrect.

68. On 24 August 2011, PM Thailand offered to waive a deduction for transportation costs on the proviso that doing so would result in an "immediate conclusion" to appeals that, at that stage, had been pending for nine years. This condition was not met. On 13 October 2011, PM Thailand sent the BoA a letter clearly indicating that it considered its offer was no longer valid and that it sought a deduction of transport costs.

69. PM Thailand provided the BoA with an estimate of domestic transportation costs in its letter of 9 December 2010. The BoA could have made a deduction on the basis of this evidence. If the BoA considered the information provided to be deficient, it was required to indicate why and give the importer the opportunity to provide further information. Moreover, according to the original panel, even where an importer omits to request a deduction for transportation costs, an administration should inquire as to whether such a deduction is needed. Instead, the BoA simply chose not to deduct transportation costs at all.

D. The BoA violated the due process and procedural requirements of the *CVA*

70. The procedural obligations in Articles 1.2(a) (third sentence), 11.3 and 16 apply to a Member's "customs administration". As Thailand has previously acknowledged, the BoA is "an

[23] The Philippines' first written submission, paras. 416-424; the Philippines' second written submission, paras. 332-342; the Philippines' response to Panel Questions 25 and 26.

[24] Thailand's first written submission, para. 5.96.

authority within the customs administration", and has insisted that it is "not 'independent' of" the Thai "customs administration".[25]

1. The BoA violated the procedural requirements of Article 1.2(a)[26]

71. The third sentence of Article 1.2(a) requires that, "if a customs administration has grounds for considering that the relationship influenced the price" it must "communicate its grounds to the importer", and allow the importer "a reasonable opportunity to respond". This process must take place before a decision to reject transaction value is reached.[27]

72. Before reaching its decision to reject transaction value, the BoA failed to communicate its grounds for considering that the relationship influenced the price. As a result, the BoA also denied PM Thailand its "reasonable opportunity" to address the relevant grounds, before the decision to reject transaction value was reached. It was especially important that PM Thailand have an opportunity to address the BoA's grounds for rejecting transaction value, because the BoA developed its own novel ("*de novo*") grounds for considering that the relationship influenced the price.

73. Thailand does not dispute that the BoA failed to communicate its grounds. Rather, Thailand argues that the procedural obligations in Article 1.2(a) do not apply to the BoA, because it is an appeals body under Article 11.2 of the *CVA*. As noted above, this is incorrect; Thailand has previously accepted that the BoA is part of the "customs administration". The procedural obligations in Article 1.2(a) therefore apply.

2. The BoA violated the procedural requirements of Article 11.3[28]

74. Article 11.3 requires that, when an authority within the customs administration makes a decision on appeal, it must provide in writing both (i) notice of the decision and (ii) the *reasons for the decision*. The BoA failed to provide reasons for its decision.

75. Contrary to Thailand's argument, a statement of "reasons" is not sufficient simply because it contains some – any – statement of facts relevant to a decision, even if the stated facts do not communicate adequately the substantive basis for the decision. Like Article 16, the duty to provide "reasons" under Article 11.3 embodies a "due process objective".[29] The "reasons" must set forth the basis to justify and explain a decision on appeal, including providing sufficient details to make clear the basis for rejecting transaction value and the basis for an alternative value.

76. In the BoA Ruling, the BoA's statement of reasons does not meet this threshold. The BoA provided an inaccurate and misleading explanation of how it constructed the industry group, stating that it was comprised of "imported cigarette wholesalers … whose brand reputation is close to the Marlboro cigarettes".[30] Thailand's submissions to the Panel reveal that this is not what the BoA did.

77. It is also impossible to understand from the Ruling how the BoA undertook its examination of the circumstances of sale, and why the BoA considered that the transaction value was not acceptable; it is also impossible to understand the BoA's deductive valuation under Article 5.

3. The BoA violated the procedural requirements in Article 16

78. Article 16 requires a customs authority to provide "an explanation" of its decision. The original panel explained that this provision serves "due process and transparency" objectives.[31] The explanation enables an importer to consider whether to appeal the decision and, if so, on what

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[25] Thailand's first written submission in the original proceedings, para. 289 (emphasis added).

[26] The Philippines' first written submission, paras. 338-346; the Philippines' second written submission, paras. 348- 368; the Philippines' response to Panel Questions 28 and 91; the Philippines' opening statement, paras. 41-46

[27] Original Panel Report, para. 7.155.

[28] The Philippines' first written submission, paras. 441-460; the Philippines' second written submission, paras. 369-382; the Philippines' response to Panel Questions 29, 92, 93 and 95; the Philippines' opening statement, paras. 47-55.

[29] Original Panel Report, paras. 7.234-7.237.

[30] BoA Minutes of Meeting No. 9-2555, 26 September 2012 (English translation), **(Exhibit PHL-21)**, p. 8.

[31] Original Panel Report, para. 7.237.

grounds. It also enables domestic courts and WTO panels to understand an authority's valuation determination for purposes of scrutinizing it.

79. To meet these due process and transparency ends, the explanation "must be *sufficient to make clear and give details* of how the customs value of the importer's goods was determined, including the *basis for rejecting the transaction value*", and "*how the [alternative] valuation method [used] was applied* to derive the customs value".[32] The BoA never provided PM Thailand with a sufficient explanation.

80. On 18 December 2012, after the BoA issued its Ruling, PM Thailand requested, in writing, as required by Article 16, that the BoA provide clarifications on the method used to determine the customs values. *Four years later,* the BoA purported to respond, in a letter of 16 June 2016. The content of this letter does not meet the standard of explanation required under Article 16. It does not provide, for example, the source of the data that the BoA used in its comparison, the nature of the data, and calculations based on that data. Nor does it contain sufficient information for PM Thailand to understand the basis for the BoA's calculation of a deductive value.

81. The timing of the 16 June 2016 letter, and its inadequate content, deprived PM Thailand of the ability to use the explanation in exercising its rights of appeal. In short, the BoA's letter of 16 June 2016 was too little, and too late, to discharge its obligation under Article 16.

III. THE CHARGES ARE INCONSISTENT WITH THE *CVA*

82. On 18 January 2016, the Thai Public Prosecutor filed criminal charges against PM Thailand and seven of its current employees, concerning 272 entries of cigarettes imported from the Philippines in the period 2003-2006 ("the Charges"). The Charges embody a determination that PM Thailand's declared transaction values are lower than the correct customs value. They involve a rejection of the transaction values that is inconsistent with Article 1.1 and 1.2(a) of the *CVA* and a determination of an alternative values that is inconsistent with Articles 2 and 3 of the *CVA*.

83. Thailand raises four separate hurdles that seek to prevent the Panel from reviewing whether the Charges are inconsistent with the *CVA*. If the Panel succeeds in clearing these four hurdles, Thailand concedes that the Charges are inconsistent with the *CVA,* but asserts that the Charges are justified by general exceptions in a different covered agreement, namely Article XX of the GATT 1994. Below, the Philippines summarizes why: (1) Thailand's four hurdles cannot shield the Charges from scrutiny; (2) the Charges are inconsistent with the *CVA*; and (3) the Charges are not justified by Article XX of the GATT 1994.

A. Thailand's four hurdles cannot shield the Charges from the Panel's scrutiny

1. The Philippines is not precluded from challenging the Charges[33]

84. Thailand asserts that the Philippines is precluded from challenging the Charges in these compliance proceedings. Thailand argues that this obstacle arises because, in the original proceedings, the Philippines raised, but did not pursue, claims relating to the Department of Special Investigation's ("the DSI") investigation that preceded the Charges.

85. Thailand's position lacks merit because the Charges did not exist at the time of the original proceedings. The Charges are a new measure, which Thailand took in January 2016, after the DSB's original recommendations and rulings. They are distinct from the DSI investigation. Thus, in the original proceedings, the Philippines did not challenge, and indeed could not have challenged, the Charges.

86. Thailand itself makes statements that support the Philippines' position. Thailand remarks, for example, that the Charges were adopted "nearly five years after the adoption of the original panel and Appellate Body Reports"[34], while the DSI investigation "was initiated almost five years before the adoption of the original panel and Appellate Body Reports".[35]

[32] Original Panel Report, paras. 7.240 and 7.241 (emphasis added).

[33] The Philippines' second written submission, paras. 457-464; the Philippines' response to Panel Question 46; the Philippines' opening statement, paras. 60-63.

[34] Thailand's response to Panel Question 41(a), p. 37.

[35] Thailand's rebuttal submission to the preliminary ruling request, para. 3.29.

2. The Charges are "ripe" for adjudication[36]

87. The second hurdle Thailand presents is that the Panel cannot assess the Charges because they are not "ripe" for adjudication.

88. Thailand is wrong that there is a doctrine of "ripeness" in WTO law; rather, the issue under WTO law is whether there is a *measure* that is attributable to the respondent. As the European Union has explained, "rather than introducing a new procedural concept of 'ripeness', with unclear content and vague contours, the question should be framed in a more classical manner, namely whether there is a challengeable 'measure at issue'."[37]

89. In principle, under the DSU, a Member may challenge as a "measure" *any act or omission* taken by a respondent. In terms of the relevant measures, Article 19.2 of the *CVA* foresees that claims may be made under the *CVA* in respect of any "*actions* of another Member or of other Members". Thus, the operative word in Article 19.2 is "actions". The word "action" refers broadly to "[s]omething done or performed, a deed, an act". This encompasses but is not limited to customs valuation "determinations".

90. In any event, while the Charges are an "action" by the Thai Public Prosecutor under Article 19.2, they are, more specifically an "action" in the nature of a customs valuation "determination". The word "determination" in the *CVA* includes any "more or less final decision" by any organ of the state that establishes, for purposes of Article 15.1(a) of the *CVA*, the value of goods for the purposes of levying *ad valorem* customs duties.

91. Despite accepting that the Charges are a measure, Thailand argues that the Panel should not rule on them because they are merely an "allegation" or "accusation" of wrongdoing, as opposed to a "determination". This characterization seems designed to convey that the Charges are casual, informal, and of no consequence. Whilst accusations may be casual, informal, and inconsequential in some settings – for example, schoolyard banter – that is far from the case with the Charges brought by the Public Prosecutor.

92. The Charges are a formal act by an authority of the Thai government, exercising criminal enforcement powers under Thai law, finding that PM Thailand under-declared transaction values pursuant to provisions of Thai law. The Charges result in real, legal consequences for the accused. Thailand's own arguments establish that an offence under Section 27 of the Customs Act can be prosecuted solely on the basis of charges formally issued by the Public Prosecutor, as the executive officer responsible under Thai law for taking this action.[38] Accordingly, under Thai law, the Charges are a necessary, authoritative, and definitive final step – a determination – taken by the executive branch of the Thai government to enforce Section 27.

93. Thailand also argues that the Charges are not "ripe" because they represent an allegation upon which the Court has not ruled. Contrary to Thailand's views, the fact that the Court will make a separate decision whether to convict does not mean that the Charges are not – and cannot be – a "determination". Different organs of the state may make different customs valuation determinations with respect to a given entry for the purpose of levying *ad valorem* customs duties. For example, the customs administration, an independent appeals body, and multiple courts may make customs valuation determinations with respect to a single entry under the *CVA*. Each of these decisions may properly be considered a "determination", and is subject to the *CVA*.

3. The Charges are a "measure taken to comply"[39]

94. A third hurdle deployed by Thailand is its argument that the Charges are not a measure taken to comply. However, the Charges share a close nexus – in terms of timing, nature, and effects – with the DSB's recommendations and rulings, and the 12 September 2012 BoA ruling, which is one of Thailand's declared measures taken to comply.

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[36] The Philippines' second written submission, paras. 399-456; the Philippines' response to Panel Questions 38; the Philippines' opening statement, paras. 64-72; the Philippines' comments on Thailand's response to Panel Question 100 and 101.

[37] European Union's oral statement, para. 7.

[38] Thailand's response to the Philippines' Question 3, p. 2.

[39] The Philippines' second written submission, paras. 456-522; the Philippines' response to Panel Questions 40, 41, 43, 103 and 104; the Philippines' opening statement, paras. 73-76; the Philippines' comments on Thailand's responses to Panel Questions 103 and 104.

95. With respect to *timing*, the Charges post-date the expiry of Thailand's reasonable period of time to implement the DSB's recommendations and rulings, as well as the adoption by Thailand of its declared measures taken to comply. Accordingly, the timing of the Charges is such that they are capable of undermining Thailand's compliance with the DSB's recommendations and rulings.

96. With respect to *nature*, the Charges have specific, close connections to the measures subject to the DSB's recommendations and rulings, and to one of Thailand's declared measures taken to comply (*i.e.*, the September 2012 BoA ruling). Specifically, the Charges share: the *same importer* (PM Thailand); the *same exporter* (PMPMI); the *same importing country* (PM Thailand); the *same exporting country* (the Philippines); the *same product and brands* (*Marlboro* and *L&M* cigarettes produced by PMPMI); the *same type of legal determination* (customs valuation); and the *same grounds for doubting the declared customs values* (a comparison with the duty-free prices of King Power).

97. With respect to *effects,* the Appellate Body has found a close nexus in terms of "effects" to exist when the undeclared compliance measure has "the effect of undermining compliance with the DSB's recommendations and rulings".[40]

98. Here, the Charges have precisely that effect. The Charges involve a customs valuation decision to reject the transaction values in exactly the same circumstances as Thailand's rejection of the 118 entries and the September 2012 BoA Ruling. The effect of the Charges is to perpetuate the WTO-inconsistencies it is obliged to correct with respect to a continuous stream of entries, between the same parties, under the same commercial terms. The relevant transactions are also governed by the same supply contract, with the same business terms.

99. Indeed, Paragraph 2 of the *Interpretive Notes* to Article 1.2(a) provides that, in a related party situation, "[i]t is not intended" that the customs administration would examine the circumstances of sale where it has "previously examined the relationship" between the buyer and seller. Thus, under the terms of the *CVA* itself, an unbroken stream of entries are connected across time where they involve the same commercial relationship.

100. Thailand argues that, notwithstanding these connections, the close nexus is severed because the Charges do not pertain to the *exact same* 118 entries as those at issue in the original proceedings. Thailand has, however, engineered the lack of overlap between the entries at issue. The DSI investigation initially *included* 18 of the original "WTO" 118 entries subject to the DSB's recommendations and rulings. However, after the significance of these entries under Article 21.5 of the DSU was explained by the importer, the Public Prosecutor decided – at a very late stage in the investigation process – to remove them. Thailand now seeks to profit from that decision.

101. In any event, Thailand is wrong that the measures at issue in the original and compliance proceedings must pertain to identical entries. Its position is contradicted by long-standing jurisprudence in which compliance measures pertained to different entries.[41]

102. It is also contrary to the findings of the latest panel to examine the "close nexus" test, in *US – Large Civil Aircraft (2nd Complaint) (Article 21.5 – EU)*. In this case, the compliance panel found that, "despite the differences" between the original and compliance measures, there was a close nexus between them because they all related to the production of the same Boeing product.[42] In this case, the undeclared compliance measures concern the customs valuation of the *same products* and even the same brands of those products. Just as in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the fact that the measures are not *identical* does not sever this connection.

4. The *CVA* applies to the Charges[43]

103. Thailand's fourth and final hurdle to prevent scrutiny of the Charges is its argument that the *CVA* does not apply to the Charges. Thailand is, once more, incorrect.

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[40] Appellate Body Report, *US – Upland Cotton (Article 21.5)*, para. 205.

[41] Appellate Body Report, *US – Zeroing (Article 21.5 – Japan)*, paras.160; Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, paras. 222-224, 240; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 83

[42] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.342.

[43] The Philippines' second written submission, paras. 523-618; the Philippines' response to Panel Questions 48; the Philippines' opening statement, paras. 77-115; the Philippines' comments on Thailand's responses to Panel Questions 99, 105 and 106.

104. 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.

105. Under Article 15.1(a), the Public Prosecutor made a determination of customs value for the purposes of levying *ad valorem* customs duties. Specifically, the Public Prosecutor rejected PM Thailand's declared transaction values through a comparison with King Power's prices, and determined that King Power's prices constituted alternative customs values, which were used as the tax base to determine the amount of *ad valorem* customs duties supposedly due.

106. Thailand makes a number of argument as to why the *CVA* does not apply. *First*, Thailand argues that the Charges do *not* determine the monetary worth of the imported goods for the purposes of levying *ad valorem* customs duties, because King Power's prices serve only the purpose of establishing a benchmark to calculate a potential fine. *Second*, Thailand argues that because the Charges require a showing of intention to defraud, the *CVA* does not apply. *Third*, Thailand argues that the *CVA* cannot apply to the Charges, because it would be too onerous for Members to be subject to the procedural obligations in the *CVA* in criminal proceedings. Below, the Philippines explains why these arguments are unavailing.

a. The Charges make a determination of customs value for the purposes of levying ad valorem customs duties

107. Thailand contests that the Charges establish King Power's prices as the basis for rejecting PM Thailand's declared transaction values and as alternative customs values. Instead, it argues that the references in the Charges to King Power's prices are solely to establish a benchmark to calculate the potential fine.

108. However, the Charges themselves demonstrate that King Power's prices are the benchmark for rejecting transaction values, and serve as the higher, alternative customs values used as the tax base to determine the amount of *ad valorem* customs duties supposedly due. Every single clause of the Charges concludes that PM Thailand's prices are "false" because they are "contrary to the actual price", which is identified as King Power's prices. Every clause also refers to the "amount of tax and duty under the law of customs that the defendant was liable to pay", and calculates that "amount" using King Power's prices as the tax base.

109. Although Thailand asserts that the Charges do not establish an alternative customs value, it also recognizes that underpayment of duties is an essential element of Section 27 of the Customs Act: "Section 27 requires a showing … of an under-statement of the declared value (and hence underpayment of duties)".[44] As a matter of logic, the Public Prosecutor's rejection of PM Thailand's transaction values could not, *on its own*, be sufficient to conclude that customs duties were underpaid. Rather, to find that there was "underpayment of duties", the Public Prosecutor had to establish alternative customs values that were *higher* than the rejected transaction values. These alternative values were King Power's prices.

110. Other evidence also shows that King Power's prices are the benchmark for rejecting transaction value *and* the alternative tax base for finding that customs duties were underpaid. In testimony before the Thai Senate, the DSI, the alleged informant himself (Mr. Somchai) and the Customs Department all explicitly acknowledged that: King Power's prices constituted the benchmark used to reject PM Thailand's transaction values; and, that King Power's prices were the alternative tax base for calculating the duties supposedly due.

111. Even if Thailand were correct that the King Power prices are used solely as the benchmark for fixing the fine, the *CVA* would still apply. The basic building block of the fine under Section 27 is an alternative customs price or value, determined for the expressed purpose of levying the correct amount of *ad valorem* customs duties due, multiplied by four. Therefore, in substance, the fine incorporates – and collects – the *ad valorem* customs duties due on an alternative customs value.

112. Finally, irrespective of the role played by King Power's prices in the Charges, and even if Thailand were correct that the Charges do not determine an alternative customs value, Thailand's rejection of the declared transaction values alone suffices to make the *CVA* applicable. If a customs administration decides to reject transaction value in deciding the "amount" of *ad valorem*

[44] Thailand's response to Panel Question 32, p. 26.

customs duties "that the defendant was liable to pay", that rejection is, fundamentally, a conclusion about the customs value of the goods.

113. The original panel agreed that "an authority's rejection of the transaction value under Article 1 is a necessary and integral element of its determination of the customs value under a different valuation method". It would be absurd if the *CVA* did not apply to a determination merely because it rejects transaction value, given that transaction value is "the primary basis" of valuation under the *CVA*. Such an approach would compromise the objectives of the *CVA*. In the case of the Charges, Thailand acknowledges that the transaction values are rejected in the course of establishing the "amount" of *ad valorem* customs duties "that the defendant was liable to pay", which is part of Thailand's process of levying *ad valorem* customs duties.

b. The "intention to defraud" element does not prevent the application of the CVA

114. Thailand explains that the crime under Section 27 of the Customs Act includes both an "act" and "intention" element. Yet, it asserts that intent is the "principal" or "main" element of the crime, with the act flowing as a "natural consequence" of the "intentional under-declaration" element. Thailand argues that, as a result, the *CVA* does not apply to the Charges.

115. The Charges do not support Thailand's assertion that the act of underpayment was established simply by showing an "intention" to underpay. Indeed, an intention to commit an act does not, in itself, amount to the commission of that act. The "act" of "underpayment" remains – as Thailand itself has accepted in these proceedings[45] – one of the two fundamental elements of the crime. *Both* elements of the crime must be established

116. In emphasizing the "intention" element of the crime, Thailand ignores the Appellate Body's findings in *US – 1916 Act* that the presence of an "intention" element does not exclude the application of relevant WTO rules. In that case, the criminal act under the *1916 Act* involved an act that amounted to "dumping". In addition, the statute imposed an intention requirement. The United States argued that this intention requirement excluded the application of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* to the *1916 Act*.

117. The Appellate Body disagreed. *First*, it found that because "the constituent elements of `dumping' are built into the essential elements of civil and criminal liability under the 1916 Act", the *Anti-Dumping Agreement* applied. *Second*, it held that an additional intention requirement "does not affect the applicability of Article VI of the GATT 1994".[46] Similarly, the additional "intent" element under Section 27 of the Customs Act does not exclude the application of the *CVA*. Rather, the *CVA* applies because the establishment of the criminal act – the underpayment of *ad valorem* customs duties – involves a determination of the allegedly proper customs value for the goods.

118. Finally, Thailand has sought to divert attention from the evidence before the Panel by relying on a "hypothetical" situation where an importer fails to declare additional invoices relating to an import transaction.

119. Thailand has failed to show that its hypothetical bears any relation to reality and appears, instead, to be nothing more than a speculative smoke-screen. Thailand acknowledges that Section 192 of Thailand's Criminal Procedure Code requires the Charges to contain all of the facts that are considered "essential elements" of the crime. Thailand also concedes that "the Charges contain []sufficient information to discern the grounds for the accusation of customs fraud". Nothing in the Charges establishes anything remotely like the fact pattern described by Thailand in its hypothetical. Rather, they rely on a customs valuation using King Power's prices.

120. Further, even if Thailand's hypothetical had some connection to reality (which it does not), the *CVA* would continue to apply. Under the hypothetical, an importer might argue, for example, that the additional invoices were impermissible additions to the transaction value under Article 8 of the *CVA*. Further, even if an importing Member, under the hypothetical, were to decide that transaction value could be rejected (*e.g.,* because of doubts about its truth or accuracy, or because the use of multiple invoices suggests that the relationship influenced the price), an alleged underpayment of duties could still be established only on the basis of a new alternative customs value determined consistently with the *CVA*.

[45] *See* Thailand's response to Panel Question 32, pp. 26-28.
[46] Appellate Body Report, *US – 1916 Act*, para. 132 (emphases added). *See also id.*, para. 122.

c. The procedural obligations in the CVA do not prevent its application to the Charges

121. With respect to the Charges, the Philippines has not made claims under the procedural obligations in the *CVA*. Thailand argues, however, that the supposedly prejudicial consequences of applying the *CVA's* procedural obligations to criminal proceedings demonstrate that the *CVA* cannot apply to the Charges.

122. The Philippines questions whether applying the *CVA's* procedural obligations to the Charges would be overly onerous. The Philippines considers that the Memorandum of Allegations and the Charges themselves could satisfy the relevant procedural obligations.

123. In any event, there may be a distinction between the *CVA's* procedural and substantive obligations. Whereas the third parties agree with the Philippines that the substantive obligations apply to criminal proceedings, they have raised a question as to the scope of application of the procedural obligations. Since the procedural obligations apply specifically to a Member's "customs administration", the scope of application depends upon the interpretation of this term.

124. The European Union takes a more "institutional" approach to this question, suggesting that the procedural obligations may apply only to the institution with responsibility for administering customs procedures, and not to other parts of the government, such as a prosecutor.[47] Canada, by contrast, takes a functional approach to the application of both the substantive and the procedural obligations, suggesting that they are not restricted to the entity formally described as the customs administrations, but "apply to the function of determining customs value of imported goods".[48] On balance, the Philippines inclines to an institutional approach to the application of the *CVA's procedural obligations*. This would mean that the procedural obligations would not, for example, apply to customs valuation made in the context of criminal proceedings.

B. The Charges are inconsistent with the *CVA*

125. In this section the Philippines summarizes its arguments as to why the charges violate Articles 1.1, 1.2(a), 2 and 3 of the *CVA*. The Philippines notes that Thailand has not rebutted the Philippines' arguments nor sought to explain why the Charges *do not* violate these provisions of the *CVA*. The Philippines also summarizes why Thailand's disclosure of certain confidential information violates Article 10 of the *CVA*.

1. The rejection of PM Thailand's transaction value is inconsistent with Articles 1.1 and 1.2(a) of the *CVA*[49]

126. Above, the Philippines has summarized the legal standard under Article 1.2(a) of the *CVA*.[50] To recall, when examining the circumstances of sale, an authority may decide to undertake comparisons, and in doing so is obliged to respect two basic principles of comparability: (1) the goods in the transactions subject to the comparison must be sufficiently comparable; and (2) full account must be taken of any factors that affect comparability.

127. In the case of the Charges, the Public Prosecutor undertook an examination of the circumstances of sale by comparing PM Thailand's declared transaction values with King Power's *prices*. The *CVA* requires that, when undertaking a price-to-price comparison, the benchmark price must be a transaction value previously accepted for another imported good under Article 1 of the *CVA*, or a customs value previously determined for such a good under Articles 2-7.

128. Below, the Philippines summarizes why, in bringing the Charges, the Public Prosecutor improperly rejected PM Thailand's transaction value.

[47] The European Union's response to Thailand's Question 4, para. 7.

[48] Canada's third party submission, para. 33.

[49] The Philippines' first written submission, paras. 576-681; the Philippines' second written submission, paras. 620-624; the Philippines' response to Panel Questions 49 and 53.

[50] *See* above, para. 14.

a. The comparison with King Power's prices failed to respect the requirements in the CVA for a price-to-price comparison

129. Thailand's reliance on a comparison between PM Thailand's transaction values and King Power's duty-free prices does not provide a valid basis for rejecting transaction values under the *CVA*, because the Public Prosecutor did not respect the requirements in the *CVA* for a price-based comparison.

130. *First,* King Power's purchase prices are not transaction values previously accepted, or customs values previously determined, by the Customs Department for imported goods. This is because King Power's relevant goods were sold *duty-free*, so King Power never even declared a transaction value for customs valuation purposes.

131. *Second*, the Public Prosecutor's comparison violated *both* of the principles of comparability that are embodied in the *CVA*.

132. In violation of the first principle of comparability, King Power's goods were not *identical* or *similar* to the goods being valued. For goods to be *identical* or *similar*, they must be sufficiently similar in terms of physical characteristics, *and* they must be produced in the same country and sold for export to the same country of importation. PM Thailand's goods were produced in the Philippines, whereas King Power's goods were produced in Malaysia.

133. In violation of the second principle of comparability, the Public Prosecutor failed to account for important differences between the two parties' transactions in respect of: (i) the impact of the incidence – if any – of *fiscal charges* on the prices paid by PM Thailand, a duty-paid operator, and King Power, a duty-free operator; (ii) the difference in *commercial level* of the transactions to PM Thailand and King Power; and, (iii) the *quantities* sold in the respective transactions.

134. With respect to differences in *fiscal charges*, whereas PM Thailand's goods were *duty-paid*, King Power's goods were *duty-free*. As a result, pricing at every stage of the two supply chains is different. With respect to differences in *commercial level*, the Public Prosecutor compared PM Thailand's purchase prices in a manufacturer/distributor transaction, with King Power's purchase prices in a distributor/retailer transaction. In fact, King Power is two commercial levels removed from PM Thailand. With respect to differences in *quantities* sold, whereas PM Thailand imported on average 8 billion sticks annually at the relevant time, King Power purchased just 170 million sticks, *i.e.* just 2 percent of PM Thailand's volume.

135. Finally, the Philippines notes that the World Customs Organization, the Thai Customs Department *and* the Public Prosecutor all rejected a comparison between PM Thailand's transaction values and King Power's prices. Regrettably, the Public Prosecutor made just such a comparison, in full awareness of the fact that the comparison was inappropriate.

b. The arbitrary exclusion of 18 entries from the Charges shows that the Public Prosecutor failed to undertake a rigorous and critical "examination"

136. Although the DSI's investigation had covered more than 290 entries from the period 2003-2007, the Public Prosecutor excluded 18 "WTO" entries that were initially included in the DSI's recommendation to prosecute, thereby accepting the transaction value of these entries.

137. The Public Prosecutor's decision to accept the transaction values for the 18 excluded "WTO" entries but to reject the transaction values for the 272 entries subject to the Charges was arbitrary. These entries all had identical or very similar circumstances of sale. To accept transaction value for one such entry but to reject it for another shows that the Public Prosecutor's rejection of transaction value was arbitrary, and thus not based on a a rigorous and critical "examination" of the circumstances of sale under Article 1.2(a).

2. The Charges' determination of alternative customs values is inconsistent with Articles 2 and 3 of the *CVA*

138. In addition to rejecting the declared customs values, the Charges establish King Power's prices as alternative customs values. The determination of the alternative customs values is inconsistent with Articles 2 and 3 of the *CVA.*

139. Under Articles 2.1(a) and 3.1(a), the alternative values to be used are the transaction value of *identical* or *similar* goods. The *CVA* imposes a number of requirements for goods to be considered *identical* or *similar* to the goods being valued. King Power's goods did not meet these requirements.

140. *First*, as noted above, goods are not *identical* or *similar* unless they are produced in the same country as the goods being valued. PM Thailand's goods were produced in the Philippines, whereas King Power's goods were produced in Malaysia.

141. *Second*, Paragraph 4 of the respective *Interpretative Notes* to Articles 2 and 3 provides that "the transaction value of identical [or similar] *imported goods* means a customs value … which *has already been accepted under Article 1*". King Power `s prices were not an already-accepted customs value.

142. *Third*, Articles 2.1(b) and 3.1(b) each require that the transaction value of identical or similar imported goods be taken from a sale "at the same commercial level and in substantially the same quantities" as the goods being valued. King Power and PM Thailand's goods were sold at different levels of trade.

3. Thailand's disclosure of business confidential information associated with the Charges breached Article 10 of the *CVA*

143. Thailand acted inconsistently with Article 10 of the *CVA* by disclosing, to the media, business confidential information concerning PM Thailand's transaction values. Specifically, press articles disclose PM Thailand's declared transaction values.

144. The only party in a position to disclose the confidential transaction values, other than PM Thailand itself, was Thailand. In the circumstances, the only way PM Thailand's transaction values could have appeared in press articles is if Thai authorities disclosed those figures to the press. In both press articles, immediately before reporting PM Thailand's declared CIF transaction values, the articles address information obtained from the Office of the Attorney General.

145. The only reasonable inference to draw is that the entity that did the "report[ing]" was the Office of the Attorney General. Indeed, in the original proceedings of this dispute, the panel found Thailand violated Article 10 of the *CVA* based on similar evidence submitted by the Philippines from press articles.[51]

146. Thailand argues that the information may have been obtained from the press articles at issue in the original proceedings. In other words, because the information had been previously disclosed in violation of Article 10 of the *CVA*, it would have already been public information in January 2016.

147. On a factual level this cannot be correct because the original press articles and the current press articles address different entries. On a legal level, it would be absurd, and render the obligation in Article 10 of the *CVA* meaningless, if Thailand's WTO-inconsistent disclosure of confidential information could effectively change the status of that information to non-confidential, such that Thailand could then continue to disclose the information freely in the press.

C. The Charges are not justified by Article XX of the GATT 1994

148. Although Thailand offers no substantive defense to the Philippines' claims in relation to the Charges under Articles 1.1, 1.2(a), 2 and 3 of the *CVA*, Thailand argues that violations of these provisions are nevertheless justified under Article XX(a) or Article XX(d) of the GATT 1994. Below, the Philippines summarizes why the *CVA* violations in the Charges cannot be justified by invoking these provisions of the GATT 1994.

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

149. Article XX is not available as a defense to violations of the *CVA*, because there is no textual basis in the *CVA* that would make Article XX applicable to justify inconsistencies with that *Agreement*.

[51] Original Panel Report, paras. 7.399-7.411.

150. The text of Article XX establishes that the provision applies, in principle, to "*this* Agreement", *i.e.*, the GATT 1994, and not to other covered agreements. Panels and the Appellate Body have found that the application of Article XX to another covered agreement requires *affirmative language*, in that other covered agreement, that is sufficient to incorporate Article XX into the other agreement.[52]

151. Only twice has the Appellate Body found that such affirmative language existed. Once was with respect to the *TRIMS Agreement*, which explicitly provides that "[a]ll exceptions under GATT 1994 shall apply".[53] The other occasion was with respect to a specific provision of China's Accession Protocol, which expressly provides that the provision was "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".[54]

152. Thailand fails to point to any such affirmative language in the *CVA*. Thailand argues that the general reference in the *CVA* to Article VII of the GATT 1994, and general language in the preamble are a sufficient textual connection. Thailand is wrong.

153. *First,* the *CVA*'s reference to Article VII does not reveal any intention to apply all of the other provisions of the GATT 1994, such as Article XX, to that other agreement. Indeed, as Japan explained, although the *CVA* refers generally to Article VII of the GATT 1994, it creates *additional obligations* that go beyond the terms of this provision.[55] It cannot thus be assumed that the general exceptions in Article XX of the GATT 1994 extend to the additional obligations in the *CVA*.

154. *Second*, general language in the preamble of the *CVA* does not suffice to incorporate specific provisions of the GATT 1994, such as Article XX, into that *Agreement*. In this respect, the preamble to the *CVA* parallels that of the *TBT Agreement*. However, it is settled that the *TBT Agreement* does not incorporate the Article XX defense.[56]

155. *Third*, the fact that Article XX(d) of the GATT 1994 permits Members to take WTO-inconsistent measures necessary to secure compliance with their laws relating to customs enforcement does not evidence an intention for Article XX to apply to *violations* of the *CVA*.

156. The obligations in the *CVA* and the provisions of Article XX(d) of the GATT 1994 share a common objective, namely, ensuring proper customs enforcement. The *CVA* pursues this objective, among others, by establishing substantive disciplines with regard to customs valuation. Article XX(d) does so by allowing Members to adopt measures necessary to ensure the proper enforcement of customs laws. It makes no sense for Article XX(d) – which permits measures necessary to secure compliance with laws relating to customs enforcement – to justify action inconsistent with the *substantive* disciplines relating to customs valuation that *themselves* have the purpose of securing customs enforcement.

157. As the European Union put it, "the rationale and nature of the obligations set out in the *CVA* are not such as to justify the conclusion that Article XX should justify breaches in this context" and "[t]he fact that Thailand's Article XX defence appears to be obviously unfounded on substance confirms that Article XX simply does not 'fit' into the purpose and architecture of the *CVA*".[57]

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

158. Even if the Article XX were available to justify a breach of the *CVA* (*quod non*), the Charges could not be justified under either Article XX(d) or Article XX(a) of the GATT 1994.

159. 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 values is inconsistent with Articles 2 or 3 of the *CVA*.

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[52] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233; Panel Report, *China – Raw Materials*, para. 7.153; Appellate Body Report, *China – Raw Materials*, para. 303; Appellate Body Report, *China – Rare Earths*, paras. 96 and 101.

[53] Appellate Body Report, *China – Rare Earths*, para. 5.56.

[54] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233.

[55] Japan's opening statement, paras. 19-20.

[56] *China – Rare Earths*, para. 5.56, citing Appellate Body Report, *US – Clove Cigarettes*, paras. 96 and 101.

[57] The European Union's response to Panel Question 6 to the third parties, para. 16.

160. It is well established in GATT and WTO case law that the aspect of a measure that must be "necessary" in order for a measure to be justified under Article XX(d) is *the aspect that gives rise to the finding of WTO inconsistency*. Most recently, the Appellate Body confirmed in *EC – Seals* that "the aspects of a measure to be justified under the subparagraphs of Article XX are those that give rise to a finding of inconsistency. [58]

161. Accordingly, under Article XX(d), 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.

162. 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.

IV. THAILAND'S MEASURES TAKEN IN CONNECTION WITH THE VAT BASE APPLICABLE TO IMPORTERS OF CIGARETTES ARE INCONSISTENT WITH THE GATT 1994

163. To comply with the DSB's recommendations and rulings, Thailand changed its tax base for VAT. As part of those changes, Thailand introduced new VAT notification requirements under Notification 187 and Order Por. 145-2555 (hereinafter, the "notification requirement"). These measures were declared as compliance measures.

164. Under the notification requirement, importers of cigarettes and the domestic monopoly producer, TTM, are subject to the *same* notification requirements. In June of each year, both are obliged to notify the average actual market price prevailing across Thailand on the date of the June notification.

165. For reasons explained below, importers *cannot know* the average actual market price on the date of notification. Instead, importers can notify only the recommended retail selling price (RRSP). In practice, Thailand has accepted notification of the RRSP.

166. This situation gives rise to the Philippines' claims that Thailand's VAT notification rules are inconsistent with Articles X:1, X:3(a) and III:4 of the GATT 1994: (1) in violation of Article X:1, Thailand has failed to publish the rule that the Revenue Department applies to accept notification of the RRSP; (2) in violation of Article III:4, the notification requirement accords imported products treatment less favorable than domestic products, through the legal jeopardy they face by being unable to comply with the notification requirement; and, (3) in violation of Article X:3(a), the notification requirement is unreasonable.

167. In pursuing these claims, the Philippines does not seek to change the Thai Revenue Department's now long-standing informal practice of accepting notification of the recommended retail selling prices ("RRSP") in satisfaction of the notification requirement. Indeed, if Thailand were to simply publish this practice, in accordance with Article X:1, this would achieve compliance. To this end, the Philippines seeks, through its claims, to provide importers with appropriate security and predictability through a formal legal framework, under Thai law, that reflects this long-standing practice and, therefore, eliminates the risk of legal jeopardy currently facing importers.

A. Thailand has violated Article X:1 of the GATT 1994 by failing to publish the Revenue Department's rule that importers may notify RRSPs

168. The Revenue Department's rule permitting notification of RRSPs to satisfy the notification requirement is a measure that falls within the scope of Article X:1 of the GATT 1994 because it: (1) is a rule that has general application; (2) is made effective by Thailand; and (3) pertains to taxes and to requirements affecting sale.

169. *First*, the phrase "[l]aws, regulations, judicial decisions and administrative rulings of general application" in Article X:1 of the GATT 1994 covers a "wide range of measures that have

[58] Appellate Body Report, *EC – Seals*, para. 5.185.

the potential to affect trade and traders", "rang[ing] from imperative rules of conduct to the exercise of influence or an authoritative pronouncement by certain authoritative bodies".[59] This phrase must be given broad effect because failure to do so would "undermine the due process objectives of Article X".[60]

170. As the authority responsible for administering Thailand's VAT requirements, the Revenue Department's practice of accepting notification of RRSPs, and then relying on them as the tax base, is both an exercise of its influence, and an authoritative pronouncement regarding the acceptable means for importers to comply with the notification requirement. Further, this practice applies to cigarette importers generally. The practice may properly be described the practice as a non-binding "administrative ruling[] of general application".

171. *Second*, the rule permitting the notification of RRSPs in satisfaction of the notification requirement to has been "made effective" by Thailand. The term "made effective" means "brought into effect, or made operative, in practice".[61] As Thailand has explained, the Thai Revenue Department has "*adopted*" a "system" or "practice" "of accepting notifications based on the RRSPs".[62] The rule therefore results in conduct attributable to, and therefore made effective by, Thailand.

172. *Third*, the Revenue Department's rule pertains to taxes, and to requirements affecting sale, because it relates to the notification of the VAT base, which is connected or related to the imposition and collection of VAT; and the VAT, in turn, is a condition for lawful sale of cigarettes in Thailand. This point does not appear to be in dispute between the parties.

173. Thailand disputes that the Revenue Department's acceptance of RRSPs in satisfaction of the VAT notification requirement is an "informal practice" of the Revenue Department, and argues that this is merely an importer's "chosen means of compliance". However, the measure does not arise because *importers* have chosen to notify RRSPs, but because the *Revenue Department* has, in full knowledge of the facts, consistently chosen, over an extended period, *to accept RRSPs as a "means of compliance"* and has used the notified RRSPs as the tax base. The evidence, of course, also includes Thailand's recognition of this as a "practice" and "system" "adopted" to implement the DSB rulings and recommendations.

174. If this measure were published, importers could rely on it to show they have properly complied with the notification requirement, thereby resolving the legal jeopardy they currently face.

B. Thailand has violated Article III:4 of the GATT 1994 by according to imported products treatment less favorable than that accorded to like domestic products

175. In the absence of publication of the informal practice of allowing notification of the RRSP in fulfilment of the VAT notification requirements, importers face a risk of legal jeopardy in light of the specific requirements set forth in Notification 187 and Order Por. 145-2555. The notification requirement set forth in those instruments gives rise to less favorable treatment of imported cigarettes as compared with the like domestic product.

176. Thailand's notification requirement entails *de jure* discrimination because it subjects importers and domestic manufacturers to treatment that is formally the same, while failing to account for relevant differences in the respective legal situations of importers and the monopoly producer of domestic cigarettes, TTM. Where a measure discriminates on a *de jure* basis between like domestic and imported products, a panel may presume that the discrimination affects "like products".[63]

177. As noted above, under the notification requirement, importers of cigarettes are subject to the *same* notification requirement as TTM for purposes of the VAT base. In June of each year, *both*

[59] Panel Report, *EC – IT Products*, paras. 7.1026-7.1027.
[60] Panel Report, *EC – IT Products*, para. 7.1026.
[61] *EC – IT Products*, para. 7.1048 (emphasis added).
[62] Thailand's first written submission, paras. 7.33 and 7.48 (emphasis added).
[63] *See* the Philippines' first written submission para. 473, citing Panel Report, *Indonesia – Autos*, para. 14.113; and Panel Report, *Colombia – Ports of Entry*, para. 7.355. In any event, as the Original Panel found, a consideration of the traditional factors used to determine "likeness" demonstrates that TTM's domestically-produced cigarettes are "like" PM Thailand's imported cigarettes. *See* Original Panel Report, paras. 7.442, 7.451, 7.541.

importers and TTM are obliged to notify the average actual market price across Thailand prevailing on the date of the June notification.

178. However, this *formally identical treatment* fails to account for the *formally different legal situations* of importers. Specifically, with respect to domestic cigarettes, TTM's exemption from Thai competition laws means that TTM can, and does, set the downstream retail price. Thus, on the date of notification, TTM is aware of the average actual market price and is able to comply with it, in fulfilment of the notification requirement.

179. By contrast, Thai competition law prohibits importers from fixing the retail selling price charged by independent operators who retail imported cigarettes. Thus, although cigarette importers are aware of – and able to notify – the *recommended* retail selling price on the date of notification, they do not know – and cannot notify – the average *actual* market price on that date. In order to know the average actual market price across Thailand on a particular date, an importer would have to obtain market research through a market research company. Because collecting and processing market data in order to calculate the average price necessarily takes time, there is necessarily a delay between the date of the notification and the subsequent date on which the average actual market price on the notification date becomes known.

180. Thailand contests that this constitutes a difference in treatment that is *detrimental to imports*. It contests that (1) cigarette importers do not know the average market price on the date it must be notified; (2) it takes several weeks for a market research company to ascertain that price; and (3) importers face legal jeopardy if they do not comply with the VAT notification requirement. Each of Thailand's arguments is unavailing.

1. Cigarette importers do not know the average market price on the date it must be notified

181. Thailand argues that, on the date of notification importers *do* know the average actual market price prevailing on that date. Specifically, Thailand asserts that the Revenue Department defines the "actual price" to reflect *only the price charged by sellers – such as 7-11 stores etc. – that invariably follow the RRSPs*".[64] However, this definition does not allow the importer to know the average market price on the date of notification.

182. *First*, Thailand bases its contention on Example (b) provided in Clause 2(4) of Order Por. 145-2555. Example (b) provides that, for *Marlboro* cigarettes, the notified price should be the retail selling price "that the *retailers in general*, e.g. convenience stores or super stores *use* as the retail selling price to sell to the *consumers in general or the majority [of them]*". Contrary to Thailand's characterization, the Example does *not* state that importers may notify the price used either by *one specific retailer*, *i.e.*, 7-11, or by retailers that "invariably follow the RRSP". Instead, it refers to "convenience stores" and "super stores" broadly as *non-exhaustive examples* of the types of stores that constitute "retailers in general".

183. *Second,* Thailand also provides no evidence to support its assertion that 7-11 or any other retailer "invariably follow the RRSPs". In fact, Thailand concedes that certain retailers "*may charge higher prices for cigarettes*" than the RRSPs.[65] Further, Thailand's *New Excise Tax* explicitly envisages situations in which the RRSP "is not consistent with the reality, or is not in accordance with market mechanisms". In other words, at any given time, the average market price that "retailers in general" "use" for "consumers in general" could be higher than an importer's RRSP.

184. As a result, an importer cannot possibly know what prices are being charged on the notification date. As a result, the only way to comply with the VAT notification requirement would be to engage in vertical price fixing.

2. It takes several weeks for a market research company to ascertain the average actual price

185. Thailand also argued that the Philippines had not shown the precise amount of time required to obtain market information. The Philippines demonstrated, based on information provided by PM Thailand and a market research company, that it takes approximately 4-6 weeks to obtain average actual market price information. However, regardless of the precise amount of time required to obtain accurate data on the average actual retail price prevailing across Thailand

[64] Thailand's response to Panel Question 63(a), p. 57. Emphasis added.
[65] Thailand's response to Panel Question 63(a), p. 57. Emphasis added.

on any given day, the decisive point for the Philippines' claims is that it takes *some amount of time* after the date of notification for an importer to obtain average actual market price information from a market research company. It is the necessary gap between the date on which the notification is made, on the one hand, and the date upon which the average actual retail price prevailing on that earlier date is known, on the other hand, that gives rise to the risk of legal jeopardy for importers.

186. Thailand itself has acknowledged that it takes some "amount of time" for a market research company to conduct market research and ascertain the average actual market price on a given date. In other words, Thailand recognizes that PM Thailand *could not obtain the average actual market price on the same day the notification is due*.

3. Importers face legal jeopardy if they do not comply with the VAT notification requirement

187. Because importers do not know the average actual market price, they cannot comply with the VAT notification requirement without violating Thai competition law. This situation creates legal jeopardy for cigarette importers, because they risk failing to comply with the notification requirement in the event of a discrepancy between the average actual market price and the RRSP.

188. Thailand argues that importers' lack of knowledge of the actual average market price prevailing on the notification date does not give rise to legal jeopardy because they can subsequently notify a corrected price, if the price originally notified was incorrect. Thailand presents two scenarios, in which corrections can be made either before the incorrect VAT base enters into effect or before the deadline for submitting the tax return. However, this argument illustrates that less favorable treatment is, indeed, afforded to imported cigarettes.

189. For a start, Thailand's scenarios do not account for the possibility that a discrepancy between the average actual market price is not discovered before a tax return is filed.

190. Further, on Thailand's view, for importers to know whether they must file a correction, they must first undertake a market survey to monitor their VAT notifications against actual prices in the market, and then submit a correction. Thailand also recognizes that a correction could require the reissuance of VAT invoices. As the usual supply chain includes PM Thailand, a distributor, a wholesaler and a retailer, three invoices may have to be reissued, by three different parties in the supply chain, for each pack of imported cigarettes.

191. In seeking to comply with the VAT notification requirement, importers face an endless spiral of notifications, corrections and reissuance of invoices. Market surveys necessarily provide information on average market prices with a time lag. Thus, a corrected notification, based on a market survey, necessarily provides the average market price prevailing on an *earlier* date, namely, the date of the original notification. However, the corrected notification may itself be inaccurate because the average market price prevailing on the date of the corrected notification is unknown on that date, pending further price surveys that will take more time. Thus, for every corrected notification, further monitoring is needed, and a further correction may be necessary several weeks in the future, with invoices reissued by several parties in the supply chain.

192. TTM does not face these additional regulatory burdens and risks. It need never monitor its VAT notifications against average market prices, submit corrections, or reissue invoices, because it is able to fix the retail price and therefore can know that its notified selling price is correct on the original date of notification.

C. Thailand has violated Article X:3(a) of the GATT 1994 by imposing, through Notification 187 and Order Por. 145-2555, an unreasonable notification requirement on importers with which they cannot comply

193. The Philippines' claim under Article X:3(a) is premised on the same underlying problem that gives rise to less favourable treatment under Article III:4, namely, the impossibility for importers of notifying the average actual market price on the date of notification, without violating competition law by fixing prices. Since the VAT notification requirements pertain to *administration* of Thailand's VAT rules, this impossibility gives rise to *unreasonable administration* contrary to Article X:3(a). The Philippines summarizes further below.

194. *First*, the VAT notification requirement is a measure that falls within Article X:3(a) because it pertains the *administration* of Thailand's rules relating to the obligation to pay VAT.

"Administration" of measures within the meaning of Article X:1 means the manner in which those measures are "applied", "implemented" or "enforced".[66] Further, "administration" can take the form of a "legal instrument that regulates the application or implementation of" substantive rules in another legal instrument.[67]

195. Whereas the Thai Revenue Code sets forth provisions containing substantive rules relating to the calculation of the VAT base, the notification requirement pertains to the *application* and *implementation* of those rules, specifically, the way information used to establish the VAT base is collected by the administrator of the law. The notification requirement therefore governs the *administration* of the VAT.

196. *Second*, the notification requirement provides for "unreasonable" administration because it imposes an impossible administrative requirement on importers.

197. Thailand argues that the notification requirement is not unreasonable because no violation of Thai competition law arises by notifying the RRSPs. This is not, however, what the Philippines argues. As discussed above, the Philippines' argument is that it is "unreasonable" to administer a tax through a notification requirement imposed on importers that seeks to collect information from importers that they do not, and cannot, possess. As discussed above, an importer cannot notify the average market price prevailing on the date of notification because it cannot know that price on that date. As a result, the only way to comply with the VAT notification would be engage in (illegal) vertical price fixing.

198. Thailand's argument that importers may notify corrections of the VAT base supports the Philippines' position. As explained earlier, in doing so, importers face an endless spiral of notifications and corrections because, when a corrected notification is filed, importers still cannot know the average market price on that date. Thus, further monitoring is required and further corrections may ensue.

199. This only adds to the inherent unreasonableness of a requirement that forces importers to choose between complying with the VAT notification requirement and facing legal jeopardy under Thai competition law, or complying with Thai competition law and facing legal jeopardy under the VAT notification requirement.

[66] Appellate Body Report, *EC – Bananas III*, para. 200. *See* also Panel Report, *Argentina – Hides and Leather*, para. 11.72.

[67] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

ANNEX B-2

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 alleges that Thailand has failed to bring itself into compliance with the DSB recommendations and rulings with respect to: (i) the decision of the Thai Customs Board of Appeals (BoA) in the appeals by Philip Morris (Thailand) Limited (PM Thailand) of the original customs valuation decisions of Thai Customs concerning 210 entries of cigarettes imported by PM Thailand; (ii) the Criminal Charges against PM Thailand (Charges); and (iii) Thailand's establishment of the value-added tax (VAT) tax base for cigarettes.

1.3. In an initial request for a preliminary ruling, Thailand requests the Panel to find that the Philippines' claims regarding the Criminal Charges are outside the scope of these proceedings. It contends that the Philippines is precluded from raising the Charges in these Article 21.5 proceedings because the Philippines raised, but did not pursue, the same issues before the original panel. Thailand further explained that the Philippines could not claim that the Charges were a "measure taken to comply" on the ground that there was a "nexus" between the Charges and the DSB recommendations and rulings in this case. Thailand notes that the Panel has indicated that it does not intend to issue its preliminary ruling before it issues its report in this case.

1.4. In a subsequent request for a procedural ruling, Thailand addresses a serious violation of Thailand's due process rights in these proceedings. During the proceedings, the Philippines submitted an exhibit containing a confidential, internal Thai government memorandum to which was attached lawyer-client privileged legal advice from Thailand's legal advisors in this dispute. Thailand has not waived, and does not waive, either expressly or impliedly, its privilege in these documents or its right to obtain legal advice to assist it in presenting its case to the Panel in these proceedings. Thailand requested the Panel to find that Thailand's due process rights have been violated in a manner that prevents the Panel from fulfilling its obligations under Article 11 of the DSU. However, the Panel issued its preliminary ruling prior to the first substantive meeting, concluding that Thailand's due process right have not been violated and rejecting Thailand's request. Thailand therefore expressly requests the Panel to explain clearly in its ruling whether it considers that the Philippines' good faith/due process obligations and the Panel's due process obligations extended merely to inquiring whether the Philippines acted legally. If not, Thailand requests the Panel to explain clearly what additional steps were required of the Philippines and where it took those steps in this case.

1.5. With respect to the Philippines' claims regarding the decision of the BoA, the Philippines has failed to show that the BoA's decision was in any way biased, partial or arbitrary. In examining these claims, the Panel should apply a standard of review to these claims similar to that used to review decisions of domestic trade remedy investigating authorities. Under this standard, the Panel must examine whether the BoA reached a reasonable, objectively justifiable, and unbiased, based on an objective review of the facts and circumstances of the case before it. As explained in more detail in section 2 below, the Philippines has failed to show that the BoA acted unreasonably or that its decision lacked objectivity. Instead, the Philippines' arguments in the end amount to a claim that the BoA should have used a different methodology that would have resulted in a more favourable outcome for the importer. This is not the purpose of multilateral review of these kinds of determinations and the Panel should not follow this approach.

1.6. With respect to the Philippines' claims regarding the Criminal Charges, these claims raise issues that are not within the scope of the CVA. The CVA governs the determination of the customs value of goods by the customs administration. It does not, and does not purport to, govern how WTO Members may exercise their police powers in the enforcement of their laws, including their customs laws. Since the Charges represent an exercise of Thailand's enforcement of its customs laws, not a determination of customs value by the customs administration, the CVA does not apply and the Philippines' claims under the CVA should be rejected. Moreover, the

Philippines' claims regarding the Charges are an unprecedented attempt to get a WTO panel to intervene in pending domestic criminal proceedings in order to pre-empt the court's consideration of the matter. The Charges are currently pending before the Thai Criminal Court, which will hear extensive evidence from both sides over the coming year and is unlikely to issue its decision before summer of 2018. Under the doctrine of "ripeness", however, a WTO panel cannot exercise its jurisdiction to engage in an exercise of speculation as to what that decision might be or whether that decision would be consistent with WTO law. A WTO panel cannot possibly render an objective decision before the Thai Criminal Court has had an opportunity to hear all the relevant evidence.

1.7. Finally, with respect to the Philippines' claims regarding the VAT system, Thailand has implemented the recommendations and rulings of the DSB on this matter in precisely the manner requested by the Philippines and the importers. Nevertheless, the Philippines has chosen to assert claims that this method of implementation is WTO-inconsistent because of a perceived difference in possible outcomes in the event of inaccurate notifications of the tax base by importers and the domestic producers. The Philippines' claims are based on a misunderstanding of both the relevant provisions of Thai law and the facts, and should be rejected.

1.8. Thailand will address the Philippines' claims with respect to the BoA Ruling in section 2 below, the claims regarding the Charges in section 3 below (including the preliminary ruling request and the procedural request on due process issues), and the claims regarding Thailand's VAT base in section 4 below. Finally, it presents its conclusions in section 5.

2 THE PHILIPPINES HAS FAILED TO DEMONSTRATE THAT THE DECISIONS OF THE BOA ARE INCONSISTENT WITH THE CVA

2.1. This section concerns the BoA decision of November 2012 regarding the customs valuation of 210 entries of cigarette imported by PM Thailand. The Philippines claims that the BoA improperly determined that the relationship between PM Thailand and the exporter affected the price such that the declared transaction value was not an appropriate customs value under Article 1.2 of the CVA. The Philippines also claims that having made this determination, the BoA improperly determined the revised customs value, in a manner inconsistent with Article 5 of the CVA. Finally, the Philippines raises several claims regarding the procedural aspects of the BoA's decision under Articles 1.2(a), 11.3 and 16 of the CVA.

2.2. Thailand disagrees that the BoA's decisions were inconsistent with the CVA. Thailand notes that this is the first case before a WTO panel involving a review of a determination of an appellate tribunal under Article 11.2 of the CVA. In these circumstances, the parties agree that the Panel should not conduct a de novo review. Instead, Thailand considers that the Panel should use a standard of review that examines not whether the outcome reached by the BoA was favourable to the importer or indeed whether the Panel would have reached exactly the same outcome itself, were it in the shoes of the BoA. Instead, the question is whether the BoA's approach was reasonable and objective in the light of the circumstances of the case and the evidence before it.[1] This standard is analogous to that used in trade remedy dispute settlement proceedings, which is mentioned in Article 17.6(i) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

2.3. There is no express standard of review for decisions such as the BoA decision in the CVA. Given the analogies between a determination by the BoA and that of a domestic investigating authority in a trade remedy proceeding under the Anti-Dumping Agreement or the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Panel should follow a standard of review similar to that used by panels in reviews of trade remedy determinations.[2]

2.4. The Appellate Body has explained that, in a trade remedy-related dispute, where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings;

[1] Thailand's second written submission, paras. 2.2-2.3.
[2] Thailand's first written submission, paras. 4.6-4.8; Thailand's second written submission, para. 2.6.

and (ii) how those factual findings support its overall determination.[3] The Appellate Body has also clarified that in such cases, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgement for that of the investigating authority.[4]

2.5. There is no dispute between the parties on the fact that the Panel should not choose its own methodology to conduct the review of PM Thailand's prices or re-assess *de novo* the facts that were examined by the BoA in the underlying customs determinations and that some level of deference to the discretion of the BoA is appropriate.[5]

2.6. However, the Philippines states that the relevant standard of review should be that provided in Article 11 of the DSU. The Philippines suggests that by proposing a standard of review similar to that of Article 17.6(i) of the Anti-dumping Agreement, Thailand is effectively seeking the Panel to accord total deference to the decisions of the BoA.[6]

2.7. This is not correct. Thailand made clear that Article 11 of the DSU applies to this dispute.[7] In Thailand's view, the Panel should apply not only Article 11 of the DSU, but also a standard similar to that stated in Article 17.6(i) of the Anti-Dumping Agreement, because this case involves the review of a determination based on a complex set of facts, by a domestic entity (the BoA) comparable to those in charge of investigations for trade remedy purposes.[8]

2.8. Under this standard, a panel need not determine whether the approach used by the investigating authority is the *best* approach. Equally, a panel is not to focus on whether the outcome is favourable to one side or another. Instead, it focuses on the *reasonableness,* the *objectivity* and the *unbiased* nature of the determination, not its results. This approach is particularly appropriate in a case like this, where the BoA used "objectively" the exact same methodology to decide three sets of appeals by PM Thailand. In two instances, the outcome was favourable to PM Thailand. In the third, the instance before the Panel, the outcome was unfavourable to PM Thailand. The purpose of the "reasonableness" standard used in trade remedy cases is precisely to avoid result-driven outcomes, whereby the WTO-consistency of the determination would depend on the result rather than on the method by which the domestic authority arrived at the result.[9]

2.9. Therefore, Thailand considers that the Panel should apply a standard of review to the BoA decision that is analogous to the "reasonableness" and "objectively justifiable" standards used in trade remedy and other analogous disputes as discussed above. In any event, the Panel must avoid becoming the initial trier of facts or examining the issues before BoA on a *de novo* basis that results in a substitution of the Panel's assessment for the objective assessment of the BoA.[10]

2.2 The BoA properly identified the comparison group of companies to establish P&GE rates

2.10. The BoA addressed PM Thailand's appeal using an approach that compared PM Thailand's profit and general expense (P&GE) ratio with those of a comparator group to determine whether PM Thailand's ratio fell within what would be considered a "normal" range. In principle, the Philippines agrees that it was appropriate for the BoA to use this approach and argues only with the manner in which it was applied in this case.

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[3] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and Appellate Body Report, *US – Lamb*, para. 103. See Thailand's second written submission, para. 2.7.

[4] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187 – 188. Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. See Thailand's second written submission, para. 2.7.

[5] Thailand's second written submission, paras. 2.5, 2.8. See Thailand's first written submission, para. 4.10; The Philippines' second written submission, paras. 57 and 66.

[6] The Philippines' second written submission, paras. 52 and 62. See Thailand's second written submission, para. 2.10.

[7] Thailand's first written submission, paras. 4.1-4.3.

[8] Thailand's second written submission, paras. 2.11-2.14.

[9] Thailand's second written submission, paras. 2.21-2.22; Thailand's opening statement at the meeting of the Panel, paras. 81-82.

[10] Thailand's second written submission, para. 2.37.

2.11. In order to determine whether PM Thailand's P&GE was within the normal range for importers of cigarettes into Thailand, the BoA had to identify a comparison group of companies. The Philippines claims that the BoA used a flawed comparison group to determine benchmark P&GE rates inconsistently with Article 1.2(a) of the CVA.

2.12. First, the Philippines tries to impose an incorrect standard of review of the BoA decision. Thailand has addressed this above. Second, the Philippines raises several objections regarding how the BoA implemented its approach. The Philippines apparently seeks perfection from the BoA. However, it fails to acknowledge that the BoA was not faced with a perfect set of choices in its determination. The nature of the cigarette industry in Thailand, where PM Thailand was the predominant importer, limited the options available to the BoA. Notwithstanding the Philippines' arguments, an expert statement filed by the Philippines itself in its first written submission made essentially this point – that it was not easy to identify a perfect comparison group in the circumstances of the cigarette industry in Thailand and that it might even have been appropriate to compare PM Thailand to companies outside the cigarette industry.[11]

2.13. The Philippines questions the exclusion of certain companies from the comparison group. However, it is presumptively reasonable to establish a rule that loss-making companies – especially those that are affiliated with the exporter – do not provide an appropriate basis for a comparison to determine whether an importer is operating at an arm's length basis.[12]

2.14. The BoA narrowed down its selection of the comparison group of companies using the following methodological steps:

- Duty-free operators were excluded (King Power, King Power Duty Free, Bangkok Airways).
- Companies that did not import cigarettes or sold only domestic products were excluded (Weh Weh, Kha Sin Thai, HAH, Chitapanya, Dekthaileemax, Ruwamsahairungruang, Thaiseree Hadyai, Pangna Changwad Trading).
- Loss making companies were excluded (BAT, JTI, PX Import Export, Oriental & Eight Happiness, Prestige Brand, Universal Consumer Products, Goldimex Intertrade, Sereewat, Phromrangsi 1999, Boontong Trading, First Trago).
- One company, Macrorich, was excluded because its P&GE ratio was excessively high.
- One company, Sutanatrading, was excluded because the BoA was unable to obtain its financial statement or confirm its activities.

2.15. Thailand sees nothing in this approach that is not objectively justifiable.[13]

2.16. The Philippines further questions (i) the BoA's decision to use a comparison group outside the industry, (ii) the BoA's alleged failure to take into account the difference in size of the companies as compared to PM Thailand, and (iii) the BoA's decision to include PM Thailand in the comparison group. Regarding the first point, it is objectively justifiable to choose companies selling the same product instead of companies of the same size.[14] Regarding the second point, this is precisely the reason why the expert statement provided by the Philippines said it was difficult to find a perfect comparison group.[15] Regarding the third point, had PM Thailand not been included in the comparison group, its P&GE ratio would still have fallen outside even the absolute range of the values for the comparison group.[16]

[11] Thailand's first written submission, para. 5.31; Thailand's second written submission, paras. 2.39-2.40; Thailand's opening statement at the meeting of the Panel, para. 84.
[12] Thailand's second written submission, para. 2.42.
[13] Thailand's second written submission, para. 2.45; Thailand's first written submission, paras. 5.21-5.29.
[14] Thailand's second written submission, paras. 2.47-2.48.
[15] Thailand's second written submission, para. 2.49.
[16] Thailand's second written submission, para. 2.50.

2.17. Thus, the Philippines has failed to make a *prima facie* case that the BoA's determination was inherently unreasonable, not objective, or biased against PM Thailand. In these circumstances, the Panel cannot set the determination aside, simply because the outcome might not have been favourable to a multinational corporation or because the circumstances before the BoA were not perfect in every respect.[17]

2.18. For these reasons, the Panel should reject the Philippines' claims regarding the BoA's selection of the comparison group in this case.

2.3 The BoA calculated the P&GE ratios consistently

2.19. The Philippines argues that the BoA calculated the P&GE ratios for the companies involved inconsistently. In particular, the Philippines states that for two of the companies in the comparison group, the BoA used a P&GE ratio based on figures for profits before tax. For the three other companies, however, the Philippines alleges that the BoA used a P&GE ratio based on figures for profits *after* tax.

2.20. This is incorrect. The BoA used exactly the same numerator and denominator for all of the companies within the comparison group, including PM Thailand. The numerator for each company was profit plus general expenses (before tax). The denominator for each company was the main or operating income (not including non-operating income such as interest income etc.). There is nothing inconsistent or unreasonable about this approach.[18]

2.21. Moreover, contrary to the Philippines' assertion, it was reasonable for the BoA to exclude companies that made losses because it may indicate that the sales were not at arm's length in the case of related-party transactions.[19] In addition, it was appropriate for the BoA to focus on operating income, profits, and expenses, rather than on whether the companies had a tax liability under Thai tax law.[20]

2.22. Finally, the Philippines argues that the BoA erred in "attribut[ing] three different P&GE rates to PM Thailand and then us[ing] these different rates inconsistently when undertaking its comparison".[21] This is incorrect. PM Thailand changed its position on what P&GE ratio should be used in this analysis at several stages in the proceeding. However, the BoA approached these rates consistently.[22] Moreover, in order to make an apples to apples comparison, it was appropriate to use comparable figures for PM Thailand and the other companies, based on the financial results in the audited financial statements.[23]

2.23. For these reasons, the Panel should reject the Philippines' arguments that the BoA's calculations were inconsistent or that the BoA was not unbiased and objective.

2.4 The BoA's establishment of the range of P&GE ratios was proper

2.24. The Philippines questions the methods used by the BoA to establish whether PM Thailand's P&GE rates were consistent with the representative industry rate. Based on the assumption that any P&GE rate falling outside the "normal range" reflects transaction values influenced by the relationship, it argues that the standard error is not the appropriate statistical method, and that the appropriate method for that purpose is necessarily the standard deviation.[24]

2.25. However, the purpose of the test was not to identify "outliers" or abnormal transactions, as the Philippines seems to suggest.[25] The BoA determined that the appropriate standard was

[17] Thailand's second written submission, para. 2.54; Thailand's opening statement at the meeting of the Panel, paras. 81-82.
[18] Thailand's first written submission, para. 5.41-5.42; Thailand's second written submission, paras. 2.57-2.58.
[19] Thailand's first written submission, para. 5.18-5.22; Thailand's second written submission, para. 2.59.
[20] Thailand's second written submission, para. 2.59.
[21] The Philippines' second written submission, paras. 199 *et seq.*
[22] Thailand's first written submission, para. 5.45; Thailand's second written submission, para. 2.61.
[23] Thailand's second written submission, paras. 2.62-2.64.
[24] Thailand's second written submission, paras. 2.68-2.69.
[25] Thailand's first written submission, para. 5.54; Thailand's second written submission, para. 2.66.

whether PM Thailand's P&GE rates were "consistent with those of the industry group"[26], and that such consistency should be measured by comparing PM Thailand's P&GE rates with a representative benchmark based on the average or mean of the individual P&GE rates.[27] However, as it would not be reasonable to compare PM Thailand's P&GE rates with an absolute and precise figure (i.e. the mean), the BoA decided to introduce a range around the average or mean. For this purpose, it used the standard error of the mean, which is the statistical tool that measures how precisely the population mean is estimated by the sample mean.[28]

2.26. In layman's terms, the range used by the BoA is the range within which the mean might be expected to fluctuate. It is perfectly reasonable to use this to establish a benchmark range of what is "normal" in an industry and to use this based on a sample, not the population as a whole. This approach has no inherent bias, no inherent subjectivity, and is plainly not outcome-based.[29] The use of the standard error is particularly apt when using a smaller sample group. As noted, the standard error is an inferential tool that estimates how close the sample mean is to the population mean. The smaller the sample group, the larger the standard error. Thus, the two standard error approach is perfectly reasonable with a small sample group as it results in a broad range within which the population mean could fall.[30]

2.27. The CVA does not prescribe a particular means of determining whether a related company's P&GE ratios are consistent with those of an unrelated importer. There is no textual base in the CVA requiring the identification of outlier sales or the use of the standard deviation as the appropriate tool to conduct this assessment. In its arguments, the Philippines is reading into the CVA obligations that are not there.[31]

2.28. In any event, even assuming for the purposes of argument that the task is to establish a "normal" range of P&GE ratios in the industry or for importers that are not related to the exporter, it remains the case that there is no express guidance on how this "normal" range is to be established.[32] In this context, it is clear that the Philippines' argument is simply that its suggested approach is better or that the BoA should have used an outcome that would have been favourable to the importer.[33]

2.29. For these reasons, the Panel should reject the Philippines' claims regarding the benchmark range established by the BoA.

2.5 The BoA's treatment of provincial taxes was reasonable

2.30. The Philippines argues that the BoA's decision to limit the deduction for provincial taxes to the amount that could be documented with receipts by PM Thailand was inconsistent with Article 5.1 of the CVA.

2.31. The Philippines draws an analogy to the determination of a fair comparison between the export price and the normal value under Article 2.4 of the Anti-Dumping Agreement. Under anti-dumping law, the burden is on the party claiming an adjustment under Article 2.4 to prove that it is entitled to the adjustment.[34]

2.32. The Philippines argues that it was unreasonable from the BoA to request PM Thailand to support its claimed adjustment for provincial taxes. In effect, the Philippines considers that the BoA should simply have accepted the adjustment as claimed by PM Thailand. However, when the BoA performed a reasonableness check on the amount claimed by PM Thailand, the amount

[26] Thailand's first written submission, para. 5.56; Thailand's second written submission, para. 2.66.
[27] Thailand's first written submission, para. 5.57; Thailand's second written submission, para. 2.66.
[28] Thailand's first written submission, para. 5.60; Thailand's second written submission, para. 2.66.
[29] Thailand's opening statement at the meeting of the Panel, para. 90.
[30] Thailand's opening statement at the meeting of the Panel, para. 92.
[31] Thailand's second written submission, para. 2.71.
[32] Thailand's second written submission, para. 2.74.
[33] Thailand's second written submission, para. 2.75.
[34] Thailand's first written submission, paras. 5.86-5.87; Thailand's second written submission, para. 2.81.

seemed to be too high. However, it was perfectly reasonable for the BoA to require additional substantiation of the claimed amounts from PM Thailand.[35]

2.33. The BoA requested PM Thailand to substantiate the amounts claimed by providing receipts. PM Thailand provided three types of receipts: (i) receipts showing that the tax was paid by PM Thailand; (ii) receipts showing that the tax was paid by a retailer such as a 7-11 shop on behalf of PM Thailand; and (iii) receipts showing that the tax was paid by an individual with nothing to indicate that this was paid on behalf of PM Thailand. The third category of receipts did not indicate that the payor was PM Thailand or show that the amounts were paid by retailers on behalf of PM Thailand. It was therefore perfectly reasonable for the BoA to conclude that the claimed adjustment had not been substantiated in full and to adjust the amount of the deduction accordingly.[36]

2.34. Therefore, the Panel should reject the Philippines' arguments regarding the issue of provincial taxes and find that the BoA properly limited the adjustment to the amounts that were actually documented by PM Thailand.

2.6 The BoA's treatment of transportation costs was reasonable

2.35. The Philippines argues that the BoA should have made an adjustment for transportation costs.

2.36. As discussed above with respect to provincial taxes, the burden to prove an adjustment lies on the party claiming the adjustment.[37] Since the BoA did not have its own access to the necessary records, it was up to PM Thailand to document the claim for an adjustment for transportation costs.[38]

2.37. Thailand recalls that the BoA did not make this adjustment because PM Thailand had explicitly stated in a letter dated 24 August 2011 that it was willing to waive this adjustment.[39] In response, the Philippines argued that PM Thailand had "withdrawn" its offer to "waive" an adjustment for transportation costs and that the BoA could have made this adjustment on the basis of an "estimate" provided by PM Thailand.

2.38. Thailand disagrees. In the letter referred to by the Philippines to support its point, PM Thailand did not seek a deduction for any particular amount for transportation costs, even though, in the same letter, PM Thailand provided further figures on what it considered to be the correct P&GE ratio to be used in the calculation.[40] In fact, PM Thailand *never* made a substantiated claim of an adjustment for transportation costs. As the Philippines indicates, PM Thailand referred only to an "estimate" of transportation costs in its submissions to the BoA.[41] In these circumstances, the BoA was not required to take the burden of proof entirely on itself and to be more assiduous than the importer itself in seeking out information that would have been in the possession of the importer regarding this minimal amount.[42]

2.39. Therefore, it was perfectly reasonable of the BoA not to make any adjustment for transportation costs.

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[35] Thailand's first written submission, paras. 5.88-5.92; Thailand's second written submission, paras. 2.82-2.85.

[36] Thailand's second written submission, paras. 2.86-2.87.

[37] Thailand's first written submission, para. 5.97; Thailand's second written submission, para. 2.98.

[38] Thailand's second written submission, para. 2.94.

[39] Thailand's first written submission, para. 5.98; Thailand's second written submission, para. 2.95. See Exhibit PHL-39-B, p. 18, para 4.2.

[40] Thailand's second written submission, para. 2.97.

[41] Thailand's second written submission, para. 2.100.

[42] Thailand's second written submission, para. 2.103.

2.7 The BoA did not act inconsistently with the procedures of Article 1.2(a) of the CVA

2.40. The Philippines claims that the BoA acted inconsistently with the procedural requirements of Article 1.2(a) of the CVA by failing to communicate its grounds for considering that the relationship influenced the price or allowing the importer a reasonable opportunity to respond.[43]

2.41. Thailand's view is that the procedural requirements of Article 1.2(a) do not apply *mutatis mutandis* to decisions of appellate tribunals under Article 11 of the CVA. Thailand explained that while Article 1.2(a) clearly envisages a determination of the customs value that may subsequently be subject to an appeal under Article 11, there is nothing in either Article 1.2(a) or Article 11 to suggest that the appellate tribunal must follow exactly the same procedures as must be used to reach the initial valuation decision. Thailand also explained that the logic and purpose of an appeal would also suggest that the same procedures should not apply *mutatis mutandis*, in that the issues and evidence would normally be different at an appellate stage.[44]

2.42. Moreover, Article 11 does not prescribe the procedures to be followed in appeals of customs valuation decisions. The drafters did not prescribe any such procedures or state that they intended the procedures of Article 1.2(a) to apply *mutatis mutandis* to appeals under Article 11. These omissions must be given effect in the interpretation of what procedures apply to appeals under Article 11 of the CVA.[45]

2.43. In response, the Philippines argues that since the BoA is part of the customs administration, the procedural provisions of Article 1.2(a) necessarily apply to its decisions. This does not follow. Article 1.2(a) applies to determinations of the customs value. In contrast, the BoA's task is to resolve an *appeal of a determination of customs value.* There is no reason to assume that the same procedures necessarily apply *mutatis mutandis* to both.[46] Moreover, under the Philippines' reliance on the reference to "customs administration", the procedures of Article 1.2(a) would apply to appeals to authorities within the customs administration but not to appeals to the judicial authorities (who are not part of the customs administration). It would not make sense for the procedures of Article 1.2(a) to apply to appeals in one case but not the other.[47]

2.44. The Philippines also states that the procedures of Article 1.2(a) must apply because, in its view, the BoA conducted a *de novo* assessment of PM Thailand's customs values.[48] This term appears to imply that the BoA went back and conducted exactly the same enquiry as a customs officer would have done when goods were first imported. However, this is not what the BoA did. Instead, the BoA used a testing methodology based on PM Thailand's P&GE rates, which the Philippines acknowledges was not as such inappropriate.[49]

2.45. For these reasons, the Panel should reject the Philippines' claims regarding the procedural aspects of Article 1.2(a).

2.8 The Philippines failed to establish that the BoA acted inconsistently with Article 11.3 of the CVA

2.46. The Philippines claims that the BoA acted inconsistently with Article 11.3 of the CVA, which requires that "[n]otice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing".

2.47. In effect, the Philippines' argument is that the BoA ruling did not provide the reasons for its decision in sufficient detail. However, this is incorrect. The BoA's decision makes clear both the legal conclusions and key facts on which the decision is based.[50] The BoA explains that its decision

[43] The Philippines' first written submission, paras. 338-346.
[44] Thailand's first written submission, paras. 5.119-5.124; Thailand's second written submission, paras. 2.109-2.110.
[45] Thailand's first written submission, para. 5.121; Thailand's second written submission, para. 2.103.
[46] Thailand's second written submission, paras. 2.111-2.112.
[47] Thailand's second written submission, para. 2.113.
[48] The Philippines' second written submission, para. 355.
[49] Thailand's second written submission, para. 2.114.
[50] Thailand's first written submission, paras. 5.106-5.107; Thailand's second written submission, para. 2.124.

to reject the transaction value is based on its conclusion that the relationship between purchaser and seller affected the purchase price, a conclusion reached after having examined the circumstances of sale, using the test methodology which is also at issue in this case. The BoA ruling also explains that it compared PM Thailand's P&GE rates to the "profits and general expenses rate of the industry group of imported cigarette wholesalers in the year 2002 (9.80-15.08 percent)". In its ruling, the BoA also indicated that PM Thailand's P&GE rates were not consistent with the industry rates.[51]

2.48. Moreover, the twelve points the Philippines considers that the BoA should have addressed in its decision go well beyond the level of detail that would normally be required as "reasons". Contrary to other WTO agreements (such as the Anti-Dumping Agreement and the SCM Agreement), Article 11 of the CVA does not contain such detailed requirements regarding the reasons for a decision in an appeal.[52]

2.49. Therefore, the Philippines' claim under Article 11.3 of the CVA should be rejected since it is premised on an erroneous understanding of the disciplines actually imposed by this provision.

2.9 The Philippines failed to establish that the BoA acted inconsistently with Article 16 of the CVA

2.50. Finally, the Philippines claims that the BoA ruling is inconsistent with Article 16 of the CVA because it "fails to provide basic information that is essential to understand the reasons for its customs valuation decision".[53]

2.51. However, Article 16 does not apply to decisions by appellate tribunals under Article 11.2 of the CVA. Instead, decisions of an appellate tribunal under Article 11.2 are subject to the more specific procedural rules of Article 11.3. More specifically, Article 16 provides that an importer, on written request, shall have the right to an explanation from the customs administration of how the customs value was determined. Article 11 applies to an *appeal* of the "determination of customs value" referred to in Article 16, and Article 11.3 provides that notice of the decision and the "reasons for such decision shall be provided in writing" even without a request from the importer. Article 11.3 therefore applies specifically to appeals decisions, and provides more detailed rules governing those decisions than Article 16. Therefore, Article 16 does not apply to decisions on appeal. To conclude otherwise would render Article 11.3 redundant, since it would essentially be a repetition of the disciplines contained in Article 16, and would go against the principle of effective treaty interpretation.[54]

2.52. In response, the Philippines uses the same argument discussed above with respect to the procedures under Article 1.2(a): since in both provisions (Articles 11 and 16) the text refers to the "customs administration", both obligations apply. Thailand's response is also the same: This ignores the difference between the nature of the determinations – a determination of customs value versus an *appeal* of a determination of customs value. In addition, under the Philippines' approach, Article 16 by its terms would apply only to appeals under Article 11 before bodies such as the BoA but not appeals before judicial authorities. This would make no sense.[55]

2.53. Therefore, the Philippines has failed to establish that the BoA acted inconsistently with Article 16 of the CVA.

[51] The Philippines' first written submission, para. 452; Thailand's second written submission, para. 2.124.

[52] Thailand's first written submission, paras. 5.109-5.110; Thailand's second written submission, paras. 2.125-2.129.

[53] The Philippines' first written submission, para. 462.

[54] Thailand's first written submission, paras. 5.114-5.115; Thailand's second written submission, paras. 2.132-2.133.

[55] Thailand's second written submission, paras. 2.134.

3 THE PHILIPPINES HAS FAILED TO DEMONSTRATE THAT THE CHARGES ARE INCONSISTENT WITH THE CVA

3.1. This section concerns criminal Charges that were issued by the Public Prosecutor in January 2016 and relating to 272 entries of cigarettes imported by PM Thailand. The Philippines claims that these Charges are inconsistent with Articles 1.2(a), 1.1, 2 and 3 of the CVA.

3.2. The Philippines' claims against the Charges should be dismissed *ab initio* as they suffer from fundamental legal flaws: (i) Thailand's due process rights have been violated as a result of the Philippines' use of confidential internal communications between Thailand and its legal counsel; (ii) the Philippines is precluded from challenging the Charges in these compliance proceedings because the Philippines challenged this same measure in the original proceedings; (iii) the Charges fall outside the scope of these compliance proceedings because they are not a "measure taken to comply" within the meaning of Article 21.5 of the DSU; (iv) the Philippines' claims against the Charges raise issues that are not covered by the CVA; and (v) the Charges are a measure that is not "ripe" for adjudication. In any event, the Charges are justified under Articles XX (a) and (d) of the GATT 1994. The Philippines has also failed to make a *prima facie* case of inconsistency under Article 10 of the CVA.

3.1 Thailand's due process rights have been violated

3.3. In its request for a procedural ruling, Thailand addresses a serious violation of Thailand's due process rights in these proceedings. In its second written submission, the Philippines submitted to the Panel as Exhibit PHL-150 materials including confidential, internal Thai government memorandum to which was attached lawyer-client privileged legal advice from Thailand's legal advisors in this dispute, the Advisory Centre on WTO Law (ACWL). Thailand has not waived, and does not waive, either expressly or impliedly, its privilege in these documents or its right to obtain legal advice to assist it in presenting its case to the Panel in these proceedings. As explained in more detail below, the Philippines' decision to use these materials violates Thailand's due process rights under Article 11 of the DSU and, in addition, appears inconsistent with the Philippines' obligation under Article 3.10 of the DSU to engage in these proceedings in good faith.[56]

3.4. The due process rights of parties to a dispute settlement proceeding are an extremely serious matter. Any failure to observe these rights, especially with respect to a matter as important to the integrity of the process as the right of a Member to defend itself, must be rectified fully wherever possible. If the failure cannot be fully rectified, such that it continues to cast a shadow over the fairness and objectivity of the proceedings, the proceedings have been tainted and the Panel must decline to rule on the claims before it.[57]

3.5. Article 11 of the DSU requires a panel 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 ... ". Article 11 embodies the due process inherent in WTO dispute settlement proceedings and the due process rights of the parties.[58]

3.6. As the Appellate Body made clear in the original proceedings in this dispute, "[d]ue process is a fundamental principle of WTO dispute settlement".[59] The Appellate Body emphasized that "[i]n conducting an objective assessment of a matter [under Article 11 of the DSU], 'a panel is bound to ensure that due process is respected'".[60] The Appellate Body explained the basis for this as follows:

> Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. The protection of due

[56] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.1.
[57] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.2.
[58] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.5.
[59] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.
[60] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147, quoting Appellate Body Report, *Chile – Price Band System,* para. 176.

> process is thus a crucial means of guaranteeing the legitimacy of and efficacy of a rules-based system of adjudication.[61]

3.7. The Appellate Body emphasized that panels must be "vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU".[62]

3.8. The disclosure of privileged legal advice to a WTO panel, without the consent of the Member, necessarily disadvantages that Member, violates its due process rights, and undermines the objectivity and fairness of the panel's analysis. A panel must be able to address a party's arguments and defences with a clear and open mind. This cannot happen when the panel has before it not merely the arguments put forth by a party but also some of the legal advice received by the party in the process of preparing for the dispute. Put another way, a party has a right to have its arguments before a panel judged only according to the standard in Article 3.2 of the DSU of whether they are based on a correct clarification of the provisions of the covered agreements in accordance with the customary rules of interpretation of public international law. A party should not be forced also to have to justify its arguments in the light of the legal advice it may have received in preparing those arguments. This would be particularly inappropriate where, in order to explain how the context in which it received legal advice and how that advice relates to the arguments it has made before a panel, the party would necessarily be forced to reveal further details of what questions it asked its legal advisors and more details regarding the nature and context for the advice provided. To force a party into having to explain the legal advice it has obtained is, therefore, absolutely inconsistent with its due process right to be able to defend itself meaningfully before a panel.[63]

3.9. Moreover, a panel's own ability to perform an objective evaluation of the case before it is necessarily tainted by the panel having before it privileged legal advice obtained by a party in the course of preparing for proceedings. No matter how great the integrity of the members of a panel (and, indeed, of the officers of the Secretariat assisting them) the objectivity of the panel is tainted – not of its own doing – when it is made aware of the privileged legal advice obtained by a party as part of its preparations. In these circumstances, Thailand notes that the Rules of Conduct for the DSU refer to situations that might "give rise to justifiable doubts" as to the impartiality of the covered persons".[64] Such doubts may arise, of course, through no fault of the individuals themselves. Thailand also recalls that the "protection of due process is thus a crucial means of guaranteeing the legitimacy of and efficacy of a rules-based system of adjudication".[65] This means that with respect to the protection of due process rights, justice must not only be done, it must be seen to be done.[66]

3.10. In the Philippines' words, "PM Thailand exercised its rights under Thai law to request, through the criminal court, evidence from the Public Prosecutor's files. PM Thailand requested a copy of the ACWL opinion, together with a letter from the Ministry of Commerce to the Attorney General concerning this opinion".[67] To the best of Thailand's knowledge, in exercising its rights under Thai law, PM Thailand did not indicate to the Thai Criminal Court that these materials would be considered as privileged and confidential under the DSU and that PM Thailand sought these documents with a view to providing them to the Philippines for use in WTO dispute settlement proceedings. On 8 April 2016, the Criminal Court instructed the Public Prosecutor to provide various documents, including those in Exhibit PHL-150, to PM Thailand for the purposes of assisting in its defence. On 19 April, in accordance with Thai law, the Public Prosecutor complied with the Court's order. Thus, these documents were provided to PM Thailand, not to the government of the Philippines.[68]

3.11. The Philippines states that PM Thailand provided the Philippines with these materials on 2 June 2016, on the date of the formal consultations in Bangkok in these proceedings. Thus, even

[61] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.
[62] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150. See Thailand's request for a procedural ruling regarding the violation of its due process rights, paras. 1.6-1.7.
[63] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.14.
[64] Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1 (11 December 1996), para. III.1.
[65] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.
[66] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.15.
[67] The Philippines' second written submission, para. 433.
[68] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.30.

though the documents were clearly marked as "Confidential" and were provided to PM Thailand ostensibly as evidence for the purpose of PM Thailand's defence in the Thai criminal proceedings, it appears clear that the documents were actually requested and obtained at the behest of the government of the Philippines, not for the purpose of the domestic Thai proceedings, but to be provided to the government of the Philippines for use in the WTO dispute settlement proceedings.[69]

3.12. Once again, even though the Philippines was undoubtedly aware of the privileged and confidential nature of these materials, the Philippines declined the opportunity during the consultations in Bangkok to check, in good faith, with the relevant officials of the Thai government whether privilege had been waived in these materials under WTO law.[70]

3.13. As noted above, the Philippines provided these materials to the Panel in its second written submission on 12 April 2017, more than 10 months after it says it received them from PM Thailand. During that 10-month period, including in the preparation of its second written submission, the Philippines never made any good faith effort to check with Thailand whether privilege in these materials had been waived.[71]

3.14. Again, there can be no doubt whatsoever that the Philippines fully understood that these materials would be considered as subject to lawyer-client privilege and that had they asked at any time, Thailand would have asserted privilege in the documents.[72]

3.15. In presenting these materials to the Panel, without clarifying with Thailand whether it could do so, the Philippines expressly seeks to undermine Thailand's credibility before the Panel and place it in a disadvantageous position. Thus, the Philippines states that "Thailand and its legal counsel accept ... ".[73] Further, the Philippines claims that the legal advice obtained by Thailand "directly contradicts the position that Thailand now takes before the Panel".[74] It is not an exaggeration to say that the *only* purpose for the Philippines' actions is to attempt to undermine Thailand's credibility and to restrict its ability to defend itself in these proceedings.[75]

3.16. The Philippines was required to accord Thailand the full measure of protection of its due process rights and not to engage in unfortunate litigation techniques that would frustrate the objectives of the DSU, which include the due process rights inherent in Article 11 of the DSU instead of respecting these rights, the Philippines and/or PM Thailand sought to obtain privileged material in a circuitous manner, without respect for Thailand's rights. In any event, regardless of precisely how the Philippines obtained this material, it is clear that the Philippines made no effort to respect Thailand's rights by checking in good faith with Thailand whether privilege had been waived.[76]

3.17. Thailand made clear that it considered that its due process rights had been violated regardless of whether the Philippines had obtained these materials "legally". As Thailand explained during the hearing, if materials are obtained illegally, it is beyond dispute that they cannot be used. Issues of good faith and ethical protection of due process rights scarcely arise. Thus, a finding that materials were obtained legally is just the beginning of the analysis of good faith and due process, not the end.[77]

3.18. It is one of the oldest principles of law that what is legal cannot be equated with what is proper. As long ago as the sixth century CE, the Code of Justinian provided that "non omne quod licet honestum est" (not everything that is permitted is honourable). Thailand strongly disagrees with an interpretation of what previous panels and the Appellate Body have said about the duties

[69] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.31.
[70] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.32.
[71] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.33.
[72] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.34.
[73] The Philippines' second written submission, subheading a on page 132.
[74] The Philippines' second written submission, para. 577.
[75] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.35.
[76] Thailand's request for a procedural ruling regarding the violation of its due process rights, para. 1.39.
[77] Thailand's responses to the Panel questions following the meeting with the parties, p. 40.

of panels and, indeed, parties themselves to protect the due process rights of other parties as meaning that anything goes as long as it is legal.[78]

3.19. In light of the foregoing, Thailand requested the Panel to find that due to the violation of Thailand's due process rights under WTO law, under Article 11 of the DSU, the Panel can no longer rule on the claims before it. In addition, the Panel should delete from the record the exhibit at issue and any references to it.[79] However, on 2 August 2017, the Panel informed the parties that it decided to reject Thailand's assertion that its due process rights have been violated. Consequently, it rejected Thailand's request that the Panel should decline to rule on the charges, and declined to order the Philippines to withdraw Exhibit PHL-150. It further stated that it would elaborate the reasons for its decision in its Report.[80]

3.20. Thailand therefore expressly requests the Panel to explain clearly in its ruling whether it considers that the Philippines' good faith/due process obligations and the Panel's due process obligations extended merely to inquiring whether the Philippines acted legally. If not, Thailand requests the Panel to explain clearly what additional steps were required of the Philippines and where it took those steps in this case.

3.2 The Philippines is precluded from raising the Charges-related claims in these Article 21.5 proceedings

3.21. Thailand submits that the Philippines is precluded from pursuing the Charges-related claims in these Article 21.5 proceedings because the Philippines already challenged this same measure in the original dispute, with respect to which the Philippines failed to make a *prima facie* case.[81]

3.22. In this case, the Charges were brought in the context of a criminal investigation conducted by Thailand's Department of Special Investigation (DSI) that was challenged by the Philippines in the original panel proceedings in this dispute. The Philippines' original panel request (2008 panel request) contained claims with respect to the DSI criminal investigation.[82] The Philippines could have sought rulings and recommendations from the panel on the consistency of the DSI investigation with WTO law. However, it ultimately decided not to do so and, therefore, the Panel made no findings with respect to the criminal investigation.[83]

3.23. The jurisprudence confirms that the preclusion doctrine applies when the failure to make a *prima facie* case is attributable to the complainant, either because of the complainant's inactivity or inability to make a *prima facie* case.

3.24. The panel's decision in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*_offers a pertinent example of a claim excluded from Article 21.5 proceedings due to the complainant's inactivity to make a prima face case in the original proceedings.[84] The decisions in *EC – Bed Linen (Article 21.5 – India)*[85] and *US – Shrimp (Article 21.5 – Malaysia)*[86] offer examples of claims excluded from Article 21.5 proceedings due to the complainant's inability to make a *prima facie* case in the original proceedings.

3.25. The Philippines finds itself in a similar situation. The failure to make a *prima facie* case of violation before the panel is attributable to its own actions or, more precisely, to its own inactivity to substantiate its claims under Articles X:3(a) and X:3(b) of the GATT 1994. As the Appellate Body did in the cases described above, the Panel in this Article 21.5 dispute should exclude from its terms of reference the Philippines' challenge against the Charges.

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[78] Thailand's responses to the Panel questions following the meeting with the parties, p. 40.

[79] Thailand's request for a procedural ruling regarding the violation of its due process rights, paras. 1.4, 1.41, 1.44; Thailand's response to Panel question 37(b).

[80] Panel's communication to the parties, 2 August 2017.

[81] Thailand's preliminary ruling request of 12 January 2017, paras. 3.26 *et seq.*

[82] The Philippines' original request for the establishment of a panel, WT/DS371/3, 6 October 2008, para. 7 (2008 panel request).

[83] Thailand's preliminary ruling request of 12 January 2017, para. 1.3.

[84] Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.74.

[85] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 78 – 99.

[86] Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 89 – 99.

3.26. The Philippines submits that, under WTO jurisprudence relating to Article 21.5 of the DSU, the preclusion doctrine applies when the complainant attempts to challenge in compliance proceedings a measure that remains unchanged following the original proceedings.[87] According to the Philippines, this jurisprudence does not apply in the present case because the Charges are a different measure from the DSI investigation.

3.27. The Philippines' argument that the Charges are a distinct measure from the DSI investigation is without merit. The Philippines itself acknowledges that the Charges are the "culmination" of the DSI investigation.[88]

3.28. The Philippines' approach not only lacks support in WTO jurisprudence but also contradicts common sense. The term "investigation" is defined as "[t]he action or process of investigating".[89] The term "process", in turn, is defined as "[a] thing that goes on or is carried on; a continuous series of actions, events, or changes".[90] It follows that an investigation is, by definition, a continuous process that is composed of various events.[91] The stages of an investigation – the beginning, the development, and the end – are inseparable; one cannot exist without the other. A culmination cannot exist in the abstract; it is necessarily part of the process that preceded it. The Philippines' efforts to divorce the culmination of the investigation from its earlier stages itself amount to an artificial separation of the investigation's various components.

3.29. For the reasons stated above, Thailand requests the Panel to exclude from its terms of reference the Philippines' claims with respect to the Charges. The Philippines should not be given a second chance to revive a legal challenge that it initiated but abandoned in the original proceedings. This is not the function of Article 21.5 of the DSU.

3.3 The Charges are not a measure taken to comply within the meaning of Article 21.5 of the DSU

3.30. Even if the Panel finds that the preclusion principle is not applicable, the Philippines' claims regarding the Charges would also be outside the scope of Article 21.5 because the Charges do not have a close nexus with the DSB recommendations and rulings or with Thailand's declared measure taken to comply (the September 2012 BoA Ruling).[92]

3.31. To recall, Article 21.5 proceedings are limited in scope. They "do not concern just *any* measure"[93], but only measures taken to comply with the DSB rulings and recommendations. The Appellate Body has warned that "characterizing an act by a Member as a measure taken to comply when that Member maintains otherwise is *not something that should be done lightly* by a panel".[94]

3.32. To determine whether the measure not declared as a measure taken to comply by the defendant is nonetheless a "measure taken to comply", the Appellate Body has articulated a "nexus-based test" which consists of examining whether, in terms of timing, nature and effects, the disputed measure is sufficiently connected with the declared measures taken to comply and with DSB ruling and recommendations.[95]

3.33. In the present dispute, in terms of *timing*, the long time gaps between the initiation of the DSI investigation (August 2006), the adoption by the DSB of the original panel and Appellate Body reports (July 2011), and the filing of the Charges (January 2016) indicate that they are too

[87] The Philippines' first written submission, para. 700.

[88] The Philippines Article 21.5 panel request, WT/DS371/18, 29 June 2016, para. 11. See also the Philippines' first written submission, paras. 471 – 493.

[89] *Shorter Oxford English Dictionary*, 6th edn (Oxford Univ. Press, 2007), Vol. 1, p. 1425.

[90] *Shorter Oxford English Dictionary*, 6th edn (Oxford Univ. Press, 2007), Vol. 2, p. 2356.

[91] The Philippines' description of the "procedural history of the Charges" illustrates perfectly that the DSI investigation consisted of various stages, which culminated into the Charges (The Philippines' first written submission, paras. 471 – 493).

[92] Thailand's rebuttal submission on the preliminary ruling request, para. 3.9.

[93] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. (original emphasis) See Thailand's rebuttal submission on the preliminary ruling request, para. 3.13.

[94] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 74. (emphasis added). See Thailand's first written submission, para. 3.13.

[95] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 77. See Thailand's rebuttal submission on the preliminary ruling request, paras. 3.14-3.20.

remote.[96] Moreover, the investigation that led to the Charges and the entries covered by the Charges (July 2003 to June 2006) pre-date the DSB recommendations and rulings.[97] The entries covered by the Charges also pre-date the entries covered by the DSB recommendations and rulings (August 2006 to September 2007).[98]

3.34. In terms of *nature*, the Charges cover entries different from the specific entries covered by the panel's findings: the Charges cover 272 entries from July 2003 to June 2006, whereas the panel's finding covered another specific set of 118 entries from August 2006 to September 2007. To recall, in the original proceedings, the Panel rejected the Philippines' assertion that Thailand maintained a "general rule requiring the rejection of the transaction value and the use of the deductive method".[99] Therefore, the original panel's rulings concerned only the specific set of 118 entries, not any previous or subsequent set of entries. Moreover, the Charges are a mere accusation of wrong doing. Thus, they are criminal in nature, and they do not involve any customs valuation decision. Finally, they were adopted by a different government agency than the ones responsible for implementing the panel's findings.[100]

3.35. In terms of the *effects* of the Charges, the Charges do not have any effects on the customs valuation of the entries at issue in the original proceedings, because they do not concern the same entries and do not entail a customs valuation determination.[101] To recall, Thailand implemented the original panel's ruling with respect to the 118 entries in its September ruling. In that ruling, Thailand's BoA accepted PM Thailand's declared transaction value with respect to these specific 118 entries that were subject to the original panel's findings under the CVA.[102] The Philippines acknowledges this fact.[103]

3.36. Thus, the examination of the timing, nature and effects of the Charges clearly shows that the Charges are not sufficiently connected to the DSB recommendations and rulings and the declared measure taken to comply.

3.37. The Philippines argues that the Charges are nonetheless sufficiently connected to the DSB recommendations and rulings, and to Thailand's declared measure taken to comply because they share certain characteristics, such as the fact that they refer to the same importer and exporter, same importing and exporting country, same products and brands.[104] However, the Appellate Body has made clear that identity in product and country coverage is insufficient to establish a close nexus. General similarities are not sufficient to establish a close nexus.[105]

3.38. Moreover, the Philippines argues that the Charges involve the same type of determination as that at issue in the original proceedings. However, the Philippines' assertion is based on a fundamental misunderstanding of the nature of the Charges. The Charges do not form part of a continuum with any customs valuation decision dealt with in the original proceedings. They are an accusation of criminal actions, and not a decision or determination for the purpose of levying customs duties. The purpose of the Charges is to seek a finding of and punishment for alleged customs fraud by an importer, not to levy *ad valorem* customs duties.[106]

3.39. Therefore, the Charges do not share a sufficiently close nexus with the DSB recommendations and rulings or with Thailand's declared measure taken to comply such that it can be considered a measure taken to comply within the meaning of Article 21.5 of the DSU.

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[96] Thailand's rebuttal submission on the preliminary ruling request, paras. 3.29-3.31.
[97] Thailand's opening statement at the meeting of the Panel, para. 46.
[98] Thailand's response to Panel questions 41(b) and 104.
[99] Original Panel Report, para. 8.2(a).
[100] Thailand's rebuttal submission on the preliminary ruling request, paras. 3.32-3.42.
[101] Thailand's rebuttal submission on the preliminary ruling request, paras. 3.43-3.48.
[102] Thailand's rebuttal submission on the preliminary ruling request, para. 3.25; Thailand's second written submission, para. 3.61.
[103] The Philippines' first written submission, paras. 61, 553; the Philippines' second written submission, para. 467.
[104] The Philippines' second written submission, para. 482.
[105] Appellate Body Report, *US – Zeroing (Article 21.5 - EC)*, para. 239. See Thailand's opening statement at the meeting of the Panel, para. 47.
[106] See Thailand's rebuttal submission on the preliminary ruling request, para.3.42; Thailand's second written submission, para. 3.50; Thailand's opening statement at the meeting of the Panel, para. 48.

3.4 The Philippines failed to show how the provisions of the CVA on which it relies govern criminal proceedings

3.40. The Charges do not constitute "customs valuation" within the meaning of the CVA and, therefore, are not subject to the disciplines of this agreement.

3.41. The CVA's scope of application is limited to "customs valuation" conducted by the "customs administration" of WTO Members.[107] The definition of "customs valuation" is thus fundamental for understanding the scope of application of the CVA. Article 15.1(a) of the CVA defines the "customs value of imported goods" to mean "the value of goods for the purposes of levying ad valorem duties of customs on imported goods". In *Colombia – Ports Entry*, the panel found it necessary to define the term "customs valuation" to decide whether one of Colombia's measures fell within the purview of the CVA. The panel sought guidance from Article 15.1(a) of the CVA and, on this basis, found that "customs valuation" refers to "the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties".[108] The panel further noted that its definition of "customs valuation" has two central aspects: (i) the value of the goods, which is used (ii) for the purposes of levying *ad valorem* customs duties.[109]

3.42. Thailand also notes that the CVA refers repeatedly and exclusively to the work of the "customs administration" of a Member. The CVA contains no references whatsoever to the work of government agencies exercising police powers. While Article 17 of the CVA preserves the right of customs administrations to satisfy themselves as to the truth or accuracy of customs declarations, this should not be interpreted as limiting the police power with respect to the enforcement of customs laws. Had the drafters intended the CVA to circumscribe the exercise of the police powers and not merely the work of customs administrations in determining the customs value of imported goods, they would have said so.

3.43. Given their criminal nature, the purpose of the Charges, and of the legal proceedings before the Criminal Court, is to ascertain whether PM Thailand has engaged in any criminal conduct as provided in Section 27 of Thailand's Customs Act. Their purpose is not to determine the customs value of the 272 entries at issue in order to levy ad valorem customs duties. Nowhere in the Charges does the Public Prosecutor indicate that the criminal accusations against PM Thailand shall be the basis for levying ad valorem customs duties.

3.44. Thailand's position is further supported by Article XX(d) of the GATT 1994, which expressly provides that nothing in the GATT, including Article VII governing valuation, shall prevent Members from deviating from GATT rules with respect to measures necessary to secure compliance with laws or regulations "relating to customs enforcement".[110]

3.45. Furthermore, a report by the WTO's Technical Committee on Customs Valuation expressly states that "[n]othing in the Valuation Agreement prevents an administration from enacting tough enforcement provisions in cases of valuation fraud".[111]

3.46. In response, the Philippines advances various arguments, all of which are without merit.

3.47. The Philippines argues that the Charges constitute "customs valuation" and, therefore, fall within the scope of the CVA. The Philippines contends that the references in the Charges to King Power's prices mean that the Public Prosecutor used these prices as alternative customs value for the levying of customs duties.[112]

3.48. Thailand explained that the references to King Power's prices in the Charges, which are contained in an Annex, serve the purpose of providing a possible benchmark to the Criminal court

[107] Thailand's first written submission, para. 6.24.
[108] Panel Report*, Colombia – Ports of Entry*, para. 7.83.
[109] Panel Report*, Colombia – Ports of Entry*, para. 7.84.
[110] Thailand's first written submission, para. 3.71
[111] Committee on Customs Valuation, *Technical Committee on Customs Valuation response to the terms of reference for the work of the Technical Committee on Customs Valuation in connection with concerns on the accuracy of the declared value (G/VAL/51)*, G/VAL/54, 16 May 2003, para. 33
[112] The Philippines' opening statement at the substantive meeting, paras. 87 – 89.

to impose a fine in the event of a conviction.[113] Under Thai law, the Public Prosecutor is required to propose the amount of the potential fine to the Criminal Court.[114] Clearly, a criminal fine is not the same thing as a customs duty. Therefore, the references to King Power in the Annex of the Charges is not the basis for the accusation of a criminal offence under Section 27 of the Customs Act.[115]

3.49. Thailand recalled that the purpose of the Charges is not to determine the amount of *ad valorem* customs duties owed by Philip Morris; rather, their objective is to prosecute a criminal offence stipulated in Section 27 of Thailand's Customs Act.

3.50. The Philippines also argues that the Charges constitutes "customs valuation" because a necessary element of the offence under Section 27 of the Customs Act is the under-declaration of customs value, "which necessarily means that the Public Prosecutor determined the customs value that it considered to be correct".[116] As clarified by Thailand, the Philippines' position is incorrect, as it ignores that customs fraud, under Section 27 of the Customs Act, requires a showing not merely of an under-statement of the declared value, but also a showing of an intent to defraud. The element of intent in Section 27 is known in criminal law as *mens rea,* which refers to a situation where the accused individual acts with the express intent to avoid the payment of tax revenue.[117] This is a common feature of many legal systems in the world, including that of the Philippines. Section 3602 of the Philippines' Tariff and Customs Code criminalizes customs fraud, which the Philippines' Supreme Court has referred to as "technical smuggling".[118] According to the Philippines' Supreme Court, this fraudulent practice is "[o]ften committed by means of misclassification of the nature, quality or value of goods and articles, undervaluation in terms of their price, quality or weight, and misdeclaration of their kind".[119]

3.51. The Philippines argues that, by using the word "price" in the Charges, the Public Prosecutor conducted an act of customs valuation within the meaning of the CVA.[120] The Philippines bases this assertion on Section 2 of the Customs Act, which defines "price" as the customs value. The Philippines repeats this argument when alleging that the Public Prosecutor recognized it had engaged in customs valuation under the CVA in a letter to the DSI. The Philippines says that the Public Prosecutor again mentioned the word "price" in a letter to the DSI in which he explained that 18 entries were excluded from the Charges because the BoA had resolved to "accept the prices".[121]

3.52. The Philippines' argument is based on an incorrect understanding of Thailand's Customs Act. The Philippines incorrectly assumes that the term "price" has the same meaning throughout the entire Customs Act. This is not the case. The preamble of Section 2 of the Customs Act states that the definitions set out in Section 2 may have different meanings, which can be discerned only by looking at the specific provision of the Customs Act that is being applied. In this case, Section 103 of Thailand's Customs Act is the relevant provision to determine the meaning of the word "price" as used in the Charges. The text of Section 103 makes clear that "price" under this provision has a different meaning from "price" in Section 2. This triggers the application of the preamble of Section 2 mentioned above, because Section 103 stipulates a different rule from that of Section 2, such that the definitions of Section 2 do not apply.[122]

3.53. In response to Thailand's arguments that the scope of the CVA is also limited to acts of the "customs administration", which does not include acts of the Public Prosecutor, the Philippines' argumentation changed as the proceedings advanced, reaching a point where the Philippines contradicted its own arguments and actually supported Thailand's position.

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[113] Thailand's first written submission, para. 6.40.
[114] Thailand's response to Panel question 99 (d).
[115] Thailand's response to Panel question 32 (a).
[116] The Philippines' second written submission, para. 600.
[117] Thailand's response to Panel question 32.
[118] Thailand's opening statement at the substantive meeting, para. 17 (referring to the Philippines' Tariff and Customs Code, Section 3602, Exhibit THA-43).
[119] Thailand's opening statement at the substantive meeting, para. 17 (referring to Republic of the Philippines, Supreme Court, *Bureau of Customs Vs. The Honorable Agnes Vst Devanadera,* G.R. No. 193253, 8 September 2015, page 22, Exhibit THA-44).
[120] The Philippines' second written submission, paras. 590 - 602.
[121] he Philippines' second written submission, para. 616 and Exhibit PHL-113-B.
[122] Thailand's second written submission, paras. 3.115 – 3.121.

3.54. The Philippines first proposed a "functional" interpretation of the term "customs administration", whereby the CVA should apply to acts of any governmental entity, regardless of its classification under municipal law, provided that this entity performs customs valuation functions.[123] This "functional" interpretation cannot apply to the CVA's procedural obligations, because entities outside the customs administration *stricto sensu*, such as the Public Prosecutor or the Supreme Court, do not follow the procedures of the CVA when investigating and prosecuting acts of customs fraud.[124] Realizing the flaw of its original proposition, the Philippines changed its position: it maintained the "functional" interpretation of "customs administration" but only for the CVA's substantive obligations, and proposed an "institutional" interpretation of "customs administration" for the CVA's procedural obligations.[125] Under an "institutional" interpretation, the term "customs administration would encompass only those government entities whose institutional and structural features determine whether they are part of the customs administration.

3.55. This bifurcated interpretation of "customs administration" also fails because it lacks support in the text of the CVA. The term "customs administration" is used throughout the CVA without any indication that its scope could vary depending on the type of obligation.[126] A close reading of the CVA shows that, where the drafters wished to distinguish different types of authorities for different obligations, they did so expressly. Whereas most of the substantive and procedural obligations refer to "customs administration", certain CVA provisions, such as Article 10, refer generally to "authorities". This indicates that the CVA negotiators, aware of the different types of authorities that could be subject to CVA disciplines, decided that most substantive and procedural obligations of the CVA would apply only to the "customs administration".

3.56. Thailand submits that the term "customs administration" must have the same meaning throughout the CVA, regardless of the type of obligation. In Thailand's view, when interpreting the term "customs administration", the only reasonable approach is an institutional interpretation that applies to the CVA as a whole, i.e. the CVA's substantive and procedural obligations.

3.57. The Philippines also cites the Appellate Body findings in *US – 1916 Act* as support for its argument that "[t]he separate 'intent' element of the Charges does not detract from" the conclusion that the Charges involve customs valuation for purposes of the CVA.[127] The Philippines' reference to that dispute is inappropriate. In *US – 1916 Act*, the Appellate Body found that the US measure violated Article 18.1 of the Anti-Dumping Agreement, a provision that limits the types of measures Members may take against the act of "dumping" to those expressly stated in the Anti-Dumping Agreement. In contrast, no similar provision exists in the CVA that would prevent Members from applying criminal penalties to situations involving a false declaration of the value of imported goods. The silence of the CVA in this regard confirms Thailand's position that WTO Members are free to impose criminal penalties on customs fraud.[128]

3.58. In summary, the Philippines has failed to demonstrate that the issues addressed in its claims against the Charges are covered by the CVA as "customs valuation" conducted by Thailand's "customs administration".

3.5 The Philippines failed to rebut Thailand's argument that the Charges are a matter not "ripe" for adjudication

3.59. In addition, Thailand considers that the Panel lacks a basis to rule on the Philippines' claims regarding the Criminal Charges because the matter is not "ripe" for adjudication in WTO dispute settlement proceedings. Put simply, where the Charges are pending before the Thai Criminal Court and that Court has yet to hear or evaluate the evidence, let alone reach a decision, a WTO Panel has no basis on which to evaluate the outcome of the matter at this point. The Philippines' claims

[123] The Philippines' second written submission, paras. 553 and 572.
[124] Thailand's second written submission, paras. 3.91-3.92.
[125] The Philippines' response to Panel question 92, para 179; See also Philippines' response to Panel question 102, para 235.
[126] Thailand's comments on the Philippines response to Panel question 92 (a) and (b), p. 22.
[127] The Philippines' response to Panel question 97, para. 209. See also the Philippines' oral statement at the substantive meeting, para. 81.
[128] Thailand's comments on the Philippines response to Panel question 97 (c), p. 27.

represent an unprecedented attempt to get a WTO panel to interfere in pending domestic criminal proceedings.[129]

3.60. Thailand explained that the doctrine of ripeness is present in WTO law under different provisions. First, it finds support in a panel's duty to make an objective assessment of the case before it under Article 11 of the DSU. A panel cannot make an objective assessment of a matter within the meaning of that provision if that matter is not ripe for adjudication. This principle is particularly valid in the context of ongoing court proceedings, where the decision of the court remains uncertain, and many unknown facts, such as evidence that will be presented, may still influence that decision.[130] In *US – Shrimp (21.5 – Malaysia)*, the Appellate Body held that the panel was right not to examine a US Court ruling that was pending before the US Court of Appeals, because it would have engaged in "speculation" contrary to its duty under Article 11.[131] Moreover, Article 11 of the DSU dictates that panels may not engage in *de novo* reviews. This implies that a panel may only examine the matter where a decision has been reached. Otherwise, the panel would act as an initial trier of the facts and would engage in a *de novo* review contrary to article 11 of the DSU.[132]

3.61. Second, the doctrine of ripeness also finds support in Articles 3.4 and 3.7 of the DSU. These provisions make clear that the objective of the dispute settlement process is to provide a positive and effective resolution to disputes. In the case of ongoing court proceedings, where the court has not reached a decision and the outcome is still uncertain, a panel cannot provide a "satisfactory settlement" or a "positive solution" to the dispute within the meaning of Articles 3.4 and 3.7 of the DSU.[133]

3.62. Third, the doctrine of ripeness finds support in a panel's obligation under Article 19.1 of the DSU to recommend that the Member concerned bring its measure into conformity with the agreement with which the measure is inconsistent. In order for a panel to be able to make such recommendation, there has to be a measure that is capable of being brought into conformity. If a matter is not "ripe", a panel will be unable to recommend that the Member brings its measure into conformity with its WTO obligations.[134]

3.63. Fourth, professor William Davey situated the doctrine of ripeness in WTO dispute settlement proceedings in the distinction between mandatory and discretionary measures. Under that distinction, when a measure, such as a statute, provides discretion in its application to an agency of the government, a WTO panel can make a finding of WTO-inconsistency only when the statute has actually been applied in a manner that is WTO-inconsistent.

3.64. Fifth, in the anti-dumping context, Article 17.4 of the Anti-Dumping Agreement provides that a Member may only challenge a measure when it is ripe for adjudication, i.e. when a provisional or a definitive measure is imposed. A Member may not challenge a decision to initiate an anti-dumping investigation until such provisional or definitive measure has been imposed.[135] In the context of subsidies, a challenge to an actionable subsidy under Article 5 of the SCM Agreement is not "ripe" until sufficient time has passed – three years under Article 6.3(d) – to enable a panel to determine whether the measure has had adverse effects.[136] These are examples of how the doctrine of ripeness is reflected in WTO law.

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[129] Thailand's first written submission, para. 6.48.

[130] Thailand's first written submission, paras. 6.57-6.60; Thailand's second written submission, para. 3.138.

[131] Appellate Body Report, *US – Shrimp (21.5 – Malaysia)*, para. 95.

[132] Thailand's first written submission, para. 6.61; Thailand's second written submission, para. 3.140.

[133] Thailand's first written submission, paras. 6.62-6.65; Thailand's second written submission, para. 3.141.

[134] Thailand's first written submission, paras. 6.66-6.67; Thailand's second written submission, para. 3.143.

[135] Thailand's first written submission, para. 6.69; Thailand's second written submission, paras. 3.147, 3.164; Thailand's comment on the Philippines' response to the Panel question 102.

[136] Thailand's second written submission, paras. 3.145, 3.164; Thailand's comment on the Philippines' response to the Panel question 102.

3.65. Sixth, the doctrine of ripeness is also reflected in US law, Swiss law, and in the context of the International Court of Justice.[137]

3.66. Finally, as the Panel rightly pointed out, Articles 1 through 7 of the CVA apply only to measures that constitute a customs valuation "determination". A "determination" is defined as "[t]he settlement of a suit or controversy by the authoritative decision of a judge or arbiter; a settlement or decision so made, an authoritative opinion".[138] In US – *Section 301 Trade Act*, the panel, in assessing a claim under Article 23.2(a) of the DSU, found that the term "determination" implies "a high degree of firmness or immutability, i.e. a more or less final decision".[139] Article 11 of the CVA further confirms this view. It provides that an importer shall have a right to appeal a customs valuation determination. Therefore, only measures that constitute "more or less final decision[s]" may be subject to an appeal.[140]

3.67. In the present case, it is beyond dispute that the Charges mark the beginning of the Criminal Court proceedings. They are part of a process which started in 2006 with the DSI investigation, "culminated" in the Charges being filed by the Public Prosecutor in January 2016, and led to current examination by the Thai Criminal Court. As part of this process, hearings will take place and a considerable amount of evidence will be presented before the Court. The Court is expected to render its decision around mid-2018 at the earliest.[141]

3.68. It is clear from that description that the Charges do not constitute an evidence of guilt, and do not reflect all the evidence that the Public Prosecutor will present or the evidence supporting the defendant. Much less do they amount to a decision by the Court whether the accused is guilty, or whether a fine will be imposed.[142]

3.69. Moreover, the Charges do not meet the threshold of a "determination" covered by the CVA. They do not amount to a "more or less final decision" that has "a high degree of firmness and immutability". They are a mere accusation of wrong-doing. There will only be something akin to a "more or less final decision" once the Court renders its decision based on all the evidence it still needs to assess.[143] Article 11 of the CVA also supports this position, because only "more or less final decision[s]" may be subject to an appeal under that provision. If, as the Philippines asserts, the Charges amount to a customs valuation "determination", then Thai authorities would also have to provide a right to appeal the Charges under Article 11. This makes no sense and would be impracticable.[144]

3.70. In light of these features, the Panel cannot make "an objective assessment of the matter … including an objective assessment of the facts of the case" within the meaning of Article 11 of the DSU. It would be engaging in extensive *de novo* review or making itself the initial trier of facts in a manner that would exceed its mandate under Article 11. It would also not be providing a positive and effective solution to this dispute in accordance with Articles 3.4 and 3.7 of the DSU by making a ruling on ongoing Court proceedings that are far from being over. The Panel can simply not pre-empt the outcome of the Criminal Court proceedings.[145]

3.71. Moreover, there is no precedent for a WTO panel to put itself in the place of a domestic tribunal and make a determination that is within the jurisdiction of that tribunal before the tribunal itself has a chance to make its ruling. The Philippines has provided no basis in WTO law for a WTO

[137] Thailand's first written submission, paras. 6.51-6.54; Thailand's second written submission, para. 3.135.

[138] *Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p.663. See Thailand's response to Panel question 38(a).

[139] Panel Report, *US – Section 301 Trade Act*, fn 657. This approach was endorsed by the panel in *EC – Commercial Vessels*, para. 7.212, and the Appellate Body in *Canada/US – Continued Suspension*, paras. 396. See Thailand's response to Panel question 38(b).

[140] Thailand's response to Panel question 38(b).

[141] Thailand's first written submission, paras. 6.73-6.77; Thailand's second written submission, paras. 3.153-3.156.

[142] Thailand's second written submission, para. 3.155.

[143] Thailand's response to Panel question 38(b).

[144] Thailand's comment on the Philippines' response to the Panel question 102.

[145] Thailand's first written submission, para. 6.79; Thailand's second written submission, para. 3.156.

panel to make such a pre-emptive ruling before a domestic tribunal has had a chance to make its ruling.[146]

3.72. In light in these facts, the Panel simply has no basis to assess the WTO-consistency of the Charges before all the evidence is presented, and before the Court makes a decision based on this evidence.

3.6 The Philippines failed to rebut Thailand's argument that the Charges are justified under Article XX(d) and (a) of the GATT 1994

3.73. Thailand considers that the Panel should not reach the issue of Thailand's Article XX defence in this case. This is so because: (i) the Charges are not within the scope of these Article 21.5 proceedings, (ii) the claims advanced by the Philippines under the CVA do not govern or apply to criminal investigations and prosecutions of customs fraud, and (iii) the charges are not "ripe" for adjudication.[147]

3.74. If, however, the Panel were to find otherwise, Thailand submits that the violations of Articles 1.1, 1.2(a), 2, and 3 of the CVA claimed by the Philippines are nonetheless justified under Articles XX(d) and XX(a) of the GATT 1994.[148]

3.6.1 The defences under Article XX of the GATT 1994 are available to justify a departure from the CVA rules

3.75. In *China – Rare Earths*, the Appellate Body held that "in some instances … exceptions in one covered agreement, such as Article XX of the GATT 1994, may be invoked to justify a breach of an obligation set forth elsewhere than in the GATT 1994".[149] The Appellate Body in *China – Publications and Audiovisual Products* held that Article XX is available where there is a clear textual link between the provisions under which the claims are made and the GATT 1994, in particular Article XX.[150]

3.76. Thailand submits that the Article XX defences may be invoked to justify a departure from the CVA rules for several reasons. First, the title of the CVA clearly indicates that the CVA implements the rules contained in Article VII of the GATT 1994.[151] The preamble of the CVA further recognizes the desire to "elaborate rules for the[] application of [the provisions of Article VII of the GATT 1994]". It is undisputed that Article XX of the GATT applies to all the obligations in the GATT 1994, including Article VII.[152] Since Article XX is available to Article VII, it is also available to the agreement that implements and elaborates Article VII, i.e. the CVA. This flows from the well-established principle that treaty provisions must be interpreted harmoniously and is the only logical conclusion to be drawn from the structure of the relevant agreements.[153] In response to a question by the Panel, the Philippines argues that the CVA is *lex specialis* as compared to Article VII of the GATT 1994, because it creates additional specific obligations. Therefore, it argues that it cannot be assumed that the exceptions that apply to Article VII automatically apply to the CVA as well.[154] However, there is no conflict between Article VII of the GATT 1994 and the CVA, such that the principle of *lex specialis* would apply. In fact, since the CVA

[146] Thailand's opening statement at the meeting of the Panel, para. 28.
[147] Thailand's second written submission, paras. 3.186-3.188.
[148] Thailand's first written submission, para. 6.90; Thailand's opening statement at the meeting of the Panel, para. 51.
[149] Appellate Body Report, *China – Rare Earths*, para. 5.56. See Thailand's second written submission, para. 3.196.
[150] Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 229-233. See Thailand's first written submission para. 6.92; Thailand's second written submission, para. 3.195.
[151] Thailand's first written submission, para. 6.91; Thailand's second written submission, paras. 3.207-3.210.
[152] Appellate Body Report, *US – Gasoline*, p. 24. See Thailand's second written submission, para. 3.208; Thailand's response to Panel question 110(a).
[153] Appellate Body Report, *Argentina – Footwear*, para. 81. See
[154] The Philippines' response to Panel question 110(a).

implements and elaborates Article VII, it is clear that the former is a development of the latter, and that the Article XX defences apply to both.[155]

3.77. Second, the preamble of the CVA also provides a textual basis for the applicability of Article XX of the GATT 1994 to the CVA. Recital 2 of the preamble mentions the desire to "further the objectives of the GATT 1994". Thus, there is another explicit mention in the preamble of the link between the CVA and the GATT 1994. The objectives of the GATT 1994 include trade liberalization but also allow some regulatory space for Members. In that respect, the Appellate Body in *China – Raw Materials* explained that "[w]e understand the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns".[156]

3.78. Third, the text of Article XX itself supports the position that it is available to the CVA, because Article XX(d) provides explicitly that Members may adopt measures necessary to secure compliance with their laws "relating to customs enforcement".[157] Therefore, Article XX(d) can be used to justify measures otherwise WTO-inconsistent that are necessary to enforce a Member's customs laws.

3.6.2 The Charges are justified under Articles XX(d) and XX(a)

3.79. 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.[158]

3.80. With respect to Article XX(d), Thailand submits that the Charges are "designed" to secure compliance with Section 27 of the Thai Customs Act, which criminalizes the avoidance of the payment of taxes or duties with the intention to defraud the Thai government and in turn enforces the obligation to pay customs duties contained in Section 10bis. The objective of fighting fraudulent tax and duty evasion through Section 27 is of utmost importance to Thailand. The relationship between the Charges and Section 27 can be seen by the explicit reference to Section 27 in the legal basis for the Charges, and by the fact that the Charges are the only way to enforce Section 27, as they lead to an examination of the matter by the Court.[159] Moreover, the Charges are "necessary" to secure compliance with that provision, because the Charges - and the calculation of the potential fine by the Public Prosecutor - make an essential contribution to the enforcement of Section 27. Any departure from the CVA rules was necessary to secure compliance with a different set of rules that govern the prosecution of customs fraud. Specifically, Section 103 of the Thai Customs Act provides the rule for calculating a fine. There is no legal reason why the police authorities should have to go through exactly the same process outlined in the CVA for customs administrations in order to enforce laws against customs fraud. This would seriously undermine the police powers of a government to prosecute and punish customs fraud in an expedited and efficient manner. Lastly, since the Charges do not contain any import restriction or import prohibition, nothing indicates that they are trade-restrictive.[160]

3.81. With respect to Article XX(a), Thailand submits that the Charges are "designed" to protect public morals because by prosecuting alleged customs fraud perpetrators, they are closely related to the fight against duty and tax evasion, which in turn contributes to the fight against smuggling

[155] Thailand's response to Panel question 110(a); Thailand's comment on the Philippines' response to Panel question 110(a).

[156] Appellate Body Report, *China – Raw Materials*, para. 306; Thailand's response to Panel question 110(a).

[157] Thailand's first written submission para. 6.91; Thailand's second written submission, para. 3.212; Thailand's opening statement at the meeting of the Panel, para. 59; Thailand's response to Panel question 110(a).

[158] Thailand's first written submission paras. 6.95-6.102, 6.113-6.119, 6.125-6.128.

[159] Thailand's first written submission para. 6.103-6.108; Thailand's second written submission, para. 3.220-3.229.

[160] Thailand's first written submission, paras. 6.109-6.110; Thailand's second written submission, paras. 3.214-3.215, 3.225, 3.232-3.233.

and contraband. This is an important policy objective that represents a real concern in Thailand.[161] Moreover, the Charges are "necessary" to protect public morals. By investigating, prosecuting, and punishing perpetrators of customs fraud, the Charges significantly contribute to the fight against duty or tax evasion, which in turn contributes to the fight against smuggling and contraband. Any departure from the rules for customs valuation prescribed in the CVA was necessary in order to prosecute perpetrators of customs fraud efficiently following a different set of rules.[162]

3.82. In response, the Philippines argues that Thailand cannot ensure the collection of the correct amount of the customs duties with a WTO-inconsistent customs valuation.[163] However, this assertion is based on a wrong understanding of the Charges. The Charges are not meant to collect the correct amount of the customs duties. Rather, the purpose of the Charges is to impose a punishment on offenders and to prevent or discourage criminal conduct. The fact that if the Panel reaches Article XX, it would have found that something in the Charges amounts to a customs valuation determination, does not change the fact that the Charges are criminal in nature.[164] Moreover, the Philippines cannot rely on same finding of inconsistency that the Panel would have found before reaching Article XX in order to argue that the Charges are not necessary to secure compliance with Thai laws or to protect public morals.[165]

3.83. Notably, the Philippines did not present any less trade-restrictive alternatives to Thailand's measure.[166] This is an important part of the panel's assessment of the necessity of the measure. In the absence of any less trade-restrictive alternatives presented by the Philippines, Thailand maintains that no such alternatives to the Charges exist to fulfil the objectives pursued by the measure, and that the Charges are necessary to secure compliance with Section 27 and to protect public morals.[167]

3.84. With respect to the requirements under the *chapeau* of Article XX, 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.[168] 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.[169] 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.[170]

3.85. Therefore, the Charges are designed and necessary to secure compliance with Thai customs laws and to protect public morals, within the meaning of Articles XX(d) and XX(a) of the GATT 1994.

3.7 The Philippines failed to demonstrate that the Charges are inconsistent with Article 10 of the CVA

3.86. The Philippines claims that the Office of the Attorney General disclosed PM Thailand's declared transaction values that appeared in press articles dated 19 January 2016.[171] However,

[161] Thailand's first written submission paras. 6.120-6.121; Thailand's second written submission, para. 3.239.

[162] Thailand's first written submission para. 6.123; Thailand's second written submission, para. 3.239.Thailand's opening statement at the meeting of the Panel, para. 64.

[163] The Philippines' second written submission, paras. 681-682.

[164] Thailand's second written submission, paras. 3.234, 3.242; Thailand's response to Panel question 109.

[165] Thailand's second written submission, paras. 3.216-3.3.219; Thailand's response to Panel question 109.

[166] The Philippines' second written submission, para. 704.

[167] Thailand's second written submission, paras. 3.250-3.253.

[168] Thailand's first written submission para. 6.129.

[169] The Philippines' first written submission, paras. 712-173.

[170] Thailand's opening statement at the meeting of the Panel, para. 67; Thailand's second written submission, paras. 3.258-3.259

[171] The Philippines' first written submission, paras. 682-687.

the Philippines failed to make a *prima facie* case that the Thai authorities disclosed the confidential information at issue inconsistently with Article 10 of the CVA.

3.87. By merely drawing inferences that the Office of the Attorney General disclosed the relevant information and by not providing any evidence to support this very serious accusation, the Philippines fails to meet its burden of proof. In the context of its Article 10 claim, the only two exhibits provided by the Philippines are press articles from January 2016 that mention PM Thailand's declared transaction values. Neither of them identifies the source of this information.[172]

3.88. In contrast, in the original proceedings, where the Philippines succeeded in presenting a similar claim, several press articles explicitly identified the source of the information as a Thai governmental agency. No similar circumstances exist in the current proceedings with respect to the disclosure at issue that took place in 2016.[173]

3.89. Thailand maintains that the only disclosure of the relevant information that took place is when the Public Prosecutor filed the Charges with the Criminal Court. In that context, the Public Prosecutor provided the relevant information to the Court. The Court then provided PM Thailand a copy of the Charges on the day they were issued.[174]

3.90. In any event, the Philippines is incorrect that the only inference to draw is that Thai governmental agencies disclosed the information at issue. While Thailand cannot prove a negative – that the Office of the Attorney General did not disclose the relevant information – this does not mean that the complainant has made the necessary *prima facie* showing.[175]

3.91. To the contrary, there are many other possible sources of the information. As Thailand has explained, the values at issue are the same as those that were found to have been improperly disclosed in the original proceedings.[176] Since the values were in the public domain, any journalist could have searched on the internet for the previously disclosed transaction values, and could have used those values, assuming that they did not change and without paying much attention to which entries were at issue.[177] Moreover, the journalists may have spoken to some of the individuals outside the Thai government that were familiar either with the current or original proceedings. Finally, the journalists could have discussed these values with Philip Morris itself on the basis – or even an assumption – that they were discussing the previously-disclosed values.[178]

3.92. In these circumstances, the Philippines' failure to provide any evidence that there was a fresh disclosure by the Thai government means that the Philippines has failed to establish a *prima faci*e case. For these reasons, the Panel should reject the Philippines' claim under Article 10 of the CVA.

4 THE PHILIPPINES HAS FAILED TO DEMONSTRATE THAT THAILAND'S RULES FOR DETERMINING THE VAT BASE ARE INCONSISTENT WITH THE GATT 1994

4.1. The Philippines claims that Thailand's rules concerning the notification of the VAT base are inconsistent with Articles III:4, X:1, and X:3(a) of the GATT 1994. For the reasons detailed below, the Philippines' claims in this regard should be dismissed by the Panel.

[172] Thailand's first written submission, para. 6.85; Thailand's second written submission, paras. 3.177-3.180; Thailand's opening statement at the meeting of the Panel, para. 71.

[173] Thailand's second written submission, paras. 3.181-3.182; Thailand's opening statement at the meeting of the Panel, para. 72.

[174] Thailand's first written submission, para. 6.87; Thailand's second written submission, para. 3.184; Thailand's opening statement at the meeting of the Panel, para. 73.

[175] Thailand's opening statement at the meeting of the Panel, para. 74.

[176] Thailand's second written submission, para. 3.183; Thailand's opening statement at the meeting of the Panel, para. 75; Thailand's comments on the Philippines' response to Panel question 111.

[177] Thailand's comments on the Philippines' response to Panel question 111.

[178] Thailand's opening statement at the meeting of the Panel, para. 75.

4.1 The Philippines failed to demonstrate that Thailand's VAT rules are inconsistent with the national treatment obligation of Article III:4 of the GATT 1994

4.2. The Philippines' claims concern Thailand's requirement, contained in Notification 187 and Order Por. 145-2555, that cigarette importers notify as their VAT base the average market price of their cigarettes on the date of the notification. The price notified by cigarette importers then becomes the VAT base until further notice.

4.3. The Philippines recognizes that Thailand's VAT rules impose "formally identical notification requirements in respect of imported cigarettes sold by importers and domestic cigarettes sold by TTM".[179] However, according to the Philippines, these formally identical notification requirements result in less favourable treatment for imported cigarettes because of the different situations of cigarette importers and TTM.[180] Specifically, the Philippines argues that cigarette importers cannot fix the prices at which their buyers must sell; rather, they can only recommend retail prices, which means that importers run the risk of being held liable for non-compliance with Thai law if the actual prices are not the same as the recommended prices.[181] In contrast, the Philippines argues, TTM can set downstream prices because it is exempted from Thai competition laws and can therefore accurately notify to the Revenue Department the average actual market price of its cigarettes.[182] The Philippines submits, therefore, that importers face an "additional legal jeopardy" not faced by TTM.[183]

4.4. The Philippines claims must fail as they are premised on inaccurate descriptions of the facts and of Thailand's legal framework. A correct understanding of these points indicates that Thailand's VAT system does not give rise to less favourable treatment to imported cigarettes. Thailand addresses these issues in turn.

4.5. First, it is incorrect for the Philippines to assert that Philip Morris does not know the retail price of its own cigarettes because cigarette importers can only *recommend* retail prices but cannot fix them. Thailand submits that, given the arrangements between retailers and cigarette producers, the recommended prices function, in practice, as the prices followed by retailers.[184] In one of its questions, the Panel asked the Philippines directly whether there have been cases where the recommended retail price was less than the actual retail price. Unsurprisingly, the Philippines was unable to identify one single instance in which retailers did not follow the recommended price.[185] This alone is sufficient to dismiss the Philippines' claim under Article III:4 of the GATT 1994, as it demonstrates that the alleged "legal jeopardy" does not exist.

4.6. Second, the Philippines incorrectly asserts that the agreements between manufacturers and retailers concerning the prices charged by retailers are a violation of Thai competition law. This practice, also known as "vertical price fixing", is not a *per se* violation of Thai competition law. Under Thai competition law, the legality of vertical price fixing depends on the specific circumstances of each case.[186]

4.7. Third, Thailand's competition law was recently modified to introduce multiple changes, among which is the elimination of TTM's automatic exemption from competition legislation. Therefore, even if vertical price fixing were illegal under Thai competition law, the fact that TTM, the Thai national cigarette producer, can also be subject to penalties under the competition law further undermines the Philippines' claim that, unlike cigarette importers, TTM can comply easily with the VAT notification requirements because it can legally fix retail prices.

4.8. Fourth, the Philippines did not correctly substantiate its factual assertion that the determination of the average market price to be notified requires a market study that takes 4-6 weeks to prepare. This means, according to the Philippines, that cigarette importers do not have

[179] The Philippines' first written submission, para. 802.
[180] The Philippines' first written submission, para. 804.
[181] The Philippines' first written submission, para. 813.
[182] The Philippines' first written submission, para. 804.
[183] The Philippines' first written submission, para. 813.
[184] Thailand's second written submission, para. 4.16.
[185] The Philippines' response to Panel question 66.
[186] Thailand's response to Panel question 113. "Vertical price fixing" is different from "horizontal price fixing", which is a *per se* violation of Thai competition law. Vertical price fixing involves requiring downstream sellers (rather than competitors) to sell at a determined price.

enough time to know the price that must be notified in June of each year. Although the Philippines submitted a document that purports to substantiate this point, it did so at the express request of the Panel as part of its answers to the second set of questions by the Panel.[187] Thailand is of the view that the Panel should not admit this evidence because, as part of the Philippines' *prima facie* case, it should have been submitted much earlier in the proceedings.

4.9. For these reasons, Thailand submits that the Philippines has failed to make a *prima facie* case of inconsistency under Article III:4 of the GATT 1994 concerning Thailand's VAT notification requirements.

4.2 The Philippines failed to demonstrate that Thailand acts inconsistently with Article X:1 of the GATT 1994 by not publishing a measure of general application

4.10. The Philippines claims that Thailand's Revenue Department has an official practice of permitting cigarette importers to notify their recommended retail prices as a way of complying with the obligation to notify the actual average price. In the Philippines' view, Thailand violates Article X:1 of the GATT 1994 because this practice is not published.

4.11. The Philippines' claims must be dismissed because they refer to an alleged practice of Thailand's Revenue Department that does not exist.[188] Given that the publication obligation under Article X:1 of the GATT 1994 applies only to measures of general application, the Philippines' claims must fail as there is no measure of general application as described by the Philippines.

4.12. Philip Morris has chosen to comply with the obligation to notify the average retail price by notifying its recommended retail selling price ("RRSP"). This was Philip Morris' chosen means of compliance given that, in practice, the RRSPs functions as the actual retail selling price. The fact that Philip Morris has chosen to comply with Thailand's VAT notification requirements in this manner does not mean that this amounts to a rule of general application maintained by the government.

4.13. The Philippines, however, believes that, under Article X:1 of the GATT 1994, WTO Members must notify not only the regulatory outcome required by their trade measures, but also the different methods that private operators may use to achieve such outcome. In particular, the Philippines believes that the method chosen by PM Thailand to calculate the average retail selling price should be enshrined in Thai legislation as a rule of general and prospective application. The Philippines is incorrect. That importers can choose method "A", method "B", or method "C" to comply with the requirement of Order Por. 145-2555 does not mean that any of these methods is, or should be, an express requirement under Thai law.[189]

4.14. The purpose of Article X:1 of the GATT 1994 is to ensure that governments publish measures of general application that exist. Article X:1 cannot be invoked to request governments to create new substantive rules. In essence, this is what the Philippines requests. Under the guise of its claim under Article X:1, the Philippines wants Thailand to develop tailor-made regulations so that Thailand's laws codify exactly PM Thailand's business practices.[190]

4.3 The Philippines has failed to demonstrate that Thailand acts inconsistently with Article X:3(a) of the GATT 1994

4.15. The Philippines argues that "[b]y imposing a notification requirement on importers with which they cannot comply, unless they violate Thai competition law, Notification 187 and Order Por. 145-2555 provide for unreasonable administration" within the meaning of Article X:3(a) of the GATT 1994.[191]

4.16. As is the case with its other claims against Thailand's VAT rules, the Philippines' claim under Article X:3(a) is based on crucial misrepresentations of Thai law.

[187] Thailand's comments on the Philippines' response to Panel question 115 (a).
[188] Thailand's first written submission, paras. 7.75 – 7.79.
[189] Thailand's second written submission, para. 4.27.
[190] Thailand's response to Panel question, 61 (b).
[191] The Philippines' first written submission, para. 828.

4.17. First, the notification requirements at issue are substantive elements of Thai VAT rules, rather than the "administration" of such rules.[192] The scope of Article X:3(a) is limited to the "administration" of laws and regulations. Article X:3(a) does not govern the substantive content of laws and regulations. The Appellate Body has rejected claims under Article X after concluding that the legal challenge concerned the substantive content of the rules themselves rather than their administration.[193]

4.18. Both Notification 187 and Order Por. 145-2555 establish substantive rules relating to the tax base to be used for purposes of VAT on cigarettes. The introductory paragraph of Notification 187 indicates that the Director-General of the Revenue Department "hereby prescribes the tax base" for VAT on cigarettes. Clauses 4 and 5 of Notification 187 define the tax base for VAT on cigarettes, namely that the tax base shall be the value of tobacco derived from deducting the VAT from the full retail price. Clauses 4 and 5 provide further details on the type of price to be used as the tax base. This means that the notification requirements challenged by the Philippines do not refer to the "administration" of Thailand's VAT rules and, therefore, fall within the category of measures covered by Article X:3(a).

4.19. Second, even assuming that Notification 187 and Order Por. 145-2555 refer to the "administration" of Thailand VAT rules, the claim that this administration is unreasonable is unfounded. Similar to its argument under Article III:4 of the GATT 1994, the Philippines' argument under Article X:3(a) is premised on the understanding that a cigarette producer must act in violation of Thailand's competition laws in order to comply with Notification 187 and Order Por. 145-2555.

4.20. Thailand has explained in the context of its arguments under Article III:4 that, contrary to the Philippines' assertions, compliance with Thailand's VAT notification requirements do not require violating Thailand's competition laws. As noted above, the Philippines failed to demonstrate that arrangements between retailers and cigarette producers (vertical price fixing) are *per se* inconsistent with Thailand's competition laws.[194]

4.21. In light of the foregoing, Thailand requests the Panel to reject the Philippines' claims under Article X:3(a) of the GATT 1994.

5 CONCLUSION

5.1. For the reasons stated above, Thailand requests the Panel to reject the Philippines' claims.

5.2. With respect to the BoA Ruling, Thailand requests the Panel to reject the Philippines' claims under Articles 1.1, 1.2(a), 5.1, 11.3 and 16 of the CVA. Thailand has showed that the methodology of the BoA for comparing P&GE is reasonable. The Philippines itself agrees with this. With respect to the *application* of this methodology, the Philippines has not demonstrated that it was unreasonable given the circumstances. Thailand has emphasized the importance of applying the correct standard of review when the Panel examines the Philippines' claims against the BoA Ruling. The Panel should be mindful to not conduct a *de novo* standard of review or substitute its own judgement for that of the BoA.

5.3. With respect to the Charges, Thailand requests the Panel to reject the Philippines' claims under Articles 1.1, 1.2(a), 2, and 3 the CVA. Thailand has explained the different reasons why the Philippines' claims fail *ab initio*:

a. Thailand considers that its due process right have been violated. As a result, Thailand requested the Panel to decline to rule on the Charges and to delete the exhibit at issue form the record. The Panel declined Thailand's requests. Therefore, Thailand requests the Panel to explain clearly in its ruling whether it considers that the Philippines' good faith/due process obligations and the Panel's due process obligations extended merely to inquiring whether the Philippines acted legally. If not, Thailand requests the Panel to explain clearly what additional steps were required of the Philippines and where it took those steps in this case.

[192] Thailand's first written submission, paras. 7.60 – 7.65.
[193] Appellate Body Report*, EC – Poultry*, para. 115.
[194] Thailand's first written submission, para. 7.67.

b. The Philippines is precluded from challenging the Charges in these compliance proceedings because it challenged essentially the same measure in the original dispute and failed to make a *prima facie* case of WTO-inconsistency.

c. The Philippines claims are not "measures taken to comply" within the meaning of Article 21.5 of the DSU and, therefore, are not within the scope of these compliance proceedings.

d. The provisions of the CVA on which the Philippines relies do not apply to the Charges. The Charges are not an exercise of "customs valuation" under the CVA as they do not have the purpose of levying *ad valorem* customs duties. Nothing in the CVA regulates the manner in which WTO Members can conduct criminal proceedings on customs fraud.

e. The Charges are not a matter "ripe" for adjudication. The Charges constitute merely an allegation of criminal conduct, not a judgement by the Criminal Court. The Philippines' challenge against the Charges is an attempt to interfere in a pending criminal process before Thailand's domestic Criminal Court.

5.4. In any event, even if the Panel were to accept the Philippines' position that the Charges are covered by the CVA and inconsistent with the provisions thereof, Thailand submits that any possible inconsistency with the CVA is justified under the general exceptions of Articles XX(a) and XX(d) of the GATT 1994.

5.5. Thailand requests the Panel to reject the Philippines' claim that Thailand violated Article 10 of the CVA by disclosing PM Thailand's CIF values.

5.6. With respect Thailand's VAT base, Thailand also requests the Panel to reject the Philippines' claims under Articles III:4, X:1 and X:3(a) of the GATT 1994. The Philippines has failed to demonstrate that this measure violates the national treatment obligation under Article III:4, constitutes a measure of general application which Thailand failed to publish as required by Article X:1, and that these notification requirements give rise to an unreasonable administration under Article X:3(a). The Philippines' argumentation on all three claims reflects a flawed understanding of Thai VAT rules. Indeed, it is difficult to understand why the Philippines claims that these are inconsistent with the cited provisions of the GATT 1994 when Thailand adopted these rules at its request.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA*

I. Introduction

1. Australia thanks the Panel for this opportunity to present its views in this dispute.

2. In its oral statement today Australia will focus on the issue of the scope of Article 21.5 proceedings, and the nature of "measures" and "measures taken to comply" in the context of compliance proceedings generally and in the specific context of the current case.

3. In providing these views to the Panel, Australia would like to highlight some fundamental aspects of the WTO dispute settlement system and the role of the compliance Panel in this system.

II. The WTO Dispute settlement system and the role of the compliance Panel

4. Australia recalls the object and purpose of the WTO dispute settlement system is to promptly resolve disputes between Members. Article 21.5 proceedings are particularly important in this regard, as they concern the proper implementation by a responding Member of findings of inconsistency of its measures with its WTO obligations. It is thus of the utmost importance that Article 21.5 proceedings avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the Dispute Settlement Body ("the DSB").

5. While the scope of Article 21.5 proceedings has clear limitations, in our view the proper scope of proceedings and, in particular, the measures which can be addressed, should not be so strictly or inflexibly drawn as to allow a responding Member to effectively evade its obligations, or delay implementation.

6. In considering the appropriate balance, Australia urges the Panel to consider Members' due process rights, the importance of supporting the legitimacy of the DSB's decisions and the proper functioning of the multilateral rules based system.

III. The nature of "measures" and "measures taken to comply"

7. Turning then to the specific legal question at issue, determining in the context of this dispute what constitutes a measure taken to comply, we provide some views on whether the criminal charges laid against Philip Morris Thailand and seven of its current or former employees regarding customs valuation constitute measures taken to comply.

8. It is established[1] that where a complaining Member seeks to have the compliance Panel consider measures which the implementing Member maintains are not measures taken to comply, the Panel should seek to determine whether the measures are "particularly closely connected" to the measures the implementing Member has put forward as measures taken to comply and to the DSB's recommendations and rulings. As clarified by the Appellate Body, this close nexus test[2] requires an examination of the links in terms of the nature, effects and timing of the measure, the claimed measure(s) taken to comply and the DSB's recommendations and rulings.

9. Firstly, as a point of general law, we consider that there are instances where domestic charges could constitute a measure(s) taken to comply, notwithstanding that they by their nature imply further potential action. The examination in this instance pertains to the charges in relation to the implementing Member's obligations, not the ultimate outcome of the charges. We therefore do not agree with the application of the "ripeness" argument posited by Thailand in relation to these charges. Actions such as these which have been initiated by the State have the potential to

* Australia has requested that its Oral Statement serve as its Executive Summary.
[1] *US – Zeroing (EC) (Article 21.5 – EC),* para. 207.
[2] *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 77.

impact trade and to engage trade obligations hence have the capacity to be considered "measures taken to comply".

10. Secondly, in applying the "close nexus" test we examine the nature of the charges, their timing and their effects.

11. With regard to their nature, the charges relate to the same actors, the same type of goods and the same actions of the authorities. We do not consider the fact that the actions relate to different arms of the Thai State as of relevance in this case, nor the fact that the charges do not relate to the same entries, recalling our initial comment that implementing parties must not be allowed to evade their obligations. We also do not consider the timing issues raised as preventing the Panel from considering the charges as measures taken to comply.

12. In considering the effects, the key question for the Panel to consider is whether the charges affect Thailand's obligations under the covered agreements, and in particular whether they undermine the measures ostensibly taken to comply so as to render these steps ineffective.

IV. Conclusion

13. Australia thanks the Panel for the opportunity to address these issues. We also thank the Panel for providing questions to the Third Parties in advance and we look forward to providing responses to those questions in due course.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute raises issues of a systemic nature regarding the scope of "measures taken to comply" under Article 21.5 of the DSU, when government acts such as criminal or civil charges can be adjudicated by a panel, the standard of review of a determination under the Customs Valuation Agreement (CVA) as well as issues related to the interpretation of the CVA and its relationship with the GATT 1994. Canada appreciates the opportunity it has had to provide its views on these issues. Below, Canada provides a summary of its key arguments in this dispute.

II. CRIMINAL OR CIVIL CHARGES CAN BE "MEASURES" AND "MEASURES TAKEN TO COMPLY" UNDER ARTICLE 21.5 OF THE DSU

A. Charges can be a measure

2. Canada notes that "measure" is not defined in the DSU, however, that term has been interpreted broadly for the purposes of dispute resolution under the GATT and the WTO, such that "measure" has generally been understood to refer to an action in which there was "sufficient government involvement"[1]. A determination of what constitutes a measure is made on a case-by-case basis[2].

3. It must also focus on the content and substance of a measure rather than form[3], and ultimately, any act or omission attributable to a Member can be a "measure" for the purposes of dispute settlement proceedings[4].

4. Further, Members are responsible for the acts of all their governmental departments and organs of the state including their judiciary[5].

5. Thus, in Canada's view, charges, whether criminal or civil, can be characterized as acts of an organ of the state and could therefore be considered "measures". While not every charge laid by a prosecutorial arm of the state will necessarily be considered a "measure", if the content and substance of a charge falls within the disciplines of the WTO Agreements and merits a finding, on objective grounds, that the charge is a "measure", then the charge can be a considered a "measure" for the purposes of dispute settlement.

B. Charges can be a measure taken to comply

6. In Canada's view if civil or criminal charges are found to be measures, they may also be "measures taken to comply", under Article 21.5 of the DSU, if it can be demonstrated that they have a sufficient connection with the DSB rulings and recommendations and the declared measures taken to comply such that they meet the "close nexus" test.

7. Where a Member declares measures to be a "measure[] taken to comply", an Article 21.5 panel may review that measure to assess compliance with the WTO Agreement. Measures that are not declared by an implementing Member may also be reviewed by a panel under Article 21.5 and be characterized as a measure "taken to comply"[6]. Those measures include measures that have

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[1] Panel Report*, Japan – Apples*, para. 8.11, referring to Panel Report in *Japan - Film*, paras. 10.55-10.56, which refers to GATT panel reports, *Japan –Semi-conductors*, para. 102; and *EEC – Dessert Apples*, para. 126.

[2] Panel Report*, Japan – Apples*, para. 10.56.

[3] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87, fn 87.

[4] See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81 and fn 79. See also Appellate Body Report*, Australia – Apples*, para. 171.

[5] Appellate Body Report, *US – Shrimp*, para. 173.

[6] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 66-69, 73 and 77.

the effect of undermining or nullifying the purported compliance achieved through the measures declared to be taken to comply[7].

8. A full examination of the application or the effect of the measure, including the legal and factual settings in which they operate, is required to assess the "existence" of a measure taken to comply or its "consistency with a covered agreement". Through this examination, a compliance panel can determine whether there are "sufficiently close links" between the undeclared measure, any declared measure and the recommendations and rulings of the DSB such that it would be appropriate to characterize the undeclared measure as a "measure taken to comply"[8].

9. The amount of weight to be given to the elements of the factual or legal background of a measure, including the timing of a measure taken to comply, will depend on the circumstances of the case at issue[9].

III. RIPENESS OF A CUSTOMS VALUATION DETERMINATION UNDER THE CUSTOMS VALUATION AGREEMENT AND THE APPLICABILITY OF THE CVA TO CRIMINAL OR PENAL PROCEEDINGS

10. The key consideration to determine what constitutes a customs valuation determination that is ripe for adjudication is whether a decision has actually been taken.

11. In the context of the CVA, the term "determination" is used when referring to a determination made by the customs administration of the customs value of certain imported goods[10]. Once the determination of customs value of imported goods has been made, it is possible to assess whether that determination is consistent with the covered agreements, including the CVA. As a result, Canada is of the view that whether or not a criminal charge has resulted in an acquittal or conviction is neither decisive nor relevant as to whether the determination is ripe for adjudication under the DSU. It is the consistency of the determination of customs value with the Member's CVA obligations that would be assessed, not the consistency of the charges.

12. The CVA is primarily about function, that is, the methodology to be used in the valuation of goods for customs purposes. It would undercut the efficacy of the CVA if the same imported goods could be ascribed a different customs value by different entities within the same government and only the acts of some of those entities could be considered "measures" for the purposes of the DSU. If a criminal offence focuses on fraudulent undervaluation of an imported good then the methodology applied to determine the degree of undervaluation would be that found in the CVA, regardless of who within the government calculates the valuation.

13. Therefore the relevant question to determine whether the CVA applies to criminal or penal proceedings is whether or not there is a custom valuation function. To the extent the function of the valuation of goods for customs purposes is exercised in the context of criminal or penal proceedings, the CVA would apply to the valuation of imported goods.

IV. A MEMBER CANNOT DEFEND A MEASURE INCONSISTENT WITH THE CUSTOMS VALUATION AGREEMENT BY RELYING ON GATT ARTICLE XX

14. It is Canada's view that GATT Article XX exceptions are not applicable to the provisions of the CVA because the text does not refer to the provisions of Article XX or to the GATT 1994 in a manner indicating that the exceptions apply[11].

15. There is no jurisprudence that directly addresses the issue of whether GATT Article XX can be invoked to justify a breach of the CVA provisions. However, the Appellate Body has analyzed the question and determined that Article XX was available to justify inconsistencies with

[7] Panel Reports, *Australia – Salmon (Article 21.5 –Canada)*, para. 7.10(23); *Australia – Automotive Leather II (Article 21.5 –US)*, para. 6.4*; EC – Bed Linen (Article 21.5 –India)*, para. 6.21.

[8] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.83.

[9] Canada's third-party submission, paras. 15-16.

[10] See the General Introductory Commentary "Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1"; articles 1-4, 6-9, 11 and 13.

[11] Canada's third-party submission, paras. 42-50.

obligations set out in WTO agreements other than the GATT 1994 only under limited circumstances[12]. Article XX exceptions may be available for breaches of other WTO agreements only if the text specifically or by means of a general reference provides a legal basis to resort to such exceptions[13].

16. Canada recognizes that the CVA refers to the GATT 1994 when it states in its preamble the desire of the Members to further "the objectives of GATT 1994". However, this phrase does not expressly incorporate the defences or exceptions under the GATT 1994. In fact, this type of preambular language has been interpreted in the context of the TBT Agreement as merely indicating that the two agreements have similar objectives[14].

17. Thailand submits that the GATT Article XX defence is available because the CVA implements and elaborates the disciplines of Article VII of the GATT 1994[15]. However, an Article XX defence is not available to a covered agreement on the basis that it implements a provision of the GATT 1994[16]. The mere reference to a GATT provision in a covered agreement does not compel the conclusion that GATT Article XX is available to justify a breach of that agreement[17]. In fact, the Appellate Body attached significance to the fact that an agreement refers to a provision of the GATT 1994 but does not refer to GATT Article XX[18]. It is also worth noting that other covered agreements governing the application of a provision of the GATT 1994, such as the Anti-Dumping Agreement explicitly includes general exceptions[19]. The same approach was not adopted in the context of the CVA in which no reference is made to the application of general exceptions. It is Canada's view that the absence of references to general exceptions in the CVA reflects the intention of the Members not to make Article XX available to justify a violation of the CVA.

18. Finally, the Panel raised a question as to whether Article 17 of the CVA is relevant to determine whether Article XX of the GATT 1994 applies to the CVA. Canada believes that no inference regarding the application of Article XX to the CVA can be drawn from the existence of Article 17. The ordinary meaning of Article 17 does not provide for, nor indicate the application of, any exceptions to justify measures that could be found to be inconsistent with the obligations in the Agreement[20]. In fact, the purpose of Article 17 is only to reserve the right of customs administrations "to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes"[21].

V. STANDARD OF REVIEW APPLICABLE TO THE BOA RULING

19. The CVA does not set out a specific standard of review and therefore, the general standard of review under Article 11 of the DSU applies for all covered WTO agreements. The Appellate Body has been clear in finding that when a WTO agreement is silent as to a standard of review, Article 11 applies, in particular the requirement that a panel should make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[22].

[12] Appellate Body Reports, *China – Raw Materials*, para. 272; Panel Reports, *China Raw-Materials*, paras. 7.150 and 7.153; and Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 224-230.

[13] Canada's third-party submission, paras. 42-50; Appellate Body Reports, *China – Raw Materials*, para. 307; see also Panel Reports, *China – Raw Materials*, para. 7.153; and Appellate Body Reports, *China – Rare Earths*, para. 5.56.

[14] See Appellate Body Report, *US – Clove Cigarettes*, paras. 91 and 101; Panel Report, *US – Clove Cigarettes*, para. 7.112. In *US – Clove Cigarettes*, the panel found that this phrase suggests that the TBT Agreement is a "development" or a "step forward" from the disciplines of the GATT. The phrase also indicates that the TBT Agreement and the GATT overlap in scope and have similar objectives. The Appellate Body observed that the TBT Agreement does not contain a general exception clause, such as those in Article XX.

[15] Thailand's first written submission, para. 6.91.

[16] Canada's responses to the Panel's questions to Third Parties, paras. 36-39.

[17] Appellate Body Reports, *China – Rare Earths*, para. 5.63.

[18] Appellate Body Reports, *China – Raw Materials*, para. 303.

[19] See Anti-Dumping Agreement, Article 18.1 and fn 24.

[20] Canada's responses to the Panel's questions to Third Parties, paras. 40-43.

[21] Panel Reports, *China – Auto Parts*, fn 401.

[22] Appellate Body Report, *Argentina – Footwear (EC),* para 120.

20. The Appellate Body has also been clear that the only exception to this rule is found in the Anti-Dumping Agreement, in which Article 17.6 sets out a special standard of review for disputes arising under that Agreement[23].

21. Therefore, in Canada's view, it would be incorrect for the Panel to apply a standard of review analogous to or the same as the standard applied under Article 17.6 of the Anti-Dumping Agreement.

22. In making its assessment under Article 11 of the DSU, the Panel should not engage in a *de novo* review with respect to the customs administration's determination under the CVA, nor should the Panel give total deference to the determination of the custom's administration. The Panel must make an objective assessment of the facts and the applicability of and conformity with the CVA of the customs administration's determination. This requires a "reasoned and adequate" explanation for the determination in light of the evidence on the record[24].

23. Determining what is "adequate" will "depend on the facts and circumstances of the case and the particular claims made" and the panel's assessment should test whether the reasoning of the authority is coherent and internally consistent"[25]. Further, the panel must examine whether the explanations provided disclose how the authority treated the facts and evidence in the record and whether there was positive evidence before the authority to support the inferences made and conclusions reached by the authority"[26].

24. Finally, an explanation is not reasoned, or is not adequate, if an alternative explanation of the facts is plausible and if the authority's explanation does not seem adequate in the light of that alternative explanation"[27].

[23] Ibid., para. 118.
[24] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.104-105.
[25] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[26] Ibid.
[27] Appellate Body Report, *US – Lamb*, para. 106.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 30 August 2017 and its replies to the Panel's and Thailand's questions to Third Parties of 15 September 2017. The European Union considers that the present case raises important systemic questions on the interpretation and application of the *Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (Customs Valuation Agreement, CVA), and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Its submissions focussed on those systemic questions, without taking a definitive position on the facts of the case.

I. The 2012 BoA ruling

2. The comments by the European Union focussed on the standard of review for panel proceedings under the CVA; the circumstances of sale test under Article 1.2(a) of the CVA; and the evidentiary standard for deductions for taxes payable pursuant to Article 5.1(a)(iv) of the CVA.

3. **Standard of review**: Contrary to Thailand's arguments, the European Union considers that there is no special standard of "reasonableness" under the CVA. The standard of review in disputes concerning the CVA is the standard of Article 11 of the DSU, namely the obligation of the panel to make an "objective assessment of the matter". A panel generally does not have the full record of the domestic administrative proceedings and should not step into the shoes of the national authority and carry out the assessment on substance in the place of the national authority. However, it may examine whether the national authorities' determinations were supported by the factual evidence before them and resulted from a correct interpretation and application of the relevant WTO rules. Methodological choices made by the national authorities should be subject to the same scrutiny as the other elements of the assessment.

4. **Circumstances of sale test**: According to Article 1.2(a) of the CVA, the starting point is that relatedness between exporters and importers does not in itself make transaction values unacceptable. Transaction values shall be accepted where the circumstances of sale show that the relationship did not influence the price. This test requires a thorough examination by the authorities, in a process of consultation with the importers. The Panel in the original dispute highlighted that customs authorities and importers have respective responsibilities under Article 1.2(a) of the CVA. Customs authorities must ensure that importers be given a reasonable opportunity to provide relevant information; importers are responsible for providing such information. While the obligations concerning the decision on substance and those concerning the process are separate obligations, they are closely interlinked, and violations of procedural obligations may have a direct impact on the substantive decision.

5. On substance, the deviation of an importer's P&GE from a range of comparables can indeed constitute a solid argument in favour of the actual influence of the relationship on the price, provided that the comparables are really reliable. However, all relevant quantitative and qualitative facts, submitted by the importer or otherwise in the possession of the customs authorities, must be taken into account in the assessment. Thus, a preliminary conclusion on the (non-)reliability of transaction prices reached on the basis of a P&GE comparison must be overturned if other evidence pointing to the contrary prevails.

6. Most importantly, the comparison of P&GE rates can only yield valid results if the situations being compared are truly comparable. This is a general principle which can be found throughout the covered agreements, such as in Articles I:1, III:2 and III:4 of the GATT 1994, in Article 14(b) of the SCM Agreement, in the extensive rules on price comparison and comparability in Article 2 of the ADA, but also in various provisions of the CVA itself. Comparable means that there must be sufficient similarities between the things that are compared, so as to make that comparison worthy or meaningful. Where there are no situations which are fully comparable, authorities may resort to less like, although still similar, comparators, but will be obliged to make appropriate adjustments.

7. **Evidentiary standard for deductions for taxes payable** pursuant to Article 5.1(a)(iv) of the CVA: The Panel in the original proceedings made it very clear that deductions must be made

for taxes, including provincial taxes, that are *payable*, in the sense of payments *usually* made[1], and not actual payments made and evidenced as such for each instance. The European Union fails to see how this finding can be reconciled with a system where only such taxes are deducted for which receipts of actual payments are being provided.

II. The Charges

8. The Philippines' claims relating to the Criminal Charges issued on 18 January 2016 raise important questions on what type of measures can be challenged in WTO dispute settlement, and in which procedural circumstances this can be done. The European Union commented on the concept of preclusion, the close nexus test, the question of "ripeness" or what constitutes a "measure at issue", and the application of the CVA in criminal proceedings. In its reply to a question by the Panel, the European Union also shared its views on the availability of defences under Article XX of the GATT 1994 for breaches of the CVA.

9. **Alleged preclusion**: In any event, the question of preclusion can only be relevant in cases where the potentially precluded measure is the same as in the original proceedings. This is not the case in the present dispute; the investigations and the Charges are measures of a different nature.

10. **Close nexus test**: When carrying out this test, a panel acting under Article 21.5 of the DSU is called upon to examine if the undeclared measure taken to comply is a "measure […] with *a particularly close relationship* to the declared "measure taken to comply", and to the recommendations and rulings of the DSB."[2] Assessing whether this is the case requires panels to "scrutinize these relationships", and examine "the factual and legal background against which a declared 'measure taken to comply' is adopted".[3] Depending on the facts, a number of other specific factors may be examined, in particular the "timing, nature, and effects of the various measures".[4] These aspects should however not be assessed in a mechanistic, box-ticking fashion; their relative importance will depend on the concrete circumstances of each case.

11. For the present case, the decisive question should be whether the measure at stake can be seen as having the effect of undermining compliance for the measures that had been found incompliant. In the European Union's view, some sort of concrete connector (and not a pure similarity) between the measures having been found incompliant and the undeclared measure taken to comply is required. This connector, however, must not necessarily be state action but could be a pure factual link such as the commercial relationship between the importer and the exporter in the current case.

12. **Ripeness / Measure at issue:** The parties disagree on whether the Criminal Charges can be challenged in this dispute, as in Thailand's view, they are only a preliminary step in the criminal proceedings and therefore not "ripe" for adjudication in WTO dispute settlement. The European Union considers that, rather than introducing a new procedural concept of "ripeness", with unclear content and vague contours, the question should be framed in a more classical manner, namely whether there is a challengeable "measure at issue".

13. While the universe of issues that can be challenged in WTO dispute settlement proceedings is – rightly – broad, it is however not unlimited. According to the Appellate Body, only *acts or omissions attributable to a WTO Member* can be challengeable measures.[5] In *United States - Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that the measures subject to review "encompass the entire body of generally *applicable* rules, norms and standards, for purposes of WTO law, *adopted by Members*".[6] (emphasis added)

14. Internal preparatory conduct cannot, absent any express and specific obligations to the contrary in the Agreement at stake, be a measure in that sense. Such conduct is incapable of having tangible, present effects – thus, it cannot affect the operation of any covered agreement or impair benefits accruing to a Member under the covered agreements (see Articles 3.3 and 4.2 of the DSU).

[1] Panel Report, *Thailand - Cigarettes (Philippines)*, paras. 7.356-7.360.

[2] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77 (emphasis added); see also Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 203; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205.

[3] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[4] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[5] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 81.

[6] Appellate Body Report, *US - Corrosion-Resistant Steel Sunset Review*, para. 87.

15. In light of these considerations, for the European Union, the key criterion in this case should be whether the measure at stake has legal effects in itself. The exact contours of what can constitute a "measure at issue" will be delineated by the substantive WTO law provisions at stake. Hence, in the present case, the notion of customs valuation "determination" contributes to this delineation. The European Union interprets the notion of "determination" as an act which sets out a finding of something by a competent authority. As such, the notion confirms the criterion of "genuine legal effects" suggested by the European Union. A priori, and without taking a definitive position on the facts of this case, it seems to the European Union that the Charges have such legal effects of their own.

16. **Application of the CVA in criminal proceedings**: In accordance with the views expressed by other Third Parties, the European Union considers that the application of the substantive obligations under the CVA is not dependent on the authority taking the decision or the formal characterisation of the measure in question (as "pure customs decision" versus "criminal/enforcement measure"). On the contrary, the scope of application should rather be determined on a functional basis. Thus, the substantive obligations of the CVA should apply whenever an organ of the state engages in determining the customs value of imported goods, regardless of which authority takes this decision and in which type of proceedings. Different considerations might come into play when it comes to the application of the procedural obligations of the CVA. As the Philippines allege no breach of these obligations with regard to the Charges, the question does, however, not need to be adjudicated in this case.

17. **Availability of defences under Article XX of the GATT 1994 to justify breaches of the CVA**: The European Union notes that *arguendo*, the substantive conditions of Article XX, in particular the necessity test, seem not to be fulfilled in the present case. On the question of principle, the European Union would caution against interpreting the scope of Article XX too broadly, in view of the absence of any explicit reference to the exceptions of the GATT 1994 in the CVA, and the special nature of the obligations under the CVA, which consists of technical rules aiming at ensuring orderly customs administration. The European Union fails to see how policy considerations as those contemplated in and protected by Article XX can be of any relevance in this context.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Japan participates in this dispute because of its systemic interest in the consistent interpretation and implementation of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("Customs Valuation Agreement" or "CVA"). Japan made observations on (i) the scope of Article 21.5 proceedings; (ii) the examination of "circumstances surrounding the sale" in related-party transactions under the CVA; (iii) the standard of review under the CVA; (iv) the so-called doctrine of ripeness; and (v) the applicability of Article XX of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") to the CVA.

II. THE SCOPE OF ARTICLE 21.5 PROCEEDINGS

2. It is well established that a party having recourse to Article 21.5 of the DSU may request the compliance panel to review measures that the implementing Member maintains are not measures "taken to comply".[1] The Appellate Body has explained that, in such circumstances, "the compliance panel should seek to determine whether such distinct measures are particularly closely connected to the measures the implementing Member[s] 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] This determination involves, in turn, an examination of the links, in terms of the nature, effects, and timing, between the alleged measure, the declared measure taken to comply, and the DSB recommendations and rulings.[3]

3. As regards the *nature* (or subject matter),[4] the Appellate Body has found that the use of a common methodology (zeroing) in instruments issued in connected stages of an administrative proceeding provided the necessary link in terms of the nature of the measures, particularly where the methodology was the subject of the DSB recommendations and rulings.[5]

4. By *effects*, Japan understands the Appellate Body to have in mind legal consequences. The legal consequence of a challenged measure can be analyzed from two perspectives: (i) the legal effect of the challenged measure on the measure found to be WTO-inconsistent in the original proceedings; and (ii) the legal effect of the challenged measure on the declared measure taken to comply. With regard to the first type of the legal effects, the Appellate Body in *US – Zeroing (Article 21.5 – EC)* has found that, when a measure has legal effects that supersede those of the measure found to be WTO-inconsistent in the original proceedings, but those effects continue to reflect the same WTO-inconsistent conduct, this would provide a sufficient link in terms of effect.[6] Meanwhile, concerning the second type of the legal effects of the challenged measure, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* has upheld the analysis by the panel that a subsequent measure "could have an impact on" or "could possibly undermine" the implementation of the declared measure taken to comply in the original proceedings.[7] Such an analysis is necessitated in order to ensure that "limits [on Article 21.5 proceedings] should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another."[8]

5. As regards to *timing*, the Appellate Body has found that the fact that a measure is adopted simultaneously with, shortly before, or shortly after specific actions taken by a Member to

[1] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 207.
[2] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 207.
[3] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 229.
[4] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 230.
[5] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 230.
[6] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, paras. 231-232.
[7] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 87.
[8] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

implement DSB recommendations and rulings can provide support for a finding that those measures are closely connected.[9] By contrast, adoption of a measure a considerable time before the adoption of the DSB recommendations and ruling could be evidence that the measures are not closely connected.[10] Still, the Appellate Body has cautioned against "formalistic reliance on the date of issuance"[11] and has found measures adopted prior to the adoption of the DSB recommendations and ruling to fall within the scope of Article 21.5 proceedings, if those measures "still bore a sufficiently close nexus, in terms of *nature, effects and timing*." [12]

6. Japan considers that the Panel should follow the approach outlined by the Appellate Body. In particular, the Panel could examine: whether the Charges address the same subject matter and actions addressed through the Thai Customs Board of Appeals ("BoA") ruling and the DSB's recommendations and rulings (nature); whether the Charges results in the legal effect of maintaining the WTO-inconsistency found by the DSB or negating the effect of the declared measure taken to comply (effect); and whether the timing of the Charges support the assertion that they are linked to the BoA ruling and DSB 's recommendations and rulings.

7. Japan considers that the need to interpret the scope of Article 21.5 in a flexible manner stems from the possibility that an implementing Member may seek to avoid full compliance with the DSB's recommendations and rulings by imposing inconsistent measures and yet declaring them not to be "measures taken to comply". Japan also recalls that the object of Article 21.5 proceedings is to determine whether the implementing Member has complied with the DSB 's recommendations and rulings.[13] In this light, Japan considers that the Panel should examine the link between the measure at issue, the declared measure taken to comply, and the DSB 's recommendations and rulings, to ensure that the implementing Member does not avoid full compliance.

III. EXAMINATION OF "CIRCUMSTANCES SURROUNDING THE SALE" IN RELATED-PARTY TRANSACTIONS

8. Japan agrees that a benchmark comparison may be one method of examining the "circumstances surrounding the sale". However, Japan believes that customs authorities should examine the circumstances surrounding the sale by taking into consideration all relevant qualitative and quantitative factors to determine whether the transaction price was influenced by a relationship between the buyer and seller.

9. Paragraph 3 of the *Interpretive Notes* to paragraph 1.2 describes that "circumstances surrounding the sale" involves "relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at [ ]". These are qualitative analyses that would require an authority to examine that may not be readily comparable to a quantitative benchmark. The *Interpretive Notes* then provide for quantitative analyses, providing as a further example of a situation where a relationship may not have influenced the sale "where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time [ ] in sales of goods of the same class or kind."

IV. THE STANDARD OF REVIEW UNDER THE CVA

10. Japan considers that Article 17.6(i) of the AD Agreement applies exclusively to the review of anti-dumping measures and the Appellate Body has confirmed that it does not apply to claims brought under the other covered agreements.[14]

11. Even when reviewing decisions that are the outcome of an administrative investigation, the Appellate Body has held that a panel must not "simply defer to the conclusions of the national authority".[15] Instead, "a panel must examine whether, in the light of the evidence on the record,

[9] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 225.
[10] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 225.
[11] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 226.
[12] Appellate Body Report, *US – Zeroing (EC)(Article 21.5 – EC)*, para. 226 (emphasis original).
[13] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan),* para. 122.
[14] Appellate Body Report, *Argentina – Footwear (EC)*, para. 118.
[15] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada*), para. 93.

the conclusions reached by the investigating authority are reasoned and adequate", and such a review must be "critical and searching". [16]

V. THE SO-CALLED DOCTRINE OF RIPENESS

12. Considering the systemic importance of the arguments raised in relation to this doctrine, Japan would like to make the following points.

13. First, as a general rule, the fact that a measure is pending before a national court is not relevant in the examination of the inconsistency of that measure with international law, such as the WTO covered agreements. Japan recalls that Article 27 of the Vienna Convention on the Law of Treaty stipulates that "national law cannot be invoked to justify non-compliance with international law". Even if the doctrine of ripeness were to apply to WTO dispute settlement, the situation in domestic judicial proceedings would have no bearing on the so-called ripeness under the DSU or other WTO covered agreements, unless those agreements so provided.

14. Second, Japan considers that there is no requirement for a distinctive "ripeness" test in the DSU.[17] Japan observes that, in previous disputes, panels and the Appellate Body have rather focused their analysis on whether an act or omission constitutes a "measure at issue" for the purposes of WTO dispute settlement, and have then examined whether the measure constitutes a violation of a Member 's obligation under the WTO covered agreements.[18] Questions about whether a measure is properly subject to dispute settlement are determined within the context of analyzing whether the act or omission properly constitutes a "measure at issue" under Article 6.2 of DSU, and not through a separate "ripeness" test to be conducted after this initial determination.

15. Therefore, while Japan does not comment on any factual aspect of this case, it considers that the Panel should examine those measures as a matter of "fact" in the light of the "legal rules" in the WTO covered agreements, independently from their situation in national judicial proceedings.

VI. APPLICABILITY OF ARTICLE XX OF THE GATT 1994

16. In Japan 's view, Article XX of the GATT 1994 is not available to justify measures that are found to be inconsistent with the CVA.

17. First, the CVA does not provide any textual link 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 is the inclusion of a cross-reference. For example, cross-references to Article XX of the GATT 1994 are found in other WTO covered Agreements such as the SPS Agreement and in the Agreement on Preshipment Inspection. The TRIMs Agreement expressly provides that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement". In contrast, the CVA does not contain any reference to Article XX of the GATT 1994.

18. Second, Article XX of the GATT 1994 and the CVA are of different legal construct and nature. Article XX is a provision of the GATT 1994 that provides general exceptions under the GATT 1994. In contrast, the CVA is a special agreement on implementation of a specific Article, namely, Article VII of the GATT 1994. Therefore, by its nature, the CVA constitutes a special law vis-à-vis GATT 1994, and provides special rules focusing on how Member states should determine the customs value. 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, because principles that are applicable to general rules are not necessarily applicable to special rules unless the special rules intend to incorporate these principles. Yet, as mentioned above, the CVA lacks any provision that indicates an intention to incorporate the general exceptions provided in Article XX of the GATT 1994.

19. It is well established by the Appellate Body that the applicability of Article XX of the GATT 1994 to other WTO covered agreements depends on whether a textual link exists in the text

[16] Ibid.
[17] Japan's oral statement, paras. 12-15.
[18] See e.g., Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 79.

of that other agreement. The Appellate Body in *China – Publications and Audiovisual Products* stated that China may resort to Article XX of the GATT 1994 to justify an inconsistency with Paragraph 5.1 of China 's Accession Protocol based on the very text of that paragraph which provides that "[w]ithout prejudice to China 's right to regulate trade in a manner with the WTO Agreement [ ]". In that case, the Appellate Body recognized the availability of Article XX of the GATT 1994 to justify a deviation from obligations under Paragraph 5.1 of China 's Accession Protocol because, according to the Appellate Body, the said language of Paragraph 5.1 encompasses "China 's Power to take a regulatory action that derogates from WTO obligations that would otherwise constrain China 's exercise of such power – that is, to relevant exceptions".[19] In contrast, the Appellate Body in *China – Raw Materials* denied the availability of Article XX of the GATT 1994 to justify a measure inconsistent with Paragraph 11.3 of the China 's Accession Protocol, for the reason that Paragraph 11.3 does not contain any language similar to that of Paragraph 5.3 and that Paragraph 11.3 cannot be interpreted to make Article XX of the GATT 1994 available.[20] While denying the applicability of Article XX of the GATT 1994 to the claim under Paragraph 11.3, the Appellate Body also pointed out the lack of cross-reference to Article XX of the GATT 1994 in Paragraph 11.3 of China 's Accession Protocol.[21]

20. Japan considers that the absence of a reference to Article XX of the GATT 1994 in the CVA weighs heavily against the applicability of Article XX to the CVA. Under the circumstances just discussed, the absence of any cross-reference to Article XX in the CVA indicates that the CVA is not intended to apply the Article XX of GATT 1994. This is particularly the case given that the CVA does include a cross-reference to Article X of the GATT 1994, while it does not refer to Article XX.

21. Japan notes, in addition, that even if Article XX of the GATT 1994 were to apply to certain claims under other Articles of the CVA, nonetheless, Article XX is not available in the present case, because there is no textual link to Article XX in Articles 1.1, 1.2(a), 2, 3 or 10 of the CVA

[19] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 221.
[20] Appellate Body Report, *China – Raw Materials*, paras. 304 and 307.
[21] Appellate Body Report, *China – Raw Materials*, para. 303.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. Scope of "Measures Taken to Comply " Under Article 21.5 of the DSU

1. Panel proceedings under Article 21.5 of the DSU have a more limited scope than original panel proceedings, as the only measures at issue in an Article 21.5 proceeding are "measures taken to comply." The complainant in an Article 21.5 proceeding must show either that such a measure does not exist, or that it is inconsistent with one of the covered agreements. Measures that negate or undermine compliance with the DSB 's recommendations and rulings may also come within the scope of an Article 21.5 proceeding. In addition, panels and the Appellate Body have found that a measure that is not itself a measure taken to comply, but which has a "particularly close relationship " or "sufficiently close nexus" to a declared measure taken to comply and to the DSB 's recommendations and rulings, may fall within an Article 21.5 panel 's terms of reference.

2. The Philippines and Thailand dispute whether certain criminal charges are a "measure taken to comply" for purposes of this proceeding. The United States does not understand Thailand's compliance obligations to be necessarily limited to the valuation of entries at issue in the original proceeding. However, the United States questions whether valuation determinations with respect to entries that pre-date entries that were the subject of recommendations and rulings would be a measure taken to comply with such recommendations and rulings as a general matter. The Panel should consider the timing of the entries in the charges vis-à-vis the timing of entries at issue in the original proceeding in evaluating whether the charges share a sufficiently close relationship with the recommendations and rulings and the declared measure taken to comply.

II. Application of the CVA With Respect to the Criminal Charges

3. In addition to being limited to "measures taken to comply, " a panel 's terms of reference in a proceeding under Article 21.5 are set forth in Articles 7.1 and 6.2 of the DSU. Under Article 7.1, the panel 's terms of reference are generally "[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 of the complaint."

4. In turn, the panel 's terms of reference are to examine the "specific measures at issue " set out in the complainant 's panel request, as they exist at the time of panel establishment. Neither the DSU nor the CVA establishes a "ripeness " doctrine as articulated by Thailand. If a measure is within a panel's terms of reference, the panel's mandate is to examine the measure as it existed at the time of panel establishment and to make findings with respect to that measure.

5. In addition, pursuant to Article 19.1 of the DSU, a panel is required to make a recommendation where it has found a measure within its terms of reference to be inconsistent with the relevant Member's obligations. Article 19.1 of the DSU states, in part, "Where a panel . . . concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."

6. The Panel's task regarding the Philippines' claims under the CVA with respect to the criminal charges is, therefore, to examine whether the charges, as they existed at the time of the Panel's establishment, are inconsistent with the provisions asserted. If an inconsistency is found, the DSU requires the Panel to make a recommendation with respect to the measure.

7. The Philippines claims that the criminal charges are inconsistent with Articles 1.1 and 1.2(a) of the CVA. These articles establish that the primary basis of valuation is the transaction value. An analysis of whether the criminal charges are inconsistent with Articles 1.1 and 1.2(a) should focus on whether the charges reflect a failure to accept the transaction value as the value of goods for the purposes of levying ad valorem customs duties on imported goods. If the Panel finds that such a failure occurred, it should assess whether the customs administration had grounds for

considering that the relationship influenced the price and whether it communicated those grounds to the importer and provided the importer with a reasonable opportunity to respond.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

8. The recommendations and rulings of the DSB are naturally the starting point for assessing compliance with those recommendations and rulings. With respect to the criminal charges, the relevant question for purposes of the Panel's terms of reference in this Article 21.5 proceeding is whether the charges may be subject to a proceeding whose scope is limited under the DSU to resolving disagreement as to the consistency or existence of measures taken to comply with those recommendations and rulings. The valuation of entries imported at one point in time does not necessarily have a relationship – much less a close relationship – with the valuation of any other entries, or to DSB recommendations and rulings issued later in time that cover subsequent entries. To find that the charges fall within the scope of an Article 21.5 proceeding by virtue of a close relationship with the recommendations and rulings and a declared measure taken to comply, the Panel must find that a close relationship exists.

9. With respect to the November 2012 Board of Appeals ruling, under Articles 7.1 and 6.2 of the DSU, the task of the Panel is to conduct an objective assessment as to whether the ruling is inconsistent with the provisions of the CVA asserted. The CVA does not set forth a "standard of review, "and Article 11 of the DSU does not call for the Panel to conduct a *de novo* review of the Board of Appeals ruling. The United States expects that the Panel 's assessment of whether the specific steps taken by the authority satisfied the obligations set forth in Articles 1.1 and 1.2 of the CVA will depend on the facts surrounding the ruling, including, in light of the Interpretative Notes, the Board's efforts to obtain information from the importer, the information regarding the transaction before the Board, and the reasoning provided for its determination.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL 'S QUESTIONS TO THIRD PARTIES

GENERAL

10. There is no provision in the DSU that establishes a requirement that a compliance panel follow legal interpretations of the original panel or of the Appellate Body in reports adopted by the DSB. Under the structure of the WTO Agreement (Article IX:2) and the DSU (Article 3.9), it is only through appropriate action by the Ministerial Conference and the General Council that this Panel would be "legally bound " to follow such an authoritative legal interpretation.

11. In *Chile – Price Band (Article 21.5 – Argentina)* and *US – Tuna II (Article 21.5 – Mexico)*, the Appellate Body noted that Article 21.5 proceedings "form part of a continuum, " such that "due cognizance" must be accorded to the DSB 's recommendations and rulings in the original proceeding. In this regard, it is useful to bear in mind that the DSB recommendations and rulings in the original proceedings play an important role in evaluating compliance. They inform a Member's understanding of how to bring its measure into compliance with its WTO obligations.

12. Under the DSU, the scope of proceedings under Article 21.5 is more limited than the scope of original panel proceedings. Given that valuation is conducted for all imports, on a case-by-case basis, the Panel will need to carefully consider how the criminal charges relate to the original recommendations and rulings in this context.

13. In addition, the DSU requires the complainant to show that the content of the measure identified, as it exists at the time of panel establishment, is inconsistent with the obligation asserted. If the identified measure, as it exists at panel establishment, consists of charges or allegations, the complainant must show how those charges or allegations are inconsistent with the provisions at issue in order to prevail on its claims.

CRIMINAL CHARGES

14. The CVA itself does not exclude criminal or penal actions from the scope of its commitments. The question of whether a challenged measure is inconsistent with a particular CVA obligation depends on whether that measure, as it exists at panel establishment, is inconsistent with that obligation, as interpreted under customary rules of interpretation.

15. Articles 1.1 and 1.2(a) of the CVA obligate a WTO Member to accept the transaction value, and not to reject the transaction value on the sole ground that the buyer and seller are related. These obligations are not limited to particular entities within a Member's government. Moreover, nothing in the CVA suggests that these obligations do not apply with respect to valuation in cases where the importer has committed fraud. A Member may seek and apply penalties in such a case, but it must follow the requirements of the CVA in determining the value of the goods. Improper valuation is not a permissible response to customs fraud.

16. With respect to the applicability of Article XX of the GATT 1994 to claims under the CVA, the United States is not aware that this issue has arisen in a previous dispute. Both parties to this dispute have presented arguments regarding the merits of the Article XX defenses asserted by Thailand. As such, the Panel may not need to reach this question in order to resolve this dispute, but could proceed to analyze, on an *arguendo* basis, the defenses presented by Thailand.

BOA RULING

17. Customs valuation is a transaction-specific process. The specific steps taken by the customs authority in examining the circumstances of sale will depend on the circumstances of the transaction at issue.

18. However, the discretion afforded with respect to valuation under the CVA is not unlimited. The CVA clearly establishes the transaction value as the primary basis for valuation. It further provides that, even when the buyer and seller are related, the customs value shall be accepted, provided that the transaction value is acceptable under Article 1.2. The Interpretative Notes make clear that the customs authority need not examine the relationship in every case, but rather when it has "doubts " about the acceptability of the price. In those cases, Article 1.2(a) requires an examination of the circumstances of sale, and also requires, if the customs administration has grounds for considering the relationship influenced the price, the customs authority to "communicate its grounds to the importer " and give the importer "a reasonable opportunity to respond. "