

***THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE  
PHILIPPINES – RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE PHILIPPINES***

**(DS371)**

**ORAL STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE THIRD-PARTY SESSION  
OF THE MEETING OF THE PANEL**

**August 30, 2017**

Mr. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute. As indicated in our written submission, the United States has a strong interest in adherence to the commitments of the Customs Valuation Agreement.<sup>1</sup>

2. Our statement today will emphasize and reinforce the comments in our written submission with respect to the scope of a proceeding under Article 21.5 of the Dispute Settlement Understanding,<sup>2</sup> as well as address issues related to the standard of review under the Customs Valuation Agreement.

**I. Scope of “Measures Taken to Comply” Under Article 21.5 of the DSU**

3. As the United States understands the facts of this dispute, following an investigation initiated in 2006, Thailand’s public prosecutor in 2016 issued criminal charges with respect to a number of imports between July 2003 and June 2006, alleging that the declared transaction values are “false” prices. The Philippines and Thailand dispute whether these charges are a measure taken to comply for purposes of this Article 21.5 proceeding, in particular whether they bear a close relationship to the recommendations and rulings of the DSB and the declared measure taken to comply with those recommendations and rulings.

4. The Philippines appears to suggest that because the criminal charges were issued after the recommendations and rulings, the timing of the entries subject to the charges does not matter for

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<sup>1</sup> *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (“Customs Valuation Agreement”).

<sup>2</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“Dispute Settlement Understanding”).

purposes of considering whether those charges fall within the scope of this Article 21.5 proceeding.<sup>3</sup> As reflected in the U.S. third party submission and discussed further in this statement, in light of the scope of an Article 21.5 proceeding under the DSU, the Panel should consider not only the timing of the criminal charges, but also the timing of the entries subject to those charges.<sup>4</sup>

5. The scope of an Article 21.5 proceeding is narrower than that of a proceeding under Articles 4 and 6 of the DSU.<sup>5</sup> Article 21.5 provides an expedited proceeding in cases “[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB.

6. Panels and the Appellate Body have also found that an Article 21.5 proceeding may encompass a measure other than one declared to be “taken to comply” by virtue of its “close nexus” or “close relationship” with the recommendations and rulings. That is, because of another measure’s “particularly close relationship” to a declared measure and to the DSB’s recommendations and rulings, that other measure may itself effectively be viewed as a measure taken to comply and fall within a compliance panel’s terms of reference. Analysis of the alleged nexus or relationship “requires a panel to scrutinize these relationships,”<sup>6</sup> which may include examination of the relationships in terms of timing, nature, and effect of the various measures.<sup>7</sup>

In applying the “close relationship” or “close nexus” test, the Appellate Body has maintained

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<sup>3</sup> The Philippines’ Responses to the Panel’s First Set of Questions, para. 346.

<sup>4</sup> U.S. Third Party Submission, paras. 34-37.

<sup>5</sup> *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 36; *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 72.

<sup>6</sup> *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77.

<sup>7</sup> *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 229.

that this approach is not so broad as to render the limitation on the terms of reference of an Article 21.5 proceeding meaningless.<sup>8</sup>

7. 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 at issue in this case, the relevant recommendation was that Thailand bring its inconsistent measures, in particular, “Thailand’s rejection of PM Thailand’s declared transaction values for the . . . entries at issue,” into compliance with its WTO obligations.<sup>9</sup> Thus, the relevant question for purposes of the Panel’s terms of reference is whether the criminal charges may be subject to a proceeding whose scope is limited to resolving disagreement as to the consistency or existence of measures taken to comply with those recommendations and rulings.

8. As indicated in its written submission, the United States does not take a position as to whether, in light of the respective timing of entries or other facts, the charges fall within the scope of this case.<sup>10</sup> However, the United States understands that the entries subject to the charges predate both the recommendations and rulings and the entries subject to those recommendations and rulings. As such, the United States does not consider that scrutiny of whether the charges bear a sufficiently close relationship with the recommendations and rulings can ignore the timing of the respective sets of entries.

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<sup>8</sup> *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 93; *US – Zeroing (Article 21.5 – EC) (AB)*, para. 239.

<sup>9</sup> *Thailand – Cigarettes (Panel)*, paras. 8.2(b), 8.8.

<sup>10</sup> U.S. Third Party Submission, para. 37.

9. As the Panel recognized in the original proceeding, the valuation exercise determines the customs value for particular imports.<sup>11</sup> Valuation is a fact-specific exercise, done on a case-by-case basis. By definition, valuation considers facts as they existed at the time of the entries.

10. As such, regardless of when a determination as to the valuation is made, 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.

## **II. Assessment of Claims Under the Customs Valuation Agreement**

11. In addition to questions regarding the scope of an Article 21.5 proceeding, this dispute presents a systemic issue regarding a panel’s review of measures under the Customs Valuation Agreement. This question arises in the context of the Philippines’ challenge to a November 2012 decision by Thailand’s Board of Appeals, which Thailand identified as a measure taken to comply. The Philippines argues that the Board of Appeals ruling is inconsistent with Articles 1.1, 1.2(a), and 5 of the Customs Valuation Agreement.

12. The Customs Valuation Agreement does not set forth a “standard of review.” Under the DSU, the task of the Panel with respect to the challenge to the Board of Appeals ruling is to

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<sup>11</sup>*Thailand – Cigarettes (Panel)*, para. 7.46.

conduct an objective assessment as to whether the ruling is inconsistent with the provisions of the Customs Valuation Agreement asserted, the issue on which the parties have a disagreement.

13. As explained in the U.S. third party submission, in addition to being limited to measures taken to comply, a panel's terms of reference in an Article 21.5 proceeding are set forth in Articles 7.1 and 6.2 of the DSU.<sup>12</sup> That is, a panel's terms of reference are "[t]o examine the matter . . . referred to the DSB" in the panel request, which consists of "the specific measures at issue" and "a brief summary of the legal basis for the complaint." In turn, Article 11 of the DSU requires a panel to conduct an "objective assessment of the matter before it."

14. Article 1.1 of the Customs Valuation Agreement provides, in part, "The customs value of imported goods shall be the transaction value . . . provided: . . . that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2." Article 1.2(a), in turn, provides, in part, that "the fact that the buyer and seller are related . . . shall not in itself be grounds for regarding the transaction value as unacceptable," and that "[i]n such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price."

15. Article 1.2 must be "read and applied in conjunction with" the Interpretive Notes to Article 1.<sup>13</sup> With respect to an examination of the circumstances of sale, the Interpretive Notes to Article 1 make clear that the circumstances of sale need not be examined in every case, but rather only in those cases in which the authority has "doubts" about the acceptability of the

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<sup>12</sup> U.S. Third Party Submission, para. 10.

<sup>13</sup> Customs Valuation Agreement, Article 14.

price.<sup>14</sup> Customs valuation is a transaction-specific process, and the specific steps taken by the customs authority will depend on the circumstances of the import transaction. At the same time, the Interpretative Notes indicate that the customs authority “should be prepared to examine relevant aspects of the transaction” and “give the importer an opportunity to supply such further detailed information as may be necessary” to enable examination of the circumstances.<sup>15</sup>

16. Thus, in evaluating whether the Board of Appeals ruling rejecting transaction values is inconsistent with Articles 1.1 and 1.2 of the Customs Valuation Agreement, the Panel should assess whether the Board of Appeals examined the circumstances of sale, and whether it had grounds for determining that the relationship between the buyer and seller influenced the price. As both parties recognize, Article 11 does not call for the Panel to conduct a *de novo* review of the ruling of the Board of Appeals.<sup>16</sup> That said, the United States expects that the Panel’s assessment of whether the specific steps taken by the authority satisfied its obligations set forth in Articles 1.1 and 1.2 will depend on the facts surrounding the Board of Appeals’ determination, including, in light of the Interpretive 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.

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<sup>14</sup> Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 2.

<sup>15</sup> Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 3.

<sup>16</sup> Thailand’s First Written Submission, para. 4.10; the Philippines’ Second Written Submission, para. 57. *See also EC – Hormones (AB)*, para. 117; Panel Report, para. 7.101.

### **III. Conclusion**

17. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of these views.