Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines
(DS371)

Responses of the United States of America to the Panel's Questions to Third Parties

Responses of the United States of America to Thailand's Questions to Third Parties

September 15, 2017

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Argentina – Textiles (Panel)	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted as modified by Appellate Body Report WT/DS56/AB/R, 22 April 1998
Chile – Price Band (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
EC – Hormones (AB)	Appellate Body Reports, *EC – EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R / WT/DS48/AB/R, adopted 13 February 1998
Thailand – Cigarettes (Panel)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/ R, adopted as modified by Appellate Body Report WT/DS371/AB/R, 15 July 2011
US – Softwood Lumber IV (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, adopted 20 December 2005
US – Tuna II (Article 21.5 – Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW, adopted 3 December 2015

RESPONSES TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

GENERAL

1. In light of the institutional role and mandate of a compliance panel, is this Panel legally bound to follow any legal interpretations adopted by the original panel?

1. The United States understands the Panel's question as prompted by arguments by the Philippines regarding the standard of review under the Customs Valuation Agreement (CVA).[1] The United States will first address this question under the DSU[2] and then in light of the CVA claims at issue.

2. As a general matter, 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. Rather, a panel is charged with assisting the DSB by making an objective assessment of "the applicability of and conformity with the relevant covered agreements" as will assist the DSB in making the recommendations to bring a WTO-inconsistent measure into conformity with WTO rules.[3] Article 3.2 of the DSU indicates that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements" through an adjudicator's application to provisions of the covered agreements of "customary rules of interpretation of public international law", and not through application of a prior adjudicator's *interpretations* of those agreements. In fact, the WTO Agreement and the DSU reserve to the Ministerial Conference and General Council the "exclusive authority" to adopt an "authoritative interpretation" of a provision of the covered agreements.[4] Under the structure of the WTO Agreement and the DSU, then, it is only through appropriate action by *those* bodies (and not the DSB) that this Panel would be "legally bound" to follow such an authoritative legal interpretation.

3. As noted in previous reports, Article 21.5 proceedings "form part of a continuum," such that "due cognizance" must be accorded to the DSB's recommendations in the original proceedings.[5]

4. In addition, a compliance panel may not revisit the recommendation to bring a measure into conformity with the covered agreements pursuant to DSU Article 19.1.

5. 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. Those DSB

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[1] *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*.

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

[3] DSU, Articles 11, 19.1.

[4] *Marrakesh Agreement Establishing the World Trade Organization*, Article IX:2; DSU, Article 3.9.

[5] *See, e.g., Chile – Price Band (Article 21.5 – Argentina) (AB)*, para. 136; *see also US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 5.9.

recommendations and rulings inform the understanding of a Member concerned of how to bring its measure into compliance with its WTO obligations.

6. With regard to the claims under the CVA in this dispute, as the Panel explained in paragraph 7.106 of its report in the original proceeding,

> [I]n the light of the nature of obligations under Articles 1.2(a) and 16 the Customs Valuation Agreement, the standard appropriate for our review of the Philippines' claims under Articles 1.1 and 1.2(a) of the Customs Valuation Agreement is to assess, based on the grounds as well as the explanation provided by Thai Customs, whether Thai Customs' decision to reject the transaction value of the imported cigarettes at issue was consistent with the Customs Valuation Agreement.

7. The United States agrees that the Panel must consider, based on the facts and arguments presented, whether the measure at issue – in particular, the November 2012 Board of Appeals ruling – reflects a failure to examine the circumstances of sale, including whether and to what extent the authority gave the importer an opportunity to provide information as necessary to enable it to conduct such an examination, and whether Thailand acted consistently with the obligation to accept the transaction value.

2. The parties disagree as to whether the Criminal Charges fall within the scope of these Article 21.5 compliance proceedings.

(a) In general, what in your view are the key considerations for the purposes of determining the boundaries of the measures falling under Article 21.5 compliance proceedings?

(b) Do you agree with the United States' view that, for purposes of the close nexus analysis, the Panel cannot ignore the timing of the respective sets of entries?

8. The United States responds to subparts (a) and (b) of the Panel's question below.

9. As noted in the U.S. third party submission, under the DSU, the scope of proceedings under Article 21.5 is more limited than the scope of original panel proceedings.[6] The DSU provides for a complaining party to pursue expedited proceedings for matters falling within this more limited scope.

10. The complainant in an Article 21.5 panel proceeding must show either that a "measure taken to comply" does not exist, or that it is inconsistent with one of the covered agreements.

[6] U.S. Third Party Submission, paras. 9-10.

11. 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 (though they may not be formally within the panel's terms of reference). For example, an undeclared measure may undo the compliance that might otherwise be achieved by another measure.

12. In addition, a measure that is not itself a declared measure taken to comply, but which has a "particularly close relationship" to a declared measure and to the DSB's recommendations and rulings, may effectively be viewed as a measure taken to comply and fall within a compliance panel's terms of reference.[7]

13. Given that valuation is conducted for all imports, on a case-by-case basis, the compliance panel will need to carefully consider how the measure at issue – the criminal charges – relates to the recommendations and rulings in this context.

3. The parties disagree as to whether the Criminal Charges qualify as a customs valuation "determination" that is ripe for adjudication under the DSU. In addition, an appeal of the BoA Ruling is still pending before the Supreme Court of Thailand.

(a) In your view, what are the key considerations to determine what constitutes a customs valuation "determination" that is ripe for adjudication under the DSU?

(b) What is the relationship between the doctrine of "ripeness" and the fact that the principle of exhaustion of local remedies does not apply in WTO law?

14. The United States responds to subparts (a) and (b) of the Panel's question below.

15. As explained in the U.S. third party submission, whether a measure is challenged under a provision of the CVA or another WTO agreement, the DSU does not establish a "ripeness" rule. Rather, it 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.[8]

16. If a "measure" challenged as inconsistent with the CVA (or another WTO agreement) is not "ripe" in the sense that it does not exist at panel establishment, then it is not within the panel's terms of reference.

17. If the identified measure, as it exists at the time of panel establishment, consists of charges or allegations, the complainant is required to show how those charges or allegations are inconsistent with the provisions at issue in order to prevail on its claims.

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[7] *See, e.g.*, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US) (AB)*, para. 245; *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77.

[8] U.S. Third Party Submission, para. 17.

18. Similarly, the fact that a measure might be subject to challenge in domestic courts does not itself mean that it is not within a panel's terms of reference. The complainant in such a case must show that the measure as it exists (that is, not as it might exist once domestic proceedings have been exhausted) is inconsistent with the provisions asserted.[9]

19. The United States understands the parties' discussion of whether the charges are a "determination" to relate not to whether the charges are "ripe" for adjudication under the DSU, but to whether the charges are subject to the CVA.[10] The parties agree that Articles 1 through 7 of the CVA apply to "determinations" of customs value – although the Philippines notes that application of the CVA might not be so limited[11] – but they disagree as to whether the criminal charges are a "determination" of customs value.

20. However, while the parties dispute whether the charges are a "measure taken to comply" for purposes of Article 21.5 of the DSU, it is not clear to what extent there is a dispute as to whether the charges are a "measure" that was in existence at the time of panel establishment.[12] As such, as indicated in the U.S. third party submission, the United States considers the relevant inquiry in assessing the consistency of the charges with the identified provisions of the CVA to be whether the charges reflect a failure to accept the transaction value, and if so, whether they are inconsistent with the CVA obligations asserted.[13]

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[9] As the panel explained in *Argentina – Textiles*,

> Article II of GATT imposes an unconditional obligation on a WTO Member to offer to other Members treatment not less favourable than that provided for in its Schedule. A Member violates this obligation, regardless of whether that Member provides a remedy for such violation in its domestic legal system. Notwithstanding how efficient such domestic court system may be, until the court system acts the Member is in violation of its WTO obligations. Moreover, it is not certain that the violation will ever be corrected since such correction is conditional on a decision by the Argentine importer or the holder of the clearance documents to initiate a domestic action.

Argentina – Textiles (Panel), para. 6.68.

The United States further notes that Article 11 of the CVA requires a WTO Member to provide for the right of appeal to a judicial authority, but nothing in the CVA suggests that the underlying determination of customs valuation may not be challenged under the DSU until such a judicial appeal has been completed.

[10] Thailand's Responses to the Panel's Questions in Advance of the First Substantive Meeting, Response to Question 38(c).

[11] The Philippines' Responses to the Panel's First Set of Questions, para. 309.

[12] The Philippines' Second Written Submission, paras. 427-429; Thailand's Second Written Submission, paras. 3.2, 3.131.

[13] U.S. Third Party Submission, para. 19.

CRIMINAL CHARGES

4. With respect to the "Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value", please clarify the following:

(a) Does the Decision imply that criminal/penal proceedings may be subject to the obligations in the CVA?

21. The Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value ("Decision") does not, in itself, imply one way or the other that proceedings characterized as "criminal" may be subject to the CVA. The Decision refers to situations "[w]hen a declaration has been presented and where the customs administration has reason to doubt the truth or accuracy of the particulars or of documents produced in support of this declaration." The Decision provides for certain steps to be followed in the valuation exercise in such a case, including in a case in which the importer has submitted false documents, without regard to whether that case involves criminal or penal proceedings.

22. As noted in the U.S. third party submission, the CVA itself does not exclude criminal or penal actions from the scope of its commitments.[14] 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.

23. The Decision reaffirms the primacy of the transaction value, and provides that, when a customs administration has reason to doubt the truth or accuracy of information provided in support of the importer's declaration (as opposed to cases where a customs administration doubts that the relationship between the buyer and seller did not influence the declared price), the administration may request further information from the importer. The Decision also makes clear that, in such cases, the customs administration must communicate to the importer its grounds for doubting the truth or accuracy of the information presented and provide a reasonable opportunity to respond, and must communicate to the importer its decision and the grounds therefor in writing.[15]

24. The United States understands that Thailand argues that actions of the Public Prosecutor in bringing the charges are not subject to the CVA, because the CVA "is limited to valuation for the purposes of levying *ad valorem* customs duties."[16] Thailand submits that the purpose of the charges is to initiate legal proceedings with respect to customs fraud, that the charges are based

[14] U.S. Third Party Submission, para. 27.

[15] Similarly, Article 1.2(a) of the CVA provides that, when a customs administration has grounds for considering the relationship between the buyer and seller influenced the price, it must communicate those grounds to the importer (in writing, if the importer so requests) and provide the importer a reasonable opportunity to respond.

[16] Thailand's Second Written Submission, para. 3.89.

on domestic legal provisions criminalizing customs fraud, and that the Public Prosecutor is responsible only for prosecuting criminal offenses.[17]

25. However, the United States notes that 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.

26. Moreover, as discussed in more detail in response to Question 5, nothing in the CVA suggests that these obligations do not apply with respect to valuation in cases where the importer has committed fraud. A WTO Member may seek and apply penalties in such a case, of course, but it must follow the requirements of the CVA in determining the value of the goods.

(b) Does the Decision establish procedural obligations that were applicable to the Public Prosecutor in the context of bringing the Charges?

27. The procedural obligations set forth in the Decision, as well as in Article 1.2 of the CVA, are interim steps in the valuation process. The United States would not expect these obligations to apply to a prosecutor as a general matter.

28. However, the United States notes that, in the normal course, a prosecutor's pursuit of undervaluation charges would be preceded by a related finding by the customs administration regarding the declared value. That is, the customs administration itself would have had doubts about the accuracy of the documentation provided, and would have communicated those grounds to the importer and provided the importer an opportunity to respond. In this case, the United States understands that Thailand's customs administration accepted the transaction value, which suggests that the customs administration did not have concerns about the reliability of the information provided in connection with the transactions at issue.

29. While the United States does not take a position as to the facts in this dispute, to the extent that Thailand's Public Prosecutor is determining a customs value for imported goods, it must do so in a manner consistent with the CVA. That is, while certain interim procedural requirements might not apply to the prosecutor directly, as provided in Article 1 of the CVA, "[t]he customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods," except in certain specific circumstances. As such, the United States would expect any exercise by the Public Prosecutor in valuing goods to be related to determining "the price actually paid or payable" for the goods in question.

5. In a case where an importer intentionally submits a false invoice to customs authorities indicating a lower price than that which was actually paid to the seller:

[17] Thailand's Second Written Submission, paras. 3.85-2.88.

(a) Would it be correct to say that the CVA, in principle, does not regulate the kinds of punitive measures that a Member may take in response to this form of customs fraud?

(b) Would it be correct to say that insofar as a Member's laws establish a penalty based on the customs value of the goods (e.g. a fine that is four times the amount of the proper customs value), the CVA would nonetheless apply to that aspect of the fine?

30. The United States responds to subparts (a) and (b) of the Panel's question below.

31. As noted in response to the previous question, the CVA does not exclude particular types of measures from its application. The question of whether a particular measure, including a punitive 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.

32. Article 1.1 of the CVA defines the "transaction value" as "the price paid or actually payable for the goods." In a case where an importer intentionally submits a false invoice to customs authorities indicating a lower price than that which was actually paid, the price declared on the invoice would not appear to be the "price paid or actually payable." The customs authority would not be required to accept the declared value in such a case.

33. However, the customs authority would be required to determine the value of goods consistently with the CVA. If, after undertaking the necessary procedural steps, the customs authority determines that the transaction value is not acceptable, it must follow the sequence of valuation methods set forth in the CVA in determining the final customs value.[18] In addition, the customs value could not be determined on the basis of, among other things, minimum prices or arbitrary or fictitious values.[19] Nothing in the CVA suggests that the obligations it sets forth with respect to valuation do not apply in cases where an importer falsely declares the price. Improper valuation is not a permissible response to customs fraud.

6. Regarding Article XX of the GATT 1994 and its relationship to the CVA:

(a) Is Article XX of the GATT 1994 applicable to the Customs Valuation Agreement?

(b) Does it follow from the fact that Article XX is applicable to Article VII of the GATT that Article XX must also be applicable to the CVA? In addressing this issue, please comment on paragraph 19 of Japan's third-party oral statement.

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[18] *See*, *e.g.*, Customs Valuation Agreement, Article 2.1(a), Article 3.1(a), Article 4.

[19] Customs Valuation Agreement, Article 7.

(c) What is the relevance of Article 17 of the CVA to the question of whether Article XX of the GATT 1994 applies to the CVA? Specifically, does Article 17 suggest that insofar as the drafters of the CVA wanted to include exceptions to the obligations in the CVA, they did so expressly? Or does Article 17 address a subject-matter that is distinct from the subject-matter of Article XX, such that no inference regarding the applicability of Article XX to the CVA can be drawn from the existence of Article 17?

34. The United States responds to subparts (a), (b), and (c) of the Panel's question below.

35. The United States is not aware that the issue of the applicability of GATT 1994 Article XX to claims brought under the CVA has arisen in a previous dispute. We also note that both parties to this dispute have presented arguments regarding the substantive merits of the Article XX defenses asserted by Thailand. As such, the United States considers that the Panel may not need to reach the question of whether Article XX of the GATT 1994 applies to the CVA in order to resolve this dispute. Rather, the Panel could proceed to analyze, on an *arguendo* basis, the Article XX defenses presented by Thailand.

36. The United States notes that justification under Article XX of the GATT 1994 would only be relevant if the Panel finds the criminal charges, the measure that Thailand seeks to justify under Article XX, to be inconsistent with the CVA. As noted previously, the United States does not take a position as to the facts in this dispute. However, the United States questions how a determination of customs value that is inconsistent with the CVA would be "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement," as provided under Article XX(d), or "necessary to protect public morals," as provided for under Article XX(a), because they fight duty and tax evasion. If the criminal charges were necessary to secure the importer's compliance with the customs laws, then the charges themselves (to the extent the customs value for purposes of levying duties is determined through those procedures) would seemingly require the customs value to be assessed through WTO-consistent procedures under the CVA, such as use of transaction values. As noted in response to Question 4(a), a WTO Member may seek and apply penalties in cases involving customs fraud, but it must follow the requirements of the CVA in determining the value of the goods.[20]

37. If the Panel were nonetheless to make a finding as to the applicability of Article XX of the GATT 1994 to the CVA, the United States notes that, unlike some other covered agreements, the CVA does not include a specific reference to Article XX of the GATT 1994. Further, the United States agrees with the statement in paragraph 19 of Japan's third party oral statement that, as a general matter, the exceptions that apply to general rules do not necessarily apply to special rules vis-à-vis those general rules. The "special" rules set forth in the CVA are implementing rules with respect to Article VII of the GATT 1994.

[20] That is, it is difficult to understand how the need to apply penalties to deter evasion would make "necessary" a particular determination of customs value for duty collection. These are different issues.

38. Article 17 is not an exception to the CVA. Rather, it makes clear that the CVA should not be interpreted to prevent a customs authority from satisfying itself as to the truth or accuracy of information presented to it. As Annex III to the CVA indicates, "Article 17 recognizes that *in applying the Agreement*, customs administrations may need to make enquiries concerning the truth or accuracy of any statement, document or declaration presented to them for customs valuation purposes."[21] Such inquiries may be "aimed at verifying that the elements of value declared or presented to customs in connection with a determination of customs value are complete and correct." However, the authority to make such inquiries does not justify a deviation from valuation requirements set out in the CVA itself.

BOA RULING

7. <u>To all third parties</u>: The following questions are aimed at soliciting the third parties' views on the nature of the obligation to "examine the circumstances of sale" in Article 1.2(a) second sentence:

(a) In the context of the BoA Ruling, the Philippines alleges that there are eight different "flaws" in the BoA's rejection of PMTL's transaction values, and suggests that each one of those flaws gives rise to a separate and distinct violation of the obligation, in Article 1.2(a), to conduct a proper examination of the circumstances of sale. In its response to Panel question No. 2(a), however, the Philippines contemplates the possibility that the Panel might consider "that these various flaws should be examined together". Does the nature of the obligation in Article 1.2(a) dictate that the Panel should undertake a holistic assessment of all relevant aspects of the BoA Ruling to make a single finding in respect of a single claim in relation to that obligation in respect of that measure, as opposed to multiple distinct findings in relation to the eight flaws that the Philippines has identified?

39. 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.

40. While, as previously noted, the United States does not take a position as to the facts at issue in this dispute, the United States would expect that analysis of whether Thailand examined the circumstances of sale would involve looking at the examination conducted by the Board of Appeals as a whole. It might be that an alleged "flaw" in that examination is such that the circumstances were not, in fact, examined – for example, a failure by the customs authority to request additional information from the importer.[22] But given the nature of the valuation process, it would generally be difficult to examine various elements of the examination by a customs authority in isolation from one another. The fact that Article 1.2(a) requires

[21] Emphasis added.

[22] Article 1.2(a); Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 3.

examination of the "circumstances of sale," plural, suggests that one circumstance or factor may not be determinative.

(b) Certain of the Philippines' claims relating to the BoA Ruling distinguish between the obligations under the second and third sentences of Article 1.2(a) of the CVA. The original panel stated that the "process of examining the circumstances of the sale under Article 1.2(a) … resembles that of consultation" between the customs authority and the importer.[1] The original panel further explained that the respective responsibilities of importers and customs authorities under Article 1.2(a) mean that importers are under a responsibility to provide information to the customs authority, and that once provided with that information, "customs authorities must conduct an 'examination' of the circumstance of sale, which would require an active, critical review and consideration of the information before them."[2] Do you consider that the second and third sentences of Article 1.2(a) impose distinct obligations that can be analysed separately?

[1] Original Panel Report, para. 7.172.
[2] Original Panel Report, para. 7.171.

41. The second and third sentences of Article 1.2(a) impose distinct obligations. That said, those obligations relate to the process of valuation.

42. The process of valuation typically begins when an importer presents a declaration of value of imported goods to the customs authority. The customs authority may simply accept the declared value, even if the buyer and seller are related.

43. If, in cases where the buyer and seller are related, the customs authority has doubts about the acceptability of the price, under the second sentence of Article 1.2(a), the circumstances of sale "shall be examined" and the transaction value accepted provided that the relationship did not influence the price. The specific steps taken by the customs authority will depend on the circumstances of the import transaction. However, as the Interpretive Notes confirm, the obligation in the second sentence to examine the circumstances of sale would require the customs authority to seek information from the importer and provide an opportunity to respond.[23] The question of whether the relationship influenced the price may be resolved in examination of the circumstances of sale.

44. However, in some cases, "in light of information provided by the importer or otherwise", the customs authority may have grounds for considering that the relationship influenced the price. In those cases, the third sentence of Article 1.2(a) sets forth an additional obligation,

[23] Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 3.

namely to "communicate its grounds" for considering that the relationship influenced the price to the importer and to give the importer "a reasonable opportunity to respond".

8. <u>To all third parties</u>: Thailand argues that "the Panel should apply the same standard of review [as] that governing panels in disputes arising under the Anti-Dumping Agreement"[3], or a "standard of review analogous to that used in trade remedy dispute settlement proceedings, which is mentioned in Article 17.6(i) of the Anti-Dumping Agreement."[4] Under this standard of review, Thailand considers that the question before the Panel is "whether the Board of Appeals' approach was reasonable and objective in the light of the circumstances of the case and the evidence before it."[5]

(a) Do the third parties agree with Thailand that a standard of review analogous to that mentioned in Article 17.6(i) is applicable to the review of the BoA Ruling?

(b) Do the third parties agree that, regardless of whether the standard of review is formulated in terms of Article 17.6(i), "reasonableness", "discretion", or otherwise, a Panel should not engage in a *de novo* review and a customs administration enjoys a margin of appreciation with respect to methodological issues that are not specifically prescribed by the text of the CVA?

[3] Thailand's first written submission, para. 5.12.
[4] Thailand's second written submission, para. 2.2.
[5] Thailand's second written submission, para. 2.2.

45. As noted in the U.S. oral statement at the third party session, the CVA does not provide for a "standard of review." Article 11 of the DSU governs the Panel's assessment.

46. Under Article 11, in carrying out its examination of the matter referred to it by the DSB, the Panel is to conduct an objective assessment of the matter, including the facts and the conformity of the challenged measure with the covered agreements, under the claims asserted by the complaining party.

47. Article 11 does not call for the Panel to conduct a *de novo* review of the Board of Appeals ruling.[24] And, as suggested by subpart (b) of the question from the Panel, the CVA provides some degree of discretion to a customs authority in conducting a valuation exercise. This discretion is consistent with the fact that valuation is transaction-specific, and the specific steps that a customs authority takes with respect to a specific transaction will depend on the circumstances of that transaction.

[24] U.S. Third Party Oral Statement, para. 16. *See also EC – Hormones (AB)*, para. 117; *Thailand – Cigarettes (Panel)*, para. 7.101.

48. At the same time, the CVA clearly establishes the transaction value as the primary basis for valuation.[25] 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.[26] The Interpretive Notes to Article 1 make clear that a customs authority need not examine the relationship in every case, but rather when it has "doubts" about the acceptability of the price.[27] 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."[28]

49. The discretion afforded with respect to valuation under the CVA is as such limited. The United States would expect valuation determinations to be made in light of the obligations set forth in the CVA, in particular the general obligation to accept the transaction value.

9. <u>To all third parties</u>: Is it permissible for a customs authority to conclude that the relationship between the buyer and the seller influenced the price solely on the basis that the importer's P&GE rate is outside of a range derived from an industry comparator group?

50. Article 1.1 of the CVA provides that "[t]he customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods," except under certain circumstances. Article 1.2(a) provides that, in determining whether the transaction value is acceptable for purposes of Article 1.1 in related party transactions, the "transaction value shall be accepted provided that the relationship did not influence the price."

51. Whether the comparison of an importer's P&GE rate with an industry comparator group is itself sufficient grounds for concluding that the relationship influenced the price would likely depend on the facts relating to the transaction at issue, including the product and sector at issue and any explanations provided by the importer. In addition, given that a WTO Member is obligated to accept the transaction value in related party transactions "provided that the relationship [between buyer and seller] did not influence the price," the United States would expect that, if a WTO Member rejects transaction value on the basis of a comparison of P&GE rates, it would consider how the differences in P&GE rates themselves relate to the question of whether the transaction at issue was conducted at arms' length.

52. The United States also notes, as a practical matter, that it would not generally expect a customs authority to have information about which companies engage in comparable

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[25] Customs Valuation Agreement, Article 1.

[26] Customs Valuation Agreement, Article 1(d).

[27] Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 2.

[28] *See also* Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 3 ("Where the customs administration is unable to accept the transaction value without further inquiry, it should give the importer an opportunity to supply such further detailed information as may be necessary to enable it to examine the circumstances surrounding the sale.").

transactions, nor have information about comparable sales of the particular seller to other buyers not ostensibly related. The creation of comparison groups for purposes of comparing profit and general expenses would normally be an exercise that would require information provided by the importer.

RESPONSES TO THAILAND'S QUESTIONS TO THE THIRD PARTIES

1. In *China — Intellectual Property Rights*, the Panel stated that it "acknowledge[d] the sensitive nature of criminal matters and attendant concerns regarding sovereignty. These concerns may be expected to find reflection in the text and scope of treaty obligations regarding such matters as negotiated by States and other Members".[1]

- **In the light of this statement, could the third parties indicate to the Panel where in the text of the Customs Valuation Agreement they find the obligations negotiated by Members regarding criminal matters of customs fraud?**

- **How should the Panel weigh the fact that in the TRIPS Agreement, Members expressly included obligations regarding criminal procedures and remedies, but did not do so in the Customs Valuation Agreement?**

1 Panel Report, *China – Intellectual Property Rights*, para. 7.501.

53. As indicated in the U.S. third party oral statement, the text of the CVA does not exclude a measure from its disciplines on the basis that it is characterized as criminal in nature.[29] Whether a particular measure, criminal or otherwise, is consistent with a particular provision of the CVA depends on the specific measure and the provision asserted.

54. For example, Article 1.1 of the CVA establishes a clear obligation for a WTO Member to accept the transaction value: "The customs value of imported goods shall be the transaction value." Articles 2 through 6 set forth a clear obligation for a WTO Member to follow a sequence of valuation methods in cases where the transaction value is not acceptable. And, Article 7 establishes a clear obligation not to use certain methods, including minimum or arbitrary or fictitious values. Nothing in the CVA suggests that a WTO Member may reject the transaction value, ignore the sequence of valuation methods, or rely on prohibited valuation bases in "criminal matters of customs fraud."

2. Assume that, some period after an importer has completed customs clearance procedures in which the declared transaction value was accepted as the customs value and final assessment and payment of ad valorem customs duties has taken place, evidence comes to light about two bank transfers whose details make clear that they are payments by the importer to the seller in respect of the imported goods. At the time of importation, the importer did not include these two bank transfers as part of the transaction value. The matter is referred to the criminal authorities. After a criminal investigation, the prosecutor then files an indictment/criminal charges against the importer for customs

[29] U.S. Third Party Oral Statement, para. 26.

fraud, alleging that the importer concealed information from the customs administration with the intention to evade the payment of customs duties. In your view, would the indictment/criminal charges constitute a "determination of customs value" "for the purposes of levying ad valorem duties" within the meaning of the CVA and thus be subject to the procedures of the CVA?

55. As noted in the U.S. third party submission, the United States does not take a position as to the facts in this dispute, and as such does not take a position as to whether the facts of the hypothetical included in Thailand's question are analogous to the facts at issue. The United States notes, as reflected in its responses to Questions 4(a) and 5 from the Panel, that WTO-inconsistent customs valuation is neither an appropriate nor a necessary response to customs fraud. A charge of fraud, or imposition of penalties for customs fraud, premised on customs valuation must be based on correct valuation.

3. The Philippines argues that criminal investigations and prosecutions for customs fraud are governed by the CVA and that Article XX of the GATT 1994 is not applicable. If accepted, this would mean that all criminal investigations and prosecution must be conducted in accordance with the procedures of the CVA. Do you agree?

56. The United States understands that the Philippines has challenged criminal charges filed by Thailand's Public Prosecutor as inconsistent with a number of provisions of the CVA. The United States does not understand the Philippines to have challenged criminal investigations and prosecutions for customs fraud as a general matter, nor does the United States consider that a finding that all criminal investigations and prosecutions for customs fraud are subject to CVA disciplines is necessary for resolution of this dispute. Rather, as noted in the U.S. third party oral statement, the question is whether the charges are inconsistent with the CVA provisions asserted. As noted in its responses to the Panel's questions and in its third party oral statement, the United States does not consider that the CVA necessarily excludes or includes certain types of measures. Whether a particular measure, criminal or otherwise, is inconsistent depends on the content of that measure.

4. If, as the Philippines argues, the filing of an indictment/criminal charges is an act that can be characterized as a "determination of customs valuation" subject to the obligations in Articles 1-7 of the CVA, are Members therefore required under Article 11 of the CVA to provide an appeal? How does that work in practice? Do you provide for an appeal against indictments/criminal charges (as opposed to subsequent criminal convictions) within the meaning of Article 11 under your domestic law?

57. As noted in response to the previous question, the United States understands that the Philippines has challenged criminal charges filed by Thailand's Public Prosecutor as inconsistent with a number of provisions of the CVA. The United States does not understand the Philippines to have challenged indictments or criminal charges as a general matter.

58. The United States notes that, as indicated in response to Question 4(b) from the Panel, in the normal course, a prosecutor's pursuit of undervaluation charges is preceded by a related finding by the customs administration regarding the declared value. That is, the customs

administration itself would have had doubts about the accuracy of the documentation provided, and would have communicated those grounds to the importer and provided the importer an opportunity to respond; the importer would ultimately have the right to appeal a determination by the customs administration under Article 11 of the CVA. However, this does not appear to be the case with respect to the charges challenged by the Philippines, as the United States understands that Thailand's customs administration accepted the transaction value for the transactions at issue.