WORLD TRADE ORGANIZATION

WT/DS371/RW

12 November 2018

(18-7042)

Page: 1/302

Original: English

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

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US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
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US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
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US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
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US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
US – Shrimp (Article 21.5 – Malaysia)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report WT/DS58/AB/RW, DSR 2001:XIII, p. 6529
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US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
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US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
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US – Tax Incentives	Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Tuna II (Mexico) (Article 21.5 – Mexico)	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 and Add.1, adopted 3 December 2015
US – Tuna II (Mexico) (Article 21.5 – Mexico)	Panel 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/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)	Reports of the Panels, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/RW/USA and Add.1 / *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW/2 and Add.1, circulated to WTO Members 26 October 2017 [appealed by Mexico on 1 December 2017]
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11

Short title	Full case title and citation
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31
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US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
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US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441
US – Zeroing (Japan) (Article 21.5 – Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW, adopted 31 August 2009, upheld by Appellate Body Report WT/DS322/AB/RW, DSR 2009:VIII, p. 3553

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ACWL/Commerce Letters	Advisory Centre on WTO Law opinion of 21 May 2012 and related letter of 22 January 2014 from the Thai Ministry of Commerce to Thailand's Attorney General
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BAT	British American Tobacco
BoA	Board of Appeals
BoA Ruling	Board of Appeals Ruling No. GorOr 112/2555/Por9/2555(3.1) of 16 November 2012
Charges	The Charges, Case Black No. Or. 185/2559, 18 January 2016
2002-2003 Charges	The Charges, Case Black No. Or. 232/2560, 26 January 2017
Competition Act	Competition Act B.E. 2542 (1999)
Customs Act	Customs Act B.E. 2469 (1926), as amended
CVA	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSI	Department of Special Investigations
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
IBA Rules on Evidence	International Bar Association, Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council on 29 May 2010
ILC Articles on State Responsibility	International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session, in 2001, published in Yearbook of the International Law Commission, 2001, Vol. II, Part Two
JTI	Japan Tobacco International
King Power	King Power International Co. Ltd.
Ministerial Decision	Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value
MRSP	Maximum Retail Selling Price
Nairobi Convention	International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (signed in Nairobi, 9 June 1977, entered into force 21 May 1980)
OECD Transfer Pricing Guidelines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines)
P&GE	Profits and general expenses
PM Indonesia	Philip Morris Indonesia
PM	Philip Morris
PMPMI	Philip Morris Philippines Manufacturing Inc.
PMTL / PM Thailand	Philip Morris Thailand Limited
RRSP	Recommended retail selling price
RSP	Retail selling price
SCM Agreement	Agreement on Subsidies and Countervailing Measures
September 2012 BoA Ruling	Board of Appeals Ruling No. GorOr 81/2555/Por7/2555(4.1) and cover letter No. GorKor 0519(8) (GotOr), 12 September 2012
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TFA	Trade Facilitation Agreement
THB	Thai baht
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights

TSIC	Thailand's Standard Industrial Classification
TTM	Thailand Tobacco Monopoly
USD	United States dollar
VAT	Value-added tax
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

EXHIBITS CITED IN THIS REPORT

Exhibit Number	Full Title
PHL-1-B	The Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation)
PHL-3	TTM, Annual Report, 2015 (English and Thai)
PHL-7	PMTL, Comparison calculation: King Power's duty free prices vs. PMTL's duty-paid prices
PHL-8-B	Customs Act (No. 17), B.E. 2543 (2000) (English translation)
PHL-14-B	The Criminal Court, Charges, Case Black No. Or. 232/2560, 26 January 2017 (English translation)
PHL-16-B	The Reward Giving to Offender Suppression Act. B.E. 2498 (1946) (English translation)
PHL-17-B	DSI, Memorandum of Allegation, 9 April 2009 (English translation)
PHL-18-B	Letter from the Customs Department to the Managing Director of PMTL No. Gor Kor 0514(Sor)/656, 19 June 2008 (English translation)
PHL-20-B	Letter from the Customs Privilege Bureau to PMTL No. Gor Kor 0516(5)/Fhor Bor Kor 1/285, 11 August 2006 (English translation)
PHL-21-B	BoA Ruling, No. GorOr 112/2555/Por9/2555(3.1) and cover letter No. GorKor 0519(8)/(GorOr)/118, 16 November 2012 (English translation)
PHL-25-B	Letter from PMTL to the Sub-Committee for Appeal Consideration, 5 October 2012 (English translation)
PHL-27-B	Letter from PMTL to the BoA, 18 December 2012 (English translation)
PHL-28-B	180 Notices of Assessment (English translation of one notice)
PHL-29-B	Letter from Bangkok Customs Bureau to PMTL, No. GorKor 0504(Sor)/35, 17 January 2013 (English translation)
PHL-30-B	Motion requesting the Court to summon documentary evidence or material evidence, 27 September 2013 (English translation)
PHL-31-B	Statement Explaining the event that the Defendant failed to submit the documents pursuant to the summons, 24 June 2014 (English translation)
PHL-32-B	Central Tax Court Ruling, 29 October 2014 (English translation)
PHL-33-B	Appeal by the Customs Department to the Supreme Court of the Decision by the Tax Court of 29 October 2014 on PMTL's appeal against the BoA Ruling of 16 November 2012, 28 January 2015 (English translation)
PHL-34-B	Customs Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (English translation)
PHL-37	Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 4 September 2013
PHL-38-B	Letter from the Director of Customs Standard Procedures and Valuation Bureau of Customs to PMTL, No. GorKor0519(Sor)/732, 16 June 2016 (English translation)
PHL-39-B	Minutes of the BoA Meeting of 26 September 2012 (English translation)
PHL-41	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 22 July 2010
PHL-42-B	Minutes of the BoA Meeting of 14 January 2010 (English translation)
PHL-43-B	Letter from PMTL to the Sub-Committee for Appeal Consideration, 12 October 2012 (English translation)
PHL-46-B	Chemical Resins Thailand Limited, Audited Financial Statement, 2002 (English translation)
PHL-47-B	K H S Company Limited, Audited Financial Statement, 2002 (English translation)
PHL-48	Leeintertrade Website, available at: http://www.leeintertrade.com/en (last accessed 10 October 2016)
PHL-49-B	Piriyapul International co., Ltd, Audited Financial Statement, 2002 (English translation)
PHL-50	Piriyapul International Limited, 40 Anniversary Special Publication, 2013
PHL-53-B	BoA Ruling No. GorOr 81/2555/Por7/2555(4.1) and cover letter No. GorKor 0519(8) (GotOr), 12 September 2012 (English translation)
PHL-54	BoA Presentation, 1 August 2013
PHL-58	Letter from the Permanent Mission of Philippines to the WTO to the Permanent Mission of Thailand to the WTO, 27 September 2013
PHL-59	Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 27 March 2014
PHL-60-B	Macrorich Co. Ltd., Audited Financial Statement, 2002 (English translation)

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PHL-61-A	Classic Cigars Co., Ltd. Audited Financial Statement, 2002
PHL-61-B	Classic Cigars Co., Ltd. Audited Financial Statement, 2002 (English translation)
PHL-63-B	Lee Intertrade Co. Ltd., Audited Financial Statement, 2002 (English translation)
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PHL-72	R. Mark Sirkin, *Statistics for the Social Sciences*, 3rd edn (SAGE Publications, 2006), pp. 127-141
PHL-75-B	Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010 (English translation)
PHL-76-B	Letter from PMTL to the Director of Customs Valuation Appeal Division, 24 August 2011 (English translation)
PHL-82	PMTL's submission of its expense and cost statement FY 2002 (English translation)
PHL-83-B	Letter from the Sub-Committee for Appeal Consideration to PMTL No. GorKor 0519(GorOr)/91, 27 September 2012 (English translation)
PHL-85	World Customs Organization, Customs Valuation Compendium, Commentary 15.1 "Application of Deductive Value Method", 2nd Edition, November 2008
PHL-87-B	Senate Committee on Justice and Police Affairs, Report on Review and Study of Investigation into and Consideration of Case Concerning Actual or Attempted Tax Evasion by PMTL et al., 10 October 2013 (English translation)
PHL-90-B	DSI, Press Release, 2 September 2009 (English translation)
PHL-91-B	Manager Online, "'Public Prosecutor' indicated not to prosecute Philip [Morris], reiterated 2 government agencies confirmed no offence found", 22 March 2011 (English translation), available at: http://manager.co.th/Crime/ViewNews.aspx?NewsID=9540000036517 (last accessed 19 January 2017)
PHL-93-B	DSI, Press Release, 17 August 2011 (English translation)
PHL-94-B	Criminal Procedure Code, Section 145 (English translation and Thai original)
PHL-95-B	Post Today Online, "Attorney General ordered a prosecution against Philip Morris for evasion of cigarette tax", 2 October 2013 (English translation), available at: http://www.posttoday.com/economy/finance/250676 (last accessed 19 January 2017)
PHL-96-B	Annex to the Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation)
PHL-98-B	Customs Act (No. 11), B.E. 2490 (1947) (English translation)
PHL-99-B	Criminal Code, Section 4 of the Amendment Act of the Criminal Code (No. 6) B.E. 2526 (1983) (English translation)
PHL-103	Tilleke & Gibbins International Ltd., Hearing Report, 28 June 2016
PHL-106-B	Customs Notification No. 20-2549, 27 March 2006 (English translation)
PHL-107-B	PMTL's PowerPoint presentation at meeting with the Customs Department of 7 August 2006 (English translation)
PHL-108	Statement by Georges Farah, PM World Trade, 9 November 2010
PHL-109	PMTL Products arrival 2003-2006
PHL-110	Letter from the World Customs Organization to the Government of Thailand, 27 July 2006
PHL-112-B	Letter from PMTL to the Director of Customs Bonded Warehouse, 30 August 2004, with attachments dated 23 and 27 August 2004 (English translation)
PHL-115	Expert witness statement of Paulette Vander Schueren, 16 September 2010
PHL-119	King-Oua Laohong, "Philip Morris tax evasion case reaches court", Bangkok Post, 19 January 2016, available at http://www.bangkokpost.com/news/general/831708/philip-morris-tax-evasion-case-reaches-court (last accessed 6 December 2016)
PHL-120	The Phuket News, "Philip Morris tax evasion case reaches court", 19 January 2016, available at http://www.thephuketnews.com/philip-morris-tax-evasion-case-reaches-court-55840.php (last accessed 6 December 2016)
PHL-121-B	Notification No. 187 on VAT, "Determination of tax base, categories and types of tobacco for sale for which the value of the tax base is required to be calculated according to the rules under Section 79/5(2) of the Revenue Code", 31 August 2012 (English translation)
PHL-122-B	Order Por. 145-2555, Calculation of Tax Base for Importation and Sale of Tobacco According to the Category and Type Prescribed by the Director-General and Approved by the Minister Under Section 79/5 of the Revenue Code, and Preparation of Tax Invoice In Case of Sale of Tobacco Under Section 86/5(2) of the Revenue Code (English translation)

Exhibit Number	Full Title
PHL-123-B	Letter from PMTL to the Director of the Revenue Department, 21 September 2012 (English translation)
PHL-124-B	Competition Act, B.E. 2542 (1999) (English translation)
PHL-129-B	Letter from PMTL to the Director of the Revenue Department, 28 September 2012 (English translation)
PHL-130	Email communication between officials of the Permanent Mission of the Philippines to the WTO and the Permanent Mission of Thailand to the WTO, 10 October 2012
PHL-132-B	Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation)
PHL-133-B	Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation)
PHL-134-B	Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation)
PHL-140	P&GE rates based on consistent and inconsistent use of income
PHL-145-B	Letter from PMTL to the Sub-Committee for Appeal Consideration, 13 October 2011 (English translation)
PHL-146-B	Letter from PMTL to the Customs Department, 31 March 2010 (English translation)
PHL-150-B	Commerce Ministry Letter annexing ACWL Letter, 22 January 2014 (English translation)
PHL-188	Amicus Curiae Submissions - EABC, US-ABC, USCIB, NAM, NFTC and APCAC
PHL-189	Amicus Curiae Submissions - EU-ABC and ECCP
PHL-191-B	Letter from PMTL to Chief of Analysis and Appeal Section, 15 December 2005 (English translation)
PHL-192	Anne Hawkins, Flavia Jolliffe and Leslie Glickman, *Teaching Statistical Concepts*, (Longman, 1992) (extract)
PHL-193	Robin Hill, "What Sample Size is 'Enough' in Internet Survey Research?", in *Interpersonal Computing and Technology: An Electronic Journal for the 21st Century*, Vol. 6, No. 3-4 (1998)
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PHL-196-B	Provincial tax receipts from 2003 with cover letter, 23 April 2003 (English translation)
PHL-198-B	Memorandum of Court Proceedings dated 3 July 2017, Case Black No. Or.185/2559, 3 July 2017 (English translation)
PHL-203-B	New Excise Tax Act (English translation)
PHL-204-B	Letter from PMTL to the Secretary of the Sub-Committee for Appeal Consideration, 21 August 2012
PHL-207-B	Trade Competition Act, B.E. 2560 (2017) (English translation)
PHL-212	TSIC code registrations of Goldimex Intertrade Co. Ltd., under Form SorSorChor1
PHL-214	Thailand's Standard Industrial Classification Codes (Thai and English translation)
PHL-215	SIC code registration of Piriyapul International Co., Ltd. under form SorBorChor3
PHL-216	SIC code registration of Chemical Resins (Thailand) Ltd. under form SorBorChor3
PHL-217	SIC code registration of Lee Intertrade Co., Ltd. under form SorBorChor3
PHL-218	SIC code registration of KHS Company Ltd. under form SorBorChor3
PHL-222	TTM, Annual Report, 2004, pp. 100-102 (English and Thai)
PHL-223	TTM, Annual Report, 2013, pp. 102-103 (English and Thai)
PHL-224	Letter from PMTL confirming adherence to Excise Department Guidelines, 25 September 2017
PHL-228-B	Notification of the Board of Special Case (No. 4) B.E. 2554 (2011) (English translation)
PHL-231-B	Revenue Code, Sections 37, 88, 89 and 90 (English translation)
THA-1-B	Letter from PMTL to the Director General of DSI, 1 September 2006 (English translation)
THA-3-B	Customs Act, B.E. 2469 (1926) (English translation)
THA-11	Chronology of the BoA appeals
THA-12	Betty R. Kirkwood and Jonathan A.C. Sterne, *Essential Medical Statistics*, 2nd ed (Blackwell Publishing, 2003) (excerpts only)
THA-13	BoA's calculation of the revised customs value
THA-16	Criminal Procedure Code (excerpts only)
THA-24	William J. Davey, "Has the WTO Dispute Settlement System Exceeded Its Authority? : A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques", in *Journal of International Economic Law* No. 4 Vol. 1 (2001), pp. 79-110

Exhibit Number	Full Title
THA-30-B	Minutes of the meeting of 11 June 2013 between the Revenue Department's representatives and representatives of cigarette importers and the domestic cigarette manufacturer (English translation)
THA-31-B	Minutes of the meeting of 20 June 2014 between the Revenue Department's representatives and representatives of cigarette importers and the domestic cigarette manufacturer (English translation)
THA-32	Provincial tax receipts provided by PMTL in 2002 (English translation)
THA-37	Criminal Procedure Code, Sections 8 and 177
THA-39	Documents relating to Thailand Standard Industrial Classification (TSIC)
THA-40	Calculations of P&GE ratios/ranges
THA-42	Thailand's official gazette of 7 July 2017 publishing the amended competition law (excerpts only)

1 INTRODUCTION

1.1 Complaint by the Philippines

1.1. The Philippines' complaint in this proceeding, initiated under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), concerns the alleged failure by Thailand to comply with the Dispute Settlement Body's (DSB) recommendations and rulings in the original proceeding in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*.

1.2. In the original proceeding, the Philippines challenged various measures relating to cigarettes imported into Thailand by Philip Morris Thailand Limited (PMTL). These included: (i) delays by the Board of Appeals (BoA) in resolving appeals against the rejection of transaction value for 210 entries of cigarettes over the period 2002-2003; (ii) the Thai Customs Department's determination of customs value for 118 entries over the period 2006-2007; and (iii) several measures relating to Thailand's Value-Added Tax (VAT) regime as applied to domestic and imported cigarettes.

1.3. With respect to the customs valuation issues, the original panel made the following findings under the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (CVA) and the General Agreement on Tariffs and Trade 1994 (GATT 1994):

a. Thailand did not maintain or apply a general rule requiring the rejection of the transaction value and the use of the deductive valuation method[1];

b. Thailand's rejection of PMTL's declared transaction values for 118 entries of cigarettes imported by PMTL between August 2006 and September 2007[2] was inconsistent with Articles 1.1 and 1.2 of the CVA[3];

c. Thailand acted inconsistently with Article 1.2(a) of the CVA by failing to communicate the Thai Custom Department's "grounds" for considering that the relationship between PMTL and Philip Morris Philippines Manufacturing Inc. (PMPMI) influenced the price with respect to those 118 entries[4];

d. Thailand acted inconsistently with Article 16 of the CVA by failing to provide an adequate explanation on how Thai Customs determined the customs values for those 118 entries[5];

e. Thailand acted inconsistently with Article 7.1 of the CVA by improperly assessing the deductive value of the entries concerned[6];

f. Thailand acted inconsistently with Article 7.3 of the CVA by failing to properly inform PMTL in writing of the customs value determined under Article 7, and the method used to determine such value, for these entries[7];

g. Thailand acted inconsistently with Article 10 of the CVA by disclosing confidential customs valuation information, provided by PMTL to Thai Customs, to the Thai media[8];

[1] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(a).
[2] The original panel report and the parties in the current proceeding generally refer to the clearing dates, rather than the landing dates, for the purposes of indicating when the relevant entries were imported. Whenever the dates of importation are mentioned in this Report, they refer to the dates of customs clearance, rather than the landing dates. (See parties' responses to Panel question No. 76)
[3] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(b). We note that in the original panel report, information regarding the entries at issue was redacted. (See, e.g. Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(b)) In the current Article 21.5 proceeding, neither party has designated this information as confidential.
[4] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(c).
[5] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(d).
[6] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(e).
[7] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(f).
[8] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(g).

h. Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to properly publish a general rule pertaining to the release of guarantees in the context of customs valuation[9];

i. Thailand acted inconsistently with Article X:3(a) of the GATT 1994 because of the delays caused in the BoA's decision-making process on customs valuation determinations for 210 entries of cigarettes imported by PMTL between January 2002 and January 2003[10];

j. Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent review tribunals or processes for the prompt review of customs valuation determinations for these 210 entries[11]; and

k. Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent review tribunals or process for the prompt review of guarantee decisions imposed by Thai Customs in the context of customs valuation.[12]

1.4. With respect to the VAT-related issues, the original panel made the following findings under the GATT 1994:

a. regarding the determination of the Maximum Retail Selling Prices (MRSPs) for VAT on imported cigarettes, Thailand acted inconsistently with Article III:2, first sentence by subjecting imported cigarettes to a VAT liability in excess of that applied to like domestic cigarettes with respect to the MRSPs for the December 2005 MRSP Notice, the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice[13];

b. regarding the VAT exemption for domestic cigarette resellers, Thailand acted inconsistently with Article III:2, first sentence by subjecting imported cigarettes to a VAT liability in excess of that applied to like domestic cigarettes by granting the exemption from the VAT liability only to domestic cigarette resellers[14];

c. regarding the VAT exemption for domestic cigarette resellers, Thailand acted inconsistently with Article III:4 by subjecting imported cigarettes to less favourable treatment compared to like domestic cigarettes, by imposing additional administrative requirements, connected to VAT liabilities, on imported cigarette resellers[15];

d. Thailand acted inconsistently with Article X:1 for failing to publish the methodology used to determine the tax base for VAT[16]; and

e. Thailand did not act inconsistently with Article X:1 by failing to publish the methodology and data necessary to determine ex factory prices, one of the components of the MRSP for domestic cigarettes.[17]

1.5. The original panel report was circulated to the Members on 15 November 2010. Thailand appealed certain panel findings regarding the VAT exemption for domestic resellers, and the failure to maintain independent review procedures for guarantee decisions. In its report circulated to the Members on 17 June 2011, the Appellate Body:

[9] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.4(c).
[10] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.4(e). We note that in the original panel report, information regarding the entries at issue was redacted. (See, e.g. Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.937) In the current Article 21.5 proceeding, neither party has designated this information as confidential.
[11] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.4(f). Our observation in footnote 10 above applies here equally.
[12] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.4(g).
[13] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.3(a).
[14] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.3(b).
[15] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.3(c).
[16] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.4(a).
[17] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.4(b).

a. upheld the original panel's finding that Thailand's treatment of resellers of imported cigarettes, as compared to its treatment of resellers of like domestic cigarettes, was inconsistent with Articles III:2 and III:4 of the GATT 1994[18]; and

b. upheld the original panel's finding that Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent tribunals or procedures for the prompt review of guarantee decisions.[19]

1.6. In light of its findings, the Appellate Body recommended that the DSB request Thailand to bring its measures found to be inconsistent with the CVA and the GATT 1994 into conformity with its obligations under those agreements.[20]

1.7. The DSB adopted the panel and Appellate Body reports in the original proceeding on 15 July 2011.[21] On 11 August 2011, Thailand informed the DSB that it intended to comply with the DSB's recommendations and rulings, but that it would require a reasonable period of time to do so.[22] On 23 September 2011, the Philippines and Thailand informed the DSB of their mutual agreement, pursuant to Article 21.3(b) of the DSU, that there would be two reasonable periods of time: (i) a period of 15 months, expiring on 15 October 2012, with respect to certain findings regarding exemptions from VAT liability set forth in paragraphs 8.3(b) and (c) of the original panel report; and (ii) a period of 10 months, expiring on 15 May 2012, with respect to the DSB's recommendations and rulings on all other measures.[23]

1.8. At the DSB meeting held on 24 May 2012, Thailand indicated that it had taken the following steps to bring its measures into conformity with the DSB's recommendations and rulings:

a. with respect to the original panel's findings concerning the establishment of MRSPs, on 15 May 2012, the Excise Department issued two regulations eliminating the use of MRSPs as the tax base for VAT payable on resales of both the domestically produced and imported cigarettes[24];

b. with respect to the original panel's findings under the CVA, on 8 May 2012, the Customs Department issued Regulation No. 71/B.E. 2555, revising and expanding the rules and procedures governing how the Customs Department determined customs value using the transaction value and the deductive value methods pursuant to the CVA[25];

c. with respect to the original panel's findings that Thailand had failed to properly publish the rules regarding the release of guarantees, on 8 May 2012, the Customs Department issued Regulation No. 72/B.E. 2555, which published the procedures and requirements pertaining to requests for a refund of guarantees on the final assessment of duties and the processing of refunds[26]; and

d. with respect to the original panel's findings regarding delays in the appeal process for customs valuation determinations: the Customs Department adopted Regulation No. 73/B.E. 2555, effective as of 14 May 2012, which provided for procedures pertaining to appeals of customs valuation determinations, including the procedures for submissions of appeals and related documents.[27]

1.9. Thailand subsequently informed the DSB of the following additional steps that it had taken to bring its measures into conformity with the DSB's recommendations and rulings:

a. in its status report of 15 June 2012, Thailand indicated that it issued the Customs Regulation on Administration Regarding the Customs Guarantees, which established an

[18] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 223(a).
[19] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 223(b).
[20] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 224.
[21] WT/DSB/M/299.
[22] WT/DS371/12.
[23] WT/DS371/14.
[24] WT/DSB/M/316, para. 58.
[25] WT/DSB/M/316, para. 58.
[26] WT/DSB/M/316, para. 59.
[27] WT/DSB/M/316, para. 59.

independent review process for the review of decisions to require customs guarantees on clearance of goods pending final determination of the customs value, effective as of 13 June 2012[28];

b. in its status report of 18 September 2012, Thailand reported that the BoA had issued its determination in the appeal of the customs valuation of the specific entries of merchandise listed in the original 2008 panel request[29];

c. in its status report of 12 October 2012, Thailand indicated that the Royal Decree implementing the findings of the original panel under Article III:4 of the GATT 1994 regarding the administrative requirements of Thailand's VAT system would come into effect on 15 October 2012[30]; and

d. in its status report of 7 December 2012, Thailand reported that the BoA had issued its decision in the appeal of the entries involved in the Philippines' claim under Article X:3 of the GATT 1994, which Thailand considered was the last outstanding step of the implementation process.[31]

1.10. On 4 May 2016, the Philippines requested consultations[32] with Thailand pursuant to Articles 4 and 21.5 of the DSU, Article XXII:1 of the GATT 1994, Article 19 of the CVA, and paragraph 1 of the Understanding between the Philippines and Thailand of 1 June 2012 regarding Procedures under Articles 21 and 22 of the DSU (Sequencing Agreement)[33], with respect to three distinct sets of measures, including:

a. measures related to the BoA's ruling issued on 16 November 2012 regarding 210 entries of *Marlboro* cigarettes imported by PMTL between January 2002 and January 2003 (the "BoA Ruling");

b. measures related to the criminal charges filed on 18 January 2016 by the Public Prosecutor against PMTL and seven of its current and former employees regarding 272 entries of *Marlboro* and *L&M* cigarettes imported by PMTL between July 2003 and June 2006 (the "Charges"); and

c. measures related to the notification requirement concerning the VAT base applicable to cigarette importers.

1.11. The BoA Ruling was included among Thailand's declared measures taken to comply in its status reports. The Charges were not, and in this proceeding Thailand maintains that they are not a measure taken to comply with the DSB's recommendations and rulings. Thailand's status reports indicated that changes to its VAT administrative rules were among the measures taken to comply, and in this proceeding it has confirmed that the modification of the rules related to the VAT base was introduced in order to implement the DSB's recommendations and rulings in the original dispute.[34] These measures are described further below.

1.12. Consultations were held on 2 June 2016, but the consultations failed to resolve the dispute.

1.2 Panel establishment and composition

1.13. On 29 June 2016, the Philippines requested the establishment of a compliance panel with standard terms of reference, pursuant to Articles 6 and 21.5 of the DSU, Article XXIII of the GATT 1994, Article 19 of the CVA, and paragraph 1 of the Sequencing Agreement.[35] At its meeting

[28] WT/DS371/15/Add.2.
[29] WT/DS371/15/Add.5.
[30] WT/DS371/15/Add.6.
[31] WT/DS371/15/Add.8.
[32] WT/DS371/17.
[33] WT/DS371/16.
[34] Thailand's first written submission, paras. 7.3-7.5.
[35] WT/DS371/18.

on 21 July 2016, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel, if possible, the matter raised by the Philippines in document WT/DS371/18.[36]

1.14. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Philippines in document WT/DS371/18 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[37]

1.15. On 7 December 2016, the Philippines requested the Director-General of the WTO to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. On 16 December 2016, the Director-General accordingly composed the Panel as follows[38]:

Chairperson:	Mr Thomas Cottier
Members:	Mr Alvaro Espinoza
	Mr Alvaro Hansen

1.16. Australia, Canada, China, the European Union, Japan, the Russian Federation, Singapore, and the United States notified their interest in participating in the Panel proceeding as third parties.

1.3 Panel proceedings

1.3.1 General

1.17. In this proceeding, the parties prepared and jointly proposed a set of working procedures and partial timetable for the Panel's consideration. After consulting with the parties, the Panel adopted its Working Procedures[39] and a partial timetable on 25 January 2017, based on the working procedures and partial timetable proposed by the parties. Following a request to extend one of the deadlines in the timetable, the Panel revised its timetable on 19 June 2017. On 31 August 2017, the Panel issued a revised timetable extending certain remaining deadlines at the request of the parties, and containing the dates related to the issuance of the descriptive part, the Interim Report, and the Final Report.

1.18. The Panel held its substantive meeting with the parties on 29 and 30 August 2017, including a session with the third parties that took place on 30 August 2017. On 2 November 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 8 January 2018. The Panel issued its Final Report to the parties on 12 March 2018.

1.3.2 Preliminary ruling requests related to the scope of this Article 21.5 proceeding

1.19. On 12 January 2017, Thailand submitted a request for a preliminary ruling that the Philippines' claims relating to the Charges are outside of the scope of this compliance proceeding. On 1 February 2017, as part of its first written submission, the Philippines provided its response to the substance of Thailand's preliminary ruling request, in which it argued that the jurisdictional issues raised by Thailand's request should be addressed in the Panel's report at the same time as the merits of the dispute; the Philippines requested in the alternative that, if the Panel were inclined to make an early ruling, there should be an additional hearing for that purpose. On 16 February 2017, Thailand filed its rebuttal submission on the preliminary ruling request, in which it reiterated its initial request, and proceeded to elaborate[40] on an additional ground for finding that the criminal charges are outside of the scope of this proceeding.

[36] See WT/DSB/M/383.
[37] WT/DS371/19.
[38] As Mr Roberto Carvalho de Azevêdo and Mr Richard Gottlieb, both original panelists, were no longer available, they were replaced by Mr Thomas Cottier and Mr Alvaro Espinoza, respectively.
[39] See the Panel's Working Procedures in Annex A-1.
[40] In its 12 January 2017 request for a preliminary ruling, Thailand argued that the Philippines was precluded from availing itself of a "second chance", under Article 21.5, to pursue claims that it initially raised but did not pursue before the original panel, and that for "this reason", Thailand requested the Panel to issue a

1.20. The timetable adopted by the Panel provided for the Philippines to file its rebuttal submission to the preliminary ruling request on 2 March 2017. However, given that the timetable provided that any request for a preliminary ruling was to have been filed no later than 12 January 2017, and was to be the subject to two rounds of submissions by the parties[41], the Philippines requested, on 22 February 2017, that the Panel rule that: (i) Thailand's rebuttal submission raised a new ground of request that was not part of Thailand's preliminary ruling request of 12 January 2017; and that (ii) the Philippines need not address this new ground for a preliminary ruling request in its own rebuttal submission. The Philippines requested in the alternative that, if the Panel were to consider that Thailand's new ground should be addressed on a preliminary basis, then the Panel should establish a separate preliminary procedure for consideration of that question. The Philippines also requested that, pending the Panel's decision on this matter, the Panel should immediately suspend the deadline of 2 March 2017 for the submission of the Philippines' response to Thailand's new ground for a preliminary ruling request.

1.21. On 23 February 2017, Thailand responded that the Panel should reject the aforementioned requests by the Philippines. Thailand further observed that the Philippines' letter of 22 February 2017 contained not only a procedural objection to Thailand's "new ground" but also a substantive response thereto, and thus the Philippines had given itself an additional opportunity to present substantive comments. Thailand requested that the Panel strike from the Panel record the substantive comments that the Philippines made in its letter of 22 February, because they were made outside the procedural stages contemplated in the Panel's timetable.

1.22. In a communication dated 24 February 2017, the Panel informed the parties as follows:

> The Panel recalls that paragraph 8 of the Working Procedures provides that it "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". Having carefully considered the submissions already received from the parties, the Panel is not persuaded that it would be appropriate to rule on the issues raised by Thailand's preliminary ruling request at an early stage of the proceedings. The Panel hereby informs the parties of its decision to address those issues together with the merits so as to ensure that the parties (and third parties) have an appropriately extensive opportunity to exchange views on the issues raised as part of the main proceedings, and will defer its ruling on those issues until the issuance of the Report.
>
> The Panel considers that its decision to defer ruling on the issues raised by the preliminary ruling request until the issuance of the Report renders moot the Philippines' various requests relating to the preliminary ruling procedure, including: (i) the Philippines' conditional request, in its first written submission, for a separate hearing on the issues raised by the preliminary ruling request; (ii) the Philippines' request, in its letter of 22 February 2017, that the Panel rule on which issues fall within the scope of the preliminary ruling procedure; (iii) the Philippines' additional request that the Panel immediately suspend the deadline for its rebuttal submission on the preliminary ruling request, pending the aforementioned ruling; and (iv) the Philippines' conditional and alternative request that the Panel establish a separate preliminary procedure for

preliminary ruling excluding the Charges-related claims. Thailand presented 12 pages of supporting argumentation on why the Philippines is precluded from pursuing claims that it initially raised in the original proceeding but did not pursue. In its first written submission, the Philippines addressed Thailand's preliminary ruling request and set forth its understanding that Thailand did not argue that the Charges do not constitute a "measure taken to comply". In its 16 February 2017 rebuttal submission on the preliminary ruling request, Thailand maintained that the Philippines' understanding was incorrect, and asserted that, in its preliminary ruling request, Thailand "contended not only that the Philippines is precluded from challenging the Charges, but also that the Charges are not measures taken to comply under Article 21.5". Thailand referred to two statements, found at paragraphs 1.3 and 3.37 of its preliminary ruling request, in support of this reading of its request. Without taking a position on the disputed question of whether Thailand's preliminary ruling request can be construed as embodying an argument that the Charges do not constitute a "measure taken to comply", any such argument, even if already contained or implied in the original preliminary ruling request, was only elaborated for the first time in Thailand's rebuttal submission.

[41] At the request of the parties, the timetable and Working Procedures adopted by the Panel in this proceeding provided that any request for a preliminary ruling would be subject to two rounds of submissions by the parties. Specifically, the timetable provided: that any request for a preliminary ruling would be made on 12 January 2017; that the Philippines' response would be filed on 2 February 2017; that Thailand's rebuttal submission would be filed on 16 February 2017; and that the Philippines' rebuttal submission would be filed on 2 March 2017.

consideration of the "new ground" introduced by Thailand in its 16 February 2017 submission.

The Panel notes that the Philippines provided, at paragraphs 26-36 of its "procedural objection" dated 22 February 2017, substantive argumentation on whether the measures in question constitute a "measure taken to comply". Insofar as the Philippines wishes for the Panel to consider the substantive argumentation set forth in paragraphs 27-36 of its letter, the Panel invites the Philippines to reiterate those arguments in the rebuttal submission that it is expected to file on 2 March 2017.

1.3.3 Request for leave to correct typographical errors in a submission

1.23. On 6 February 2017, the Philippines informed the Panel that it had identified a number of typographical errors in its first written submission filed on 1 February 2017, and requested the Panel's approval to submit a revised version of its first written submission that would correct these typographical errors. The Panel invited Thailand to indicate whether it had any objection to the Philippines' request. Thailand indicated that it did not. The Panel invited the Philippines to file the revised version of its first written submission, and the Philippines did so on 9 February 2017.

1.3.4 Procedural ruling requests related to lawyer-client privilege

1.24. On 9 May 2017, Thailand requested that the Panel decline to rule on the Philippines' claims relating to the Charges. Thailand requested that the Panel make this ruling as a consequence of the Philippines' decision to include, as part of its second written submission filed on 12 April 2017, certain materials including "confidential, internal Thai government memorandum to which was attached lawyer-client privileged legal advice from Thailand's legal advisors in this dispute"[42] pertaining to the Charges. Thailand further requested: (i) that the Panel instruct the Philippines to take appropriate action to rectify an inconsistency between the content of a related exhibit and the associated description in the Philippines' second written submission; (ii) that pending the Panel's decision on this matter, the Panel should postpone the deadline of 12 May 2017 for the submission of Thailand's second written submission; and (iii) that, once the Philippines had provided its response, Thailand be given the right to file a rebuttal submission on this issue.

1.25. On 10 May 2017, the Panel informed the parties as follows:

Thailand has not explained why there is a need to postpone the upcoming deadlines while its procedural ruling request is pending before the Panel. Taking account of the impact that such postponement would have on subsequent steps in the timetable, the Panel declines Thailand's request to postpone the upcoming deadlines.

The Panel wishes to clarify and assure Thailand that as a Party to the dispute it is under no obligation to disclose, justify, or explain any confidential legal advice that it has received, either in its second written submission or at any other subsequent phase of these proceedings.

1.26. In light of Thailand's request that it be given the right to file a rebuttal submission, the Panel allowed for two rounds of submissions by the parties on the issues raised by Thailand's request for a procedural ruling concerning the submission of lawyer-client privileged legal advice.[43] In the set of written questions sent to the parties on 14 June 2017 in advance of the substantive meeting, the Panel included several questions to Thailand aimed at clarifying the scope and legal bases for its requests, and soliciting both parties' views on the need to rule on this matter prior to the hearing. Thailand subsequently clarified that it was requesting not only that the Panel abstain from making legal findings on the Philippines' claims concerning the Charges, but also that the Panel exclude Exhibit PHL-150 from the record.[44] The parties expressed opposing views on the need to rule on this issue prior to the meeting.[45]

[42] Thailand's request for a procedural ruling, para. 1.1.
[43] Specifically, the Panel invited the Philippines to file its response on 17 May 2017, Thailand to file its rebuttal submission on 24 May 2017, and the Philippines to file its rebuttal submission on 2 June 2017.
[44] Thailand's response to Panel question No. 37(b).
[45] Parties' responses to Panel question No. 36.

1.27. Following a thorough exchange of arguments on this matter between the parties, on 2 August 2017 the Panel sent a communication which informed the parties and third parties as follows:

> The Panel has carefully considered Thailand's requests relating to the ACWL/Commerce Letters and the related arguments of the parties. The Panel considers that it is in the interest of due process and the efficient conduct of the proceedings to rule on Thailand's requests prior to the substantive meeting with the parties. The Panel hereby informs the parties that, for reasons to be elaborated in its Report:
>
> 1. The Panel considers that Thailand has failed to demonstrate that its due process rights have been violated, that the Philippines has not acted in good faith, or that the Panel is prevented from making an objective assessment of the matter, as a consequence of the Philippines submitting the ACWL/Commerce Letters to the Panel;
>
> 2. The Panel therefore declines Thailand's request that, as a consequence of the Philippines submitting the ACWL/Commerce Letters to the Panel, the Panel should decline to rule on the Philippines' claims relating to the Charges; and
>
> 3. For the same reasons, the Panel declines Thailand's request that the Panel order the Philippines to withdraw Exhibit PHL-150 and the related references in the Philippines' second written submission.

1.28. At the meeting of the Panel with the parties on 29 and 30 August 2017, Thailand reacted to the Philippines' opening statement by reiterating its objection to the Philippines' reference to the ACWL/Commerce Letters. This triggered a further exchange of arguments on this matter between the parties at the meeting, and in their subsequent responses to questions and comments thereupon.[46]

1.3.5 Amicus curiae submissions

1.29. On 15 May 2017, the Panel received an unsolicited *amicus curiae* submission[47] from a group of US business associations.[48] On 17 May 2017, the Panel forwarded this submission to the parties and third parties. The Panel invited the parties to provide any comments that they wished to make on this *amicus curiae* submission by 6 June 2017. The Panel also noted that the submission referred to prior statements made by several Members participating as third parties in this proceeding. The Panel indicated that if any third parties wished to make comments, they could do so in the context of their written submissions scheduled for 24 May 2017.

1.30. On 30 May 2017, the Panel forwarded to the parties and third parties two more *amicus curiae* submissions that it had subsequently received, on 29 May 2017 and 30 May 2017.[49] The Panel invited the parties to provide any comments that they wished to make on these submissions by 6 June 2017. The Panel informed the parties and third parties that, moving forward, any further *amicus curiae* submissions that it received in this proceeding would be immediately forwarded to the parties and third parties. The Panel indicated that the parties and third parties would be free, if they so wished, to integrate any comments that they wished to make on any such briefs in their oral statements at the meeting or in their responses to questions.

[46] See paragraphs 7.24. and 7.25.

[47] The Panel uses the term "*amicus curiae* submission" to refer to the various documents that it received from business associations in the course of this proceeding.

[48] This submission, dated 12 May 2017, was made jointly by four associations: the US-ASEAN Business Council (US-ABC); the United States Council for International Business (USCIB); the National Association of Manufacturers of the United States of America (NAM); and the National Foreign Trade Council (NFTC).

[49] On 29 May 2017, the Panel received an *amicus curiae* submission, dated 9 May 2017, from the European Association for Business and Commerce (EABC). On 30 May 2017, the Panel received an *amicus curiae* submission, dated 16 May 2017, from the Asia Pacific Council of American Chambers of Commerce (APCAC).

1.31. The Panel subsequently received two more *amicus curiae* submissions, which were forwarded to the parties and third parties.[50] The Philippines incorporated all the *amicus curiae* submissions received as exhibits to ensure that they are on the record of this proceeding.[51]

1.3.6 Second recourse to Article 21.5 by the Philippines

1.32. On 4 July 2017, the Philippines requested additional consultations with Thailand. This "Second Recourse to Article 21.5 of the DSU by the Philippines"[52] concerns another set of criminal charges filed by the Public Prosecutor, on 26 January 2017, against PMTL and one of its former employees (the 2002-2003 Charges).[53] According to the Philippines' request for consultations, these charges relate to 780 entries of cigarettes imported by PMTL between January 2002 and August 2003.[54] The entries of cigarettes covered by the Charges filed on 26 January 2017 are different from the entries of cigarettes covered by the Charges that were filed on 18 January 2016, and which are at issue in this first recourse to Article 21.5 of the DSU.

1.33. On 21 February 2018, the Philippines submitted a revised request for consultations that "replaces and supersedes" the consultations request dated 4 July 2017.[55] According to this revised request for consultations, the measures subject to the "Second recourse to Article 21.5 of the DSU by the Philippines" include both the 2002-2003 Charges and also certain revised Notices of Assessment for underpayment of taxes and duties covering 1052 entries of cigarettes imported between 2001-2003.[56]

1.34. The 2002-2003 Charges were filed on 26 January 2017, approximately six months after this compliance Panel was established. According to the Philippines' revised request for consultations, the 1052 Notices of Assessment in question were received by PMTL on 29 November 2017. At no point in the present proceeding has the Philippines requested that this compliance Panel rule on the 2002-2003 Charges or the 1052 Notices of Assessment. As of the date of the issuance of the Final Report to the parties, the Philippines' "Second recourse to Article 21.5 of the DSU" had not progressed beyond the consultations phase. Accordingly, neither the 2002-2003 Charges nor the 1052 Notices of Assessment are a measure at issue in this first recourse to Article 21.5 of the DSU.

1.3.7 Request for leave to comment on the comments on the draft descriptive part of the Panel Report

1.35. On 15 November 2017, the parties provided their comments on the draft descriptive part of the Panel Report in accordance with the timetable adopted by the Panel. On 17 November 2017, the Philippines requested leave to comment on Thailand's comments on the draft descriptive part of the Panel Report. The Panel invited Thailand to provide its views on the Philippines' request, and following that, on 20 November 2017, Thailand communicated its objection to the Philippines' request.

1.36. On 22 November 2017, the Panel informed the parties as follows:

> [T]he Interim Report, which is scheduled to be issued to the parties on 8 January 2018, will incorporate the descriptive part of the Report and any changes made thereto in the light of the parties' comments on the draft descriptive part of the Panel Report. The Panel notes that when the parties submit their requests to review precise aspects of the

[50] On 8 June 2017, the Panel received a submission, dated 12 May 2017, from the EU-ASEAN Business Council (EU-ABC). On 12 June 2017, the Panel received a submission, dated 24 May 2017, from the European Chamber of Commerce of the Philippines (ECCP).

[51] Amicus Curiae Submissions - EABC, US-ABC, USCIB, NAM, NFTC and APCAC, (Exhibit PHL-188); and Amicus Curiae Submissions - EU-ABC and ECCP, (Exhibit PHL-189).

[52] WT/DS371/21.

[53] As with the initial request for consultations, the Philippines' request for consultations in the context of this second recourse to Article 21.5 was made pursuant to Articles 4 and 21.5 of the DSU, Article XXII:1 of the GATT 1994, Article 19 of the CVA, and paragraph 1 of the Sequencing Agreement.

[54] According to the Philippines' first written submission, 205 of the 210 entries subject to the BoA Ruling at issue in this proceeding are also covered by the charges filed in January 2017. (Philippines' first written submission, para. 51 (referring to The Criminal Court, Charges, Case Black No. Or. 232/2560, 26 January 2017 (English translation), (Exhibit PHL-14-B))

[55] WT/DS371/21/Rev.1, p. 1.

[56] According to the Philippines' revised request for consultations, 208 of the 210 entries subject to the BoA Ruling at issue in this proceeding are also covered by these Notices of Assessment. (WT/DS371/21/Rev.1, para. 9)

Interim Report on 29 January 2018, they are free to request the Panel to review any changes that have been made to the descriptive part of the Report. Accordingly, the Panel considers it unnecessary for the parties to provide comments on one another's comments on the draft descriptive part before the issuance of the Interim Report, or separately from their requests to review precise aspects of the Interim Report. Therefore, the Panel declines the Philippines' request.

2 FACTUAL ASPECTS

2.1 Introduction

2.1. This section briefly describes the activities of relevant entities, including the foreign and domestic companies involved in the Thai cigarette market, and relevant Thai government agencies. It then briefly sets out the measures at issue, by reference to facts that are not in dispute. Detailed facts, including the background and content of the challenged measures, are further elaborated in the context of the Findings in Section 7 of this Report.

2.2 PMTL and the relevant Thai government agencies

2.2. PMTL operates in Thailand as a branch office of a US corporation.[57] PMTL imports and distributes Philip Morris brands of cigarettes in Thailand, including the *Marlboro* and *L&M* brands. PMTL is the exclusive importer of Philip Morris cigarettes in Thailand, which it distributes to wholesalers and retailers.[58] PMTL currently imports virtually all of its cigarettes from a related supplier based in the Philippines, PMPMI.[59] PMTL previously imported cigarettes from a related supplier based in Indonesia, Philip Morris Indonesia (PM Indonesia), and some of the measures at issue in this dispute, including in particular the measures related to the BoA Ruling of November 2012, concern imports that took place when PMTL imported cigarettes from PM Indonesia. As of November 2016, the market share of PMTL's brands in Thailand stood at 19%.[60]

2.3. The Thailand Tobacco Monopoly (TTM) is owned and operated by Thailand's Ministry of Finance, and is the sole domestic cigarette producer. TTM enjoys a dominant market share of 76.14%.[61]

2.4. The Thai Customs Department, which is part of Thailand's Ministry of Finance, is the agency authorized under Thai law to determine the value of goods for customs purposes.[62] The BoA, an authority within the Customs Department, hears appeals from importers or exporters in relation to initial customs valuation decisions by the Customs Department.[63]

2.5. The Thai Department of Special Investigations (DSI) and the Public Prosecutor are different agencies within the central government with responsibilities relating to the investigation and prosecution of criminal offences. Their respective mandates extend to the investigation and prosecution of criminal offences under Section 27 of the Thai Customs Act, which criminalizes acts "to avoid or attempt to avoid the payment … of any duties … with the intention to defraud the government tax of His Majesty the King which must be paid for such goods".[64] The DSI is a unit

[57] Panel Report, *Thailand – Cigarettes (Philippines)*, fn 293; Philippines' first written submission, fn 1.
[58] Philippines' first written submission, para. 254.
[59] Philippines' first written submission, para. 2.
[60] Philippines' first written submission, para. 36 (referring to A C Nielsen, Retail Index (Thailand), data as at November 2016).
[61] Philippines' first written submission, para. 36 (referring to TTM, Annual Report, 2015 (English and Thai), (Exhibit PHL-3), p. 7.)
[62] Thailand's response to Panel question No. 48(b).
[63] Philippines' first written submission, paras. 84 and 441; and second written submission, paras. 351-353 (referring to Thailand's first written submission in the original proceeding, para. 289; and Thailand's opening statement at the second meeting of the panel in the original proceeding, paras. 95 and 96); response to Panel question No. 28.
[64] Section 27 of the Customs Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (English translation), (Exhibit PHL-34-B). Thailand also submitted the Customs Act B.E. 2469 (1926) and its English translation as Exhibits THA-3-A and THA-3-B. In response to a question from the Panel, Thailand subsequently confirmed that the Panel was correct in its understanding that Thailand did not object to the English translation of Section 27 submitted by the Philippines as Exhibit PHL 34-B. See footnote 980 below.

within the Ministry of Justice with an investigative function.[65] The Public Prosecutor is responsible for the prosecution of criminal offences.

2.6. The Thai Revenue Department, which also operates within the Ministry of Finance, is responsible for the administration and collection of various forms of taxes, including VAT.[66]

2.3 The measures challenged in this proceeding

2.7. The measures at issue in this compliance proceeding include the following:

a. the BoA Ruling, including:

   i. various substantive aspects of the customs valuation determination in the BoA Ruling issued on 16 November 2012;

   ii. various procedural aspects relating to the BoA Ruling, including the BoA's alleged failure, prior to the issuance of the BoA Ruling, to communicate to PMTL its grounds for considering that the relationship between the buyer and seller influenced the price and provide an opportunity to PMTL to respond to those grounds, and the BoA's alleged failure, after issuance of the BoA Ruling, to provide reasons or an explanation to PMTL, in writing, as to how the customs value was determined; and

   iii. the 180 Revised Notices of Assessment issued in January 2013 pursuant to the BoA Ruling issued on 16 November 2012.

b. the Charges, including:

   i. various substantive aspects of the customs valuation determination allegedly contained in the Charges; and

   ii. Thailand's alleged disclosure to the Thai media of the declared transaction values for entries covered by the Charges.

c. measures related to the notification requirement concerning the VAT base applicable to cigarette importers, including:

   i. the notification requirement, arising under Notification 187 and Order Por. 145-2555, for importers of cigarettes to notify in June of each year the average actual market price valid as of the date of notification; and

   ii. Thailand's failure to publish the rule that it has allegedly adopted permitting the recommended retail selling price to be notified as a proxy for the average actual market price.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Regarding the first set of measures challenged by the Philippines, related to the BoA Ruling, the Philippines requests the Panel to find that:

a. the BoA acted inconsistently with Articles 1.1 and 1.2(a) of the CVA by rejecting PMTL's declared transaction values without a valid basis, and in particular that:

   i. the BoA acted inconsistently with Article 1.2(a), second sentence, by failing to properly examine the circumstances surrounding the sale of the cigarettes to PMTL because the BoA compared PMTL's profit and general expenses (P&GE) rates to a benchmark range of P&GE rates using a flawed industry comparator group, used flawed methods to establish the P&GE benchmark range, and followed a flawed approach to conducting the comparison between PMTL's rates and the benchmark range of P&GE rates; and

[65] Philippines' first written submission, para. 465.
[66] Panel Report, *Thailand – Cigarettes (Philippines)*, fn 942.

ii. the BoA acted inconsistently with Article 1.2(a), third sentence, by failing to communicate to PMTL its grounds for considering that the relationship influenced the price, and by failing to give PMTL an opportunity to respond.

b. the BoA acted inconsistently with Article 5.1 of the CVA in applying the deductive method to determine an alternative customs value, and in particular that:

i. the BoA acted inconsistently with Article 5.1(a)(i) by failing to deduct an appropriate amount in respect of P&GE;

ii. the BoA acted inconsistently with Article 5.1(a)(ii) by failing to deduct an appropriate amount in respect of transport costs; and

iii. the BoA acted inconsistently with Article 5.1(a)(iv) by failing to deduct an appropriate amount in respect of provincial taxes payable.

c. the BoA acted inconsistently with Article 11.3 of the CVA by failing to provide sufficient reasons for the decision; and

d. the BoA acted inconsistently with Article 16 of the CVA by failing to provide an explanation of how the customs value was determined.

3.2. Thailand requests that the Panel reject the Philippines' claims, and find that:

a. the BoA established a reasonable methodology for comparing P&GE rates in determining whether the relationship between PMTL and the exporter influenced the price, and the Philippines has failed to demonstrate that the BoA's application of the methodology in the facts and circumstances of the case was unreasonable and therefore its claims under Articles 1.1 and 1.2(a) of the CVA should be rejected;

b. the BoA reasonably determined the amounts to deduct for P&GE, provincial taxes and transport costs when determining the revised customs value, and the Philippines has failed to demonstrate that the BoA's approach in the facts and circumstances of the case was unreasonable and therefore its claims under Article 5 of the CVA should be rejected; and

c. the BoA Ruling satisfied the requirements of Article 11.3 of the CVA, was not subject to the additional procedural requirements of the third sentence of Article 1.2(a) or Article 16 of the CVA, and in the event the BoA was subject to Article 1.2(a), third sentence, and Article 16, it satisfied those requirements.

3.3. Regarding the second set of measures challenged by the Philippines, related to the Charges, the Philippines requests that the Panel find that:

a. the Charges are inconsistent with Articles 1.1 and 1.2(a) of the CVA because they reject PMTL's declared transaction values without a valid basis, and in particular that the Public Prosecutor acted inconsistently with Article 1.2(a), second sentence, by failing to properly examine the circumstances surrounding the sale of the cigarettes to PMTL because the Public Prosecutor relied on an invalid comparison between PMTL's import prices and King Power's duty-free purchase prices, insofar as the Public Prosecutor relied on the other grounds mentioned in the DSI's April 2009 Memorandum of Allegation they were equally invalid, and the Public Prosecutor drew arbitrary distinctions between those entries which were included in the Charges and those which were excluded;

b. the Charges violate Article 2.1(a) and (b) and/or Article 3.1(a) and (b) of the CVA by improperly treating King Power's purchase prices as transaction values for "identical" or "similar" goods, taking into account how these terms are defined in Article 15.2(a) and (b) of the CVA; and

c. Thailand violated Article 10 of the CVA by improperly disclosing business confidential information associated with the Charges that PMTL had provided for the purpose of customs valuation.

3.4. Thailand requests that the Panel reject the Philippines' claims, and find that:

a. the Panel should decline to rule on the Philippines' claims relating to the Charges as a consequence of the Philippines' decision to put before the Panel confidential documents, including confidential, lawyer-client privileged legal advice received by Thailand from its legal advisers in this dispute;

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

c. the Charges do not have a sufficiently "close nexus" with the matters covered by the DSB's recommendations and rulings or the BoA Ruling of 12 September 2012, and therefore they are not a "measure taken to comply" with the DSB's recommendations and rulings within the meaning of Article 21.5 of the DSU;

d. the Charges are not a matter "ripe" for adjudication, as they constitute merely an allegation of criminal conduct, and not a judgment by the Criminal Court;

e. contrary to the Philippines' misreading of the Charges, they actually allege customs fraud by PMTL and the references to King Power's prices in the accompanying Annex only serve to establish a possible benchmark for a fine in the event of a conviction, and therefore Articles 1, 2 and 3 of the CVA do not apply because the Charges do not determine "the value of goods for the purpose of levying *ad valorem* customs duties" within the meaning of Article 15.1(a) of the CVA, are not a measure taken by the "customs administration", and nothing in the CVA regulates the manner in which WTO Members can conduct criminal proceedings to address customs fraud;

f. 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 such inconsistency with the CVA is justified under the general exceptions in Article XX(a) and Article XX(d) of the GATT 1994; and

g. the Philippines has failed to demonstrate that Thailand violated Article 10 of the CVA by disclosing PMTL's transaction values to the media.

3.5. Regarding the third set of measures challenged by the Philippines, related to the requirement on importers to notify the average actual market price of cigarettes on the date of notification for the purpose of determining the VAT base, the Philippines requests the Panel to find that:

a. Thailand's failure to publish the general rule that cigarette importers may notify recommended retail selling prices under Notification 187 and Order Por. 145-2555, as opposed to the average actual market prices, violates Article X:1 of the GATT 1994;

b. the requirement under Notification 187 and Order Por. 145-2555 for cigarette importers to notify the average actual market prices of cigarettes on the date of notification violates Article III:4 of the GATT 1994 by according less favourable treatment to imported cigarettes than like domestic cigarettes; and

c. the requirement under Notification 187 and Order Por. 145-2555 for cigarette importers to notify the average actual market prices violates Article X:3(a) of the GATT 1994 by imposing an unreasonable notification requirement on such importers.

3.6. Regarding the third set of measures challenged by the Philippines, Thailand requests that the Panel reject the Philippines' claims under Article X:1, Article III:4 and Article X:3(a) of the GATT 1994 because they are all premised on an inaccurate description of the operation of Thailand's VAT rules, and in particular that:

a. the Philippines has failed to demonstrate that the Thai Revenue Department's acceptance of recommended retail selling prices to satisfy the requirement under Notification 187 and Order Por. 145-2555 to notify the VAT base is a rule of general application that falls within the scope of Article X:1 of the GATT 1994;

b. the Philippines has failed to demonstrate that the notification requirement under Notification 187 and Order Por. 145-2555 accords imported cigarettes "less favourable treatment" within the meaning of Article III:4 of the GATT 1994; and

c. the Philippines has failed to demonstrate that Notification 187 and Order Por. 145-2555 provide for the "administration" of laws, regulations, decisions and rulings of the kind described in Article X:1 of the GATT 1994, and the Philippines' claim of "unreasonable" administration is premised on the misconception that compliance with Notification 187 and Order Por. 145-2555 cannot be achieved without contravening Thai competition law.

3.7. The Philippines requests that, pursuant to Article 19.1 of the DSU, the Panel "reiterate the recommendation that the DSB request Thailand to bring its measures into conformity with its obligations under the covered agreements".[67]

3.8. Thailand requests that the Panel reject the Philippines' claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The parties' arguments are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annex B).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Canada, the European Union, Japan, and the United States are reflected in their executive summaries, provided in accordance with paragraph 24 of the Working Procedures adopted by the Panel (see Annex C). China, the Russian Federation, and Singapore did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 8 January 2018, the Panel issued its Interim Report to the parties. On 29 January 2018, the Philippines and Thailand each submitted written requests for the Panel to review aspects of the Interim Report. On 19 February 2018, each party submitted comments on the other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out our response to the parties' requests for review of precise aspects of the Report made at the interim review stage. We discuss the parties' requests for substantive modifications below, in sequence according to the sections and paragraphs to which the requests pertain.

6.3. In addition to the substantive requests that are discussed below, various corrections or improvements of a typographical or editorial nature were made to the Report, including but not limited to those suggested by the parties in their interim review comments. Both parties identified a number of instances in which drafting improvements could be made to enhance clarity or precision, in respect of which no objection was made by the other party. In those instances we made the requested drafting improvements, and in the interest of brevity refrain from listing such changes below.

6.4. As a consequence of adding several new paragraphs and footnotes in response to the parties' comments on the Interim Report, the numbering of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Final Report.

[67] Philippines' first written submission, para. 857; and second written submission, para. 802.

6.2 General parameters guiding our consideration of the parties' requests for additional findings on certain arguments or issues

6.5. Both parties have made requests that we address certain arguments or issues that are not strictly necessary to resolving the dispute in the light of the findings that we have made. We consider it useful to briefly set out the general parameters that guide our consideration of such requests.

6.6. On the one hand, we find guidance in the Appellate Body's statement that "there is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU".[68] We consider that the case for exercising judicial economy in respect of particular arguments may be particularly strong in situations where those arguments only amount to additional reasons that would, if accepted, lead to the same conclusion that a panel has already reached on a claim, defence, or element thereof. For example, the panel in the original proceeding explained that:

> [T]he Philippines has made one claim under Article 7.1 based on two sets of arguments. Having so considered and to the extent that we examine and make a finding in the following sections with respect to the Philippines' claim under Article 7.1 based on Thai Customs' decision not to deduct the three items at issue, we do not find it necessary to examine the same claim based on another set of arguments.[69]

6.7. On the other hand, we understand that the exercise of judicial economy may have the potential, whether exercised at the level of claims or individual arguments, to detract from a clear enunciation by a panel of the relevant WTO law.[70] Furthermore, deciding not to rule on arguments or issues that are not strictly necessary in the light of other findings that a panel makes could undermine the objective of securing the prompt settlement of the dispute insofar as this restricts the Appellate Body's ability to complete the analysis in the event that it subsequently reverses the Panel's other findings[71], or insofar as it creates uncertainty with respect to the respondent's implementation obligations.[72] For these reasons, panels are not precluded from ruling on arguments or issues that are not strictly necessary to resolve the dispute in the light of its other findings, and may see compelling reasons to do so in respect of particular issues. For example, the original panel decided to address certain *ex post facto* explanations provided by the respondent on an *arguendo* basis, in order to help "resolve the parties' dispute".[73]

6.8. In exercising our judgement on whether to address certain arguments or disputed issues that are not strictly necessary to resolve in the light of our other findings, we have sought to balance considerations of judicial economy against the equally important interests of contributing to the clarification of WTO law and assisting the parties in arriving at a prompt settlement of the dispute.

6.3 Descriptive part

6.9. We note that Section 1.3.6 of the Report provides a brief factual description of the "Second recourse to Article 21.5 of the DSU by the Philippines", with a view to distinguishing the measures at issue in this proceeding. This Section of the Report was included in the Interim Report issued to the parties on 8 January 2018, and the description that it contained was based on the Philippines' request for consultations filed on 4 July 2017. On 21 February 2018, two days after the parties' final opportunity to provide comments on the Interim Report, the Philippines filed a revised request for consultations in connection with the "Second recourse to Article 21.5 of the DSU by the Philippines", which "replaces and supersedes" the Philippines' request made on 4 July 2017.[74] We have revised the brief factual description in Section 1.3.6 to reflect the revised consultations request filed on 21 February 2018.

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[68] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 124-125 (referring to Appellate Body Report, *EC – Poultry*, para. 135).
[69] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.304.
[70] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213.
[71] Appellate Body Reports, *US – Tuna II (Mexico)*, para. 405; *EC – Seal Products*, para. 5.67.
[72] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 215.
[73] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.365.
[74] WT/DS371/21/Rev.1, p. 1.

6.4 The ACWL/Commerce letters and lawyer-client privilege

6.10. Thailand submits that paragraph 7.47 responds to an argument that it did not make, insofar as it suggests that Thailand argued that a defending Member may be entitled to refuse to provide material that was labelled "confidential". In this regard, Thailand recalls that its argument concerns documents that are labelled "confidential" and include lawyer-client privileged material. In these circumstances, Thailand requests the Panel to either delete paragraph 7.47, or to at a minimum clarify that the Panel does not intend to suggest that a Member could be compelled to provide lawyer-client privileged material that was not otherwise disclosed. The Philippines does not object to amending the third sentence of paragraph 7.47 to reflect Thailand's position that its argument was that a Member must consent to the use of information that it designates as confidential *and lawyer-client privileged*, but it considers that paragraph 7.47 should be retained, as the Panel's point in the paragraph still stands. We have revised paragraph 7.47 to reflect the parties' comments.

6.5 The Board of Appeals Ruling

6.11. The Philippines notes that the Panel uses the terms "customs administration" and "customs authority" interchangeably throughout the Report, and queries whether the Panel would prefer to adopt the term "customs administration" consistently throughout the Report. Thailand does not comment on the Philippines' request. In considering this request, we note the following: the original panel appears to have used the terms "customs administration" and "customs authority" interchangeably to describe entities performing customs valuation within the meaning of the CVA[75]; the Appellate Body in the original proceeding used the term "customs authority" to refer to such entities[76]; the Philippines itself in the course of this proceeding has used the terms interchangeably[77]; and certain of the issues raised by the parties touch on the scope of the term "customs administration" as it appears explicitly in certain provisions of the CVA.[78] We therefore do not consider our use of the term "customs authority" to be inappropriate or unwarranted, and decline the Philippines' request.

6.12. The Philippines highlights that, during the course of the proceeding, Thailand asserted that "the Panel should apply the same standard of review that governs panels in disputes arising under the Anti-Dumping Agreement, namely, Article 17.6 of that Agreement".[79] The Philippines notes that, in addressing the standard of review under the CVA in paragraphs 7.85 to 7.87, the Panel did not expressly address Thailand's argument. In the Philippines' view, addressing this argument would clarify the relevant standard of review for fact-finding under the CVA. Thailand does not comment on the Philippines' request. In accordance with the Philippines' request, we have added paragraph 7.110. to address this issue.

6.13. The Philippines notes that the final sentence of paragraph 7.141. concerning the Panel's discussion of whether the P&GE rates of companies included in the industry group were obtained in respect of sales of goods of the same class or kind as those sold by PMTL, refers to a comparison between products, and a comparison between companies, and uses the term "apt comparison". The Philippines suggests, first, clarifying that the relevant methodology entails a comparison with P&GE rates obtained (by a company) in sales of certain *products*, and not a comparison of P&GE rates obtained by *companies* selling those products. The Philippines also suggests that the Panel should clarify its use of the term "apt comparison". Thailand does not comment on the Philippines' request. In the interest of clarity, we have revised the final sentence of paragraph 7.141. .

6.14. Thailand requests that the Panel revise certain aspects of paragraph 7.154. , as well as paragraph 7.155. , concerning other methods that the BoA could have used to examine the circumstances of sale. Thailand submits that these paragraphs mischaracterize the parties' arguments, since the Philippines has not argued that the BoA was required to demonstrate that it could not use other methodologies, and, in Thailand's view, it is not clear that Thailand would bear the burden of demonstrating whether the BoA had indeed done so. Thailand requests the Panel to remove or revise these paragraphs. The Philippines objects to Thailand's request, on the grounds that the Panel did not say that the BoA "should" have used a different methodology, but rather

[75] See generally Panel Report, *Thailand – Cigarettes (Philippines)*.
[76] See Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 208-209.
[77] See generally the Philippines' first and second written submissions.
[78] See, e.g. paragraphs 7.258. , 7.269. to 7.271. , and 7.419. and 7.420. below.
[79] Philippines' request to review the Interim Report, para. 19 (quoting Thailand's first written submission, para. 5.12).

stated that it "could" have used alternative methodologies, and this statement was made in response to Thailand's own argument that the BoA's approach was reasonable given the difficulties of applying the chosen methodology. The Philippines also points out that these paragraphs properly take account of the Philippines' own argument that "if the BoA felt it faced difficulties with the approach it had decided to take, other options were available."[80] In considering Thailand's request, we note that the paragraphs in question address Thailand's argument that the BoA's examination of the circumstances of sale was reasonable in light of the difficulties of conducting a comparison of P&GE rates to examine the circumstances of sale. The relevant paragraphs identify that a relevant consideration to be taken into account is the "extent to which the problems that the BoA encountered could have been avoided by following a different method". In this context, we do not consider it relevant that a particular methodology or approach is, *in principle*, an appropriate means of conducting an examination of the circumstances of sale. To the extent that it bears repeating, we emphasize that the fact that a particular methodology is a valid methodology in principle does not grant a customs authority the discretion to apply such methodology without regard to whether its application in the *particular circumstances* of a specific decision would be apt to reveal whether the relationship between the buyer and seller influenced the price. We further note that we do not make any finding of inconsistency exclusively on the basis of the difficulties facing the BoA, nor do we "require" that the BoA examine all possible methodologies. Rather our analysis of the BoA's examination of the circumstances of sale is on the basis of an overall assessment that takes into account both the difficulties facing the BoA and the steps taken by the BoA to address those difficulties. We therefore decline Thailand's request.

6.15. The Philippines, for its part, notes that in paragraph 7.154. , the Panel only identifies a single alternative methodology that the BoA could have used. The Philippines requests that the Panel broaden or revise its description of alternative possible methodologies, in light of certain limitations on the application of the computed-value methodology in Thailand. The Philippines suggests other alternative methodologies that, in its view, are more appurtenant. Thailand objects to the Philippines' request, reiterating its argument that these references to alternative methodologies should be deleted, given the parties' lack of argumentation on this issue. Thailand also argues that the Philippines introduces new arguments and evidence in the context of this request, and that the Philippines is requesting additional factual findings regarding TTM. In respect of Thailand's argument that the Panel's analysis goes beyond the scope of the parties' arguments, we consider that the Panel's analysis fairly reflects the Philippines' argument that the BoA's "difficulties were entirely of [its] own making" and that, if the comparison was incapable of satisfying the requirements of Article 1.2(a) of the CVA, then "the BoA should have explored a different testing method".[81] Regarding Thailand's other arguments, we emphasize that, as explained above, the Panel makes no finding of inconsistency in respect of the BoA's choice to use a comparison of P&GE rates to examine the circumstances of sale, but rather the Panel addresses whether the BoA's application of its chosen methodology satisfies the requirements of Article 1.2(a). With that in mind, we consider the Philippines' suggestion to be helpful, and have revised paragraph 7.154. accordingly. We emphasize in this regard that our minor revisions do not alter or extend the substance of our findings, as contained in the interim report, in any way.

6.16. The Philippines agrees with the Panel's conclusion in paragraph 7.171. that an authority should communicate to the importer its exclusion of a company from the comparator group on the basis that it is a loss-making company. The Philippines considers, however, that a customs administration or administrative tribunal within the administration may have access to information about private companies that importers do not have, and consequently suggests that the panel's findings reflect the nature of the consultative process, and that the burden placed on an importer will depend on the particular circumstances of the case (including whether relevant information is in the hands of the importer or the authority). Thailand objects to the Philippines' request on the grounds that the panel's discussion is comprehensive, and the revision is both unnecessary and goes beyond the scope of the Panel's reasoning. In the interests of resolving any unintended ambiguities, we have made minor revisions to paragraph 7.171. , and added a footnote to that paragraph.

6.17. Thailand requests that paragraph 7.195. , concerning the parties' arguments with respect to the BoA's calculations of the P&GE figures for the companies in the industry group, be revised, because it incorrectly implies: (i) that the explanation provided by Thailand was insufficient to respond to the arguments that had been made by the Philippines at that point; and (ii) that Thailand offered no further explanation of these calculations once the Philippines raised further alleged

[80] Philippines' comments on Thailand's request to review the Interim Report, para. 14 (referring to Philippines' second written submission, paras. 142 and 150-153; response to Panel question No. 9).

[81] Philippines' second written submission, paras. 142 and 153.

anomalies. The Philippines objects to Thailand's request, on the basis that the paragraph in question accurately captures the fact that Thailand did not provide a full and transparent explanation of the BoA's figures in its first written submission. Without prejudice to the accuracy of the statement itself, in the interest of avoiding unintentional ambiguity, we have removed the relevant sentence of this paragraph, as requested by Thailand. We do not consider that the removal of this sentence alters in any way our factual description of the parties' exchange of views on this issue, nor our substantive findings regarding this process, as captured in paragraph 7.201. .

6.18. Thailand requests the Panel to revise paragraphs 7.200. and 7.219. , concerning the BoA's determination of the numerator and denominator used to calculate the P&GE rates for companies included in the industry group. Thailand requests that these paragraphs be revised to reflect that the explanation provided by Thailand was not contested by the Philippines, and consequently there is no dispute, or lack of clarity, as to how the BoA performed its calculation. The Philippines objects to Thailand's request, on the grounds that the Panel's description is accurate, given the explanation, as contained in paragraph 7.200. , that the BoA relied on two different ways of defining income when calculating the numerator as opposed to the denominator. The Philippines highlights that Thailand has not objected to this characterization of the facts. As an initial matter, we note that Thailand's explanation for *why* the BoA used different definitions is set forth in full in paragraph 7.198. . We do not consider that the accuracy of the statement that "the BoA used different definitions of income in determining the numerator and denominator" is in any way refuted or called into question by the alleged *reasons* for adopting such different definitions. In this respect, we note that Thailand has not objected to the description of the facts in paragraph 7.200. , namely that the BoA included extraordinary income in its "definition" of income for inclusion in the numerator, but excluded such extraordinary income in its "definition" of income when determining the denominator. We therefore decline Thailand's request.

6.19. Thailand requests that paragraph 7.206. , concerning the P&GE rates used by the BoA in respect of PMTL, be revised to reflect the fact that PMTL requested the BoA to use several different rates (as explained in paragraph 7.226.). The Philippines objects to Thailand's request, noting the different contexts of the two paragraphs, highlighting that PMTL's request to use the first P&GE rate was on the understanding that the BoA was conducting a different methodology to examine the circumstances of sale, and emphasizing that the relevant BoA Minutes state repeatedly that the rate requested by PMTL was the rate of 18.47%. In the light of the parties' comments, we have added a sentence to the relevant footnote to paragraph 7.206. .

6.20. Thailand requests that the Panel revise paragraph 7.215. , concerning the explanation "on the record" of the BoA's determination as to how the BoA determined a benchmark range of 9.8% to 15.08%. Thailand requests that the Panel reflect in this paragraph that the determination of the range by calculating two standard errors of the mean, and the confidence level of 95%, appears in evidence "on the record", as reflected in Exhibit PHL-54. The Philippines objects to Thailand's request, in light of the Panel's finding that Exhibit PHL-54 is not part "of the record" of the determination. We agree with the Philippines, and refer Thailand to footnote 429 in which we explain why we do not consider that Exhibit PHL-54 can be considered "on the record" of the BoA's determination. We therefore decline Thailand's request.

6.21. Thailand requests that the Panel remove the phrase "using a Ouija board" in the penultimate sentence of paragraph 7.218. , and argues that doing so would not change the point the Panel is trying to make in that paragraph. The Philippines disagrees, and submits that this reference to a comparison of the BoA's methodology to an arbitrary "methodology", such as a Ouija board, helps to illustrate the flaws in Thailand's logic. The Philippines requests that, if the Panel were to modify the reference to a "Ouija board", it should replace it with the "spinning wheel" analogy used by the original panel, to preserve the Panel's point. We have revised the wording of paragraph 7.218. in the light of the parties' comments.

6.22. Thailand requests that the Panel replace its reference to the "adjusted" P&GE rate of 18.47% in paragraph 7.219. with the term "hypothetical". The Philippines disagrees, and submits that the word "adjusted" is appropriate, given that the term "unadjusted" has been consistently used by the original panel, the parties, and the compliance Panel, to refer to a P&GE rate calculated using PMTL's audited financial statements, adjusted to reflect PMTL's declared transaction value. The Philippines further submits that the use of the word "hypothetical" in either paragraph 7.219. or paragraph 7.206. does not seem to be appropriate, as the relevant P&GE rate is calculated based on real figures, namely PMTL's audited accounts and declared transaction values. On the basis of the parties' observations regarding the references to "adjusted" and "unadjusted" P&GE rates, we have revised

all references by the Panel to P&GE rates in order to unambiguously identify the figures on which they were based (i.e. the transaction values as *declared* by PMTL, or the *revised* customs values as determined by the Thai Customs Department). Such changes appear in paragraphs 7.206. , 7.219. , 7.226. and 7.230. , as well as footnote 573. In the course of making this change, we also aligned the wording of the third and fourth sentences of paragraph 7.230. ("should have") to harmonize these statements with the wording used in the last sentence of paragraph 7.206. ("could have"). We have not altered our description, in paragraph 7.185. , of the Philippines' characterization of these P&GE rates as adjusted/unadjusted.

6.23. The Philippines recalls that the parties exchanged arguments regarding the proper interpretation of the term "inconsistent with", for the purposes of determining whether an importer's P&GE rates are "inconsistent with" those of the industry group. The Philippines notes that the panel does not address this aspect of the parties' argumentation, and considers that clarification of the relevant legal standard that the BoA should have applied would add weight to the Panel's findings. The Philippines submits that such findings could follow paragraph 7.226. . Thailand does not comment on the Philippines' request. We have revised paragraph 7.228. to reflect our approach to this issue.

6.24. Thailand considers that paragraphs 7.262. to 7.266. misrepresent Thailand's arguments that the procedural obligations of Article 1.2(a), third sentence, of the CVA do not apply to appeals tribunals such as the BoA. Specifically, Thailand considers that these paragraphs incorrectly suggest that Thailand considers that the procedural obligations of Article 1.2(a) "do not apply *at all* to appellate tribunals such as the BoA", and requests that the Panel correctly reflect its argument "that these obligations *do not apply mutatis mutandis* to appeals".[82] The Philippines has no comments on the Thailand's request. We consider that Thailand's request to revise paragraph 7.262. is helpful, in that it identifies an issue as to terminology that has the potential to create confusion. First, while Thailand submits that the discussion incorrectly suggests that Thailand argued that the procedural obligations of Article 1.2(a) "do not apply *at all* to appellate tribunals such as the BoA", in our view that is indeed an accurate characterization of Thailand's arguments in its submissions.[83] We do not understand Thailand to have argued that the obligations in the third sentence of Article 1.2(a) are *partially* applicable to appeals tribunals such as the BoA, in the sense that some aspects of the procedural obligations in Article 1.2(a) may apply to the BoA but that other aspects may not be applicable in the same manner to the BoA. Nor do we understand Thailand to have argued that in some *circumstances* the procedural obligations in Article 1.2(a), third sentence, may apply to the BoA but that in other circumstances those obligations may not be applicable to the BoA. It has not framed its argument in such terms, nor has it specified precisely what aspects of the obligations in Article 1.2(a), third sentence, would or would not apply to the BoA, or in what circumstances the obligations in Article 1.2(a), third sentence, would not apply to the BoA. Thailand's argument is that Article 1.2(a), third sentence, of the CVA is inapplicable to appeals tribunals such as the BoA, *inter alia* because it would not make sense to subject such tribunals to the exact same procedures that apply in the context of an initial customs valuation determination. We further understand Thailand to argue that even if this is incorrect, and the procedural obligations in Article 1.2(a), third sentence, do apply to such tribunals, then in the circumstances of this case, this obligation was satisfied since PMTL was aware that the BoA was conducting a comparison of P&GE rates, and because PMTL had an "open-ended opportunity" to communicate with the BoA. We address that second issue, including Thailand's arguments in relation to that second issue, below in Section 7.2.3.3.3. Second, we consider that confusion is likely to arise from the manner in which Thailand employs the term "*mutatis mutandis*" to qualify its view of the applicability of Article 1.2(a), third sentence, to the BoA.[84] We have therefore made adjustments to paragraphs 7.246. , 7.255. , 7.262. , and

[82] Thailand's request to review the Interim Report, para. 2.15. (emphasis original)

[83] See, e.g. Thailand's first written submission, Section 5.6.4 ("The procedures of Article 1.2(a) of the CVA do not apply to the BoA decision"); second written submission, paras. 2.109-2.118 ("the Philippines has failed to make a *prima facie* case that the procedures of Article 1.2(a) must be applied *mutatis mutandis* to the work of an appellate authority such as the Board of Appeals"); and comments on the Philippines' response to Panel question No. 73(b), p. 11 ("the procedural requirements of Article 1.2(a) cannot be applied *mutatis mutandis* to appeals under Article 11.2 of the CVA in the same manner as they would be applied to the original valuation determination").

[84] Specifically, Thailand equates the notion of subjecting the BoA to an obligation to "follow exactly the same procedures as must be used to reach the initial valuation decision" (Thailand's first written submission, para. 5.120) with the notion that those procedures apply "*mutatis mutandis*" to the BoA. Thus, when Thailand argues that it would *not* make sense to apply exactly the same procedural obligations in Article 1.2(a), third sentence, "*mutatis mutandis*" to the BoA, we understand its argument to be that it would not make sense to apply exactly the same procedural obligations to an appeals tribunal like the BoA. However, this formulation

7.268. that aim to fairly and accurately characterize Thailand's argument while avoiding any potential confusion.

6.25. The Philippines requests that the Panel include, in its summary of the Philippines' arguments in paragraph 7.324. , the Philippines' argument that had PMTL been given the opportunity to provide further evidence of its payment of provincial taxes, it could have provided evidence from its SAP accounting system and statements from its customers confirming that PMTL paid the provincial tax on their behalf. The Philippines also considers that it would add weight to the panel's findings to address this point in its summary of the Philippines' arguments. Thailand does not comment on the Philippines' request. To comprehensively reflect the Philippines' arguments on this issue, we have added a reference to these aspects of its argumentation in paragraph 7.324. of Section 7.2.6.2, entitled "Main arguments of the parties", and have also reflected the citations to the Philippines' arguments during the proceeding in the footnote to paragraph 7.368. , where we address this argument. However, we consider that paragraph 7.368. , and the footnote thereto, sufficiently captures our consideration of this argument, and we therefore decline the Philippines' request to further revise our findings.

6.26. Thailand considers that the final sentence of paragraph 7.349. , which concerns the BoA's determination of the total amount of provincial tax payable by PMTL in 2002, does not explain Thailand's argument with sufficient clarity. Thailand suggests the following revision to the final sentence of this paragraph: "For its part, Thailand agrees with the distinction made by the original panel, but argues that in this case, because the provincial tax is not applied in all provinces, the amount of provincial taxes payable cannot be determined without additional evidence of provincial taxes paid." The Philippines objects to Thailand's request, arguing that the Panel's description is accurate, and Thailand's revision inaccurate, because through the course of the proceeding Thailand gave a number of reasons why, in its view, the BoA required additional evidence of provincial taxes paid. In light of the parties' concerns, we have revised the relevant sentence of paragraph 7.349. to quote Thailand's own explanation, as provided in its first written submission.

6.6 The Criminal Charges

6.27. Regarding paragraph 7.479. , which lists the legal consequences of the Charges that do not result from the DSI investigation, the Philippines requests adding the following: (i) an offence under Section 27 of the Customs Act can be prosecuted only after the Public Prosecutor has issued charges, which the Panel mentions as a consequence of the Charges in paragraph 7.595 of its Report; and (ii) the Charges result in the accused's potential liability for fines over USD 2.35 billion. With respect to the first consequence mentioned by the Philippines, Thailand notes that it is redundant because the legal consequences cited by the Panel in paragraph 7.479. already reflect the fact that the Charges trigger Thailand's ability to prosecute. With respect to the second part of the proposed addition, Thailand considers that it is not relevant to the Panel's analysis because the list of consequences contains direct and actual legal consequences for the accused, whereas the fine that may be imposed is, in contrast, a potential consequence. We agree with the points made by Thailand in its comments on the Philippines' request, and therefore we have not revised paragraph 7.479. in the manner requested by the Philippines.

6.28. Thailand requests revising the first sentences of paragraphs 7.497. and 7.538. to clarify that the quoted passage is not Thailand's argument, but the Philippines' mischaracterization of what Thailand argued. In this regard, Thailand states that it has not argued that "the lack of overlap is decisive" for purposes of determining whether there is a substantive connection between the 272

may be apt to cause confusion, since Black's Law Dictionary defines the term "*mutatis mutandis*" as "all necessary changes having been made; with the necessary changes". *(Black's Law Dictionary*, *7th edn*, Bryan A. Garner (ed.) (West Group, 1999), p. 1039) Fn1250.) Likewise, the Appellate Body has explained that when Article 22.7 of the SCM Agreement indicates that the provisions of Article 22 are to apply "*mutatis mutandis*" to the initiation and completion of Article 21 reviews, what that means is that "certain requirements set out in Articles 22.1 through 22.6 of the SCM Agreement, which are fully applicable to the initiation or completion of an Article 11 original investigation, may not be applicable in the same manner, or to the same extent, to Article 21 reviews". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.535 (referring to Panel Reports, *US - Corrosion-Resistant Steel Sunset Review*, para. 7.33, and *US - Oil Country Tubular Goods Sunset Reviews*, para. 7.248) Therefore, insofar as Thailand were arguing that some aspects of the procedural obligations in Article 1.2(a), third sentence, may apply to the BoA, or that in some circumstances the procedural obligations in Article 1.2(a), third sentence, may apply to the BoA, then we would characterize either of those arguments as an argument that the procedural requirements in Article 1.2(a) third sentence *are* applicable *mutatis mutandis* to the BoA. As explained above, however, we do not understand Thailand to have advanced that argument.

entries subject to the Charges and the 118 entries subject to the DSB's recommendations and rulings. The Philippines submits that its characterization of Thailand's argument is correct. We consider that these sentences are drafted in a manner that makes clear that the quoted passage is the Philippines' characterization, not the Panel's characterization, of Thailand's argument. Furthermore, we note that the Philippines' comments on Thailand's request make clear that the Philippines stands by that characterization of Thailand's arguments. Therefore, we have not adjusted the text of paragraphs 7.497. and 7.538. . However, we have supplemented paragraph 7.537. , which presents Thailand's arguments on this point, to reflect Thailand's clarification that the lack of overlap is not "decisive" and is "only one of the several factors presented by Thailand demonstrating the lack of close nexus".

6.29. With reference to the Panel's conclusion at paragraph 7.549. regarding the effects of the Charges for the purpose of the "close nexus" test, the Philippines requests that the Panel explicitly address its argument that the Charges "aggravate the WTO-inconsistencies that Thailand has been instructed by the DSB to resolve", and in this way "undermine compliance" and "circumvent" the DSB's recommendations and rulings because they "perpetuate the problem" addressed in those recommendations and rulings. Thailand does not comment on the Philippines' request. Although we are not required to address each and every argument advanced by the parties, we consider that the change requested by the Philippines would serve to make explicit that which is already implicit in our reasoning. Therefore, we have added language to paragraph 7.549. connecting the existing reasoning in that paragraph to the Philippines' argumentation.

6.30. In paragraph 7.578. the Panel quotes a particular portion of Thailand's response to Panel question No. 39, and Thailand requests that the Panel instead quote a different portion of Thailand's response "in order better to reflect Thailand's response to the Panel's question". The Philippines submits that the Panel should reject Thailand's request because it does not explain why its preferred quote better reflects its response, and because the Panel is entitled to quote the elements of Thailand's argument that the Panel considers to be most relevant to the particular aspect of the Panel's reasoning at stake. We have supplemented the existing text of paragraph 7.578. by including the quotation requested by Thailand.

6.31. The Philippines proposes that a new paragraph, summarizing its argument that the Charges should not be understood as alleging customs fraud in the sense that the Panel describes in the first sentence of paragraph 7.631. , be included following paragraph 7.631. . In its view, this would be helpful to clarify this aspect of the parties' disagreement over the nature of the Charges. Thailand considers that the fairly lengthy summary of arguments proposed by the Philippines breaks the structure of the Panel's narrative in this section. In this regard, Thailand observes that in paragraph 7.631. the Panel clarifies only that the disagreement between the parties does not relate to the concept of customs fraud, but to whether the Charges constitute an allegation of customs fraud, and is not meant to be an exhaustive summary of the parties' arguments on this aspect. Thailand also points out that a summary of the Philippines' arguments is unnecessary because these arguments are explained and addressed by the Panel in the subsequent sub-sections of the Panel's report (as well as in the parties' executive summaries). We agree with the points made by Thailand in its comments on the Philippines' request, and therefore we have not added the new paragraph proposed by the Philippines.

6.32. The Philippines also proposes the following amendment to paragraph 7.631. , fourth sentence: "Thailand does not specifically contest the Philippines' understanding on ~~this point~~ the nature of customs fraud in relation to the declared value, […]". The Philippines asserts that this amendment would add clarity to the Panel's reasoning. Thailand objects to this request, being of the view that the current wording of paragraph 7.631. is sufficiently clear; in its view, by indicating that Thailand does not specifically contest the Philippines' understanding "on this point", the Panel's narrative makes clear that it is referring to the issue described immediately above in that same paragraph and there is no need, therefore, to rephrase something that the Panel already described. We agree with the point made by Thailand in its comments on the Philippines' request, and therefore we have not introduced this amendment.

6.33. The Philippines suggests a revision to the statement, in paragraph 7.642. , that insofar as the "plain meaning" of the term "customs administration" is "inconclusive", the object and purpose of the covered agreements should guide the Panel to avoid interpretations that would enable Members to circumvent or evade their obligations. In the Philippines' view, this could be read to suggest a degree of uncertainty regarding the interpretation of the term "customs administration", and in any event recalls that a panel is entitled to take into account the object and purpose of a

covered agreement regardless of whether or not the plain meaning is "inconclusive". Thailand does not comment on the Philippines' request. We have adjusted the wording of this sentence in paragraph 7.642. in the light of the Philippines' comment, and made a similar change to the wording of a similar sentence found at paragraph 7.671. .

6.34. The Philippines requests that the Panel reconsider the statement in paragraph 7.649. , that the Panel "would be inclined to agree with Thailand that the Charges fall outside of the scope of application of the CVA" if Thailand were able to substantiate its assertions about the meaning of the Charges. In its view, the Panel's statement addresses a hypothetical circumstance that does not need to be addressed to resolve the dispute. The Philippines also notes that earlier in its findings the Panel correctly confirms that the Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value elaborates on certain procedures that would apply in such situations. Thailand observes that this paragraph serves to outline the Panel's approach and the possible outcomes that may result from its assessment of the facts, which is particularly important when there is a threshold question raised by Thailand regarding the applicability of a particular WTO agreement. Furthermore, Thailand considers that the Panel's view that the CVA would not apply in certain circumstances serves to clarify the scope of application of the CVA, an issue that is at the heart of this dispute. Thailand also argues that the Philippines' characterization of paragraph 7.649. gives the impression that the Panel addressed these circumstances as *obiter dicta* for no apparent reason, but as the Philippines is aware, the circumstances addressed by the Panel were those put forth by Thailand as part of its argumentation. Finally, Thailand disputes the Philippines' understanding that the procedures referred to in the Ministerial Decision would necessarily and always apply in cases of customs fraud. We note that contrary to what the Philippines' comment and another comment by Thailand in relation to paragraphs 7.681. and 7.682. might be taken to suggest, paragraph 7.649. does not make a blanket statement that the CVA does not apply to any circumstance when the declared transaction value is not the price actually paid or payable. Rather, the text states that we would "be inclined to agree" with Thailand that the Charges fall outside of the scope of application of the CVA if Thailand were to substantiate its "interrelated assertions" that (i) "the Charges allege customs fraud based on a determination that the price that PMTL *declared* to have paid to PMPMI was not the *actual* price that was paid to PMPMI", *and* that (ii) "the references to King Power's prices in the Annex merely serve as a possible benchmark for the purposes of a fine" *and* (iii) not "as a basis for determining the actual customs value of PMTL's imported goods". We also agree with the points made by Thailand in its comments on the Philippines' request as to why paragraph 7.649. is not gratuitous. For these reasons, we have not deleted or modified the first sentence of paragraph 7.649. . However, we have added a footnote clarifying that in the circumstances of this case, the Panel need not decide, and therefore does not decide, whether in such circumstances the domestic authorities may still be subject to the procedures elaborated in the Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value.

6.35. The Philippines notes that paragraph 7.652. , which refers to a statement by the Appellate Body regarding the allocation of the burden of proof in the context of the examination of the respondent's municipal law, could be read to suggest that the Philippines is making an "*as such*" challenge against a Thai "municipal law". The Philippines suggests an alternative quote to describe the Philippines' burden to introduce evidence as to the scope and meaning of the legal instruments that it challenges. Thailand considers that the Philippines misses the point. In its view, the Philippines is challenging the Charges *on their face*, and not as they may be applied once the Thai Criminal Court has heard all of the evidence, and in this context the Panel's reference to "as such" (or *de jure*) is correct and should be maintained. We have retained the reference to the Appellate Body's statement, because we consider that it reflects a general principle that is applicable not only to the manner in which a panel should approach claims relating to the WTO-consistency of a municipal law in the form of a statute or a regulation, but also to the manner in which a panel should approach claims relating to the WTO-consistency of municipal legal instruments such as the Charges. We have adjusted the wording of paragraph 7.652. to that effect, and with a view to avoiding any suggestion that the Philippines is making an "as such" challenge against any provision of Thai legislation in the context of the Charges.

6.36. The Philippines requests a revision to paragraph 7.659. , which states that "an allegation of customs fraud could be made without ever seeking to determine the customs value of the importer's goods" and then refers to a hypothetical example given by Thailand involving the discovery of a second invoice suggesting that declared value is less than the amount actually paid. The Philippines expresses its concern that the Panel's reasoning here could suggest that the *CVA* would "never apply" in this situation, and then recalls that the Decision Regarding Cases Where

Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value elaborates on certain procedures that apply in such situations and submits that in making these *obiter* remarks, the Panel is addressing the legal consequences of a hypothetical example that the Panel has found does not correspond to the facts in this dispute. Thailand objects to the Philippines' request to revise this paragraph for the same reasons expressed above with respect to the Philippines' comment on paragraph 7.649. . We note that paragraph 7.659. refers to Thailand's example only as a simple hypothetical meant to illustrate how there could be situations in which the customs administration may never have conclusive evidence of the price actually paid by the importer, but could nonetheless come into possession of proof that the declared value was less than the price actually paid by the importer. Paragraph 7.659. does not say or imply that the CVA would be "necessarily inapplicable" in the case of Thailand's hypothetical example nor more generally in cases where an importing Member doubts whether the declared value is the "transaction value". Accordingly, we are not persuaded that there is any need to revise this paragraph.

6.37. The Philippines requests a revision to paragraph 7.660. , which concludes that the terms of Section 27 of the Customs Act do not always require that the authorities engage in custom valuation determinations, such that any and all Charges brought pursuant to Section 27 do not necessarily fall within the purview of the CVA. The Philippines recalls that Section 27 provides that "[f]or each offence that there shall be a fine of four times the amount of *price of the goods including duty* or to imprisonment for a term of not exceeding ten years, or to both". The Philippines requests that the Panel: (i) clarify that the terms of Section 27 do not always require that the authorities engage in customs valuation determinations "in order to establish the constituent elements of an offence"; and (ii) include a clarification that, even in the situation where the constituent elements of the offense in a particular case under Section 27 do not involve customs valuation, if Thailand were to establish a fine that is calculated on the basis of the value of the goods, the CVA applies to that valuation exercise. Thailand requests that the substance and text of paragraph 7.660. remain as they are. Thailand submits that the Philippines' comment goes beyond the scope of interim review, as it "addresses the WTO consistency of Section 27 of the Customs Act 'as such', that is, its WTO consistency in general terms beyond the specific manner in which it was applied in the Charges". Thailand also suggests that it is internally contradictory to suggest that where something "do[es] not involve a customs valuation", the CVA would nevertheless "appl[y] to that valuation exercise". In addition, it reiterates its position that the CVA does not apply when calculating a benchmark for a possible criminal fine. We consider that the Philippines' requests are aimed at stating explicitly that which is already implicit in the text of paragraph 7.660. when read in conjunction with our observations in paragraph 7.662. . Therefore, we have made the clarifications requested by the Philippines.

6.38. With reference to paragraph 7.662. , both the Philippines and Thailand recall that the parties disputed the use of the term "price" in the Charges and advanced arguments addressing Section 2 and Section 103 of the Customs Act, and request that the Panel address those arguments in this regard. We note that paragraph 7.662. implicitly rejects Thailand's argument that Section 103 of the Customs Act is the relevant provision for the calculation of a criminal fine, and that Section 103, and not Section 2, is therefore the correct context for understanding the term "price" as used in the Charges. We agree with the parties that the basis for rejecting Thailand's argument should be set out explicitly. We have added a footnote to paragraph 7.662. explaining that we agree with the Philippines that it is clear from the terms of the Charges that they refer to the "price" for the purpose of establishing the constituent elements of the crime under Section 27 of the Customs Act, and not for "for the purpose of fixing the amount of any fine or penalty".

6.39. Thailand suggests that the Panel modify paragraphs 7.681. and 7.682. , which contain part of the Panel's analysis regarding the applicability of the Appellate Body's findings in *US – 1916 Act* to the instant dispute, to ensure that there are no internal inconsistencies in its findings. In this regard, Thailand sees a contradiction between (i) the Panel's statements that the CVA would not apply when the declared transaction value is not the price actually paid or payable (paragraph 7.649.) and that the absence of any CVA provision analogous to Article 18.1 of the Anti-Dumping Agreement could mean that the silence of the CVA in this regard indicates that WTO Members are free to impose criminal penalties on customs fraud (paragraph 7.681.); and (ii) the Panel's statement that the Appellate Body's findings in *US – 1916 Act* nonetheless support the conclusion that the CVA applies to the aspect of the Charges that is regulated by the CVA (paragraph 7.682.). The Philippines submits that there is no contradiction between these statements. Furthermore, with reference to paragraph 7.649. , the Philippines considers that "Thailand's interpretation of the Panel's *obiter* statement, and its reliance upon this statement at the first opportunity, illustrates the dangers of the Panel's approach" in making this obiter statement. We have reviewed these

paragraphs in the light of Thailand's comments, and we see no internal inconsistencies between any of these findings and therefore we have not revised these paragraphs. We note that, contrary to what Thailand's comment might be taken to imply, paragraph 7.649. does not make a blanket statement that the CVA does not apply when the declared transaction value is not the price actually paid or payable.

6.40. The Philippines requests an amendment to paragraph 7.703. , which addresses the legal standard under the CVA for regarding goods as "identical or similar" to the goods being valued, in order to state more explicitly that the close physical similarity of goods is not sufficient to make the goods identical or similar for valuation purposes under Articles 1, 2, or 3 of the CVA. The Philippines observes that, as reflected in the record, this point continues to be an issue of contention, and even a source of confusion, in the ongoing criminal proceedings in Thailand. Thailand considers that the Philippines' request is unwarranted given that the Panel already made a finding of violation under Articles 1, 2, and 3 of the CVA, as requested by the Philippines. In its view, the Philippines is essentially asking the Panel not only to find a violation, but to do so by addressing every argument the Philippines made. However, Thailand recalls that nothing in the DSU obliges WTO panels to address all arguments advanced by the parties. We agree with Thailand that we are not required to address all arguments advanced by the parties, at least insofar as it would not alter the overall conclusion reached in respect of the claim at issue. Having said that, we consider that the change requested by the Philippines merely makes more explicit what is already implicit in our reasoning. Accordingly, we have revised paragraph 7.703. as requested by the Philippines.

6.41. The Philippines observes that the footnote to paragraph 7.703. refers to Article 2.4 of the Anti-Dumping Agreement as contextual support for the need to take into account the differential impact of fiscal charges or duties under the CVA, and suggests that the Panel could anchor this aspect of its interpretation in context drawn from the CVA. To this end, the Philippines recalls that it has referenced a number of provisions of the CVA as context supporting the requirement to adjust for factors that affect price-comparability, including Articles 1.2(b), 2 and 3 of the CVA. Thailand does not comment on the Philippines' request. We have adjusted this footnote in the light of the Philippines' request.

6.42. The Philippines observes that paragraph 7.712. refers to the Public Prosecutor's "*decision to examine the circumstances of sale*" in respect of 272 entries subject to the Charges, and its decision to exclude from *that examination* the 18 WTO entries, but recalls that the 18 WTO entries were included in the DSI's examination and in its two recommendations to prosecute, and they were also included in the Public Prosecutor's examination until just before the Charges were issued. The Philippines requests an amendment to reflect that the Public Prosecutor's decision-making is arbitrary because, after the examination, the Public Prosecutor decided to accept the transaction values for the 18 WTO entries (deferring to the customs administration's decision sitting as the BoA) but decided to reject it for the 272 entries subject to the Charges, even though the circumstances of sale were identical for 111 of the entries, and highly similar for the remaining entries. Thailand submits that the Panel's conclusion is sufficiently clear as it stands in paragraph 7.712. , and that if accepted by the Panel, the Philippines' formulation would go beyond the Panel's conclusion, and would in fact change the nature of the Panel's finding as to what conduct by the Public Prosecutor was "arbitrary". We have reviewed paragraph 7.712. in the light of the parties' comments, and consider that the amendment suggested by the Philippines entails a more precise articulation of the premise of our reasoning. We have therefore made this change.

6.43. Regarding paragraphs 7.720. and 7.721. , the Philippines notes that the Panel's findings with respect to the other grounds set out in the Memorandum of Allegation are limited. The Philippines considers that it would be helpful for the Panel to provide further reasoning as to why these grounds do not constitute a valid basis to reject transaction value, and proceeds to reiterate its arguments to that effect. Thailand requests that the Panel clarify the meaning of its finding that the rejection of the transaction value "cannot be justified on the basis of the grounds contained in the Memorandum of Allegations", and in particular whether the Panel is finding that (i) the Charges are inconsistent with the CVA in relation to the grounds mentioned in the Memorandum of Allegation (in addition to its other findings of inconsistency under the CVA); or (ii) it is not ruling on the CVA-inconsistency of the Charges in relation to the grounds mentioned in the Memorandum of Allegation. In this regard, Thailand seeks clarification that the Panel is not ruling on the WTO consistency of the content of the Memorandum of Allegation. Thailand considers that the Philippines' request for additional substantive findings are without merit, because it considers that the Panel correctly characterized the Philippines' comments regarding the Memorandum of Allegation as "conditional", as they were made in anticipation that Thailand could seek to defend the Public Prosecutor's rejection

of PMTL's declared transaction values on the grounds indicated therein; and as the Panel found, this condition precedent did not occur and, hence, the Panel concluded that the rejection of the transaction value cannot be justified on the basis of the grounds mentioned in the Memorandum of Allegation. We recall that the Philippines has advanced a single claim under Articles 1.1 and 1.2(a), which is that the Public Prosecutor's rejection of the declared transaction value in the Charges was inconsistent with Articles 1.1 and 1.2(a) of the CVA because the Public Prosecutor lacked a valid basis to reject the declared transaction value. In support of that claim, the Philippines has presented arguments relating to: (i) the comparison with King Power; (ii) the arbitrary inclusion/exclusion of entries; and (iii) the additional grounds for rejecting PMTL's transaction values contained in the 2009 Memorandum of Allegation. We understand both parties to agree that these aspects and factual circumstances of the Charges do not necessarily require that the Panel make three separate and distinct findings in relation to the obligation in Article 1.2(a), second sentence, as these are simply arguments in support of a single claim, namely that the Charges allegedly violated the obligation in Article 1.2(a) to engage in a proper examination of the circumstances of sale.[85] In response to the parties' comments, we have revised paragraph 7.721. to reflect our views on the parties' *arguments* concerning the grounds set out in the Memorandum of Allegation. However, we emphasize that our finding therein does not constitute a separate finding of inconsistency, but rather a finding in respect of one aspect of the parties' arguments that is nonetheless relevant to our ultimate finding of inconsistency as set out in paragraph 7.722. .

6.44. The Philippines notes that in paragraph 7.731. , the Panel provides a single conclusion in which it makes findings with respect to the Philippines' claims under Articles 1.1, 1.2(a) second sentence, 2.1 and 3.1 of the CVA. The Philippines requests that the Panel provide separate conclusions in each of the sections dealing with the Philippines' separate claims under the CVA. Thailand does not comment on the Philippines' request. We note that the Philippines has advanced one claim under Articles 1.1 and 1.2(a), second sentence, regarding the rejecting of PMTL's transaction values, which we address together in Section 7.3.6.2.2 under the heading "Claim under Articles 1.1 and 1.2(a), second sentence, of the CVA", and another set of two alternative claims under Articles 2.1 and 3.1 regarding the determination of an alternative customs value, which we address together as alternative claims in Section 7.3.6.2.3 under heading "Claims under Articles 2.1 and/or 3.1 of the CVA". We understand the Philippines to request that instead of presenting our conclusions on the claims considered in these two subsections together at the end of the analysis in paragraph 7.731. under the heading "Conclusion", we should separate the conclusions contained therein and instead present them as conclusions within, and at the end of, Sections 7.3.6.2.2 and 7.3.6.2.3. We note that these conclusions are already separated in paragraph 8.2(a) and (b) of the Conclusions and Recommendations section of the Report, and it is not apparent to us that the change requested by the Philippines is necessary. However, insofar as the Philippines' request is motivated by the concern that grouping these conclusions together in a single paragraph could be read as suggesting that they are not independent claims or findings, we agree that it may be useful to first present these conclusions as separate conclusions within Sections 7.3.6.2.2 and 7.3.6.2.3. We have done so, and we have also adjusted the language in paragraph 7.731. to state explicitly that these are two distinct sets of claims.

6.45. Regarding paragraph 7.759. , Thailand disagrees with the Panel's characterization that Thailand's defences under Article XX(a) and XX(d) "essentially reiterate" the argument that "the Charges do not involve any customs valuation determination in the first place, and that the reference to the King Power prices merely serves the purpose of providing a possible benchmark to the Criminal Court to impose fines in the event of a conviction". Thailand requests the Panel to also address the specific facts and arguments put forward by Thailand, including in its first written submission (paragraphs 6.103-6.112 and 6.120-6.131) and second written submission (sections 3.6.3 to 3.6.6). Also regarding paragraph 7.759. , the Philippines requests that the Panel supplement its observations by explicitly stating the necessary consequence of its findings in paragraph 7.759. , which is that the "aspect of the Charges that needs to be justified under Article XX" is *not* the use of King Power's prices as a possible benchmark for the imposition of a fine, but, rather the Charges' WTO-inconsistent customs valuation. The Philippines further requests the Panel to confirm that a WTO-inconsistent customs valuation could never be necessary for the proper enforcement of Thailand's customs laws. Having carefully considered the parties' requests, we are not convinced that there is any reason to modify or add to the existing text of paragraph 7.759. . First, while we note that Thailand disagrees with our characterization of how its defences under Article XX(a) and (d) relate to its arguments regarding the applicability of the CVA, and while we recognize and appreciate that it has made very detailed submissions elaborating its defences under Article XX(a)

[85] See Philippines' and Thailand's responses to Panel question No. 70(a).

and (d), we are not persuaded that we have incorrectly or unfairly characterized its essential argument. Second, we understand the Philippines' requests to be motivated by the concern that, if Thailand were to successfully appeal the Panel's findings on the applicability of Article XX to the CVA, there may be insufficient findings on the record to complete the analysis as to whether the Charges are justified under Article XX. As already indicated in paragraphs 7.758. to 7.760. , we are not convinced that we need to make any additional factual findings, beyond those already made in earlier sections of its Report, to assist the Appellate Body in completing the analysis under Article XX. Likewise, we do not see how the Appellate Body's ability to complete the analysis would turn on the presence or absence, in our Report, of the particular statements requested by the Philippines. Accordingly, we have not revised paragraph 7.759. .

6.46. Thailand asks the Panel to modify paragraph 7.784. , which sets forth the Panel's understanding that the article from the Bangkok Post must have been based on the information contained in the Annex to the Charges because the comparison between PMTL's import prices with those of King Power in the article mirrors the comparison in the Annex to the Charges, to reflect the fact that it is not clear that the information in the Bangkok Post was necessarily based on the Annex to the Charges. Thailand observes that, while the Panel is saying that this is the first time that King Power's import prices were disclosed and compared to PMTL's import prices, this is incorrect because King Power's import prices and the comparison with those of PMTL also appear in several past press articles, including the DSI press release from September 2009 (Exhibit PHL-90-B), and press articles from 2006 and 2009. For that reason, Thailand requests the Panel to modify the paragraph at issue and reflect this. The Philippines submits that the Panel is correct that the information in the *Bangkok Post* necessarily demonstrates knowledge of some of the information contained in the Annex to the Charges, and there is no basis to modify paragraph 7.784. as Thailand suggests. We consider that Thailand's request for modification proceeds on an incorrect premise. The Panel does not proceed on the premise that this is the first time that King Power's import prices were disclosed and compared to PMTL's import prices. Rather, as explained in paragraph 7.784. , the Panel reasons that the article from the Bangkok Post must have been based on the information contained in the Annex to the Charges because the comparison between PMTL's import prices with those of King Power in the article mirrors the comparison in the Annex to the Charges. Thailand has not sufficiently explained why, absent knowledge of the fact that the Charges are based on a comparison between the prices of King Power and the PMTL as set forth in the confidential Annex, that information would be included in a press article reporting on the Charges.

6.47. Thailand requests that the Panel delete the third sentence of paragraph 7.789. , which reads: "We agree with the Philippines that this evidences a consistent pattern by Thailand of disclosing PMTL's confidential information, contrary to Article 10 of the CVA." Thailand considers that this statement amounts to a legal finding of inconsistency with Article 10 of the CVA of an alleged measure that was not before the Panel, and notes that the Panel itself stated, in paragraph 7.787. , that "it would be outside of our terms of reference to make any findings of inconsistency under Article 10 with respect to the DSI press releases from September 2009 and August 2011, and we make no such findings". The Philippines submits that there is no basis to construe the Panel's statement in paragraph 7.789. as amounting to a "legal finding of inconsistency with Article 10". The Philippines notes that the Panel expressly notes that Thailand's prior disclosures were not identified as measures, and are therefore outside its terms of reference. In this regard, the Philippines observes that, instead of finding that Thailand's "'consistent pattern' of behavior" constitutes a "measure", the Panel explains that Thailand's previous conduct constitutes relevant factual circumstances, which have "probative value" to the question before it, namely whether, in January 2016, Thai officials disclosed PMTL's transaction values to the press. In order to avoid any ambiguity, we have revised paragraph 7.789. .

6.7 The VAT notification requirement

6.48. Thailand requests the Panel to specify in paragraph 7.798. of the section on the factual background that "the Revenue Department reserves the right to verify whether the notified price is, in fact, the average actual purchase price". The Philippines does not object to Thailand's request. We note that in the course of this proceeding the parties disagreed on the precise content of the Revenue Department's practice. As discussed in paragraph 7.881. , "according to the Philippines, in the course of audit, the Revenue Department would be comparing the notified RRSP against the RRSP in force on the date of notification; according to Thailand, the Revenue Department would be comparing the notified RRSP against the average actual market price on the date of notification." To resolve this disagreement, we have found in paragraphs 7.881. to 7.884. that the Revenue Department reserves the right to verify whether the notified price reflects the average actual market

price. Since the factual issue that Thailand would like us to reflect in paragraph 7.798. is contested by the parties, we consider that it is more appropriate to address it in the context of the Philippines' claim under Article X:1 of the GATT 1994 rather than in the section on the factual background, which reflects uncontested facts. We therefore decline Thailand's request to modify paragraph 7.798. . Instead, to accommodate Thailand's concern we have modified the wording of paragraph 7.883. . We have also added a reference to Thailand's response to Panel question No. 117 in the footnote to paragraph 7.883. .

6.49. The Philippines requests us to delete paragraph 7.800 of the Interim Report, included in Section 7.4.1.3 ("Claims not pursued") of the Interim Report. This paragraph stated that the Philippines has not pursued a claim under Article III:4 of the GATT 1994 against TTM's exemption from the competition law. The Philippines submits that, in its panel request, it did not identify TTM's exemption from Thai competition law as a "measure" taken to comply; rather, according to the Philippines, it identified TTM's exemption from competition law as a factual circumstance relevant to the Philippines' claims regarding discrimination under the VAT notification requirement. The Philippines requests the Panel to delete paragraph 7.800 and Section 7.4.1.3 of the Interim Report or, alternatively, to specify that the Philippines mentioned TTM's exemption from Thai competition law both in its panel request and its submissions as a relevant factual circumstance, but did not identify the exemption as a measure taken to comply. Thailand disagrees with the changes requested by the Philippines and reiterates its request for additional findings under Article III:4 of the GATT taking into account the amended competition law. We do not consider Section 7.4.1.3 of the Interim Report to be essential to our analysis and therefore have deleted it from the Final Report. To reflect this deletion, we have modified the language of paragraphs 7.800. and 7.801. .

6.50. Regarding the Panel's decision to examine Thai competition law as it existed on the date of the establishment of the Panel, as set out in Section 7.4.2.2, Thailand requests the Panel to make an additional finding taking into account the amendment to Thailand's competition law that entered into force on 5 October 2017. Specifically, Thailand submits that Thailand's VAT measures and Thailand's amended competition law are not inconsistent with Article III:4 of the GATT 1994 because cigarette importers and the producer of domestic cigarettes face the same requirements for purposes of notifying the VAT base as neither of them benefits from an exemption from Thai competition law. Thailand argues that the Panel's terms of reference extend to the amendment of the competition law and that knowing whether Thailand's VAT notification requirement is WTO-consistent in light of the current regulatory framework would help to secure a positive solution to the dispute. According to Thailand, in the absence of such findings, the parties would be compelled to start new compliance proceedings to resolve their disagreement as to whether the VAT measures have been brought into compliance. The Philippines suggests that, instead of making additional findings, the Panel exercise judicial economy over the Philippines' claim under Article III:4 of the GATT. For the reasons set forth at paragraphs 7.808. to 7.811. , including in particular the potential utility of the Panel presenting the parties' arguments and making factual findings that could assist the Appellate Body on appeal, we have accepted Thailand's request and have accordingly modified paragraphs 7.807. to 7.811. , and 7.950. . We have added the summaries of the parties' arguments regarding the amendment in Section 7.4.5.2, and have made additional findings in Section 7.4.5.4 ("Legislative changes in the course of the proceeding"), at paragraphs 7.969. to 7.977. .

6.51. With regard to Section 7.4.2.3.2, Thailand requests that the Panel reflect the fact that the Philippines has not produced any evidence of instances where the RRSP differed from the actual retail prices used by retailers. In response, the Philippines points to paragraph 7.829. of the Interim Panel Report, which states, "[w]e recognize that the Philippines has not identified any instances in which PMTL's recommended price differed from the actual retail selling price". The Philippines submits that there is no basis to revise Section 7.4.2.3.2. We consider that paragraph 7.829. indeed adequately reflects the issue raised by Thailand and thus no additional language is necessary.

6.52. The Philippines recalls the Panel's finding that the Revenue Department has adopted an unpublished administrative ruling that cigarette importers can notify RRSPs under Notification 187 and Order Por. 145-2555 to the extent that they reflect the average actual market prices. The Philippines then refers to the Panel's statement in paragraph 7.926. made in the context of the analysis under Article X:3(a) that the unpublished administrative ruling "gives no guarantee that the Revenue Department … will not impose penalties in the event of a divergence between the RRSP and the average actual market price" and suggests an amendment to reflect that even if published, the unpublished administrative ruling creates no legal certainty for importers that they are complying with the VAT notification requirement correctly. Thailand submits that paragraph 7.926. adequately

reflects the consequences of the unpublished administrative ruling and that it is unnecessary to insert additional language regarding the unpublished administrative ruling, an aspect relevant to the claim under Article X:1, not Article X:3(a). As we explained in paragraph 7.926. , the administrative ruling constitutes part of Thailand's administration of the VAT rules and thus has to be taken into account in the analysis under Article X:3(a). We therefore agree with the Philippines and consider it appropriate to explain fully the consequences of the administrative ruling in the context of our analysis under Article X:3(a). Accordingly, we have modified paragraph 7.926. and added paragraph 7.931. .

6.53. With regard to the Panel's analysis under Article III:4 of the GATT 1994, the Philippines suggests an amendment to paragraph 7.959. to reflect that, even if the Revenue Department's administrative ruling is published, an importer cannot rely on this informal rule to establish its formal compliance with the VAT notification requirement and to eliminate the uncertainty and legal jeopardy facing importers. The Philippines explains that the Revenue Department accepts RRSPs only to the extent that they reflect the average actual market prices and therefore the informal rule would not protect importers in the event of a divergence between the RRSP and the average actual market price. Thailand considers that the additional language regarding the administrative ruling suggested by the Philippines is unnecessary for the Panel's findings under Article III:4 since this part of the Panel Report does not deal with Article X:1 of the GATT 1994. We recall that under Article III:4 Thailand argued that the practice of notifying RRSPs "applies equally to both TTM and the importers".[86] We therefore consider that the discussion of the Revenue Department's practice, which we found to be an administrative ruling within the meaning of Article X:1, is appropriate for our examination of the claim under Article III:4. We have modified paragraph 7.959. accordingly.

7 FINDINGS

7.1 Initial considerations

7.1.1 Introduction

7.1. The Philippines' complaint in this proceeding, initiated under Article 21.5 of the DSU, concerns the alleged failure by Thailand to comply with the DSB's recommendations and rulings in the original proceeding in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371).[87]

7.2. In Section 1 above, we recalled the panel and Appellate Body findings in the original proceeding, listed Thailand's declared measures taken to comply, recapitulated the procedural rulings that we made in the course of the proceeding, and specified the three sets of measures challenged by the Philippines in this proceeding. In Section 2 above we identified the relevant governmental and corporate entities implicated by the measures, and in Section 3 we set forth the parties' requests for findings in relation to those measures.

7.3. Before turning to our analysis of the measures at issue in this Article 21.5 compliance proceeding, we address several preliminary issues at the outset, including the jurisdiction of the Panel, Thailand's request for a preliminary ruling in respect of certain evidence submitted by the Philippines, and the relevance of Thailand's developing country status to our objective assessment of the matter.

7.1.2 Jurisdiction of the Panel

7.1.2.1 The scope of Article 21.5 compliance proceedings

7.4. Article 21.5 of the DSU provides, in relevant part:

> Where 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

[86] Thailand's first written submission, para. 7.32.

[87] See Panel Report, *Thailand –Cigarettes (Philippines)*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R; and Appellate Body Report, *Thailand – Cigarettes (Philippines)*, WT/DS371/AB/R, adopted 15 July 2011.

DSB] such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

7.5. Panels and the Appellate Body have explained that the object and purpose of Article 21.5 is to provide for expedited procedures to determine whether a Member has properly implemented the recommendations and rulings of the DSB in the dispute.[88] The Appellate Body has made clear that, compared to the original panel proceedings, Article 21.5 proceedings "do not concern just *any* measure".[89] The mandate of a panel established under Article 21.5 is limited to an examination of "measures taken to comply with the recommendations and rulings" of the DSB.[90] These are "measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB".[91] Thus, the scope of Article 21.5 proceedings depends on (i) the existence of relevant recommendations and rulings of the DSB, and (ii) the existence (or otherwise) of measures taken to comply with those recommendations and rulings.

7.6. It is well established that a panel is entitled to consider the issue of its jurisdiction on its own initiative, and must satisfy itself of its jurisdiction in any dispute that comes before it.[92] Therefore, even where the respondent declares that a measure is one taken to comply, we do not *a priori* exclude the possibility that there might be circumstances where a compliance panel would consider it necessary to conduct its own assessment of whether that "declared" measure taken to comply falls within its jurisdiction. Having said this, we are not aware of any case to date in which a compliance panel has conducted its own assessment of whether a "declared" measure taken to comply by the respondent falls within the scope of a compliance panel proceeding.[93] Accordingly, where a respondent declares that a challenged measure is one "taken to comply", and that measure is subsequently challenged by the complainant in an Article 21.5 compliance proceeding, a compliance panel may be expected to proceed on that shared understanding, unless there are extraordinary circumstances compelling a panel to conduct its own independent assessment.

7.7. Where there is a disagreement between the parties about whether a measure that is *not* a "declared" measure taken to comply nevertheless falls within the scope of a compliance proceeding, the panel must make an objective and independent assessment of that issue. The starting point is that inherent in proceedings under Article 21.5 of the DSU is "the need to balance important systemic interests"[94] and ensure due process for both the complainant and respondent. Expanding the scope of a compliance proceeding to cover older measures not challenged by the complainant in the context of the original proceeding, and to include measures other than those declared by the respondent to be a measure "taken to comply", may be necessary to ensure prompt and thorough verification of compliance, and to ensure due process to the complainant. However, expanding the scope of a compliance proceeding in this way can also compromise due process for the respondent insofar as it circumvents the ordinary dispute settlement process by enabling a complainant to obtain a finding of non-compliance and potentially seek retaliation without the respondent having had a reasonable period of time in which to bring any inconsistent measures into compliance.[95]

7.8. The scope of a panel's jurisdiction with respect to what measures and claims it may consider in an Article 21.5 compliance proceeding has been addressed by a number of panels and the Appellate Body, and several fundamental principles have emerged from these decisions. On the one hand, in the interest of ensuring prompt and thorough verification of compliance and due process

[88] Appellate Body Report, *EC − Bed Linen (Article 21.5 − India),* para. 98; and Panel Reports, *US − Countervailing Measures on Certain EC Products (Article 21.5 − EC)*, para. 7.74; *Chile − Price Band System (Article 21.5 − Argentina),* para. 7.135.

[89] Appellate Body Report, *Canada − Aircraft (Article 21.5 − Brazil)*, para. 36. (emphasis original)

[90] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 199.

[91] Appellate Body Report, *Canada − Aircraft (Article 21.5 − Brazil)*, para. 36.

[92] Appellate Body Reports, *US − 1916 Act*, fn 30; *Mexico − Corn Syrup (Article 21.5 − US)*, para. 36; *EC and certain member States − Large Civil Aircraft*, para. 791.

[93] The Appellate Body has stated that, "if the measure at issue is found to constitute *in itself* a measure taken to comply, it will not be necessary to establish a 'particularly close relationship' of the measure at issue to the *declared* measure taken to comply in order to subject the measure at issue to the scope of Article 21.5." (Appellate Body Report, *EC − Bananas III (Article 21.5 − US/Article 21.5 − Ecuador II)*, paras. 244-245 (emphasis added)) The Appellate Body's finding is consistent with our understanding that, where a measure is *declared to be* a measure taken to comply by the respondent, it is generally not necessary for a compliance panel to independently establish that it has a close nexus to any other "measure taken to comply", or to the DSB's recommendations and rulings.

[94] Panel Report, *China − GOES (Article 21.5 − US)*, para. 7.11.

[95] Panel Report, *China − GOES (Article 21.5 − US)*, para. 7.11.

for the complainant, it is now accepted that nothing in Article 21.5 limits the scope of a compliance panel's mandate to considering only certain claims in relation to, or certain aspects of, a measure taken to comply. In other words, a measure taken to comply with the DSB's recommendations and rulings is "a new and different measure" that must be examined in its totality, and an Article 21.5 panel must, in principle, examine all claims of inconsistency regarding the new measure, including those claims that are new and different from those raised in the original proceeding.[96] Thus, a complainant can challenge all aspects of a new measure taken to comply, not only those aspects related to issues covered by the original proceeding.[97] Furthermore, a panel is not limited, in conducting its review under Article 21.5, to examining the measures taken to comply from the perspective of the claims, arguments and factual circumstances related to the measure that was the subject of the original proceeding.[98]

7.9. On the other hand, with a view to avoiding the circumvention of the ordinary dispute settlement process and protecting the due process rights of the respondent, it is well established that an Article 21.5 proceeding must be narrower in scope than an original proceeding, in particular with respect to the types of measures at issue.[99] Two fundamental limitations warrant emphasis at the outset of our findings.

7.10. First, a compliance panel proceeding is not an opportunity to "re-litigate" issues that were addressed, or that could have been addressed, in the original proceeding.[100] The Appellate Body has concluded that, in the context of a compliance proceeding, a complainant may be precluded from bringing the same claim with respect to an aspect of the respondent's measure that is unchanged from the original dispute.[101] An unchanged aspect of the original measure that the respondent does not have to change, and does not change, in complying with the recommendations and rulings of the DSB thus should not be susceptible to challenge in a compliance proceeding.[102] This limitation applies where a complainant: (i) could have challenged the unchanged measure (or unchanged aspect thereof) in the original proceeding but chose not to; or (ii) did challenge the unchanged measure (or aspect thereof) in the original proceeding, but failed to establish a *prima facie* case.[103]

7.11. Second, even if a new measure is not one that was challenged or that could have been challenged in context of the original proceeding, it will still not necessarily fall within the jurisdiction of a compliance panel. To determine whether a new measure that is not one of the "declared" measures taken to comply is nonetheless a "measure taken to comply" for the purpose of Article 21.5 of the DSU, the Appellate Body has articulated a "nexus-based test"[104], or "close nexus analysis".[105] This test requires an examination of how the measure at issue relates to the respondent's declared measure(s) taken to comply, and to the DSB's recommendations and rulings in the original proceeding. The Appellate Body has noted that:

> Some measures with a *particularly close relationship* to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared "measure taken to comply" is adopted. [106] (emphasis added)

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[96] Appellate Body Reports, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 86-87; *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40-42; *US – FSC (Article 21.5 – EC)*, para. 222; and *EC – Bed Linen (Article 21.5 – India)*, para. 79.

[97] See, e.g. Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.3-6.12.

[98] See, e.g. Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 37-41.

[99] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 72.

[100] Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 96; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210; and Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.35.

[101] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.

[102] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 88-89.

[103] See Section 7.3.2 of this Report.

[104] Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 8.98.

[105] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, section VI.B.

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

7.12. The "close nexus" analysis, therefore, 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 the DSB's recommendations and rulings.

7.13. Based on the foregoing, if we were to find that any of the challenged measures (or aspects thereof) could have been challenged in the original proceeding, or were already challenged in the original proceeding, then we would find that the Philippines is precluded from challenging those same measures (or aspects thereof) in this proceeding. Furthermore, if we were to find that any of the challenged measures that are not a declared measure taken to comply only have general links, associations, similarities or connections to general matters addressed in the original proceeding[107], then we would find that the Philippines is precluded from challenging those measures in this proceeding.

7.1.2.2 The measures at issue in this proceeding

7.14. As explained in Section 2.3 above, the Philippines has challenged three sets of measures in this Article 21.5 compliance proceeding, namely (i) measures related to the BoA Ruling of 16 November 2012 (the BoA Ruling); (ii) measures related to the criminal charges filed on 18 January 2016 by the Public Prosecutor against PMTL and seven of its current and former employees (the Charges); and (iii) measures related to the notification requirement concerning the VAT base applicable to cigarette importers. It is uncontested that each of the challenged measures is specifically identified in the Philippines' request for establishment of a panel, in accordance with the requirements of Article 6.2 of the DSU. As elaborated below, it is also uncontested that most of these measures fall within the scope of this Article 21.5 compliance proceeding.

7.15. As regards the first set of measures, it is uncontested that all of the challenged measures related to the BoA Ruling fall within the scope of this compliance panel proceeding. The BoA Ruling itself is one of Thailand's declared measures taken to comply with the DSB's recommendations and rulings in the original proceeding.[108] More specifically, the original panel found that Thailand acted inconsistently with Articles X:3(a) and (b) of the GATT 1994 by virtue of delays in the administrative review proceedings before the BoA in relation to outstanding appeals relating to customs valuation[109], and the parties agree that the BoA Ruling issued on 16 November 2012 is a "measure taken to comply" with the DSB's recommendations and rulings under Articles X:3(a) and (b) of the GATT 1994.[110] Taking into account the absence of any disagreement between the parties, we conclude that the BoA Ruling is a "measure taken to comply" falling within the scope of this proceeding.

7.16. Additionally, the Philippines has challenged 180 Revised Notices of Assessment that were issued in January 2013, pursuant to the BoA Ruling issued on 16 November 2012. The Philippines explains that they "derive mechanically from the BoA Ruling and are, therefore also measures taken to comply", because they are "a means of assessing and collecting outstanding customs duties due on the customs values determined in the Ruling".[111] Thailand does not contest that understanding. Taking into account the absence of any disagreement between the parties, we conclude that the 180 Revised Notices of Assessment constitute "measures taken to comply" falling within the scope of this proceeding.

7.17. Regarding the second set of measures, Thailand maintains that the Philippines is precluded from challenging the Charges in this compliance proceeding because it challenged essentially the same measure in the original dispute and failed to make a *prima facie* case of WTO-inconsistency. Thailand also argues that the Charges do not have a sufficiently close nexus with the matters covered by the DSB's recommendations and rulings or the BoA Ruling of 12 September 2012, and therefore they are not a "measure taken to comply" with the DSB's recommendations and rulings within the

[107] Thailand's rebuttal submission on the preliminary ruling request, paras. 3.21 and 3.40; first written submission, para. 3.13.

[108] WT/DS371/15/Add.8, and see paragraph 1.9. d above.

[109] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 8.4(e) and (f).

[110] Parties' responses to Panel question No. 1(a).

[111] Philippines' first written submission, paras. 237-238 (referring to Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 311; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para 181).

meaning of Article 21.5 of the DSU. We will address the parties' arguments on these issues in the context of our assessment of the Charges further below.[112]

7.18. We recall that, in addition to the Charges themselves, the challenged measures include Thailand's alleged disclosure to the Thai media of the declared transaction values for entries covered by the Charges. Thailand argues that the Philippines has failed to demonstrate that Thai officials disclosed PMTL's transaction values to the media, but Thailand does not contest the premise that the alleged disclosure of PMTL's import prices to the press in January 2016 is a measure that falls within the scope of this compliance proceeding. We recall that the original panel found that Thailand acted inconsistently with Article 10 of the CVA by disclosing PMTL's import prices to the Thai media.[113] In this proceeding, the Philippines claims that Thai officials did so again in connection with the issuance of the Charges in January 2016, and that this subsequent disclosure represents another violation of Article 10.[114] Taking into account the absence of any disagreement on Thailand's part, we consider that there is a sufficiently close nexus between the challenged measure (i.e. the alleged disclosure of PMTL's import prices to the press) and the DSB's recommendations and rulings in the original proceeding, such that the Philippines' claim against this measure is within our jurisdiction. This is without prejudice to our assessment of the merits of the Philippines' claim, and in particular whether or not the Philippines has proven its allegation that Thai officials disclosed PMTL's import prices to the press in January 2016, and thereby substantiated this element of its claim under Article 10 of the CVA. That is an issue that goes to our assessment of the merits of the Philippines' claim, and we do not consider it in the context of determining whether we have jurisdiction in respect of the claim under Article 10 of the CVA.

7.19. Regarding the third set of measures, it is uncontested that all of the challenged measures related to the VAT notification requirement fall within the scope of this compliance proceeding. In the original proceeding, the panel found that Thailand had acted inconsistently with Article III:2 of the GATT 1994 by subjecting imported cigarettes to a VAT liability in excess of that applied to like domestic cigarettes, by means of the calculation of the government-mandated MRSPs that were used as the VAT base.[115] In response to the DSB's recommendations and rulings, Thailand modified its VAT regime, and declared these modifications to be a measure taken to comply.[116] Thailand promulgated the challenged measures − Notification 187 and Order Por. 145-2555 − on 31 August 2012 and 30 November 2012, respectively. The Philippines argues that since Notification187 and Order Por. 145-2555 directly replace Thailand's earlier framework for calculating the VAT base through MRSPs, they have "the necessary connections − to both Thailand's declared measures taken to comply and to the subject-matter of the dispute", to be "measures taken to comply".[117] Thailand has not contested this understanding. Rather, Thailand confirms that it "implemented the recommendations and rulings of the DSB regarding its VAT tax base by changing the tax base for VAT on cigarettes from the old 'maximum retail selling price' to the average actual retail selling price for each brand, as notified by the producer/importer to the Revenue Department".[118] In the absence of any disagreement on Thailand's part, we agree with the Philippines that the VAT notification requirement arising from Notification 187 and Order Por. 145-2555 are "measures taken to comply" falling within the scope of this proceeding.

7.20. Additionally, we observe that the Philippines' claim under Article X:1 of the GATT 1994 regarding Thailand's failure to publish the rule that it has allegedly adopted, of permitting the recommended retail selling price to be notified as a proxy for the average actual market price, is intrinsically linked to Notification 187 and Order Por. 145-2555. Thus it is closely connected to these measures taken to comply, and to the DSB's recommendations and rulings, in the sense that it only exists in the context of those measures. Thailand argues that the Philippines has failed to demonstrate that the Revenue Department has adopted such a rule, but Thailand does not contest the premise that its failure to publish the rule that it has allegedly adopted is a measure falling within the scope of this compliance proceeding. In the absence of any disagreement on Thailand's part, we consider that the measure challenged by the Philippines, i.e. the failure to publish the alleged practice of permitting the recommended retail selling price to be notified as a proxy for the average actual market price, is a "measure taken to comply" falling within the scope of this proceeding. Of

[112] See Sections 7.3.2 and 7.3.3 below.
[113] Panel Report, *Thailand − Cigarettes (Philippines)*, para. 8.2(g).
[114] See Section 7.3 8.
[115] Panel Report, *Thailand − Cigarettes (Philippines)*, paras. 7.567 and 8.3(a); Philippines' first written submission, para. 729; and Thailand's first written submission, para. 2.9.
[116] See Statement by Thailand to the DSB, 24 May 2012, WT/DSB/M/316.
[117] Philippines' first written submission, para. 762.
[118] Thailand's second written submission, para. 4.3.

course, this is without prejudice to our assessment of the merits of the Philippines' claim, and in particular whether or not the Philippines has proven its allegation that the Revenue Department has adopted a rule permitting the recommended retail selling price to be notified as a proxy for the average actual market price. That is an issue that goes to our assessment of the merits of the Philippines' claim under Article X:1.

7.1.3 The ACWL/Commerce letters and lawyer-client privilege

7.1.3.1 Introduction

7.21. In its second written submission, the Philippines referred to a May 2013 legal opinion prepared for Thailand by the Advisory Centre on WTO Law (ACWL), Thailand's legal counsel in this proceeding.[119] The Philippines stated that the legal opinion "directly contradicts the position that Thailand now takes before the Panel that the *CVA* does not, *a priori*, apply to customs enforcement actions taken by municipal law enforcement agencies".[120] The Philippines submitted the ACWL opinion, as well as a related letter by the Ministry of Commerce, as Exhibit PHL-150 (the ACWL/Commerce Letters).

7.22. On 9 May 2017, Thailand filed a "request for a procedural ruling regarding the violation of its due process rights", in which it requested that the Panel decline to rule on the Charges as a consequence of the Philippines submitting "lawyer-client privileged legal advice from Thailand's legal advisors".[121] While Thailand's request is framed as a request for a procedural ruling regarding its "due process rights", Thailand has stated that "it has, primarily, asked the Panel to make a ruling under Article 11 of the DSU that its ability to make an objective assessment of the matter has been compromised".[122] In response to a question from the Panel, Thailand has clarified that the three distinct grounds for its request are that: (i) Thailand's "due process" rights have been violated; (ii) the Philippines has not acted "in good faith"; and (iii) the Panel is prevented from making an "objective assessment of the matter" because the "objectivity of the panel is tainted".[123]

7.23. As already indicated in the descriptive part of the Report[124], we considered that it was in the interests of due process and the efficient conduct of the proceedings to rule on Thailand's request prior to the substantive meeting with the parties. On 2 August 2017, we informed the parties and third parties that, for reasons to be elaborated in our Report, we had concluded that Thailand had failed to demonstrate: that its due process rights had been violated; that the Philippines had not acted in good faith; or that the Panel was prevented from making an objective assessment of the matter as a consequence of the Philippines submitting the ACWL/Commerce Letters to the Panel. The Panel therefore rejected Thailand's request that, as a consequence of the Philippines submitting the ACWL/Commerce Letters to the Panel, the Panel should decline to rule on the Philippines' claims relating to the Charges. For the same reasons, the Panel declined Thailand's request that the Panel exclude Exhibit PHL-150 from the record and strike the related references from the Philippines' second written submission.

7.24. Thailand reacted to the Philippines' opening statement at the substantive meeting with the Panel by reiterating its objection to the Philippines' reference to the ACWL/Commerce Letters. This triggered a further exchange of arguments on this matter between the parties at the meeting and in their subsequent responses to questions and comments thereupon. As part of this further exchange of arguments, Thailand requested 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", and 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".[125] The Philippines responded that Thailand's "unsolicited

[119] Philippines' second written submission, paras. 435-436, 558-561 and 576-577 (referring to Commerce Ministry Letter annexing ACWL Letter, 22 January 2014 (English translation), (Exhibit PHL-150-B)).
[120] Philippines' second written submission, para. 577.
[121] Thailand's request for a procedural ruling, para. 1.1.
[122] Thailand's reply to the Philippines' comments on the procedural ruling request, para. 4.6.
[123] Thailand's response to Panel question No. 35.
[124] See paragraphs 1.24. to 1.27. above.
[125] Thailand's responses to the Panel's second set of questions, p. 40. Thailand presented this request under the heading "Thailand's request for a procedural ruling", not in response to any particular question from the Panel. In the context of providing its comments on the draft descriptive part of the Report issued to the

comment" on an issue "closed by the Panel's ruling of 2 August 2017" seems "to demand findings from the Panel that Thailand may use to support some theory for an appeal", and "amounts to little more than an invitation to the Panel to provide an advisory opinion on a topic not properly briefed by the parties".[126]

7.25. We note that Thailand has made this request for additional clarification prior to seeing our reasoning for our ruling on its request, as elaborated in the Report. Our ruling on the ACWL/Commerce Letters, and the reasons that we elaborate below in support of that ruling, form an integral part of this Report. In accordance with Article 15.2 of the DSU, both parties have the right to request the Panel to review "precise aspects" of the Report in the context of the interim review phase of the proceeding. Those requests may extend to precise aspects of the reasoning that we have elaborated below in support of our ruling on the ACWL/Commerce Letters. While nothing requires that a disputing party wait until it has seen a panel's interim report before asking a panel to address or clarify certain points in its reasoning, we consider that it would be more efficient and fruitful to address any requests that either party wishes to make in connection with precise aspects of our reasoning on the ACWL/Commerce Letters in the context of the interim review phase of the proceeding.

7.1.3.2 Main arguments of the parties

7.26. Thailand submits that "the privileged nature of communications between a Member and its legal advisors is an essential component of the Member's right to access and use legal advice to defend itself in dispute settlement proceedings", and that "the importance of the lawyer-client privilege is recognized in most legal systems around the world".[127] Thailand accepts that the privileged/confidential nature of legal advice "may of course be waived by the party receiving the advice", but maintains that "tribunals are naturally generally very reluctant to deem or imply waivers where there has been no express waiver" and that "waivers of essential due process rights must be express and clear".[128] Thailand considers that the Philippines failed to act in good faith under Article 3.10 of the DSU by submitting the documents to the Panel[129], that "Thailand's essential due process right to defend itself fully before the Panel has been violated", and that the Philippines' actions "have compromised the Panel's ability to undertake an objective assessment of the matter as stipulated in Article 11 of the DSU and the Panel can no longer make an objective assessment".[130]

7.27. Thailand submits that notwithstanding the Public Prosecutor's disclosure of the ACWL/Commerce Letters to PMTL in May 2016, these documents continued to be subject to lawyer-client privilege for purposes of WTO dispute settlement proceedings because "it is clear that Thailand never consented, expressly or even impliedly, to the use of these documents *by the Philippines in WTO proceedings*".[131] Thailand asserts that, under Thai law, the right to access documents, as exercised by PMTL in the context of Thai criminal proceedings, is "normally for the purpose only of enabling a party to defend itself in the instant Thai court proceedings [and] …. is normally understood to mean that the documents would not be shared publicly or used for another purpose, such as separate proceedings between different entities in an international forum".[132] Thailand suggests that this understanding also explains why the Public Prosecutor chose to disclose the documents at issue even though he had a choice to refuse to do so.[133] Thailand further recalls that the Thai Criminal Court issued an interim order on 27 June 2016 requiring that any documents in the case be kept confidential, and submits that it is not relevant that the Public Prosecutor did not designate the Commerce/ACWL Letters as meriting special protection.[134] Furthermore, Thailand stresses that the documents were clearly labelled "confidential" and clearly include material that would normally be considered to be lawyer-client privileged.[135] Based on the foregoing, Thailand considers that the

parties in accordance with Article 15.1 of the DSU, Thailand subsequently asked the Panel to record these requests.

[126] Philippines' comments on Thailand's responses to the set of questions, paras. 128 and 133.

[127] Thailand's request for a procedural ruling, paras. 1.13 and 1.16.

[128] Thailand's request for a procedural ruling, para. 1.19.

[129] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 4.5.

[130] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 5.1.

[131] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 1.4. (emphasis added)

[132] Thailand's reply to the Philippines' comments the procedural ruling request, para. 3.24 (referring to Criminal Procedure Code, Section 8, (Exhibit THA-37)).

[133] Thailand's reply to the Philippines' comments the procedural ruling request, para. 3.35.

[134] Thailand's reply to the Philippines' comments the procedural ruling request, paras. 3.27-3.29.

[135] Thailand's reply to the Philippines' comments the procedural ruling request, para. 3.31.

Philippines' assertion that "there was no reason for the Philippines to consider that Thailand regarded the ACWL/Commerce Letters as secret, confidential, or protected by law" is "simply inaccurate".[136]

7.28. The Philippines submits that it would be outside of the Panel's terms of reference to find that it did not act in good faith[137], and that, in any event, it is "evident that the Philippines has acted in good faith".[138] The Philippines submits that, if lawyer-client privilege amounts to a WTO due process right, the nature of that right must be understood in light of the general principles applicable to privilege.[139] The Philippines submits that it is well established that privilege is waived by the party's disclosure of a lawyer-client communication to a third party that is outside the lawyer-client relationship, and thus the Public Prosecutor's choice to disclose the ACWL/Commerce Letters waived any lawyer-client privilege attached to those documents.[140] In addition, the Philippines submits that the Panel "is perfectly capable of making an objective assessment of the claims regarding the Charges irrespective of the arguments and evidence provided by the two parties", and the ACWL/Commerce Letters do "not taint the Panel's own understanding and evaluation of the law".[141] The Philippines states that it "is surprised to find itself having to defend its use of two documents … that the Thai Public Prosecutor, an agent of the Thai government, chose to disclose to a third party, and did so without asserting that the documents are confidential or privileged, and without imposing any restrictions on the use of those documents".[142] The Philippines submits that nothing in Thai law prohibited PMTL from sharing the ACWL/Commerce Letters with the Philippines[143], and that the consequences of disclosing the ACWL/Commerce Letters to third parties outside the lawyer-client relationship are not cured by the fact that the Commerce Letter was stamped confidential.[144]

7.1.3.3 Analysis by the Panel

7.1.3.3.1 General considerations

7.29. Thailand's "request for a procedural ruling regarding the violation of its due process rights" is said to be warranted as a consequence of the Philippines submitting "lawyer-client privileged legal advice from Thailand's legal advisors".[145] The concept of lawyer-client privilege, and the extent to which it can be waived, are thus central to our consideration of Thailand's request.[146] As an initial matter, the Panel notes that issues of due process, including questions regarding lawyer-client privilege and the good faith conduct of WTO Members, are fundamental to the substantive obligations of the Members as well as the dispute settlement system as a whole. The questions raised as a result of Thailand's request, in our view, implicate significant due process considerations concerning both parties to this dispute, and merit serious consideration. In light of this, we emphasize that the decision by the Panel to reject Thailand's procedural ruling request was made following careful consideration of the parties' extensive arguments on the questions raised by Thailand's request, and focusing on the particular factual circumstances surrounding the disclosure of the ACWL/Commerce Letters.

7.30. The WTO has not elaborated any rules governing lawyer-client privilege, and thus there are no directly applicable legal provisions or guidelines expressly addressing lawyer-client privilege that we can refer to in order to resolve the issues raised by Thailand. Furthermore, there is very limited prior WTO jurisprudence to guide our analysis. In *EC – Seal Products*, the only previous WTO dispute settlement proceeding in which a similar issue arose, the complainants agreed to a request from the respondent to withdraw the material at issue.[147] In that case, all parties appeared to accept that the legal opinions at issue were "classified documents under the applicable regulations of the European

[136] Thailand's reply to the Philippines' comments the procedural ruling request, para. 3.39.
[137] Philippines' comments on Thailand's request for a procedural ruling, paras. 20-21.
[138] Philippines' comments on Thailand's request for a procedural ruling, para. 22.
[139] Philippines' comments on Thailand's request for a procedural ruling, paras. 71-73 and 82.
[140] Philippines' comments on Thailand's request for a procedural ruling, para. 64.
[141] Philippines' comments on Thailand's request for a procedural ruling, paras. 60 and 98.
[142] Philippines' comments on Thailand's request for a procedural ruling, para. 1.
[143] Philippines' reply to Thailand's comments on the Philippines' comments on Thailand's request for a procedural ruling, paras. 96-101.
[144] Philippines' reply to Thailand's comments on the Philippines' comments on Thailand's request for a procedural ruling, paras. 61-67.
[145] Thailand's request for a procedural ruling, para. 1.1.
[146] We use the expression "lawyer-client privilege" as a generic term to mean the same thing as "attorney-client privilege" and "solicitor-client privilege", which are the expressions more commonly encountered in the context of domestic legal systems.
[147] Preliminary Ruling of the Panel, *EC – Seal Products*, WT/DS400/6; WT/DS401/7, para. 2.2.

Union and [which had] not been authorized by the EU Council for public disclosure".[148] The panel in that case considered that it was not necessary for it "to pronounce on the legal status of the documents or the relevance thereof", and that, given the complainants' willingness to remove the documents, it was not necessary "to determine whether the European Union would [have suffered] any impairment in its ability to defend itself in [those] proceedings were the documents to remain in the record".[149] The panel further considered that, in light of the complainants' agreement to withdraw the documents from the record and their undertaking to refrain from making any reference thereto in those proceedings, "the complainants' due process rights would not [have been] affected by the removal of the two exhibits from the record".[150]

7.31. We note that the panel in *EC − Tariff Preferences* found itself in somewhat analogous circumstances when confronted with a procedural issue on which the DSU is silent, and we find its approach instructive. In that case, the responding party requested that the panel clarify whether, as a matter of principle, the same legal counsel could represent simultaneously a complaining party and a third party and, if so, under what conditions.[151] The panel first noted that the WTO has not elaborated any rules governing the ethical conduct of legal counsel representing WTO Members in particular disputes, and that therefore there were no directly applicable legal provisions or guidelines to which it could refer to resolve the issue. The panel also observed that it was not aware of any previous GATT or WTO dispute in which a panel or the Appellate Body had addressed the type of "conflict of interest" issue raised by the European Communities.[152] The panel observed that, whereas issues of confidentiality and of measures necessary to maintain such confidentiality were addressed in certain prior proceedings, "the factual settings and the rulings in those earlier cases [were] not apposite to the issues raised by the European Communities".[153] In such circumstances, the panel in *EC − Tariff Preferences* considered that:

> [F]lowing from its terms of reference and from the requirement, in Article 11 of the DSU, to "make an objective assessment of the matter before it … ", as well as the requirement, pursuant to Article 12 of the DSU, to determine and administer its Working Procedures, the Panel has the inherent authority − and, indeed, the duty − to manage the proceeding in a manner guaranteeing due process to all parties involved in the proceeding and to maintain the integrity of the dispute settlement system. With specific reference to issues raised in the instant case, it is incumbent on the Panel to clarify whether the ACWL's joint representation of India and Paraguay poses any ethical concerns of the kind raised by the European Communities. At the same time, and although the European Communities asks the Panel for a ruling whether, as a matter of principle, the same legal counsel can represent simultaneously a party and a third party and, if so, under what conditions, the Panel considers that it cannot rule on such issues in the abstract, but only as they relate to the specific case before it.[154]

7.32. Thus, in the absence of directly applicable WTO rules expressly governing "conflicts of interest" in respect of legal representation, the panel in *EC − Tariff Preferences* proceeded to identify and apply general principles contained in the DSU relating to confidentiality, as well as "common elements to ethical rules of conduct in many jurisdictions [that] are equally appropriate to dealing with issues of representational conflict of interest in the WTO dispute settlement context".[155] We consider that a similar approach is warranted in the circumstances of this case. As elaborated further below, the parties appear to agree that the Panel's analysis should apply or at least be informed both by general principles of WTO dispute settlement − including a panel's duty to make an objective assessment of the matter, the principle of due process, and the principle of good faith − as well as general principles applicable to the concept of lawyer-client privilege reflected in the practice of other

[148] Preliminary Ruling of the Panel, *EC − Seal Products*, WT/DS400/6; WT/DS401/7, para. 2.2.
[149] Preliminary Ruling of the Panel, *EC − Seal Products*, WT/DS400/6; WT/DS401/7, para. 3.1.
[150] Preliminary Ruling of the Panel, *EC − Seal Products*, WT/DS400/6; WT/DS401/7, para. 3.3.
[151] Panel Report, *EC − Tariff Preferences*, para. 7.3.
[152] Panel Report, *EC − Tariff Preferences*, paras. 7.5-7.6.
[153] Panel Report, *EC − Tariff Preferences*, para. 7.7.
[154] Panel Report, *EC − Tariff Preferences*, para. 7.8.
[155] Panel Report, *EC − Tariff Preferences*, paras. 7.9-7.11. The panel referred to American Bar Association, Model Rules of Professional Conduct; State Bar of California, Rules of Conduct; New York State Bar Association, Lawyer's Code of Professional Responsibility; Canadian Bar Association, Code of Professional Conduct; Law Society of Upper Canada, Rules of Professional Conduct; Council of the Bars and Law Societies of the European Union, Code of Conduct for Lawyers in the European Union; Barreau de Paris, Règles professionnelles; and the Bar of England and Wales, Code of Conduct.

international courts and tribunals.[156] We do not consider that either applies to the exclusion of the other, or that it would be correct to establish any hierarchy between these sets of principles.

7.33. The Appellate Body has linked principles of due process to Article 11 of the DSU. The Appellate Body has stated, for example, that in conducting an "objective assessment" of a matter under Article 11 of the DSU, a panel "is bound to ensure that due process is respected".[157] We recall that in the original proceeding, 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 process is thus a crucial means of guaranteeing the legitimacy of and efficacy of a rules-based system of adjudication.[158]

7.34. With regard to "good faith", Article 3.10 of the DSU establishes that "all Members will engage in these procedures in good faith in an effort to resolve the dispute". The Appellate Body has said that by complying with the requirements of the DSU in good faith, complaining Members "accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules".[159]

7.35. Given that the relevant WTO dispute settlement rules and procedures are silent on the issue of lawyer-client privilege, we consider that it is appropriate to review wider international practice in this regard.[160] We do so with a view to identifying common principles that may be equally appropriate to dealing with issues of lawyer-client privilege in the WTO dispute settlement context. In this respect, we note that lawyer-client privilege is specifically regulated in the procedural rules of certain international courts and tribunals.

7.36. The International Bar Association Rules on the Taking of Evidence in International Arbitration[161] provide that an international arbitral tribunal shall exclude any document from evidence or production if there exists a "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable".[162] However, those rules also indicate that tribunals must also take into account "any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise".[163]

7.37. The Rules of Procedure and Evidence of the International Criminal Court provides that "communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure".[164] However, the same provision states that this general rule applies unless "the person consents in writing to such disclosure", or "the person voluntarily disclosed the content of the communication to a third party, and that third party gives evidence of that disclosure".[165] The same rule is replicated in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former

[156] Thailand's legal arguments on the issue of lawyer-client privilege place more emphasis on general principles of WTO dispute settlement, including a panel's duty to make an objective assessment of the matter, the principle of due process, and the principle of good faith, whereas the Philippines' arguments appear to place more emphasis on general principles applicable to privilege.

[157] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147 (quoting Appellate Body Report, *Chile – Price Band System,* para. 176).

[158] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

[159] Appellate Body Report*, US – FSC*, para. 166.

[160] As one panel observed, "it may be appropriate for panels to look to the practice of international tribunals for inspiration, particularly in situations where the WTO agreements, GATT/WTO jurisprudence or practice provide no useful guidance." (Panel Report, *EC – Approval and Marketing of Biotech Products,* para. 7.1663)

[161] International Bar Association, *Rules on the Taking of Evidence in International Arbitration*, adopted by a resolution of the IBA Council on 29 May 2010 (IBA Rules on Evidence).

[162] IBA Rules on Evidence, Article 9.2(b).

[163] IBA Rules on Evidence, Article 9.3(d).

[164] Rules of Procedure and Evidence of the International Criminal Court, Rule 73(1).

[165] Rules of Procedure and Evidence of the International Criminal Court, Rule 73(1)(a).

Yugoslavia[166], the International Criminal Tribunal for Rwanda[167], the Special Court for Sierra Leone[168], and the Special Tribunal for Lebanon.[169] In applying this rule, international criminal tribunals have confirmed that disclosure of a communication to a third party may waive lawyer-client privilege. The International Criminal Court has confirmed that privilege would be waived where communications are disclosed, because "the content of communications made in the context of the professional relationship … would be revealed".[170] Similarly, the International Criminal Tribunal for Rwanda has found that "[a]ttorney/client privilege … was waived by the accused when he communicated to persons other than his counsel, the content and nature of the documents".[171]

7.38. The Permanent Court of Arbitration (PCA) has recognized that "[t]he attorney-client privilege, which is widely applied in domestic legal systems, has been recognized in public international and international commercial arbitration rules and arbitral awards".[172] The PCA has also confirmed that disclosure of a communication to a third party may waive lawyer-client privilege:

> [L]egal communications which would qualify for privilege … may lose their privilege if the party entitled to it waives the privilege by word or deed or voluntarily publicizes the substance of the legal communications beyond the circle of those who are authorized to make or to participate in the making of the decision.[173]

7.39. The practice of investor-State dispute settlement tribunals is also a source of guidance on common elements regarding the scope of lawyer-client privilege, and the possibility of waiver through disclosure. The Tribunal in *VG Gallo v Canada*, citing to prior case law, confirmed that "domestic legal concepts of solicitor-client privilege are recognised and protected by international law".[174] In several cases, investor-State tribunals have made rulings on whether a party's disclosure of legal communications to one or more third parties had the consequence of waiving lawyer-client privilege. For instance it has been established that in the government context, when the client is by nature a group, lawyer-client privilege "is not defeated by circulation beyond the attorney and the person within the group requesting or providing the information", such that privileged communications between different government departments remain privileged if "there is a 'substantial identity of legal interests' within the different [departments] in the particular subject matter of the communication".[175]

7.40. In a series of cases, it has also been established that privilege is not automatically waived by inadvertent disclosure to the opposing party. In *Glamis Gold v USA*, the Tribunal found that there was no waiver when the respondent inadvertently disclosed several privileged documents to the opposing party; in reaching its decision, the Tribunal considered several different circumstances, including the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production, and any delay and measures taken to rectify the disclosure.[176] In *VG Gallo*, the Tribunal stated that "according to … international law on the subject, where information covered by solicitor-client privilege is disclosed inadvertently, as a general rule

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[166] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rule 97.

[167] Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 97.

[168] Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 97.

[169] Rules of Procedure and Evidence of the Special Tribunal for Lebanon, Rule 163.

[170] *Mbarushimana* case, Pre-Trial Chamber, Second Decision on the Review of Potentially Privileged Material, 12 July 2011, p. 7.

[171] *Prosecutor v Nahimana et al.,* ICTR-99-52-I, Decision on the Defence Motion for Declaratory Relief, 9 May 2002, p. 4.

[172] *Dr Horst Reineccius et al* v *Bank for International Settlements*, Procedural Order No. 6, 11 June 2001, p. 180.

[173] *Dr Horst Reineccius et al* v *Bank for International Settlements*, Procedural Order No. 6, 11 June 2001, p. 180.

[174] *VG Gallo v Government of Canada*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Procedural Order No. 3, dated 8 April 2009, para. 41.

[175] *Glamis Gold Ltd v United States of America*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Decision on the Parties' Requests for Production of Documents Withheld on Grounds of Privilege, 17 November 2005, para. 24 (followed in *Bilcon et al vs Government of Canada*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Procedural Order No. 12, dated 2 May 2012, paras. 25-26).

[176] *Glamis Gold Ltd v United States of America*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Decision on the Parties' Requests for Production of Documents Withheld on Grounds of Privilege, 17 November 2005, paras. 50-52.

there is no waiver of privilege".[177] In that case, the Tribunal found that the respondent had "not implicitly waived its right to claim solicitor-client privilege with respect to the Draft and Final Cabinet Decisions, due to its inadvertent disclosure to the counterparty".[178] In relation to another issue in the same proceeding, the Tribunal found that by specifically referring to and relying on the otherwise-privileged legal advice in its written submission to the Tribunal, there was an "implicit waiver of privilege" in respect of such legal advice.[179] In *Bilcon et al*, the Tribunal, having considered several circumstances, found that the respondent had not waived privilege over 45 documents inadvertently disclosed to the opposing party.[180]

7.41. In our view, several common principles emerge from the foregoing. First, lawyer-client privilege is recognised and has been protected in the context of international dispute settlement proceedings. Second, lawyer-client privilege over a communication may be waived if the party voluntarily discloses the document or the content thereof to a third party. Finally, the extent to which the disclosure to a third party waives privilege depends on the specific circumstances. For example, privilege is not automatically waived by inadvertent disclosure to the opposing party. We consider that these common principles are fully consonant with the general principles of due process and good faith applicable in the WTO dispute settlement context. We therefore consider that applying these principles is appropriate when dealing with issues of lawyer-client privilege arising in WTO dispute settlement.

7.42. In light of the parties' arguments and the principles identified above, we consider that the main issue raised by Thailand's request is whether it would be a violation of due process for the Panel to rule on the WTO-consistency of the Charges. We consider that to address this issue, we must resolve whether Thailand waived lawyer-client privilege over the ACWL/Commerce Letters by disclosing them to PMTL in May 2016, and whether their submission by the Philippines precludes the Panel from making an objective assessment of the matter.

7.1.3.3.2 The circumstances surrounding the ACWL/Commerce letters

7.43. We recall that it is not in dispute that, in May 2016, the Public Prosecutor, an agent of the Thai government, provided a copy of the ACWL/Commerce Letters to PMTL in the context of the ongoing criminal proceedings against PMTL that are the subject matter of this dispute. It is also not in dispute that the Public Prosecutor provided the ACWL/Commerce Letters to PMTL without invoking the Public Prosecutor's right to object under Section 231 of the Thai Criminal Procedure Code. This provision establishes a right to object to disclosure of requested documents on the grounds that they are, *inter alia*, "secret", "confidential", or "protected from publicity by law".[181] At no time has Thailand asserted that the Public Prosecutor disclosed these materials to PMTL inadvertently. To the contrary, it is common ground that the Public Prosecutor knowingly and voluntarily disclosed the ACWL/Commerce Letters to PMTL. We consider that, absent a clear and compelling explanation by Thailand as to why the ACWL/Commerce Letters continue to be protected by lawyer-client privilege despite the Public Prosecutor knowingly and voluntarily disclosing them to PMTL, the foregoing would suffice to compel the conclusion that Thailand waived any lawyer-client privilege over the documents.

7.44. In our view, Thailand has provided no such explanation. Regarding Thailand's argument that "it is clear that Thailand never consented, expressly or even impliedly, to the use of these documents *by the Philippines in WTO proceedings*", we accept that Thailand never specifically consented to the use of these documents by the Philippines in this proceeding.[182] However, we are unable to agree with Thailand that such consent was required following the Public Prosecutor's decision to knowingly and voluntarily disclose the ACWL/Commerce Letters to PMTL. That action by the Public Prosecutor had the consequence of waiving any lawyer-client privilege that previously existed in relation to the

[177] *VG Gallo v Government of Canada*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Procedural Order No. 4, dated 21 December 2009, para. 27.
[178] *VG Gallo v Government of Canada*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Procedural Order No. 4, dated 21 December 2009, para. 29.
[179] *VG Gallo v Government of Canada*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Procedural Order No. 3, dated 8 April 2009, para. 61.
[180] *Bilcon et al vs Government of Canada*, Arbitration under NAFTA Chapter Eleven and the UNCITRAL Arbitration Rules, Procedural Order No. 12, dated 2 May 2012, paras. 47-49.
[181] Philippines' comments on Thailand's request for a procedural ruling, paras. 39-40.
[182] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 1.4. (emphasis added)

ACWL/Commerce Letters. With this in mind, we are aware of no dispute in which a panel or the Appellate Body found that evidence in the possession of one party could not be submitted to the panel in the absence of express consent, by the opposing party, for the use of those documents in WTO proceedings.

7.45. Regarding Thailand's assertion that under Thai law the right to documents exercised by PMTL "is normally understood to mean that the documents would not be shared publicly or used for another purpose, such as separate proceedings between different entities in an international forum", we agree with the Philippines that Thailand has failed to substantiate this assertion.[183] Furthermore, in the course of the proceeding, Thailand's assertion has also been contradicted by the Thai Criminal Court itself. In its 14 July 2017 response to the Panel's questions relating to the ACWL/Commerce Letters, the Philippines drew the Panel's attention to an order of the Thai Criminal Court, dated 3 July 2017, issued in response to a petition by the Public Prosecutor for the Court to examine whether PMTL acted inconsistently with Thai law by sharing the ACWL/Commerce Letters with the Philippines.[184] The order holds that PMTL enjoyed a right under Thai law to share the Commerce and ACWL Letters with the Philippines, and did not act in violation of the earlier court order prohibiting dissemination of information when it did so.[185]

7.46. We now turn to Thailand's argument that the documents were clearly labelled "confidential" and included material that would normally be considered to be lawyer-client privileged. Thailand has not provided us with any domestic or international legal authority to support the premise that when a party voluntarily and knowingly discloses a communication to a third party, without imposing any restrictions on how that document may be used, lawyer-client privilege is not waived as long as that document is still marked "confidential".[186] We agree with the Philippines that the consequences of disclosing the ACWL/Commerce Letters to third parties outside the lawyer-client relationship "are not cured by the fact that the Commerce Letter was stamped confidential".[187] As the Philippines observes, it is often the case that, when a client discloses a privileged communication to a third party, and thereby waives privilege, the communication will have been marked or stamped "confidential" and/or "privileged" by the lawyer.[188]

7.47. Furthermore, we need to take into account the consequences that would follow from accepting Thailand's argument. The Appellate Body has found that a party cannot refuse to provide information requested by a panel that is exclusively in the party's possession on the grounds that it is confidential, as that would enable the party to "thwart the panel's fact-finding powers and take control itself of the information-gathering process".[189] Insofar as Thailand's argument suggests that a Member must consent to the use of any information contained in a document stamped "confidential", and which it chooses to designate as lawyer-client privileged notwithstanding its prior disclosure, this would have the same effect. Naturally, a Member that is defending a challenged measure in the context of a WTO dispute settlement proceeding would not have an incentive to consent to the use of information that a complainant seeks to rely on to establish the WTO-inconsistency of that measure.

7.48. Thailand argues that the question of whether documents are obtained "legally" or "illegally" under domestic law does not resolve all of the relevant issues, as there "could be cases in which documents were obtained legally, in the very strict sense of the word, but the circumstances make clear that they were not intended for other use", and that in such circumstances, the question of whether the use of the documents was consistent with WTO due process rights and obligations

[183] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 3.24; Philippines' reply to Thailand's comments on the Philippines' comments on Thailand's request for a procedural ruling, paras. 94, 99, 100, 121 and 124.

[184] Philippines' response to Panel question No. 36, paras. 292-301 (referring to Memorandum of Court Proceedings dated 3 July 2017, Case Black No. Or.185/2559, 3 July 2017 (English translation), (Court Order of 3 July 2017), (Exhibit PHL-198-B)).

[185] Court Order of 3 July 2017, (Exhibit PHL-198-B). Pursuant to a separate order issued by the court, PMTL was also permitted to share this 3 July 2017 order with the Philippines, notwithstanding the order of 27 June 2016 that otherwise bars the defendants from sharing any information on the court record.

[186] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 3.31.

[187] Philippines' reply to Thailand's comments on the Philippines' comments on Thailand's request for a procedural ruling, paras. 61-67.

[188] Philippines' reply to Thailand's comments on the Philippines' comments on Thailand's request for a procedural ruling, para. 66.

[189] Appellate Body Report, *Canada – Aircraft*, para. 188.

"would not turn on the strict legality under domestic law".[190] As an example, Thailand refers to a hypothetical in which "the Philippines or PM Thailand found the Commerce cover letter and the ACWL Letter lying on the street in Bangkok, having been dropped accidentally".[191] Thailand submits that there would "presumably be nothing illegal in picking them up", but it could not be "assume[d] in the same manner that it would be appropriate to submit them to a panel without any further effort to see whether it was appropriate to do so".[192] As noted above, following the meeting, Thailand requested that the Panel "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", and "[i]f 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".[193]

7.49. It appears that Thailand's argument about PMTL and the Philippines acting "legally" is concerned with the situation in which a party obtains a communication that was *inadvertently* disclosed by the opposing party. As we have already found above, in such a situation, privilege is not automatically waived by the inadvertent disclosure to the opposing party. In such a situation, we agree with the premise that it may well be contrary to principles of good faith to then exploit the accidental disclosure by the other party. However, we do not consider it necessary to opine on what steps may be required of a party in such a case, because we agree with the Philippines' observation that "the relevant facts do not remotely resemble Thailand's hypothetical scenario".[194] Specifically, in this case the facts are that "the Public Prosecutor elected to disclose the Letters to specific third parties, in a formal process, following a formal request naming one of the Letters; and, the Public Prosecutor agreed to disclosure without exercising its right to object to disclosure, and without imposing restrictions on the use of the Letters".[195]

7.50. It seems to us that the basic thrust of Thailand's argument is that even though the Public Prosecutor knowingly and voluntarily provided the ACWL/Commerce Letters to PMTL for the purpose of enabling PMTL to defend itself against the Charges, and even though the Thai Court has confirmed that under Thai law PMTL was free to share these letters with the Philippines for the purpose of this proceeding (in which the Philippines challenges the WTO-consistency of the same Charges), the Panel should nonetheless decline to rule on the Philippines' claims on the grounds that the Philippines should have proceeded on the premise that widely recognized principles relating to the waiver of lawyer-client privilege do not apply in the context of WTO dispute settlement. In our view, to uphold Thailand's request in these circumstances would violate the due process rights of the Philippines. In this connection, we recall that, in the original proceeding, the Appellate Body explained that ensuring due process requires a balancing of the interests of both parties, and not merely the interests of the responding party. The Appellate Body explained that other interests may include "an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner".[196] In line with this understanding, the panel in *EC – Seal Products* highlighted that "the complainants' due process rights would not be affected by the removal of the two exhibits from the record in the present proceedings".[197]

7.51. Thailand submits that the Philippines' actions "have compromised the Panel's ability to undertake an objective assessment of the matter as stipulated in Article 11 of the DSU and the Panel can no longer make an objective assessment".[198] In this regard, Thailand emphasizes that "[e]ven with the best will in the world, however, it cannot be guaranteed that the Philippines' deliberate attempt to plant a seed of doubt as to Thailand's credibility will have no effect on how the Panel perceives and addresses the arguments of the parties for the remainder of these proceedings."[199] Thailand explains that while a panel must be able to address a party's arguments and defences with a clear and open mind, that "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

[190] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 4.4.
[191] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 4.4.
[192] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 4.4.
[193] Thailand's responses to the Panel's second set of questions, p. 40.
[194] Philippines' reply to Thailand's comments on the Philippines' comments on Thailand's request for a procedural ruling, para. 47.
[195] Philippines' reply to Thailand's comments on the Philippines' comments on Thailand's request for a procedural ruling, para. 47.
[196] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.
[197] Preliminary Ruling of the Panel, *EC – Seal Products*, WT/DS400/6; WT/DS401/7, para. 3.3.
[198] Thailand's reply to the Philippines' comments on Thailand's request for a procedural ruling, para. 5.1.
[199] Thailand's request for a procedural ruling, para. 1.41.

for the dispute"[200], and that "the consequences of the Philippines' actions cannot be wiped out simply by the *post hoc* exclusion of the evidence".[201] Thailand submits that "it is inevitable that any rulings by the Panel adverse to Thailand, especially with respect to the claims to which this material relates, will be perceived as having been tainted by the materials submitted by the Philippines".[202]

7.52. We consider that it is perfectly normal for different individuals or agencies within a government, or advising a government, to hold different views on certain legal issues. In addition, we consider that it is to be expected that a Member's view on certain issues may change or evolve over time. Furthermore, a number of Thailand's arguments before the Panel regarding the non-applicability of the CVA to the Charges raise novel legal issues that are not touched upon at all in the ACWL/Commerce Letters. We note that the ACWL/Commerce Letters, which were apparently prepared years prior to the Charges being issued, do not establish any relevant fact relating to the Charges such that their existence or content would assist the Panel in making its objective assessment of the facts. More generally, if a complaining party considers that certain arguments or analysis contained in an agency's opinions are compelling, then it may present those arguments or analysis to the Panel − authorship by an organ or agency of the responding party does not itself contribute to the force of the arguments or analysis. In this regard, we agree with Thailand that "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".[203] We recall that, in our 10 May 2017 communication to the parties, we assured Thailand that "as a Party to the dispute [Thailand] is under no obligation to disclose, justify, or explain any confidential legal advice that it has received".[204]

7.53. In the light of the foregoing, we consider that the ACWL/Commerce Letters are not relevant to our assessment of the matter before us, and we have given no weight to them in our analysis of the disputed issues in this proceeding. The ACWL/Commerce Letters have had no effect on how the Panel perceives and addresses the arguments advanced by the parties in relation to the applicability of the CVA to the Charges, and we consider that this is reflected in our extensive analysis of the issues raised in that regard.[205]

7.54. We further note that in WTO dispute settlement proceedings it is not unusual for parties to develop arguments that attempt to rely on statements made by the opposing party outside the context of WTO dispute settlement proceedings, or in the context of prior or parallel WTO dispute settlement proceedings, or in its submissions in the same proceeding, and present these statements as being inconsistent with the arguments that the opposing party is advancing before the panel.[206] This does not compromise a panel's ability to discharge its function of making an objective assessment of the matter. We further observe that there is no precedent for a GATT/WTO panel declining to rule on a claim on the basis that its ability to make an "objective assessment" of a matter has been compromised. In this regard, we find it relevant that the panel in *EC − Seal Products* evidently did not consider that the submission of an internal legal opinion in any way compromised its ability to make an objective assessment of the matter before it. We recall that in that case, unlike this case, it appears to have been common ground between the parties that the legal opinions at issue *were* classified documents under the applicable EU regulations, and the EU Council had not authorized their public disclosure.[207] Given that the submission of an internal legal opinion in those circumstances did not preclude the panel from making an objective assessment of the matter before it, Thailand's argument is to some extent contradicted by the only prior panel to find itself in an analogous situation.[208]

[200] Thailand's request for a procedural ruling, para. 1.14.
[201] Thailand's request for a procedural ruling, para. 1.41.
[202] Thailand's request for a procedural ruling, para. 1.41.
[203] Thailand's request for a procedural ruling, para. 1.14.
[204] See paragraph 1.25. above.
[205] See Section 7.3.5 below.
[206] For example, in its comments on the Philippines' response to Panel question number 92, Thailand states that the Philippines' approach to interpreting and applying the CVA's should be rejected because it is legally incorrect, but additionally Thailand "notes that the Philippines' new approach is a glaring *volte-face* of its original position in these proceedings".
[207] Preliminary Ruling of the Panel, *EC − Seal Products*, WT/DS400/6, WT/DS401/7, paras. 2.2 and 2.4.
[208] We further note that the European Union, in its third-party submission, rejects Thailand's premise that the ACWL/Commerce Letters were obtained illegally, or that their disclosure prevents the Panel from making an objective and independent assessment of the matter. (European Union's third-party submission, paras. 66-67)

7.55. In addition to requesting that the Panel decline to rule on the Charges, Thailand requested that the Panel order the Philippines to withdraw Exhibit PHL-150 from the record, as well as the related references in the Philippines' second written submission. In our view, if there is no basis to find that the ACWL/Commerce Letters are protected by lawyer-client privilege, or that their submission taints the Panel's objectivity, then it follows that we have no basis to order the Philippines to withdraw Exhibit PHL-150 from the record, or the related references in the Philippines' second written submission.

7.1.3.4 Conclusion

7.56. For the foregoing reasons, the Panel concluded that Thailand had failed to demonstrate that its due process rights were violated, that the Philippines did not act in good faith, or that the Panel was prevented from making an objective assessment of the matter as a consequence of the Philippines submitting the ACWL/Commerce Letters to the Panel. The Panel therefore rejected Thailand's requests that the Panel decline to rule on the Philippines' claims relating to the Charges as a consequence of the Philippines submitting the ACWL/Commerce Letters to the Panel, and declined Thailand's request that the Panel exclude Exhibit PHL-150 from the record and strike the related references from the Philippines' second written submission. However, although the ACWL/Commerce Letters are admissible and are not protected by lawyer-client privilege, the Panel considers that they are not relevant to its assessment of the matter before it, and therefore gave no weight to them in its analysis of the issues in dispute in this proceeding.

7.1.4 The relevance of Thailand's developing country status

7.57. Article 20.1 of the CVA provides that, upon notification, developing countries were entitled to delay the application of the CVA for a period "not exceeding five years". Thailand made a notification under this provision and implemented the CVA in 2000, following the expiry of the transition period allowed for under Article 20.1.[209] Therefore, the special and differential treatment provisions of the CVA no longer apply to Thailand for the purposes of this dispute.[210] The Panel notes that, in the course of these Panel proceedings, Thailand did not raise any specific provisions on differential and more-favourable treatment for developing country Members that require particular consideration.[211]

7.58. Although the parties in this dispute generally agree that a "single legal standard applies to all WTO Members"[212], Thailand nonetheless argues that its "developing country status may be relevant when the Panel attempts to determine compliance with that single legal standard".[213] In this regard, Thailand states that its developing country status is a "relevant fact that the Panel may take into account in assessing the reasonableness of the actions of the Thai authorities at issue in this proceeding".[214] Regarding the BoA Ruling, Thailand submits that "even if the BoA's decisions are not perfect, in the sense in which the Philippines' legal team, experts in the western legal tradition, wants, such perfection is not required".[215] With respect to the criminal Charges, Thailand states that "developing countries such as Thailand face particular difficulties when dealing with customs fraud", and therefore "need to be able to adopt tough enforcement measures, such as criminal prosecution, in order to fight customs fraud efficiently".[216]

7.59. We are aware that the diversity of existing national legal systems and traditions influences the way in which Members implement their WTO obligations. Regarding the BoA Ruling, which concerns issues of customs valuation and the CVA, we elaborate further below that, where the terms of the CVA are generally-worded and do not prescribe any particular means or methodology that

[209] See Entry into Force and Notification of Acceptances, WT/Let/1, 27 January 1995; parties' responses to Panel question No. 75.

[210] Thailand's response to Panel question No. 75, p. 9.

[211] We note that Article 12.11 of the DSU provides that, where one or more of the parties is a developing country Member, "the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures".

[212] Philippines' response to Panel question No. 75, para. 53; Thailand's comments on the Philippines' response to Panel question No. 75.

[213] Thailand's comments on the Philippines' response to Panel question No. 75, p. 12.

[214] Thailand's comments on the Philippines' response to Panel question No. 75, p. 12.

[215] Thailand's response to Panel question No. 75, p. 9.

[216] Thailand's response to Panel question No. 75, p. 10.

must be followed in discharging a substantive and procedural obligation contained therein, the domestic customs authorities involved in customs valuation enjoy a margin of discretion regarding the means or methodology that they may follow, within the parameters laid down in the applicable treaty provisions, read in their context and in the light of the object and purpose of the CVA.[217] It follows that, insofar as the terms of the CVA leave such a margin of discretion, "perfection is not the standard" that applies in WTO dispute settlement proceedings.[218] In addition, in the context of our findings on the Charges we point out that it is common ground between the parties that there is nothing in the text of the CVA that prevents Members – developing or developed – from taking tough enforcement measures against customs fraud.[219] Thus, we also agree with Thailand that developing country Members "need to be able to adopt tough enforcement measures, such as criminal prosecution, in order to fight customs fraud efficiently".[220] However, the basis for our agreement is not that developing countries face special difficulties in this regard, but rather our interpretation of the rights and obligations under the CVA and the GATT 1994 that we develop in the context of our findings on the Charges.

7.60. We note that Article 12.10 of the DSU provides that "[i]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation". During this proceeding, the Panel took into account the respondent's status as a developing country Member when preparing and revising the timetable for the process. The Panel accommodated both Thailand's and the Philippines' requests for ample time to prepare the written submissions, and written question and answer procedure prior to the meeting; the extension of the initially agreed deadlines to submit responses to (and subsequent comments on) the questions posed by the Panel after the substantive meetings; as well as the timing of the issuance of the draft descriptive part of the Panel's report, and the issuance of the Panel's interim report to the parties.

7.2 The Board of Appeals Ruling

7.2.1 General

7.2.1.1 Factual background

7.61. This section provides a general factual description of the BoA Ruling, including the events leading up to, and post-dating, the issuance of the BoA Ruling. The parties do not disagree on these facts. We note that the parties do disagree on several factual issues regarding the amount of provincial taxes actually paid by PMTL in the year 2002. We address these disputed factual issues in Section 7.2.6 below.

7.62. Between January 2002 and January 2003, PMTL imported into Thailand 210 entries of *Marlboro* cigarettes from Indonesia.[221] PMTL's transaction value for each of these entries was USD 8.50 per 1,000 sticks.[222] The Thai Customs Department rejected the transaction values for the 210 entries of cigarettes imported by PMTL, and assigned a higher customs value.[223] PMTL filed an appeal with the BoA, an authority within the Thai Customs Department that hears appeals from importers or exporters in relation to initial customs valuation decisions by the Customs Department.[224] PMTL's appeal against the duty assessment for these 210 entries was part of a series of appeals made by PMTL, covering a total of 867 entries that took place between June 2000 and March 2003.[225]

[217] See paragraph 7.82. below.
[218] Panel Report, *US – Steel Plate*, para. 7.71. See also Panel Report, *EU – Footwear (China)*, para. 7.656.
[219] We note the Philippines' agreement on this point. (See Philippines' comments on Thailand's response to Panel question No. 75)
[220] Thailand's response to Panel question No. 75, p. 10.
[221] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 1.
[222] BoA Ruling, No. GorOr 112/2555/Por9/2555(3.1) and cover letter No. GorKor 0519(8)/(GorOr)/118, 16 November 2012, (BoA Ruling), (Exhibit PHL-21-B), p. 2.
[223] BoA Ruling, (Exhibit PHL-21-B), p. 2. The assessed values for the 210 entries were USD 9.88 per 1,000 sticks for *Marlboro* Light; USD 10.21 per 1,000 sticks for *Marlboro*; USD 10.71 per 1,000 sticks for *Marlboro* Light Menthol; and USD 10.71 per 1,000 sticks for *Marlboro* Menthol.
[224] Philippines' first written submission, para. 94.
[225] Philippines' first written submission, para. 94.

7.63. When the original panel issued its report in 2010, PMTL's appeals regarding the 210 entries were still outstanding before the BoA.[226] Before the original panel, the Philippines claimed, *inter alia*, that Thailand acted inconsistently with Articles X:3(a) and (b) of the GATT 1994 as a consequence of the undue delay in the administrative review proceedings before the BoA in relation to the outstanding appeals for the 210 *Marlboro* entries. The original panel found that Thailand had acted inconsistently with both Articles X:3(a) and (b), and recommended that Thailand take action to address the delays.[227]

7.64. On 16 November 2012, the BoA issued its Ruling on PMTL's appeal of the customs duties assessed by the Customs Department for the 210 entries imported by PMTL between January 2002 and January 2003.[228] The BoA Ruling rejected PMTL's transaction values on the basis that the relationship between the buyer, PMTL, and the seller, PM Indonesia, had influenced the transaction values as declared by PMTL.[229] The BoA based this rejection on an examination of the circumstances of the sale, conducted "by comparing the [P&GE] rate according to the 2002 financial statements of PMTL, certified by the auditor, and the [P&GE] rate as requested by PMTL with the profits and general expenses rate of [an] industry group of imported cigarette wholesalers in the year 2002".[230] The BoA Ruling concluded that two separate P&GE rates ascribed to PMTL were "not consistent with those of the industry group of imported cigarette wholesalers, which is the information for the sale of the goods of the same class or kind in the Kingdom [of Thailand]".[231]

7.65. The BoA Ruling explains that, having rejected the transaction value, the BoA determined the customs value by using the "deductive value", i.e. "applying the selling price per unit of the imported goods sold in the Kingdom to the unrelated purchaser in the same condition as when imported at the first level of sale and in the greatest aggregate quantity", while making deductions for P&GE, taxes and duties.[232] In calculating the customs value, the BoA made deductions for PMTL's P&GE, using the average P&GE rate for the industry group in place of PMTL's requested P&GE value.[233] The BoA Ruling also stated that PMTL "voluntarily accepted" that transportation costs would not be considered for the calculation of the customs value by the BoA, and that "[a]s such, there was no information for considering the deduction".[234] The BoA also made deductions for "taxes and duty", which included "provincial tax (calculated by using the total amount of payment of the provincial tax pursuant to the receipts specifying that money is received from PMTL and the name of the retailers … in the year 2002 according to the information provided by PMTL … and comparing in proportion to the sales amount throughout the year)".[235] The resulting customs value determined by the BoA was equivalent to THB 9.3001 per pack (or THB 465.01 per 1,000 sticks).[236]

7.66. By letter of 18 December 2012 to the Director General of the Customs Department, PMTL "request[ed] an explanation as to how the customs value was determined for the 210 entries at issue in the BoA Ruling".[237] In particular, PMTL requested an explanation regarding questions that "are essential to the Company's understanding of how the BoA has determined the customs value for the Company's products set out in the BoA ruling".[238] With respect to the industry group used in the comparison of P&GE rates, PMTL requested an explanation of the following: (i) the identity of the companies included in the "industry group of imported cigarette wholesalers in the year 2002" from which the benchmark P&GE rates were derived; (ii) how and why these companies were chosen, including the "selection criteria" for including or excluding a company from the industry group; and (iii) how the average P&GE rate for the industry group was calculated, including "the mean; the standard deviation; and the variances of the volumes / sales values for the members of the industry group".[239] PMTL also requested an explanation regarding the deduction for provincial taxes.[240]

[226] Philippines' first written submission, para. 101.
[227] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 8.4(e) and (f).
[228] BoA Ruling, (Exhibit PHL-21-B).
[229] BoA Ruling, (Exhibit PHL-21-B), p. 2.
[230] BoA Ruling, (Exhibit PHL-21-B), p. 3.
[231] BoA Ruling, (Exhibit PHL-21-B), p. 3.
[232] BoA Ruling, (Exhibit PHL-21-B, pp. 3-4.
[233] BoA Ruling, (Exhibit PHL-21-B), p. 4.
[234] BoA Ruling, (Exhibit PHL-21-B), p. 4.
[235] BoA Ruling, (Exhibit PHL-21-B), p. 4.
[236] BoA Ruling, (Exhibit PHL-21-B), p. 3.
[237] Letter from PMTL to the BoA, 18 December 2012 (English translation), (Exhibit PHL-27-B), p. 1.
[238] Letter from PMTL to the BoA, 18 December 2012 (English translation), (Exhibit PHL-27-B), p. 3.
[239] Letter from PMTL to the BoA, 18 December 2012 (English translation), (Exhibit PHL-27-B), p. 2.
[240] Letter from PMTL to the BoA, 18 December 2012 (English translation), (Exhibit PHL-27-B), p. 3.

7.67. On 16 June 2016 (i.e. three and a half years later), the Customs Department sent a letter to PMTL providing certain information in response to PMTL's request for an explanation dated 18 December 2012.[241] The letter stated that information regarding P&GE rates was collected by assessing the 2002 P&GE rates for "wholesalers of imported cigarettes which are … in the same class or kind … in the level of brand [reputation] close to Marlboro cigarettes".[242] The letter indicates that the average P&GE rate was determined with reference to "5 companies, with a 95% confidential [*sic*] interval at a range of 9.80 − 15.08 per cent with an average of 12.44 per cent".[243] Additionally, the letter states that the deduction for provincial tax was determined by "applying the total amount of payment of provincial tax according to the receipts specifying that money is received from Philip Morris (Thailand) Limited and the name of retailers … and comparing in proportion to the cigarette sales amount in 2002".[244]

7.68. Following the issuance of the BoA Ruling in November 2012, Thailand reassessed the customs duties and internal taxes due on the 210 entries.[245] On the basis of the revised customs values, and taking into account currency fluctuations, refunds were due on some entries, and additional duties and taxes were due on others. With respect to 30 entries, Thailand has paid PMTL a refund; for 180 entries, additional sums were due.[246] On 9 January 2013, PMTL received 180 Notices of Assessment in respect of these latter entries.[247] The revised Notices of Assessment resulted in the payment by PMTL of an additional THB 152,581,835.35 (around USD 5.2 million) in duties and taxes.[248]

7.69. On 18 January 2013, PMTL appealed the BoA Ruling to the Central Tax Court of Thailand. In a judgment of 29 October 2014, the Court upheld PMTL's appeal, on the grounds that the Customs Department had improperly used minimum values as the basis for the original valuation.[249] On this basis, the Court ordered revocation of: the original 210 assessments; the BoA Ruling; and the 180 Notices of Assessment that resulted from the BoA Ruling.[250]

7.70. On 28 January 2015, the Customs Department, together with the members of the BoA, appealed the Central Tax Court decision to the Thai Supreme Court, requesting the Supreme Court to reverse the decision of the Central Tax Court.[251]

7.2.1.2 Claims and order of analysis

7.71. The parties' requests for findings in relation to the BoA Ruling are set out in greater detail in Section 3 of our Report. As reflected there, the Philippines' claims and Thailand's defences raise a number of issues in relation to the BoA Ruling.

7.72. Article 1 of the CVA requires that, in situations where the importer is related to the seller, the transaction value must nonetheless be accepted, unless the customs authority demonstrates, after examining the circumstances of sale in accordance with the requirements of Article 1.2(a), that the price was influenced by the relationship between the buyer and seller. The Philippines claims that the BoA Ruling is inconsistent with Article 1 of the CVA because the BoA rejected the transaction value without properly examining the circumstances of sale, and because the BoA failed to communicate its grounds to PMTL for rejecting the transaction value, thereby also precluding PMTL from responding to those grounds. We note that the Philippines has made distinct claims in respect of: (i) the "substantive" obligation under Article 1.2(a), second sentence, that a customs authority must conduct an examination of the circumstances of sale in order to determine whether the relationship influenced the price; and (ii) the "procedural" obligation under Article 1.2(a), third

[241] Letter from the Director of Customs Standard Procedures and Valuation Bureau of Customs to PMTL, No. GorKor0519(Sor)/732, 16 June 2016 (English translation), (Letter from Customs Department to PMTL of 16 June 2016), (Exhibit PHL-38-B).
[242] Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B).
[243] Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B).
[244] Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B).
[245] Philippines' first written submission, para. 113.
[246] Philippines' first written submission, para. 113.
[247] 180 Notices of Assessment (English translation of one notice), (Exhibit PHL-28-B).
[248] Philippines' first written submission, paras. 113-114 (referring to Letter from Bangkok Customs Bureau to PMTL, No. GorKor 0504(Sor)/35, 17 January 2013, (Exhibit PHL-29-B)).
[249] Central Tax Court Ruling, 29 October 2014 (English translation), (Exhibit PHL-32-B).
[250] Central Tax Court Ruling, 29 October 2014 (English translation), (Exhibit PHL-32-B), p. 18.
[251] Appeal by the Customs Department to the Supreme Court of the Decision by the Tax Court of 29 October 2014 on PMTL's appeal against the BoA Ruling of 16 November 2012, 28 January 2015 (English translation), (Exhibit PHL-33-B), p. 18.

sentence, that a customs authority must communicate to the importer its grounds for doubting the transaction value, and give the importer a reasonable opportunity to respond. The parties and third parties have indicated that these obligations are distinct, although they may be related.[252] Notwithstanding that these provisions may be related, we agree with the parties and third parties that the obligations are distinct. We therefore proceed with our analysis by addressing the Philippines' distinct claims under these provisions separately, and in accordance with the structure of Article 1.2(a), by first addressing the Philippines' claim concerning the substantive obligation in the second sentence of Article 1.2(a), before addressing the Philippines' claim in respect of the procedural obligation in the third sentence.

7.73. Article 5 of the CVA concerns the deductive method of customs valuation. Under Article 4, where a customs authority has rejected the transaction value under Article 1, and the customs value cannot be determined under the provisions of Articles 2 and 3, the customs value shall, in principle, be determined under Article 5. When using the deductive method under Article 5, a customs authority determines the customs value of the imported goods based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, when they are sold in an unrelated transaction and deducts certain amounts from that figure to arrive at a revised customs value. Article 5 lists the specific types of deductions that must be made. After the BoA rejected the transaction value on the basis of the comparison of P&GE rates, the BoA proceeded to determine a revised customs value, by deducting various amounts from the value of the first sale to an unrelated purchaser (specifically, sales to retailers).

7.74. The Philippines claims that, in determining the customs value to use in place of the transaction values, the BoA acted inconsistently with several aspects of Article 5 of the CVA.[253] The Philippines contends that the BoA failed to deduct the correct amount of P&GE, inconsistently with Article 5.1(a)(i). The Philippines submits that the BoA acted inconsistently with Article 5.1(a)(ii) by failing to deduct any amount for transportation expenses. The Philippines also considers that the BoA failed to deduct the proper amount for provincial taxes payable by PMTL, and subjected PMTL to an excessively high burden of proof, inconsistently with Article 5.1(a)(iv).

7.75. We note that the Philippines does not raise any issue or claim with respect to the fact that, having rejected the transaction value under Article 1.2(a) of the CVA, the BoA proceeded to determine the customs value on the basis of the methodology set forth in Article 5, as opposed to determining an alternative customs value on the basis of Article 2 or Article 3.[254]

7.76. Where a customs authority improperly rejects the transaction value, inconsistently with the requirements of Article 1 of the CVA, it becomes a moot point whether the customs authority's determination of a revised customs value was conducted in accordance with the requirements of Articles 2 to 7. Thus, if we were to uphold the Philippines' claim that the BoA failed to satisfy the legal requirements of Article 1, it may be a moot point whether the BoA determined a revised customs value in accordance with the legal requirements of Article 5. In this respect, the Philippines acknowledges that "[i]f the Panel were to find that the BoA Ruling violates Articles 1.1 and 1.2(a), it would be within the Panel's discretion to exercise judicial economy with respect to the Philippines' claim under Article 5".[255] Having said that, the Philippines "urges the Panel not to exercise judicial economy" in respect of the claims under Article 5, as it considers that "findings on a range of issues are an important means of contributing to the full and prompt resolution of the dispute."[256] We note that the original panel, having found that the Thai customs authority acted inconsistently with Article 1 of the CVA, made additional findings in respect of Articles 5 and 7 of the CVA.[257] We adopt the same approach in this proceeding, in the interest of assisting the parties in resolving their

[252] See parties' responses to questioning at the meeting of the Panel; parties' responses to Panel question No. 73; third parties' responses to questioning at the meeting of the Panel; third parties' responses to Panel question No. 7(b).

[253] Philippines' first written submission, paras. 350-427; second written submission, paras. 278-343; response to Panel question Nos. 20-22, 24-26, 85-86 and 89-90; opening statement at the meeting of the Panel, paras. 34-39; and closing statement at the meeting of the Panel, paras. 7-8.

[254] Philippines' response to Panel question No. 85. Under Article 4 of the CVA, customs value may only be determined under the provisions of Article 5 if the customs value cannot be determined under the provisions of Articles 1, 2 or 3.

[255] Philippines' response to Panel question No. 20(a).

[256] Philippines' response to Panel question No. 20(a).

[257] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.291-7.398.

dispute.[258] We will therefore proceed by addressing the Philippines' claims under Article 5 in the event that we uphold the Philippines' claims under Article 1. Since each of the Philippines' three claims under Article 5 pertains to a distinct provision of Article 5.1(a), we address each claim separately.

7.77. We then turn to the Philippines' claim that the BoA acted inconsistently with Article 11.3 of the CVA by failing to provide sufficient reasons for its decision to PMTL, before finally addressing the Philippines' claim that the BoA acted inconsistently with Article 16 of the CVA by failing to provide an adequate explanation to PMTL upon request. Both of these claims involve an alleged failure by the BoA to provide reasons/an explanation to PMTL. However, since these claims are based on distinct provisions of the CVA, we address them separately.

7.2.1.3 Claims not pursued

7.78. The Philippines' panel request contains a number of claims in relation to the BoA Ruling, almost all of which it has pursued in this proceeding. We note however that in addition to the measures specified in paragraph 2.7. above, the panel request also indicates that:

> On 29 October 2014, the Thai Tax Court upheld an appeal by PM Thailand against the BoA Ruling. However, on 28 January 2015, Thai Customs appealed the Tax Court's decision to the Thai Supreme Court. The appeal is currently outstanding. On appeal, Thai Customs has argued that the DSB's recommendations and rulings under points (xii) and (xiii) above bind only the Philippines, and not Thailand. *All actions by Thailand to uphold the BoA Ruling are measures taken to comply that are inconsistent with the provisions cited in paragraph 10*.[259]

7.79. The Philippines has referred to the appeal to the Thai Supreme Court in its submissions, and we have taken note of this factual circumstance in the context of setting forth the factual background and context to the measures at issue.[260] However, the Philippines has not pursued any claims in respect of the "actions by Thailand to uphold the BoA Ruling" in the course of this proceeding. Accordingly, it is not necessary for us to make findings on what types of actions taken by a Member in the context of domestic appeal proceedings could constitute measures taken to comply.

7.2.1.4 Principles of interpretation applicable to the CVA

7.80. Being ever mindful of the function and institutional role of a compliance panel under Article 21.5 of the DSU, we consider that the starting point for our interpretation of the terms of the CVA are the findings of the panel and the Appellate Body that were made in the original proceeding, and which were adopted by the DSB in the context of the ordinary dispute settlement process. We agree with the parties and third parties that we are not, strictly speaking, "bound" to follow the legal interpretations of the original panel.[261] However, we also share the view that, in the interests of ensuring security and predictability in dispute settlement and the finality of the DSB's recommendations and rulings, there is an expectation that, absent compelling reasons, compliance panels will make findings consistent with those made by the original panel in the same dispute. The Appellate Body has stated that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record and explanations given".[262]

7.81. In this compliance proceeding, the Panel is presented with a number of interpretative issues that the original panel was not required to resolve. Article 3.2 of the DSU states that the WTO dispute settlement system serves to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". The "customary rules of interpretation of public international law" referred to by the DSU include Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (the Vienna Convention). Article 31(1) of the Vienna Convention

[258] We note that Thailand has also not requested the Panel, in the event it were to find that the BoA acted inconsistently with Article 1 of the CVA, to limit its analysis to those claims.
[259] Panel request, fn 22. (emphasis added)
[260] See paragraphs 7.69. and 7.70. above.
[261] Parties' responses to Panel question No. 74; third parties' responses to Panel question No. 1.
[262] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.

provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

7.82. Where the terms of the CVA are generally-worded and do not prescribe any particular means or methodology that must be followed in discharging a substantive and procedural obligation contained therein, we proceed on the understanding that the domestic customs authorities involved in customs valuation enjoy a margin of discretion regarding the means or methodology that they choose to follow, within the parameters laid down in the applicable treaty provisions, read in their context and in the light of the object and purpose of the CVA. This understanding derives from the manner in which the Appellate Body and previous panels have approached generally-worded obligations that do not prescribe a particular means or methodology for conducting the analysis, or making the determinations provided for in the WTO agreement in question.[263] We note that the Philippines accepts that the CVA "does not prescribe a specific process for customs authorities to follow" when conducting an examination of the circumstances of sale[264] and that, as a consequence, the customs authority "has a degree of discretion in deciding how to conduct its examination".[265]

7.83. We also note that Article 14 of the CVA provides that the interpretative notes in Annex I to the CVA "form an integral part" of the CVA, and that the provisions of the CVA are "to be read and applied in conjunction with" those notes. We recall the original panel's view that although commentaries by the Technical Committee on Customs Valuation are "not legally binding upon the parties", they may be "instructive and can provide guidance on the interpretation of the Customs Valuation Agreement, especially since it is the WTO Members that make up the Technical Committee".[266] In this proceeding, both parties have referred to the World Customs Organization's (WCO) Commentary 15.1, regarding the application of the deductive value method. The Philippines has observed, without any disagreement from Thailand, that this commentary is not legally binding on customs administrations, and does not amount to international law, but is a well-respected authority and aims to facilitate a uniform interpretation and application of the CVA.[267]

7.84. Also relevant to the interpretation of the provisions of the CVA is the Decision of the Committee on Customs Valuation Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value (the Decision).[268] We recall that the original panel found guidance in the Decision to confirm its understanding of certain CVA obligations.[269] Furthermore, we observe that the parties are of the view that the Decision is, or could potentially qualify as, a "subsequent agreement between the parties regarding the interpretation of the treaty

[263] See, e.g. Appellate Body Reports, *US – Anti-Dumping Methodologies*, para. 5.22; *EC – Fasteners*, para. 436; *US – Line Pipe*, para. 158; *US – Tyres (China)*, para. 191; and Panel Reports, *EU – Footwear (China)*, para. 7.357; *US – Steel Safeguards*, paras. 10.49-10.197; *EC – Salmon*, para. 7.716; *EC – Tube or Pipe Fittings*, para. 7.241; *Russia – Commercial Vehicles*, para. 7.61.

[264] Philippines' first written submission, para. 171.

[265] Philippines' first written submission, para. 559.

[266] Panel Report, *Thailand – Cigarettes (Philippines)*, fn 650. We note that Article 18 of the CVA mandates the creation of two committees for the administration of the CVA. Article 18.1 establishes the Committee on Customs Valuation ("the Committee"), which comprises representatives of all WTO Members, and which is established under the auspices of the WTO. Article 18.2 establishes the Technical Committee on Customs Valuation ("Technical Committee"), which also comprises representatives of WTO Members, but which is established under the auspices of the Customs Cooperation Council (CCC), which subsequently became the World Customs Organization (WCO). The Technical Committee on Customs Valuation was established "with a view to ensuring, at a technical level, uniformity in interpretation and application of this Agreement". (Annex II, paragraph 1, of the CVA)

[267] Philippines' first written submission, fn 212.

[268] See Committee on Customs Valuation, Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, G/VAL/1, 27 April 1995, (the Decision), and Minutes of the Committee Meeting of 12 May 1995, G/VAL/M/1, 11 August 1995. The Decision was adopted pursuant to the invitation in the Ministerial *Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value* (the Ministerial Decision). The Philippines also considers that the Ministerial Decision, which invited the Committee on Customs Valuation to take its own decision, may be considered an "agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" under Article 31.2(a) of the Vienna Convention because the invitation was made concurrently with the conclusion of the CVA. (Philippines' response to Panel question No. 97(c), para. 212)

[269] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.172, fns 564 and 582.

or the application of its provisions" within the meaning of Article 31(3)(a) of the Vienna Convention.[270]

7.2.1.5 Standard of review

7.85. The parties do not contest that Article 11 of the DSU sets forth the standard of review in respect of both the GATT 1994 and the CVA (the two agreements invoked by the Philippines in this proceeding).[271] Under Article 11, a panel's mandate is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

7.86. Regarding the CVA specifically, the original panel explained that Article 11 of the DSU sets forth the standard of review, pursuant to which the Panel must "make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[272] The original panel relied on the Appellate Body's statement that "this means 'neither *de novo* review as such, nor 'total deference'".[273] The original panel also explained that the standard of review under the CVA requires a panel to "*critically* examine a domestic authority's explanation 'in depth, and in the light of the facts before the panel'".[274] The original panel further recalled the Appellate Body's statement that an "objective assessment under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review."[275] The original panel stated that it would therefore make an objective assessment of the matter "in the light of the relevant obligations" invoked.[276]

7.87. In the course of this proceeding the parties have exchanged views on the standard of review in the context of the BoA Ruling.[277] The parties agree, however, that the standard of review under Article 11 of the DSU also applies to the CVA.[278] Furthermore, the parties agree that the Panel can neither defer to the findings of the customs authority, nor can it conduct a *de novo* review.[279] We address below in the context of our substantive analysis additional issues concerning the standard of review as they arise.[280]

7.2.2 Claim under Articles 1.1 and 1.2(a), second sentence, of the CVA

7.2.2.1 Introduction

7.88. Article 1 of the CVA requires that, in principle, the customs value of imported goods shall be the transaction value. In situations in which the buyer and seller are related, the transaction value must be accepted as the customs value so long as the transaction value is acceptable under the

[270] Parties' responses to Panel question No. 97(c).

[271] Philippines' second written submission, paras. 39-84; Thailand's first written submission, paras. 4.1-4.3.

[272] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.70.

[273] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.70 (referring to Appellate Body Reports, *EC – Hormones*, para. 117; and *US – Lamb*, para. 1).

[274] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.104 (quoting Appellate Body Report, *US - Lamb*, para. 106).

[275] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.71 (quoting Appellate Body Report, *US - Countervailing Duty Investigation on DRAMS*, para. 184).

[276] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.72.

[277] According to the Philippines, the parties have "fundamentally different views as to how the panel should undertake its task of examining the Philippines' claims ... [t]hese differences pertain to the factual and legal standards that apply to the Panel's review of the BoA's rejection of the transaction value and the determination of an alternative customs value." (Philippines' second written submission, para. 38. See also Philippines' second written submission, paras. 39-84; response to Panel question Nos. 4 and 74; opening statement at the meeting of the Panel, paras. 5-14; responses to questioning at the meeting of the Panel; Thailand's first written submission, paras. 4.1-4.12 and 5.9-5.12; second written submission, paras. 2.5-2.37; and response to Panel question No. 4.

[278] Philippines' second written submission, para. 40; Thailand's second written submission, paras. 2.11.

[279] Philippines' second written submission, para. 66; Thailand's second written submission, para. 2.13-2.14.

[280] See, for example, paragraphs 7.107. to 7.121 below.

requirements of Article 1.2. In this respect, Article 1.2(a), second sentence, requires that, in a situation where the buyer and seller are related, if the customs authority has doubts as to whether the relationship influenced the price, it must examine "the circumstances surrounding the sale" and accept the transaction value, unless the customs authority demonstrates that the relationship did indeed affect the price.

7.89. It is uncontested that the buyer (PMTL) and the seller (PM Indonesia) in the relevant transactions at issue here were indeed "related" within the meaning of the CVA.[281] Since the buyer and seller were related, the BoA conducted an examination of "the circumstances of sale", specifically by comparing, on the one hand, two "profit and general expenses" (P&GE) rates attributed to PMTL and, on the other hand, a "benchmark range" constructed around an "industry average" P&GE rate that was calculated using the P&GE rates of five companies allegedly representative of the industry (these five companies comprised an alleged "industry group").[282]

7.90. The Philippines asserts that the BoA's examination of "the circumstances of sale" was inconsistent with the substantive requirements contained in the second sentence of Article 1.2(a), and consequently the BoA's rejection of the transaction value was inconsistent with Article 1.1.[283] The Philippines asserts that the BoA, in comparing PMTL's P&GE rates to a benchmark range of P&GE rates representative of the industry: (i) composed an improper industry benchmark group of companies; (ii) improperly determined the benchmark range of P&GE rates; and (iii) conducted an improper comparison between PMTL's P&GE rates and the benchmark range.

7.91. In Thailand's view, the BoA reasonably determined that the relationship between PMTL and PM Indonesia affected the transaction value.[284] Thailand considers that the BoA's choice of companies to include in the benchmark comparison group was reasonable; that the BoA acted reasonably in determining the benchmark range for the industry group; and that the comparison between PMTL's P&GE rates and the benchmark range was reasonable.

7.92. The parties agree that an examination of the circumstances of sale between related parties under Article 1.2(a) may, in principle, be conducted by using a comparison aimed at determining whether the transaction value reflects normal commercial behaviour between unrelated parties.[285] More specifically, the parties agree that comparing the P&GE rate that the importer obtained in sales of the imported goods with the P&GE rates obtained by other importers of similar or identical goods, could give an indication as to whether the relationship influenced the price.[286] The Philippines argues that "the BoA's *application* of the method as part of its examination of the circumstances of sale was

[281] We recall the original panel's finding that "[t]he Philippines agrees that PM Thailand and PM Philippines are related within the meaning of Article 15.4(f) of the Customs Valuation Agreement, because they are both directly or indirectly controlled by a third person, PM International." (Panel Report, *Thailand – Cigarettes (Philippines)*, fn 460)

[282] Philippines' first written submission, paras. 126-127.

[283] Philippines' first written submission, paras. 227-346; second written submission, paras. 32-277 and 348-368; response to Panel question Nos. 2-6(a), 7(b), 8(a), 8(c), 9-12, 14, 16,19, 78-80, 82(a) and 83-84; comments on Thailand's response to Panel question Nos. 78(b), 80-81 and 82(b); opening statement at the meeting of the Panel, paras. 3-33 and 41-46.

[284] Thailand's first written submission, paras. 5.13-5.75; second written submission, paras. 2.1-2.105; response to Panel question Nos. 4-7(a), 8(b)-8(c), 11, 13, 15, 17-18, 77, 78(b), 80, 81 and 82(b); comments on the Philippines' response to Panel question Nos. 78(b)-79, 82(a), 83; opening statement at the meeting of the Panel, paras. 78-95.

[285] Philippines' first written submission, para. 175; Thailand's first written submission, para. 5.2.

[286] Philippines' first written submission, paras. 175 and 229-231; Thailand's first written submission, para. 5.2. We note the Philippines' explanation that:

> A comparison of P&GE rates ... might shed light on whether the parties' relationship influenced the price. The logic is that, in a related-party context, the price paid or payable for imported goods might be *lower* than would prevail were the parties unrelated. By lowering the import price, the importer would reduce its cost of goods sold, as well as its liability for customs duties and internal taxes assessed on the transaction value. However, the importer would still resell its goods in the country of importation at the prevailing market price. As a result, there would be a larger net difference between the importer's sales revenues and its cost of goods sold plus fiscal charges. Thus, relative to an importer purchasing the same goods from an unrelated party, sales of the imported goods would generate a *higher* P&GE rate, which is the difference between sales revenue and cost of goods sold plus fiscal charges, expressed as a percentage of sales revenue. (Philippines' first written submission, para. 230 (emphasis original))

flawed in ways that render the examination inconsistent with Article 1.2(a) of the *CVA*."[287] We proceed with our analysis on the understanding that a comparison of P&GE rates between PMTL and an industry benchmark is, in principle, a valid methodology for determining whether the relationship between PMTL and PM Indonesia influenced the price.

7.2.2.2 Main arguments of the parties

7.93. The Philippines argues that an examination of the circumstances of sale, under Article 1.2(a), must consist of a rigorous and critical examination that observes due process, and covers "all relevant aspects of the transaction".[288] According to the Philippines, the transaction value must be used unless the customs authority has grounds rooted in objective, positive evidence for regarding the transaction value as unacceptable.[289]

7.94. Regarding the BoA's examination of the circumstances of sale, the Philippines first argues that the BoA constructed an improper industry group to compare against PMTL's P&GE rates. Specifically, the Philippines argues that the selection of the companies included in the industry group was inconsistent with the requirements of Article 1.2(a), second sentence, because the inclusion of PMTL itself sheds no light on whether PMTL's sale was consistent with the industry standard, and the P&GE rates of the other companies included in the industry group were not comparable to PMTL's P&GE rate since those companies did not make sales of imported cigarettes at the wholesale level.[290] The Philippines also argues that, if the companies selected in the group were appropriate, then the BoA should have also included two other companies that it chose to exclude.[291] Additionally, in the Philippines' view, regardless of whether the companies included in the group were appropriate, the BoA improperly excluded two companies that were appropriate comparators, and which therefore should have been included in the industry group.[292]

7.95. Second, the Philippines argues that the way in which the BoA determined the benchmark range, on the basis of the industry group, was flawed. The Philippines considers that the BoA inappropriately determined the P&GE rates for the companies in the group, by using different definitions of "profit" in the numerator, compared to the denominator, when applying the calculation to determine P&GE.[293] Additionally, the Philippines argues that the BoA used an inappropriate figure in respect of PMTL's P&GE rate when determining the benchmark range.[294] Furthermore, the Philippines argues that the BoA inappropriately relied on a simple average instead of a weighted average when calculating an average P&GE rate for the industry group, thereby failing to take into account the differences in sales volumes of the companies in the industry group.[295] The Philippines also submits that the BoA inappropriately determined the benchmark range using the statistical tool of "standard error".[296]

7.96. Third, the Philippines argues that the BoA conducted an improper comparison between PMTL's P&GE rates and the benchmark range, because the BoA incorrectly relied on a strict quantitative test to assess whether the BoA's rates were consistent with the benchmark range, without taking into account qualitative factors that may have explained apparent discrepancies in the comparison of

[287] Philippines' first written submission, para. 232. (emphasis original) See also Philippines' comments on Thailand's response to Panel question No. 73.

[288] Philippines' first written submission, paras. 162 and 168 (referring to Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.191). See also Philippines' second written submission, paras. 93-95.

[289] Philippines' first written submission, paras. 155, 160 and 169.

[290] Philippines' first written submission, paras. 241-257; second written submission, paras. 111-153; response to Panel question Nos. 6, 7(b) and 78-79; comments on Thailand's response to Panel question No. 78(b); opening statement at the meeting of the Panel, paras. 16-22.

[291] Philippines' first written submission 258-261 and 265-268; second written submission, paras. 177-186; response to Panel question Nos. 10-11, 80, 82(a); comments on Thailand's response to Panel question No. 82(b); opening statement at the meeting of the Panel, paras. 25-26.

[292] Philippines' first written submission, paras. 258-264; second written submission, paras. 157-177; response to Panel question Nos. 8(a), 8(c), 9, 80; comments on Thailand's response to Panel question No. 81; opening statement at the meeting of the Panel, para. 24.

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

[294] Philippines' first written submission, paras. 282-288; second written submission, paras. 199-212; response to Panel question No. 14.

[295] Philippines' first written submission, paras. 269-279; second written submission, paras. 187-198; response to Panel question Nos. 23 and 83.

[296] Philippines' first written submission, paras. 296-324; second written submission, paras. 226-260; response to Panel question Nos. 16 and 84; opening statement at the meeting of the Panel, paras. 27-33.

P&GE rates.[297] Additionally, the Philippines notes that the BoA apparently used two rates for PMTL when comparing PMTL to the benchmark range, and that both of these rates were different to the P&GE rate used in respect of PMTL when calculating the industry average rate.[298] The Philippines argues that the BoA should have been consistent, and used a single P&GE rate for PMTL both when determining the benchmark range, and when comparing PMTL to that range.

7.97. In Thailand's view, the BoA reasonably determined that the relationship between PMTL and PM Indonesia affected the transaction value. Thailand considers that the BoA's choice of a benchmark comparison group was reasonable, because the BoA acted impartially and objectively by selecting the companies based on information received from the Thai Business Development Department, and which information was based on a Thai industrial classification identifying companies in the business of "wholesale of tobacco and tobacco products".[299] Thailand considers that the inclusion of PMTL in the industry group was reasonable and appropriate.[300] Thailand explains that the BoA excluded certain companies from the list on the basis of objectively justifiable reasons, including companies whose P&GE rates were disproportionately high, and companies for whom the BoA could not find relevant financial information.[301] Thailand explains that the BoA excluded loss-making companies from the group, and that a company's loss-making status is a sufficient reason to exclude it from an industry group, on the basis that loss-making companies do not reflect P&GE in the ordinary course of trade.[302] Thailand argues that the BoA's approach was reasonable in light of the difficulties of constructing a relevant group of comparator companies with which to compare PMTL's P&GE rates, and highlights that such realities, and the consequential necessity of relying on companies outside the cigarette sector, are acknowledged by a representative of PMTL itself.[303]

7.98. Regarding the determination of the benchmark range, Thailand argues that the BoA's calculation of P&GE rates "was used consistently for all companies in the group" and that, even if the denominator had been based on total income, there "would have been no effect on the overall calculation."[304] Regarding the determination of PMTL's P&GE rate, Thailand explains that the BoA used the rate of 9.22% in order to be consistent with how the rates were established for the other companies included in the benchmark group.[305] Regarding the use of a simple average, instead of a weighted average, Thailand explains that, had the BoA weighted the calculation of the industry average, the volume of PMTL's sales would have "led to the BoA comparing PM Thailand with itself", meaning that PMTL "would not be subject to scrutiny simply because it was the largest importer."[306] Thailand also argues that the BoA's reliance on "standard error" to establish a benchmark range of P&GE rates to compare against PMTL's P&GE rate was reasonable.[307]

7.99. Regarding the comparison of PMTL to the benchmark range, Thailand considers that the BoA's determination of whether PMTL's rates were consistent with those of the industry group was objective and reasonable.[308] Additionally, Thailand considers that the BoA did not act inconsistently with Article 1.2(a) by comparing two distinct rates for PMTL to the benchmark range.[309]

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[297] Philippines' first written submission, paras. 325-337; second written submission, paras. 261-276; response to Panel question Nos. 19 and 83.

[298] Philippines' first written submission, paras. 282-288; second written submission, 199-212; response to Panel question No. 14.

[299] Thailand's response to Panel question No. 6. See also Thailand's response to Panel question Nos. 13 and 80; comments on the Philippines' response to Panel question No. 79.

[300] Thailand's second written submission, para. 2.50; response to Panel question Nos. 7(a) and 78(b); comments on the Philippines' response to Panel question No. 78(b).

[301] Thailand's first written submission, fn 66; second written submission, paras. 2.43-2.46; response to Panel question Nos. 11 and 82; comments on the Philippines' response to Panel question No. 82.

[302] Thailand's first written submission, paras. 5.18-5.27; second written submission, para. 2.42; response to Panel question Nos. 8(b)-8(c) and 81; opening statement at the meeting of the Panel, para. 83.

[303] Thailand's first written submission, paras. 5.21, 5.31-5.32 and 5.36-5.37; second written submission, paras. 2.40-2.41 and 2.47; response to Panel question Nos. 6 and 13; comments on the Philippines' response to Panel question No. 79; opening statement at the meeting of the Panel, para. 84.

[304] Thailand's response to Panel question No. 15, p. 17 (referring to Calculations of P&GE ratios/ranges, (Exhibit THA-40)). See also Thailand's second written submission, para. 2.59.

[305] Thailand's second written submission, paras. 2.61-2.66.

[306] Thailand's first written submission, para. 5.35. See also Thailand's second written submission, para. 2.49; comments on the Philippines' response to Panel question No. 83.

[307] Thailand's first written submission, paras. 5.48-5.75; second written submission, paras. 2.69-2.78; response to Panel question No. 17.

[308] Thailand's first written submission, paras. 5.49-5.75; second written submission, para. 2.76-2.78; response to Panel question No. 18; opening statement at the meeting of the Panel, paras. 87-92.

[309] Thailand's first written submission, paras. 5.45-5.46; second written submission, para. 2.66.

7.2.2.3 Analysis by the Panel

7.2.2.3.1 General considerations

7.100. Article 1.1 (d) of the CVA states that:

> The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:
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> ...
>
> (d) 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.

7.101. Article 1.2(a) of the CVA elaborates two distinct but related obligations, in its second and third sentences. It states that:

> In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. *In 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.* If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, *it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond*. If the importer so requests, the communication of the grounds shall be in writing.[310]

7.102. Thus, Article 1.1 provides that, in principle, a customs authority must use the transaction value of the imported goods as the customs value. Article 1.1(d) read in conjunction with Article 1.2(a) clarifies that this applies also in situations in which the buyer and the seller are related, unless it is established that the relationship influenced the price. If a customs authority has doubts as to whether the relationship between the buyer and seller affected the price, then under Article 1.2(a), second sentence, the customs authority must examine the circumstances surrounding the sale, and the customs authority may reject the transaction value if the customs authority establishes that the relationship influenced the price. Article 1.2(a), third sentence, also requires that if the customs administration has grounds for considering that the relationship influenced the price, it must communicate those grounds to the importer and the importer must be given a reasonable opportunity to respond, before the customs authority makes its final determination.

7.103. There is no disagreement between the parties that if the BoA's examination of the circumstances of sale was not in accordance with the substantive requirements contained in the second sentence of Article 1.2(a), then it would automatically entail a consequential violation of Article 1.1. In accordance with the findings of the original panel, we proceed on that basis.[311] Accordingly, our analysis of the Philippines' claims under Articles 1.1 and 1.2(a) focuses on the legal standards under Article 1.2(a). In this section of our Report we address the Philippines' claim under the second sentence of Article 1.2(a), and in Section 7.2.3 below we address the Philippines' claim under the third sentence of Article 1.2(a).

7.104. The parties agree that Article 1.2(a) "does not prescribe a specific process for customs authorities to follow", and that the customs authority "has a degree of discretion in deciding how to conduct its examination".[312] We agree. In this respect, we recall the original panel's findings that the term "examine" means to "inquire into, investigate or consider critically", similarly to the word "investigate", which means "[s]earch or inquire into; examine (a matter) systematically or in detail;

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[310] Emphasis added.

[311] See, e.g. Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.195 and 8.2(b).

[312] Philippines' first written submission, paras. 171 and 559. See also Thailand's first written submission, paras. 4.8-4.10; second written submission, paras. 2.8-2.17.

make an (official) inquiry into".[313] We note that the interpretative notes concerning Article 1.2(a), as well as Article 1.2(b), all indicate methods that may be used to determine whether the relationship between the buyer and seller influenced the price. We also note that the object and purpose of an examination of the circumstances of sale under Article 1.2(a) is to reveal whether the price was influenced by the relationship between the buyer and seller. Given the foregoing, we consider that, although Article 1.2(a) does not prescribe any particular means or methodology that must be followed by a customs authority in examining the circumstances of sale, the chosen means or methodology must be capable of, and suitable for, revealing whether the relationship between the buyer and seller influenced the price. We therefore agree with the Philippines that an examination of the circumstances of sale under Article 1.2(a) must be apt to reveal whether the relationship between the buyer and seller influenced the price.

7.105. We note that the CVA and its accompanying interpretative notes provide guidance and instruction on a number of aspects of customs valuation that may be relevant to determining whether a particular examination of the circumstances of sale is apt to reveal whether the relationship influenced the price. Given the discretion that the CVA accords to the customs authority in determining its approach to examining the circumstances of sale, we do not consider it appropriate to indicate in the abstract any specific principles, beyond those articulated above, that would bind a customs authority in any and all situations. Rather, we consider that a determination of whether the customs authority has acted consistently with the legal standard above may be informed by the context provided by the other provisions of the CVA, on a case-by-case basis. To that end we address below, in the context of the specific arguments of the parties, the extent to which other provisions of the CVA inform our determination of whether the BoA's examination of the circumstances of sale was apt to reveal whether the relationship between the buyer and seller influenced the price.

7.106. Regarding the legal standard under Article 1.2(a), second sentence, we recall the findings of the original panel that the customs authority's examination must consist of a process of consultations as between the importer and the customs authority:

> [I]n order to properly examine the circumstances of a given transaction, the customs authority must clearly indicate to the importer how it evaluates the information submitted by the importer, including the insufficiency of the information submitted and, if necessary and feasible, any further particular type of information that may help them assess the validity of the transaction value.
>
> ...
>
> [C]ustoms authorities and importers have respective responsibilities under Article 1.2(a). The customs authorities must ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price. Importers are responsible for providing information that would enable the customs authority to examine and assess the circumstances of sale so as to determine the acceptability of the transaction value. Provided with such information, the 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.
>
> ... The process of examining the circumstances of the sale under Article 1.2(a) therefore resembles that of consultation as both the importer and the customs administration respectively need to make a good faith effort on the one hand to provide relevant information and on the other hand to provide a reasonable opportunity to the importer to submit information and review the information provided in reaching a final determination.[314]

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[313] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.158 (referring to *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, 2002, Vol. I, p. 1417 (2002)).

[314] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.164 and 7.171-7.172. The original panel also stated, regarding the burden of proof, that:

> [T]he nature of the obligations under Article 1.2(a) can be clarified on the basis of the text of Article 1.2(a) considered in its context and in the light of the objective and purpose of the Customs Valuation Agreement. Therefore, to that extent, we do not consider it necessary to address the applicability of the notion of burden of proof in the context of the Customs Valuation

7.107. The parties disagree on whether the legal standard under Article 1.2(a) requires that the customs authority conduct a "rigorous and critical" examination of the circumstances of sale, as the Philippines puts it[315], or alternatively whether, in order to prevail on a claim under Article 1.2(a), a complainant must demonstrate that the customs authority's determination was "inherently unreasonable", "not objective", or "biased", as Thailand argues.[316] In our view, the essential requirement under Article 1.2(a), second sentence, is that an examination of the circumstances of sale must be apt to reveal whether the relationship between the buyer and seller influenced the price. To that end, it appears inevitable that a biased, arbitrary, or unreasonable examination would indeed be inapt to reveal whether the relationship influenced the price. We also consider it probable that an examination that is neither rigorous nor critical would fail to satisfy this requirement. Fundamentally, however, the assessment of whether a customs authority satisfied the requirements of Article 1.2(a) must be based on whether the examination was apt to reveal whether the relationship between the buyer and seller influenced the price.

7.108. We note that Thailand has argued that, in considering the issues pertaining to the BoA Ruling in this dispute, the Panel's mandate is limited to determining whether the BoA acted "reasonably", and that the issues should be framed in terms of the reasonableness of the BoA's approach.[317] The Philippines, for its part, considers that Thailand seeks to substitute "a general standard of reasonableness" for the specific legal standards that are set forth in the CVA.[318] We take it both as a given, and as a requirement under Article 3.2 of the DSU, that an interpreter cannot simply substitute an abstract standard of "reasonableness" for the specific legal standards set forth in a treaty. Rather, we consider that the extent to which considerations of reasonableness may be taken into account in assessing a Member's consistency with any provision of the covered agreements is a function of the particular provisions.[319] In this respect, we have set forth both our standard of review[320], and the legal standard under Article 1.2(a), second sentence,[321] above. In accordance with our standard of review, and the relevant legal standard under Article 1.2(a), second sentence, we proceed with our analysis by making an objective assessment of whether the BoA properly rejected the transaction value by examining the circumstances of sale within the meaning of Article 1.2(a).[322]

7.109. Having said that, we do not understand Thailand to suggest that the Panel should substitute a general standard of "reasonableness" in place of specific legal standards in the CVA. Rather, we

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Agreement for the purpose of resolving the present dispute. (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.173)

[315] See, e.g. Philippines' first written submission, paras. 168 and 224; second written submission, para. 94.

[316] See, e.g. Thailand's first written submission, paras. 5.39 and 5.75; second written submission, paras. 2.53-2.54, 2.67, and 2.78; response to Panel question Nos. 6(c)(ii), 8(b), 11(a), 13, and 18; and comments on the Philippines' response to Panel question Nos. 73, 78 and 79.

[317] Thailand's first written submission, paras.4.1-4.12 and 5.9-5.12; second written submission, paras. 2.1-2.37; response to Panel question No. 4.

[318] Philippines' second written submission, paras. 11, 72, 76, 78, and 231. In the Philippines' view, "Thailand's position that the Panel should apply a deferential 'reasonableness' standard … seems to infect its arguments regarding the legal standards to be applied by the Panel." (Philippines' second written submission, para. 67) The Philippines elaborates that "Thailand conspicuously fails to engage in any such examination of the relevant treaty text … Thailand repeatedly argues that the issue is whether the BoA's 'decision', 'approach', 'methodology', or 'determination' was 'reasonable' … A reader of Thailand's submission would be forgiven for thinking that Articles 1.1, 1.2(a), and 5.1 of the *CVA* were drafted to include a 'reasonableness' obligation." (Philippines' second written submission, paras. 74 and 76) The Philippines considers that "[i]n proposing that the BoA's determination must be assessed under a standard of reasonableness, Thailand simply ignores the relevant treaty language". (Philippines' second written submission, para. 83)

[319] For example, in *EU – Biodiesel*, the Appellate Body rejected the respondent's argument that the obligation in Article 2.2.1.1 of the Anti-Dumping Agreement is qualified by, or informed by, a "general standard of reasonableness". (Appellate Body Report, *EU – Biodiesel*, paras. 6.35-6.39) We also note that, as Thailand rightly points out, "[t]here are other provisions in the covered agreements that do not refer to 'reasonableness' and nonetheless have been construed as requiring that aspect in the adoption of the measures at issue. For instance, in the evaluation of a justification under Articles XX(a), (b) or (d) of the GATT 1994, a panel must look at whether the national authorities had considered reasonable alternative means to the challenged measure, even though there is no express reference to that requirement in those provisions." (Thailand's second written submission, para. 2.23). In our view, whether a particular provision involves an element of reasonableness must be assessed in accordance with the interpretative principles set forth under Article 3.2 of the DSU.

[320] See Section 7.2.1.5.

[321] See paragraphs 7.100. to 7.107. above.

[322] See Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.99-7.101.

construe Thailand's arguments relating to "reasonableness" in the context of discussing the applicable legal standards in the CVA to be another way of saying that, insofar as the CVA does not prescribe a specific process for customs authorities to follow, they have a degree of discretion in deciding how to conduct the examination, and it is not for a treaty interpreter to read terms into the text that are not there.[323] As already indicated, we agree that, as a matter of treaty interpretation, authorities enjoy a degree of discretion with respect to matters not prescribed by the text of the provision. Furthermore, we construe Thailand's arguments relating to "reasonableness" in the context of discussing our standard of review, which should not be conflated with the question of the applicable legal standards in the CVA, to be another way of saying that the Panel should not engage in a *de novo* review. We have already indicated our agreement with this understanding as well.

7.110. We note that during this proceeding the parties exchanged views on the applicability and relevance of Article 17.6(i) of the Anti-Dumping Agreement to the Panel's standard of review under the CVA.[324] In this respect, we agree with the Philippines that, by its express terms, Article 17.6(i) applies to matters within the scope of the Anti-Dumping Agreement, and is not directly applicable to matters arising under the CVA. Having said that, certain aspects of the standard of review articulated in relation to the Anti-Dumping Agreement may nonetheless be analogous to, and in some respects inform and provide guidance on, the standard of review to be followed under one or more other covered agreements.[325] Indeed, certain aspects of the standard of review under the Anti-Dumping Agreement have informed our approach to certain issues arising in relation to the standard of review under the CVA.[326]

7.111. Additionally, we note that the parties and third parties have expressed different views on the extent to which a panel's assessment of a customs authority's examination of the circumstances of sale must take into account the "effect or impact" on the final determination.[327] In our view, our reliance on the legal standard articulated above largely resolves this issue. Insofar as we find that there is a flaw or shortcoming in the examination that renders the examination inapt to reveal whether the relationship between the buyer and seller influenced the price, then there is a violation of the obligation in Article 1.2(a), second sentence. However, insofar as we find a flaw or shortcoming in the examination, but consider that the nature of the flaw or shortcoming does not render the examination inapt to reveal whether the relationship between the buyer and seller influenced the price − because the flaw or shortcoming is not sufficiently "serious" or "consequential", or for some other reason − then we would conclude that there is no violation of Article 1.2(a), second sentence. An assessment of whether a flaw or shortcoming in the examination of the circumstances of sale is

[323] See, e.g. Thailand's second written submission, paras. 2.24-2.28.

[324] See Thailand's first written submission, paras. 5.9-5.12; Thailand's second written submission, paras. 2.2-2.14 and 2.31-2.32; Philippines' second written submission, paras. 38-84; Philippines' response to Panel question Nos. 4, 5 and 94; and Philippines' opening statement, paras. 5-14.

[325] Generally speaking, the standard of review articulated in relation to the Anti-Dumping Agreement is similar to the standard of review under the SCM Agreement and the Agreement on Safeguards, insofar as factual issues are concerned. One of the main reasons for this is that Article 11 of the DSU, which applies to all of the covered agreements other than the Anti-Dumping Agreement, has been understood as establishing a standard of review that is, at its core, very similar to the standard of review expressed in Article 17.6(i) of the Anti-Dumping Agreement. (See, e.g. Panel Report, *US − Softwood Lumber VI*, paras. 7.15-7.18)

[326] See, e.g. paragraphs 7.112. and 7.117. below. Having set forth our understanding of the applicable standard of review under the CVA that is relevant to our assessment of the issues raised in this proceeding (see paragraphs 7.85. to 7.87. above, read together with our further observations in paragraphs 7.108. to 7.109. above and paragraphs 7.111. to 7.121. below), we do not consider it necessary to embark on the exercise of further elaborating on the extent to which the standard of review under Article 17.6(i) of the Anti-Dumping Agreement is similar to, or different from, the standard of review under the CVA.

[327] In its third-party submission, the European Union stated that the Panel must be certain that the authority's error is "sufficiently serious and consequential to justify a finding of error". (European Union's third party submission, para. 14. See also European Union's third-party statement at the meeting of the Panel, para. 2) Thailand agrees, and also submits that "a panel should consider whether a particular flaw is sufficiently serious to justify finding of inconsistency". (Thailand's response to Panel question no. 71, p. 6) The Philippines disagrees with Thailand and the European Union, and argues that "[i]t is not necessary for the Panel to determine the relative impact that each of the alleged flaws had on the BoA's P&GE calculation in order to determine whether the alleged flaw gives rise to an inconsistency with Articles 1.1 and 1.2(a)", and that "[a]ny shortcoming in an administration's determination in these respects amounts to a violation of these treaty provisions, with no additional requirement to demonstrate that a particular shortcoming had a particular factual effect or impact on the administration's determination". (Philippines' response to Panel question No. 2(b), paras. 19 and 22. See also Philippines' comment on Thailand's response to Panel question No. 71) We note that Canada also comments on this issue, stating that "some flaws may be minor enough on their own to not warrant a finding of a violation under Article 1.2(a). However, when combined with other flaws, the cumulative effect may amount to a clear violation." (Canada's third-party response to Panel question No. 3(a), para. 45)

"sufficiently serious and consequential" is, to that extent, inherent in the legal standard that we have articulated above.

7.112. In our view, consideration of whether a flaw or shortcoming is sufficiently serious or consequential as to render the examination inapt to reveal whether the relationship between the buyer and seller influenced the price is distinct, however, from any attempt to embark on an assessment of how a particular flaw or shortcoming may have affected the calculations performed by the authority, or would have altered the overall outcome reached by the authority. To the extent that the parties' disagreement extends to whether a particular examination of the circumstances of sale (or aspect of that examination) must have gone against the interests of the importer in order to be found to be inconsistent with Article 1.2(a), second sentence, we wish to clarify that a determination may be found to be inconsistent with the obligation in Article 1.2(a), second sentence, regardless of the impact (if any) of the flaw or shortcoming on the final outcome of the determination.[328]

7.113. As a final observation in respect of the legal standard under Article 1.2(a), second sentence, we recall that the original panel considered that the notion of the "burden of proof" may not be central to the assessment of whether or not a Member has complied with its obligations under the CVA, including, in particular, with respect to the examination of the circumstances of sale in a related-party transaction under Article 1.2(a) of the CVA.[329] To the extent that issues regarding the burden of proof on an importer or customs authority do arise in this proceeding, we address them in the context of our substantive analysis below.

7.114. Before proceeding to assess the parties' arguments under Article 1.2(a), second sentence, we note that another general issue concerns the relevant evidence upon which we base our assessment of those arguments. In setting forth the standard of review in respect of Article 1.2(a) of the CVA, the original panel explained that its assessment would be based on the customs authority's "grounds" for considering that the relationship influenced the price, as required to be communicated by the customs authority to the importer under the third sentence of Article 1.2(a), as well as the "explanation" that was provided by the customs authority to the importer, as required under Article 16, upon request from the importer.[330] The original panel also based its analysis under Article 1.2(a), second sentence, on letters sent between the customs authority and the importer, as

[328] We note that in *US – Orange Juice (Brazil)*, the panel found a violation of Article 2.4 of the Anti-Dumping Agreement through the use of zeroing, even though the zeroing had no impact on the amount of anti-dumping duties actually collected. (Panel Report, *US – Orange Juice (Brazil)*, paras. 7.156-7.157) In *US - Zeroing (Japan – Article 21.5*), the panel found that a sunset review failed to comply with the requirements of Article 11.3 due to the United States' reliance on dumping margins determined through zeroing, and rejected the United States' argument that the reliance on margins calculated through zeroing was not material because its investigating authority would have made the same determination anyway. (Panel Report, *US – Zeroing (Japan – Article 21.5)*, paras. 7.222-7.229) Article 3.8 of the DSU indicates that "where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", and that "there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge." The Appellate Body has also found that "the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82) We further note that the Appellate Body and a number of panels have previously found, in the context of specific provisions of the covered agreements, that the "impact" or "trade effects" of a Member's act need not be demonstrated when assessing the WTO-consistency of that act. (See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23, DSR 1996:I, 97, at p. 115; and Panel Reports, *Russia – Tariff Treatment*, paras. 7.18-7.20; *EC – IT Products*, para. 7.757; *Argentina – Hides and Leather*, para. 11.20; *US – Orange Juice (Brazil)*, para. 7.156)

[329] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.173. The original panel stated:

> As a final observation, we note that in the course of this dispute, the parties have contested the applicability of the principle of the burden of proof to the Customs Valuation Agreement, in particular with respect to the examination of the circumstances of sale in a related-party transaction. As our analysis above illustrates, the nature of the obligations under Article 1.2(a) can be clarified on the basis of the text of Article 1.2(a) considered in its context and in the light of the objective and purpose of the Customs Valuation Agreement. Therefore, to that extent, we do not consider it necessary to address the applicability of the notion of burden of proof in the context of the Customs Valuation Agreement for the purpose of resolving the present dispute.

[330] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.106 and 7.182.

well as the minutes of a meeting held between the customs authority and representatives of the importer.[331]

7.115. In this proceeding, the Philippines argues that "in assessing whether a Member has complied with its substantive obligation to examine the circumstances of sale, a panel must review all available contemporaneous evidence relating to the examination, such as meeting minutes … [S]uch other evidence sheds light on the substance of the examination conducted, whether or not the evidence forms part of the grounds and explanation."[332] Specifically, the Philippines submits that such contemporaneous evidence includes the BoA Ruling itself, the minutes of internal BoA meetings held on 14 January 2010 and 26 September 2012 that allegedly constitute part of the "decision-making process", certain "BoA memoranda and presentations", a letter sent by the Customs Department to PMTL on 16 June 2016 in response to PMTL's December 2012 request for an explanation, and explanations that were provided by Thailand to the Philippines (but that were not provided to PMTL), attached to a letter dated 27 March 2014.[333] In support of its view, the Philippines argues that "[i]t is well established that a panel should examine evidence on the record of a domestic administration, in addition to the administration's explanation of its decision" and that the additional evidence "reveal[s] important elements of the BoA's examination of the facts that were critical to its ultimate decision."[334]

7.116. For its part, Thailand considers that "the BoA decision should be read in conjunction with the minutes of the meeting of 26 September [2012]", but that documents "prepared after the BoA's decision by officials that [w]ere not directly involved in the BoA's process … do not form part of the decision".[335] Thailand agrees that "in certain situations, it is appropriate to examine contemporaneous evidence when examining the consistency with the CVA of a customs value determination".[336] Thailand explains, however, that documents that do not "constitute[] exchanges or interactions between the customs administration and the importer… cannot be considered 'contemporaneous evidence'".[337]

7.117. As the original panel noted, the Appellate Body has indicated in the context of the Safeguards Agreement that, "where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled … [and] the panel has no option but to find that the competent authority has not performed the analysis correctly."[338] However, the Appellate Body has also explained that the standard of review under the Anti-Dumping Agreement does not "prevent a panel from examining *facts* that were not disclosed to, or discernible by, the interested parties at the time of the final determination."[339] Furthermore, in the context of reviewing a countervailing duty determination, the Appellate Body has stated that, "in principle, a panel must review the conduct of an investigating authority in the light of information contained *on the record* and the explanations given … in [the] published report".[340] In the latter dispute, the Appellate Body upheld the panel's examination of the investigating authority's preliminary and final determinations, as well as "other contemporaneous … document[s]".[341] Most pertinently, in a dispute concerning an anti-dumping investigation, the Appellate Body upheld the panel's assessment of the complainant's

[331] See Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.182-7.194 and fn 591. See also Thailand's comments on the Philippines' response to Panel question No. 72(a).

[332] Philippines' response to Panel question No.72, para. 24.

[333] Philippines' response to Panel question Nos. 5; 72, para. 30; and 73, para. 33.

[334] Philippines' response to Panel question No. 5, paras. 67-68.

[335] Thailand's response to Panel question No. 5, pp. 9-10.

[336] Thailand's comments on the Philippines' response to Panel question No. 72(a), p. 8.

[337] Thailand's comments on the Philippines' response to Panel question No. 72(a), p. 8.

[338] Appellate Body Report, *US – Steel Safeguards*, para. 303. See also Panel Report, *Thailand – Cigarettes (Philippines)*, fn 499.

[339] Appellate Body Report, *Thailand – H-Beams*, para. 118. (emphasis added)

[340] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.273. (emphasis added)

[341] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.273 (quoting Panel Report, *US – Carbon Steel (India)*, para. 7.154). Applying that standard in *US – Tyres (China)*, the Appellate Body considered that "[t]he fact that the Panel may have examined evidence or data on the record that the [investigating authority] did not refer to specifically in its determination does not establish that the Panel conducted an improper review of the USITC determination." (Appellate Body Report, *US – Tyres (China)*, para. 330) This approach was also followed by the panel in *EC – Salmon,* which stated that "in order for … information to be put before a [p]anel to support an argument in dispute settlement, such information must be reflected in the published determinations, *or at a minimum in other documents in the files of the investigating authority and brought before us in a form that demonstrates that it was available to and considered by the investigating authority in establishing the facts*." (Panel Report, *EC – Salmon*, para. 7.843 (emphasis added))

substantive claim under Article 3.4 of the Anti-Dumping Agreement on the basis of an "internal 'note for the file'" that was not disclosed to the interested parties during the investigation.[342] The Appellate Body emphasized in its reasoning that the panel had taken "steps to assure [itself] of the validity" of the relevant exhibit, and to establish that the document formed "part of the contemporaneous written record of the … investigation".[343]

7.118. We note that the Philippines in this proceeding has argued that the "grounds", "reasons", and "explanations" provided by the BoA to PMTL during and after the process of conducting the customs determination, are, respectively, inconsistent with Article 1.2(a), third sentence, Article 11.3, and Article 16 of the CVA.[344] Without prejudice to our findings on those claims, we note in particular that the Philippines has argued that the explanation provided in the BoA Ruling itself is not only incomplete, but is factually inaccurate regarding the BoA's method of examining the circumstances of sale.[345] Furthermore, we emphasize that the Philippines as the complainant has *not* requested us to make findings solely on the basis of information contained in the BoA Ruling itself, but has insisted that our assessment of the BoA's examination of the circumstances of sale should take into account all relevant contemporaneous evidence − which the Philippines has provided as exhibits to substantiate its claims.

7.119. In the context of reviewing a customs valuation determination, a WTO dispute settlement panel should be wary of assigning undue weight to documentary evidence that was not communicated to the importer at the time of the determination. At the same time, we do not consider that any potential failings by a customs authority to properly explain its customs valuation determination to the importer should serve to shield its actual determination from being assessed for its substantive consistency with the CVA. Insofar as another Member brings claims before a WTO panel that necessitate an assessment of how the authority actually conducted its examination, the complainant bears the burden of establishing the facts as to how the authority actually conducted its examination. Indeed, the circumstances surrounding the determination may be such that the complainant has no means of establishing how the authority actually conducted its examination other than on the basis of documentary evidence that was not provided to the importer at the time of the customs valuation determination. In such circumstances, it could be inconsistent with the panel's function under Article 11 of the DSU if it were to disregard documentary evidence that sheds light on how the authority actually conducted its examination, and instead made only a truncated assessment of the matter based solely on information provided to the importer at the time of the determination. This is particularly relevant in circumstances where the complainant claims that relevant information was not communicated to the importer, or the information that was communicated to the importer was insufficient to understand how the authority conducted its examination (for instance, on the basis that the information provided was factually inaccurate).

7.120. Therefore, we consider that, in the circumstances of this case, it is appropriate to assess the Philippines' claim under Article 1.2(a), second sentence, on the basis of evidence comprising part of the written record of the determination, regardless of whether it was communicated to the importer at the time of the determination. We recognize that there may be no official "record" of a customs authority's determination, in contrast to the record that exists in an anti-dumping, countervailing duty, or safeguards investigation. However, in our view, documents that pertain to the customs authority's decision-making process, and that were demonstrably a part of the customs valuation process, may be construed to be part of the "record" for our purposes. Such evidence necessarily includes communications between the importer (PMTL) and the customs authority (the BoA)[346] both during and after the customs determination, as well as evidence in the form of documents that were not communicated by the BoA to the importer, but nonetheless constitute a part of the BoA's decision-making process and shed light on how the BoA actually conducted its examination. We do not consider it necessary at this stage to identify all relevant documents that satisfy this standard. Rather we proceed with our analysis, and identify therein the evidence upon which we rely in respect of different aspects of the parties' arguments, by applying the legal standard articulated here.[347]

[342] See Appellate Body Report, *EC − Pipe Fittings*, paras. 119-128.
[343] Appellate Body Report, *EC − Pipe Fittings*, para. 127 (quoting Panel Report, *EC − Pipe Fittings*, para. 7.307).
[344] See Sections 7.2.3 , 7.2.7 and 7.2.8 below.
[345] See, e.g. Philippines' first written submission, para. 379; second written submission, para. 115.
[346] And vice-versa.
[347] See footnotes 349, 356, 392, 429, 445 and 517 below.

7.121. Having said that, we are not suggesting that a respondent can justify the actions of a customs authority on the basis of reasons or rationalizations that were not relied upon by the customs authority itself at the time it conducted the customs valuation determination. The Appellate Body has cautioned that a Member may not rely on *ex post* rationalizations of an authority's conduct in WTO dispute settlement.[348] We therefore consider that Thailand cannot seek to justify the BoA's actions on the basis of any *ex post* rationalizations that are not substantiated by any of the documents on the record of the customs valuation determination.

7.2.2.3.2 The BoA's examination of the circumstances of sale

7.122. It is uncontested by the parties, and borne out by the evidence, that the BoA conducted the following process for examining the circumstances of sale for the purpose of determining whether the relationship between PMTL and PM Indonesia influenced the transaction value:

a. The BoA constructed an "industry group" of five companies;

b. The BoA determined P&GE rates for each of the five companies in the industry group;

c. The BoA calculated an "industry average" P&GE rate of 12.44% for the five companies, using a simple average calculation;

d. From that industry average, the BoA constructed a "benchmark range" of P&GE rates falling between 9.8% and 15.08%, by adding and subtracting 2.64% from the industry average of 12.44%; and

e. The BoA compared two different P&GE rates for PMTL, namely 9.36% and 18.47%, against the benchmark range, and concluded that, because PMTL's rates fell outside the benchmark range, the transaction value was "influenced by the relationship between the purchaser and seller".[349]

7.123. The Philippines has raised a number of different arguments concerning alleged flaws in the BoA's examination of the circumstances of sale, each of which, in the Philippines' view, individually "constitutes a sufficient basis for a finding of violation".[350] However, the Philippines has also clarified that is making a single claim under Article 1.2(a), second sentence, and is only requesting a single finding of inconsistency.[351] The Philippines has also indicated that in analysing the various grounds raised by the Philippines, "the Panel enjoys a degree of discretion in organizing its analysis … [and] could evaluate each ground separately or it could group inter-connected grounds together – for example, when dealing with the various arguments raised in respect of the comparator group constructed by the BoA as part of its circumstances of sale test."[352] We note that two of the third

[348] See, e.g. Appellate Body Reports, *Japan – DRAMs (Korea)*, para. 159; *US – Tyres (China)*, para. 329.

[349] See BoA Ruling, (Exhibit PHL-21-B), pp. 2-4; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), pp. 7-9. We consider that the BoA Ruling and the Minutes of the BoA Meeting of 26 September 2012 both constitute documents "on the record" of the determination. We note that the BoA Ruling contains the reasons for the BoA's decision, as communicated to the importer. We recognize that the Minutes of the BoA Meeting were not communicated to the importer in the context of the customs valuation determination itself, but were only provided to PMTL in the course of the domestic court proceeding initiated by PMTL after the BoA Ruling was issued. (See Philippines' first written submission, para. 138; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B)) Nevertheless, we consider that these Minutes officially document the BoA's decision-making process. We also note that both the Philippines and Thailand argue that the Panel should take these Minutes into account in assessing the WTO-consistency of the BoA's determination. (See parties' responses to Panel question No. 5)

[350] Philippines' response to Panel question No. 70, para. 5. See also the Philippines' response to Panel question No. 2, paras. 11-12.

[351] Philippines' response to Panel question No. 70, para. 3.

[352] Philippines' response to Panel question No. 70, para. 8. The Philippines also indicates that, if "the Panel considers that these various flaws should be examined together, the Philippines' position is that, collectively, these flaws *a fortiori* constitute grounds for a violation of Articles 1.1 and 1.2(a)." (Philippines' response to Panel question No. 2, para. 12) The Philippines also identifies a number of aspects related to the BoA's determination of the benchmark range, which the Philippines indicates "the Panel may wish to consider … under a single heading in its report." (Philippines' response to Panel question No. 84, para. 146)

parties also suggest that we should conduct a "holistic assessment", or assess the BoA's examination of the circumstances of sale "as a whole".[353]

7.124. Panels have a degree of discretion as to how they structure their analysis, provided that they do not do so in such a way as to lead them to truncate their analysis prematurely, or foreclose consideration of crucial aspects of a party's arguments.[354] We find it useful to address certain of the Philippines' arguments together, insofar as they correspond to three different aspects of the BoA's examination. We therefore proceed by addressing, in turn, the Philippines' arguments concerning: (i) the BoA's composition of the industry group; (ii) the BoA's determination of the benchmark range (including the way in which the BoA determined the P&GE rates for the companies in the industry group); and (iii) the BoA's comparison between PMTL and the benchmark range.

7.125. While we group the issues raised into these three distinct aspects of the BoA Ruling, we stress at the outset that these issues involve interrelated aspects of the methodology and approach followed by the BoA. As integrally related aspects of a single methodology employed by the BoA, we do not consider that these aspects can be assessed in isolation from one another. In this regard, both parties share the understanding that the various aspects alleged by the Philippines are to be assessed by the Panel as constituting a single claim, rather than as a series of distinct claims.[355] We will therefore conduct a holistic examination of the totality of the facts to arrive at an overall conclusion, taking into account our intermediate findings in respect of these various aspects.

7.2.2.3.2.1 The composition of the industry group

7.126. As indicated above, to determine whether the price of the cigarettes was influenced by the relationship between PMTL and PM Indonesia, the BoA compared PMTL's P&GE rates with a range of P&GE rates. That range was based on an industry group that the BoA composed. The industry group consisted of five companies: PMTL itself, Lee Intertrade, Chemical Resins, Piriyapul International, and KHS.[356] In the BoA Ruling, and other documents on the record, this industry group was described as consisting of "wholesalers" of "imported cigarettes", and comprising information for the "sale of … goods of the same class or kind" as PMTL.[357]

7.127. The Philippines argues that the BoA's composition of the industry group was flawed, because: (i) the companies included in the industry group were not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price; (ii) the BoA excluded two companies from the industry group that should have been included in the industry group; and (iii) the BoA arbitrarily excluded two other companies that were, for the purposes of the comparison, as similar to PMTL as those companies that were included in the industry group.

7.128. We first set out the parties' arguments on these aspects of the BoA's approach, before proceeding with our analysis of the issues raised.

7.129. First, regarding the companies that were included in the industry group, the Philippines asserts that, as a general matter, under Article 1.2(a), an examination of the circumstances of sale in the form of a comparison must satisfy two "principles of comparability", namely that the

[353] See Canada's third-party response to Panel question No. 7(a), para. 44; United States' third-party response to Panel question No. 7(a), para. 40. The European Union also commented on this issue, stating that "[t]he question of whether individual flaws should be considered as undermining the comparability by themselves, or only by their combined effect, should depend on the Panel's assessment on substance of the gravity of the flaw in question." (European Union's third-party response to Panel question No. 7(a), para. 19)

[354] Appellate Body Report, *Argentina – Financial Services*, para. 6.203.

[355] Parties' responses to Panel question No. 70(b).

[356] See Letter from Customs Department to PTML of 16 June 2016, (Exhibit PHL-38-B). We consider that this letter, constituting a communication from the Customs Department to PMTL referring specifically to the BoA Ruling, and provided explicitly in response to a request from PMTL for information concerning the Customs Department's decision, constitutes evidence "on the record" of the determination. We further note that the identity of the five companies was confirmed by Thailand in consultations with the Philippines, and it is uncontested by the parties that the industry group was composed of these five companies. (See Letter from Thailand to the Philippines of 4 September 2013, (Exhibit PHL-37))

[357] See, e.g. BoA Ruling, (Exhibit PHL-21-B), p. 3; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 8; Letter from Customs Department to PTML of 16 June 2016, (Exhibit PHL-38-B), p. 1.

comparison (i) be made between comparable goods[358]; and (ii) takes full account of any differences that affect comparability.[359] The Philippines further asserts that, in conducting its comparison of P&GE rates, the BoA acknowledged "that the sales of the companies chosen had to be comparable in terms of both the imported goods sold and the commercial level at which the sales were made."[360] The Philippines argues, however, that of the five companies that the BoA included in the benchmark industry group, the only company that satisfied this standard was PMTL itself.[361] The Philippines asserts that the other companies were invalid comparators, because three of the four remaining companies in the benchmark group (namely Chemical Resins, KHS and Lee Intertrade) did not sell imported cigarettes at a wholesale level[362], and the remaining company (namely Piriyapul International) did not import or distribute cigarettes, and its cigarette retail sales comprised only a "tiny fraction" of its overall sales.[363] As regards the inclusion of PMTL itself in the industry comparator group, the Philippines argues that "[i]f 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 in those related party transactions is consistent with pricing in *unrelated* [party] transactions."[364]

7.130. Second, the Philippines argues that the industry group was flawed because it excluded British American Tobacco (BAT) and Japan Tobacco International (JTI).[365] The Philippines points out that in the course of bilateral communications between Thailand and the Philippines, Thailand indicated that BAT and JTI were excluded on the basis that they had been "loss-making" during the relevant period.[366] In the Philippines' view, a "lack of profitability is not, in itself, a sufficient basis for excluding these companies".[367] The Philippines concedes that "it may sometimes be appropriate to exclude unprofitable companies when drawing comparisons under the CVA", but maintains that the customs authority "must take account of commercial factors before doing so".[368]

7.131. Third, the Philippines considers that Macrorich and Classic Cigars, two companies excluded from the benchmark group, were sufficiently similar to Lee Intertrade and KHS that their exclusion was not justifiable in terms of their business operations.[369] The Philippines considers that a customs authority cannot exclude a company from a comparison group solely for the reason that its P&GE rate is "too low or too high", and rather it is the comparison itself that determines whether a P&GE

[358] Philippines' first written submission, paras. 183-196; response to Panel question No. 79. The Philippines supports this view with reference to Articles 1.2(b) and Article 15.2 of the CVA, which refer to comparisons between identical or similar goods, as well as Articles 2 and 3 of the CVA, which contemplate the use of prices of identical or similar goods as alternative customs values to the transaction values. The Philippines also emphasizes that Articles 5 and 6 of the CVA, which refer to deductive and computed value methods for customs valuation, require a high level of comparability in terms of benchmark goods used for determining the customs value.

[359] Philippines' first written submission, paras. 197-206.

[360] Philippines' first written submission, paras. 241-242.

[361] Philippines' first written submission, para. 246.

[362] Philippines' first written submission, paras. 247-249 (referring to Chemical Resins Thailand Limited, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-46-B); K H S Company Limited, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-47-B); Leeintertrade Website, available at http://www.leeintertrade.com/en (last accessed 10 October 2016), (Exhibit PHL-48)). See also Philippines' second written submission, para. 117. Specifically, the Philippines contends that: Chemical Resins is a manufacturer of cigarette filters, that does not deal at all in finished cigarettes; KHS is a wholesaler of cut tobacco, that does not import cigarettes for resale; and Lee Intertrade is a wholesaler of cigars, tobacco, rolling paper, and cigarette holders, but not imported cigarettes.

[363] Philippines' first written submission, para. 250.

[364] Philippines' response to Panel question No. 7(b), para. 72. The Philippines concedes that in "exceptional circumstances", it may permissible to include an importer in an industry group. For instance, "if the industry group is large and an authority cannot disaggregate data relating to the importer from data relating to the industry group, an authority might not be required to reject the data in its entirety." However, the Philippines explains that this is not the case in the present dispute. (Philippines' response to Panel question No. 7(b), fn 80 to para. 72)

[365] Philippines' first written submission, paras. 258-264; second written submission, paras. 157-177.

[366] Philippines' first written submission, para. 262 (referring to Letter from the Permanent Mission of the Philippines to the WTO to the Permanent Mission of Thailand to the WTO, 27 September 2013, (Exhibit PHL-58), p. 2; Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 27 March 2014, (Exhibit PHL-59), p. 2).

[367] Philippines' first written submission, paras. 263.

[368] Philippines' first written submission, paras. 263.

[369] Philippines' first written submission, para. 265 (referring to Macrorich Co. Ltd., Audited Financial Statement, 2002 (English translation), (Exhibit PHL-60-B); and Classic Cigars Co. Ltd., Audited Financial Statement, 2002 (English translation), (Exhibit PHL-61-B)).

rate is too low or too high.[370] Additionally, the Philippines considers that the BoA had sufficient financial information for these companies to determine their P&GE rates.[371] In the Philippines' view, the arbitrary exclusion of these companies was inconsistent with Article 1.2(a), second sentence.

7.132. For its part, Thailand "generally agrees that an 'apples-to-apples' comparison should be used"[372], but disagrees that Article 1.2(a) requires that comparisons must be conducted in accordance with the principles of comparability suggested by the Philippines.[373] Thailand argues that the particular circumstances of the Thai cigarette market make it difficult to conduct an examination of the circumstances of sale to the level of perfection demanded by the Philippines.[374] Thailand further explains that the BoA's approach was reasonable, because it sought to establish a list of "companies in the cigarette industry" by seeking information from the Ministry of Commerce and the Thai Customs Department regarding "companies that were in the business of import and/or wholesale of cigarettes and related products".[375] Thailand also argues that the BoA's approach was in accordance with OECD guidelines.[376]

7.133. Regarding the exclusion of BAT and JTI, Thailand argues that the BoA excluded all loss-making companies from the benchmark comparison, and that the exclusion of these loss-making companies was reasonable, on several grounds.[377] Thailand argues that: loss-making sales are not in the ordinary course of trade[378]; loss-making firms "could not be reasonably used to determine whether PM Thailand's P&GE [rate] was within the range that might be expected based on transactions between unaffiliated parties"[379]; it would be excessively burdensome to require the BoA to examine whether commercial factors could explain why such firms are loss-making[380]; the Philippines did not explain what commercial reasons could account for BAT and JTI's lack of profitability, or what valid commercial reasons would be sufficient to include loss-making companies in a benchmark group[381]; and given that BAT and JTI import cigarettes from related exporters, their lack of profitability confirms that their transaction values "*may* have been influenced by the relationship".[382]

7.134. Finally, regarding the exclusion of Macrorich and Classic Cigars, Thailand explains that Macrorich was "excluded because its P&GE rate of 54% was disproportionately high and did not appear to be, in effect, 'within the ordinary course of trade'".[383] Thailand argues that "in arriving at a reasonable and objective benchmark, it is perfectly reasonable to exclude a data point that appears aberrational."[384] With respect to Classic Cigars, Thailand argues that Classic Cigars was excluded from the group of 29 companies because "no financial information about its operations and P&GE ratios for 2002 was available."[385]

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[370] Philippines' second written submission, paras. 183-186

[371] Philippines' response to Panel question No. 82(a); comments on Thailand's response to Panel question No. 82(b).

[372] Thailand's comments on the Philippines' response to Panel question no. 79, p. 15.

[373] Thailand's second written submission, para. 2.28.

[374] Thailand's opening statement at the meeting of the Panel, para. 84; responses to questioning at the meeting of the Panel; response to Panel question No. 71; comments on the Philippines' response to Panel question No. 79.

[375] Thailand's response to Panel question No. 6(a).

[376] Thailand's response to Panel question No. 78; comments on the Philippines' response to Panel question Nos. 75 and 78.

[377] Thailand's first written submission, paras. 5.21-5.29; response to Panel question No. 81. Thailand indicates that in addition to BAT and JTI, the BoA also excluded nine other companies for being loss-making, namely PX Import Export, Oriental & Eight Happiness, Prestige Brand, Universal Consumer Products, Goldimex Intertrade, Sereewat, Phromrangsi 1999, Boontong Trading, and First Trago. (See Thailand's second written submission, para. 2.45)

[378] Thailand's first written submission, paras. 5.22-5.24.

[379] Thailand's first written submission, para. 5.25.

[380] Thailand's response to Panel question No. 8(b), pp. 13-14.

[381] Thailand's first written submission, paras. 5.26-5.27; opening statement at the meeting of the Panel, para. 83.

[382] Thailand's first written submission, para. 5.26. (emphasis original)

[383] Thailand's second written submission, para. 2.43.

[384] Thailand's response to Panel question No. 11(a), p. 15.

[385] Thailand's response to Panel question No. 11(b), p. 15. See also Thailand's response to Panel question No. 82; and comments on the Philippines' response to Panel question No. 82. We note that Thailand initially argued that "[t]he reason for excluding Classic Cigars was … that research indicate that the company did not import cigarettes during 2002." (Thailand's second written submission, para. 2.43) Thailand

7.135. We recall that authorities enjoy a margin of discretion regarding the means or methodology that they choose to follow when engaging in comparisons. However, in the context of conducting an examination of the circumstances of sale, they enjoy that discretion within the parameters laid down under Article 1.2(a), read in its context and in light of the object and purpose of the CVA. We agree with Thailand that the text of Article 1.2(a) does not prescribe specific requirements regarding comparisons made in the context of examining the circumstances of sale.[386] However, we consider that certain principles of comparability are inherent in the essential legal standard to be applied under that provision, or arise by necessary implication from the context and purpose of Article 1.2(a).

7.136. As a starting point, we consider it axiomatic that, for a comparison to be apt to reveal whether the relationship between the buyer and seller influenced the price, that comparison must be between comparable things. Not only is this inherent to the legal standard under Article 1.2(a), but it is reflected in a general principle of comparability that appears both within the CVA itself, as well as throughout the covered agreements.[387] We also consider that both the CVA and other covered agreements indicate that, where there are relevant differences between things being compared, those differences must be accounted for in some way.[388] Thus, in our view, for a comparison between two things to reveal whether the relationship between a buyer and seller influenced the price, such a comparison should be between comparable things, and any relevant and identifiable differences that would affect the comparison must be taken into account.

7.137. Furthermore, we consider that, where a comparison is between the importer and a group of companies intended to represent the industry, a company that would otherwise satisfy the requirement of comparability described above may only be excluded from that industry group on the basis of an objectively justifiable reason.[389] In the absence of an objectively justifiable reason to exclude an otherwise appropriate comparator company, the industry group is arbitrary and does not accurately represent the industry. A comparison using such an arbitrary industry group would not be apt to reveal anything about the business operations of the importer relative to the industry.

7.138. Applying these basic principles to the BoA's examination of the circumstances of sale, we consider first the companies that the BoA included in the industry comparator group (PMTL itself, and four other companies). We then consider the companies excluded from the industry comparator group. We note that the parties' arguments regarding the composition of the industry comparator group raise a number of issues that are interrelated, and it is for that reason that we address them together.

7.139. It is axiomatic that the inclusion of PMTL within the industry group is not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL. Specifically, we agree with the Philippines that, if an examination of the circumstances of sale "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 in those related party transactions is consistent with pricing in unrelated

subsequently indicated that it "would like to correct an error in its explanation of the exclusion of Classic Cigars. On re-checking with the officials responsible in the BoA at the time, Classic Cigars was in fact excluded … because no financial information … was available." (Thailand's response to Panel question No. 11(b), p. 15)

[386] See, e.g. Thailand's second written submission, paras. 2.24-2.28.

[387] See, e.g. Articles 1.2(b), 2, 3, 5, 6 and 15.2 of the CVA, Articles I and III of the GATT 1994, and Article 2 of the Anti-Dumping Agreement. We also note the European Union's statement that a general principle of comparability "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 … [and] also in various provisions of the CVA itself." (European Union's third party submission, para. 21)

[388] We find support for this conclusion in an examination of Articles 1.2(b), 2 and 3 of the CVA, Article VI of the GATT 1994, Article 14(b) of the SCM Agreement, and Article 2 of the Anti-Dumping Agreement. Article 1.2(b) of the CVA requires that account be taken of differences in commercial levels and quantity levels when doing a comparison of test prices. Articles 2 and 3 of the CVA require that benchmark transaction values be at the same commercial level and substantially the same quantity as the goods being valued, or if not possible, adjustments must be made for transactions at different levels or quantities. Article VI:1 of the GATT 1994 and Article 2.4 of the Anti-Dumping Agreement require adjustments for differences in price comparability, including taxes, commercial levels, and quantities. Article 14(b) of the SCM Agreement requires adjustments to ensure comparability in a comparison of government and commercial loans.

[389] Such objectively justifiable reasons include, for instance, that a particular company is not a valid comparator on the basis of the goods it sells, the commercial level at which it sells those goods, or the volume of its sales relative to the importer. (See, e.g. Article 1.2(b) of the CVA)

transactions."[390] We further note that the BoA did not include PMTL in the industry group as a consequence of being unable to disaggregate data relating to the importer from data relating to the industry group. To the contrary, the BoA sought actively to include data for the importer. Insofar as the other four companies included in the industry comparator group engaged in business activities that were sufficiently comparable to those of PMTL, and insofar as the BoA used the appropriate P&GE rate for PMTL on both sides of the comparison, then the inclusion of PMTL itself in the industry comparator group would not necessarily render the entire industry group inapt to reveal whether the relationship influenced the price, or give rise, by itself, to a violation of Article 1.2(a) of the CVA. We do, however, consider that the BoA's decision to undertake a comparison of PMTL to itself raises questions about the BoA's composition of the industry group.[391]

7.140. Turning to the other four companies included in the group, it is uncontested that they differ from PMTL in significant ways and that, despite the representation made in the BoA Ruling itself, none of them were "imported cigarette wholesalers in the year 2002". We emphasize in this regard that it is uncontested by Thailand that:

a. Chemical Resins is a manufacturer of cigarette filters and does not sell cigarettes;

b. KHS is a wholesaler of cut tobacco that does not import cigarettes for resale;

c. Lee Intertrade is a wholesaler of cigars, tobacco, rolling paper, and cigarette holders, but not imported cigarettes; and

d. Piriyapul sells cigarettes at the retail level (instead of the wholesale level), and cigarettes comprise only a small fraction of Piriyapul's overall sales.[392]

7.141. We note that several CVA provisions contemplate a comparison of P&GE rates in connection with "imported goods of the same class or kind", including in the specific context of examining the circumstances of sale under Article 1.2(a).[393] We further note that Article 15.3 defines "goods of the same class or kind" as goods which fall "within a group or range of goods produced by a particular industry or industry sector, and [which] includes identical or similar goods." Furthermore, both paragraph 9 of the Interpretative Note to Article 5 and paragraph 8 of the Interpretative Note to Article 6 refer explicitly to the question of "whether certain goods are 'of the same class or kind' as other goods". Both interpretative notes indicate that such a determination must be on a case-by-case basis, and that "the narrowest group or range of ... goods ... for which the necessary information can be provided, should be examined." In short, while an authority is not confined to comparing

[390] Philippines' response to Panel question No. 7, para. 72.

[391] We recall that the BoA Ruling indicated that it had compared PMTL's P&GE rates with the benchmark P&GE rates of an "industry group of imported cigarette wholesalers in the year 2002". PMTL was the only company in the industry group that was an "imported cigarette wholesaler in the year 2002". (See paragraph 7.140. below) Given that there was no evident methodological reason for including PMTL itself in the industry comparator group, a question that arises is whether the BoA did so as a basis for representing, in its Ruling, that the industry group comprised "imported cigarette wholesalers in the year 2002".

[392] See Philippines' first written submission, paras. 248-250 (referring to Chemical Resins Thailand Limited, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-46-B); Lee Intertrade Co. Ltd., Audited Financial Statement, 2002 (English translation), (Exhibit PHL-63-B); and K H S Company Limited, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-47-B)); Thailand's response to Panel question No. 6(a). Regarding Piriyapul, the Philippines explains (and Thailand does not contest) that Piriyapul "imports and distributes a wide range of consumer goods for distribution to grocery stores, convenience stores and food service providers [and w]ith respect to its own retail activities, Piriyapul sells some 3,000 different goods in Piriyapul grocery stores, covering the product categories of beverages, canned food, personal care, confectionary, and tobacco." (Philippines' first written submission, para. 250 (referring to Piriyapul International co., Ltd, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-49-B); Piriyapul International Limited, 40 Anniversary Special Publication, 2013, (Exhibit PHL-50)). We note that in the course of considering PMTL's appeal, the BoA itself considered at one point that Piriyapul was not an appropriate comparator because it imported and sold other goods in addition to cigarettes. (Minutes of the BoA Meeting of 14 January 2010 (English translation), (Exhibit PHL-42-B), at pp. 14-15) We note in this connection that the Minutes of the BoA Meeting of 26 September 2012, a document which both parties agree should be taken into account in our consideration of the BoA Ruling, state explicitly that the BoA's determination as represented in the 2010 Minutes was a resolution that constituted "preparation for the arrangement of the making of the ruling". (See Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 3)

[393] See, e.g. Article 5.1(a)(i); Article 6.1(b); paragraph 3 of the Interpretative Note to Article 1.2; paragraphs 6 and 9 of the Interpretative Note to Article 5; and paragraphs 4, 5 and 8 of the Interpretative Note to Article 6.

identical or similar products for the purpose of conducting a comparison of P&GE rates, a customs authority also does not have licence to pick any products that are related in some way to the product being valued, without regard to whether those comparator products have sufficiently common characteristics for such a comparison to be apt to reveal whether the price of imported goods was influenced by the relationship between the buyer and seller.

7.142. We recall that the BoA Ruling concluded that two separate P&GE rates ascribed to PMTL were "not consistent with those of the industry group of imported cigarette wholesalers, which is the information for the sale of the goods of the same class or kind in the Kingdom [of Thailand]".[394] Recalling the definition in Article 15.3 of the CVA, Thailand submits, only in the context of providing its comments on the Philippines' responses to the Panel's second set of questions, that this definition "is much broader, of course, than the definition of 'identical' and 'similar' goods contained in Articles 15.2(a) and (b) of the CVA".[395] However, while Thailand disagrees with the Philippines' interpretation of these terms, Thailand has not advanced any arguments to demonstrate that the four companies in the comparator group actually produced products "of the same class or kind", except for its reliance on the TSIC classification.[396] We address this further below.

7.143. We recall that the legal standard under Article 1.2(a) requires that, at a minimum, the examination of the circumstances of sale should be apt to reveal whether the relationship influenced the price. In our view, given the significant differences in business operations between Chemical Resins, KHS, Lee Intertrade and Piriyapul, it is not clear how the P&GE rates of these companies can, in principle, reveal anything about the P&GE rate of PMTL, a company that exclusively sells cigarettes at the wholesale level. Having said that, we do not consider that the inclusion of these four companies in the industry comparator group, by itself, necessarily renders the entire industry group inapt to reveal whether the relationship influenced the price, or gives rise, by itself, to a violation of Article 1.2(a) of the CVA. In this regard, we consider it necessary to further consider whether the inclusion of these four companies in the industry comparator group was defensible on one or more grounds raised by the respondent.

7.144. We will therefore proceed to consider the principal reasons identified by Thailand, which are that these companies were identified as being part of the "wholesale of tobacco and tobacco products" industry, that the BoA referred to the OECD guidelines, and that the BoA encountered difficulties identifying comparable companies because, *inter alia*, the companies that were more comparable to PMTL were loss-making during the relevant period.

7.145. In its second written submission, Thailand stated that it is "incorrect" to argue that the BoA "went beyond the industry in selecting the comparison group", but did not elaborate further.[397] In response to a question from the Panel, however, Thailand elaborated that the BoA relied on information provided by the Business Development Department of the Thai Ministry of Commerce.[398] According to Thailand, the Business Development Department relied on Thailand's Standard Industrial Classification (TSIC), heading 51.233 of which referred to "wholesale of tobacco and tobacco products", to provide the BoA with a list of possible comparator companies within that sector.[399]

7.146. We consider that such references may constitute an *ex post* rationalization of the BoA's conduct. As the Philippines points out, "Thailand did not provide this justification for its industry group in the BoA Ruling, its first written submission, or its second written submission. This explanation was, instead, offered for the first time in Thailand's responses of July 2017 to the Panel's first set of questions."[400] Furthermore, in reviewing all of the evidence presented by the parties, we cannot see any evidence on the record of the BoA's determination indicating that the BoA relied on the TSIC to determine whether certain companies were comparable to PMTL. Insofar as this is an *ex post* rationalization, we do not consider that Thailand can defend the BoA's actions on this basis.

[394] BoA Ruling, (Exhibit PHL-21-B), p. 3.
[395] Thailand's comments on the Philippines' response to Panel question No. 79, p. 15.
[396] Thailand's comments on the Philippines' response to Panel question No. 79, p. 16.
[397] Thailand's second written submission, para. 2.41.
[398] Thailand's response to Panel question No. 6(a); Documents relating to Thailand Standard Industrial Classification (TSIC), (Exhibit THA-39).
[399] Thailand's response to Panel question No. 6(a); Documents relating to Thailand Standard Industrial Classification (TSIC), (Exhibit THA-39).
[400] Philippines' response to Panel question No. 79, para. 99.

7.147. Having said that, we acknowledge that in the context of customs valuation determinations, where there may be no official "record" of a customs authority's determination in contrast to the record that exists in the context of an anti-dumping, countervailing duty, or safeguards investigation, there may be circumstances in which it is difficult to sharply distinguish between an *ex post* rationalization and permissible reliance on documentary evidence showing how the authorities actually conducted their examination. We also note that the Appellate Body has explained that a panel is not precluded from making alternative findings on *ex post* rationales made by the respondent.[401] We are mindful that the original panel followed the same approach, in order to help "resolve the parties' dispute".[402] Although the absence of any evidence in support of Thailand's assertion suggests that, in this particular instance, the BoA's reliance on the TSIC may constitute an *ex post* rationalization, we nevertheless consider it appropriate to follow the same approach as the original panel. We therefore proceed to address this explanation by Thailand on an *arguendo* basis.

7.148. We concluded above that the fundamental business operations of Chemical Resins, KHS, Lee Intertrade and Piriyapul were so different from those of PMTL that a comparison of their P&GE rates was not, in principle, apt to reveal anything about the price paid by PMTL to PM Indonesia for *cigarettes*. In our view, this is not called into question by the alleged fact that the BoA relied on a domestic industry classification, pursuant to which the relevant companies all appeared under the heading of "wholesale of tobacco and tobacco products". In our view, although a domestic industry classification may be a useful starting point for a customs authority to seek comparable companies, the customs authority remains under a fundamental obligation to ensure that the comparator companies are, in actual fact, comparable to the importer.

7.149. Our reasoning in this regard is only reinforced by the fact that Thailand has not contested that, under the TSIC, "companies self-register under a particular code", "companies are not obliged to account for all their activities", "they are free to register under three separate codes at any one time", and "there is … little to no verification of whether companies correctly identify their business activities".[403] Additionally, the Ministry of Commerce apparently re-categorized the TSIC codes in 2009, and although none of the companies has significantly changed its business activities, under the new classification none of the four companies appears under "wholesale of tobacco products" (new TSIC code 46323). Rather, Chemical Resins appears under "manufacture and distribution of cigarette filter[s]" (new TSIC code 12002), KHS and Lee Intertrade appear under "wholesale of non-finished tobacco products" (new TSIC code 46203), and Piriyapul appears under "retail of other goods in general stores" (new TSIC code 47190).[404] We therefore agree with the Philippines that "the SIC code under which a particular company is registered is not a reliable indicator of the business activities undertaken by that company."[405]

7.150. As a general matter, regarding Thailand's emphasis that the BoA acted "impartially" and "objectively" in how it composed the industry group, we do not question that this was the case. Furthermore, we agree with Thailand insofar as it argues that the selection of companies whose business operations were significantly different from those of PMTL was not inherently biased against

[401] See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.274.

[402] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.365.

[403] Philippines' response to Panel question No. 79, para. 104. In order to exemplify this, the Philippines also explains that one of the companies included in the original list of 29 companies, Goldimex, has changed its classification under the TSIC multiple times since 2006, from "transportation and goods loading" to "trading in engine oil, lubricant" to "accounts and balance sheet preparations and advisory services", and ultimately registering itself under three, separate codes, namely "trading in vegetable, fruit, bamboo shoot, pepper, garden plant, cigarettes, cut tobacco, beverage, water, mineral water, fruit juice, liquor, fresh food, dried food, finished foods", "trading in engine oil, lubricant for all type of engine", and "guarantee services for one or more persons, whether individuals or juristic persons for performance of obligations, including to guarantee the person related to the business or operation of the company according to the law on immigration". (Philippines' response to Panel question No. 79, paras. 107-108 (referring to TSIC code registrations of Goldimex Intertrade Co. Ltd., under Form SorSorChor1, (Exhibit PHL-212), pp. 1-4))

[404] Philippines' response to Panel question No. 79, paras. 114-116 (referring to the Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 8; Thailand's Standard Industrial Classification Codes (Thai and English translation), (Exhibit PHL-214), p. 4; SIC code registration of Piriyapul International Co., Ltd. under form SorBorChor3, (Exhibit PHL-215); SIC code registration of Chemical Resins (Thailand) Ltd. under form SorBorChor3, (Exhibit PHL-216); SIC code registration of Lee Intertrade Co., Ltd. under form SorBorChor3, (Exhibit PHL-217); and SIC code registration of KHS Company Ltd. under form SorBorChor3, (Exhibit PHL-218)).

[405] Philippines' response to Panel question No. 79, para. 103.

PMTL.[406] However, we consider that the absence of bias or partiality is not directly relevant to assessing whether a particular examination of the circumstances of sale was apt to reveal whether the relationship between the buyer and the seller influenced the price.[407] Thus, the BoA's decision to compose an industry group on the basis of the TSIC codes is not problematic by virtue of any partiality or bias on the part of the BoA in using the TSIC codes. Rather, an apples-to-oranges comparison is problematic regardless of whether or not, in a particular case, it yields an outcome that is favourable to the importer.

7.151. Thailand also argues that the BoA's approach followed OECD guidelines.[408] We understand Thailand to refer to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.[409] We note that the Minutes of the BoA Meeting of 26 September 2012 indicate that the BoA did indeed purport to follow an approach that "is pursuant to the OECD rules".[410]

7.152. We note that Thailand has not sought to demonstrate the relevance of the OECD Transfer Pricing Guidelines to the assessment of whether the BoA's examination of the circumstances of sale was consistent with Article 1.2(a) of the CVA. Thailand has not emphasized this aspect of its argumentation, and, in our view, has not elaborated on how the OECD guidelines indicate whether the BoA acted consistently with Article 1.2(a), second sentence. In the absence of such elaboration, we are wary of undertaking our own assessment of whether the BoA followed the OECD guidelines[411], and, in any event, we do not consider it necessary to do so. In accordance with the reasoning set forth above regarding the BoA's reliance on the TSIC, we consider that regardless of the source from which a customs authority derives its approach to examining the circumstances of sale, the actual examination must, fundamentally, be apt to reveal whether the relationship influenced the price. Thailand has not demonstrated how the references in the BoA Minutes to OECD "rules" or "guidelines" demonstrate that the companies selected were apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL.

7.153. Thailand also argues that the BoA encountered significant difficulties in identifying an appropriate comparison group within the Thai cigarette market.[412] We note that, in its first and second written submissions, Thailand offered no argumentation as to why a comparison of PMTL to Chemical Resins, KHS, Lee Intertrade, or Piriyapul (or PMTL itself) would be apt to reveal anything about PMTL, or why the BoA Ruling indicated that the industry comparator group comprised "imported cigarette wholesalers" when it did not. Rather, the principal focus of Thailand's argumentation in its submission regarding the composition of the industry group was on the difficulties that the BoA encountered in finding comparable companies. Thus, we consider that Thailand's argumentation might be read as conceding that the industry group comprising these companies may not have been a very apt comparator, and that the justification for relying on them for purposes of the industry comparator group was that the BoA was not "faced with a perfect set of choices".[413] In the light of the foregoing, our assessment of the industry comparator group cannot be confined to merely focusing on the differences between PMTL and the four other companies, without considering any difficulties that the BoA may have faced in selecting companies that were more comparable.

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[406] Thailand's second written submission, para. 2.54; comments on the Philippines' response to Panel question No. 79, p. 15.

[407] See paragraph 7.107. above.

[408] Thailand's response to Panel question No. 78; comments on the Philippines' response to Panel question Nos. 75 and 78.

[409] We note that the Philippines has provided the relevant OECD guidelines. (See OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 22 July 2010, (OECD Guidelines), (Exhibit PHL-41))

[410] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 7.

[411] The subject matter of transfer pricing rules (namely, the value of goods for taxation) is closely related to, but not the same as, customs valuation (namely, the value of goods for levying of *ad valorem* duties), and it is entirely possible that a value may be acceptable for customs purposes but adjusted later under transfer pricing rules. We note, in this regard, that the Transfer Pricing Guidelines explicitly contemplate that, "[v]aluation methods for Customs purposes … may not be aligned with the OECD's recognised transfer pricing methods", without suggesting that such a deviation would fail to be in accordance with the CVA. (See OECD Guidelines, (Exhibit PHL-41), para. 1.78) In any event, we also note that the guidelines consistently insist that comparisons are to be conducted between "comparable" things. (See, e.g. OECD Guidelines, (Exhibit PHL-41), pp. 41-45 and 119-125) We note in particular that the OECD Guidelines state that "the economically relevant characteristics of the situations being compared must be sufficiently comparable". (OECD Guidelines, (Exhibit PHL-41), p. 41)

[412] See footnote 303 above.

[413] Thailand's second written submission, para. 2.40.

7.154. In our view, the difficult circumstances of the BoA's examination were self-imposed, because it followed from the BoA's decision to conduct its examination of the circumstances of sale by comparing PMTL's P&GE rates with those of an industry comparator group. Thailand has not demonstrated that these difficulties would have been present in any and every possible examination of "the circumstances of sale" involving PMTL. Rather, these difficulties were specific to an examination that relied on a comparison of PMTL's P&GE rates with an industry benchmark group. We note that the CVA itself contemplates a number of different methods for examining the circumstances of sale that possibly are less likely to suffer from the failings of the BoA's chosen method. For instance, paragraph 3 of the Interpretative Note to Article 1.2 describes a number of methodologies that are available to customs authorities for the purpose of examining the circumstances of sale, including an examination of the buyer and seller's commercial relations and method of setting the price, comparisons with pricing practices in the industry, comparisons with the seller's prices in sales to unrelated buyers, or an assessment of whether the price is adequate to ensure recovery of all costs plus a profit.

7.155. Thus, there is at least one alternative methodology that the BoA could have employed. Thailand has not argued, much less demonstrated, that the BoA could not have used other methods, or that these methods would also have been inapt to demonstrate whether the relationship influenced the price. In response to a question regarding whether the BoA was obliged to examine the circumstances of sale through a comparison of P&GE rates and whether the BoA should have explored a different testing method, Thailand indicated that it would not "be consistent with the Panel's standard of review for the Panel to say that the BoA should have exhausted every possibility in terms of finding a 'better' approach – instead, the Panel's task is simply to determine, objectively, whether the BoA's approach was reasonable."[414] We agree with Thailand that an authority is not required to "exhaust every possibility" to find the best possible approach for conducting a customs valuation determination. However, insofar as Thailand is seeking to defend the BoA's decision to use an industry group comprising companies that are not comparable to PMTL on the grounds that it had no better options, then it becomes highly germane to consider the extent to which the problems that the BoA encountered were self-imposed and could have been avoided by following a different method to conduct the examination of the circumstances of sale.

7.156. In this respect, we do not wish to suggest that a customs authority is precluded from ever conducting an examination of the circumstances of sale on the basis of a comparison of P&GE rates in situations where the market circumstances do not allow for a perfect apples-to-apples comparison between companies being compared.[415] It is conceivable that a particular market situation could be such that any examination of the circumstances of sale will suffer from certain limitations. In such a situation, certain shortcomings in the methodology may be permissible to the extent that they are controlled for in a reasonable and appropriate manner, in order to ensure that the chosen methodology is as apt as possible under the circumstances. As indicated above, shortcomings in the comparison may not give rise to an inconsistency with Article 1.2(a) insofar as relevant and identifiable differences that would affect the comparison are taken into account. We return to this issue in the context of addressing the manner in which the BoA determined the industry benchmark P&GE range, and also the manner in which the BoA compared PMTL's P&GE rates with that benchmark P&GE range.

7.157. Thailand points to what it terms an "expert witness statement" made on behalf of PMTL, and submitted as evidence in this proceeding by the Philippines, that indicates that "[i]n order to determine whether the Gross Margin [(GM)] was in line with industry standards, PM Thailand then compared this GM to that of other comparable operators that transact with unrelated parties, including distributors in the tobacco industry, but, since there are so few of the latter, also others in other sectors of industry for better comparability purposes."[416] Thailand considers that "[i]f it would be appropriate to consider companies from *other* sectors, it cannot be *a priori* unreasonable to consider companies within the tobacco sector that are not as identical to PM Thailand as the Philippines might like".[417] Thailand also points out that the expert witness "referred to 'fast-moving consumer goods companies'", which, in Thailand's view, "undermines" the Philippines' objections to

[414] Thailand's response to Panel question No. 6(c)(ii).

[415] We note in this regard that Article 2.2.2(iii) of the Anti-Dumping Agreement envisages that there will be situations in which an authority may compare an importer's P&GE rate with the P&GE rates of other exporters or producers on sales of products "in the same general category of products".

[416] Thailand's first written submission, para. 5.31 (quoting Expert witness statement of Paulette Vander Schueren, 16 September 2010, (Exhibit PHL-115), p. 7).

[417] Thailand's first written submission, para. 5.32. (emphasis original)

relying on other companies "within the group of 'tobacco products'", and in particular the reliance on Piriyapul which also sells products that "all appear to be, like cigarettes, 'fast moving consumer products'".[418]

7.158. We are wary of according undue reliance to this expert witness statement, given that it was not made on behalf of the Philippines in the context of this proceeding, but rather was submitted by PMTL in the context of a domestic criminal proceeding that addressed a different customs valuation determination to that at issue in the BoA Ruling.[419] In any event, and in accordance with the legal standard under Article 1.2(a), second sentence, the essential question is whether Piriyapul is an appropriate comparator company. Indeed, in this respect the expert witness statement explicitly indicates that, in comparing PMTL's gross margin with the industry standard, PMTL compared its gross margin to "that of other *comparable* operators", both within and outside the tobacco industry.[420] In our view, Thailand has failed to demonstrate, through either the expert witness statement, or through any other arguments or evidence, that a comparison of PMTL to Piriyapul was apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL. We do note, however, that the expert witness statement is indeed indicative of the fact that there were difficulties in establishing a comparison group in the Thai cigarette market. In this respect, as discussed above, although the particular circumstances of the market situation may be a relevant consideration in the BoA's determination of a particular method to use, it does not change the fact that the ultimate methodology chosen by the BoA to examine the circumstances of sale must have been apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price.

7.159. In connection with its arguments concerning the difficulties of establishing the industry group, Thailand asserts that when "faced with a choice between a comparison with companies selling the same product and companies of the same size, it is objectively justifiable to proceed with the former".[421] We observe that, with the exception of Piriyapul, the other companies included in the industry comparator group were not "selling the same product". In addition, Piriyapul is a "grocery store retailer" that sold several thousand other products, such that it cannot be said that its P&GE rate was derived from "selling the same product".[422] Furthermore, we consider that Thailand's argument concerning a choice between companies selling the same product versus companies of the same size represents a false dichotomy. As indicated above, we consider that there were other possible methodologies that the BoA could have employed, and Thailand has not demonstrated that the BoA was forced to choose "between a comparison with companies selling the same product and [a comparison with] companies of the same size".[423]

7.160. In its argumentation regarding the companies included in the industry comparator group and the difficulties that the BoA faced in finding comparable companies, Thailand has highlighted the difficulties that the BoA encountered in constructing an industry group given that a number of the other companies initially considered (e.g. other cigarette importers) were excluded from the final industry group, for various reasons.[424] For its part, the Philippines claims that the BoA, in fact, acted inconsistently with Article 1.2(a) through its exclusion of certain companies. Specifically, the Philippines argues that the exclusion of BAT, JTI, Macrorich and Classic Cigars from the industry

[418] Thailand's comments on the Philippines' response to Panel question No. 79, p. 15 (referring to Expert witness statement of Paulette Vander Schueren, 16 September 2010, (Exhibit PHL-115), pp. 7-8).

[419] Philippines' second written submission, paras. 128-138.

[420] Expert witness statement of Paulette Vander Schueren, 16 September 2010, (Exhibit PHL-115), p. 7.

[421] Thailand's first written submission, para. 2.47. See also Thailand's response to Panel question Nos. 6(b) and 13, pp. 10 and 16.

[422] Philippines' first written submission, paras. 144 and 250 (referring to Piriyapul International co., Ltd, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-49-B); Piriyapul International Limited, 40 Anniversary Special Publication, 2013, (Exhibit PHL-50); second written submission, para. 117).

[423] We note that the Panel directly asked Thailand whether it considered that this choice "would also be present in all other possible methodologies that could be used to examine the circumstances of sale". Thailand stated that the:

> Panel is called upon not to do a de novo review to determine what would be the best possible option, because that would require the Panel to identify every possible option and to make itself the sort of choices inherent in a situation in which there is no perfect solution. Instead, the Panel is called upon simply to determine objectively whether the approach taken by the BoA was reasonable in the circumstances. (Thailand's response to Panel question No. 13, p. 16)

[424] In its first written submission, Thailand states that all but five of the companies initially considered had losses (i.e. no profits) during the relevant period (2002). (Thailand's first written submission, para. 5.21. See also Thailand's second written submission, paras. 2.42-2.48)

group was not justified. We now address whether the exclusion of these companies was indeed justified.

7.161. Turning first to the exclusion of BAT and JTI from the industry group, Thailand argues that these companies were excluded because they were loss-making and had no profits during the relevant period. [425] The Philippines argues that a "lack of profitability is not, in itself, a sufficient basis for excluding these companies".[426]

7.162. It is uncontested that BAT and JTI's business operations in Thailand are comparable to PMTL, and, in particular, that the goods they sell are sufficiently similar to the goods at issue (namely *Marlboro* cigarettes) such that a comparison of P&GE rates could, in principle, shed light on whether the price paid by PMTL was influenced by its relationship with PM Indonesia. We recall that certain companies that are potentially relevant comparators may nonetheless be excluded from an industry comparator group on the basis of objectively justifiable reasons.[427] The parties disagree as to whether the BoA should have excluded these companies exclusively on the basis that they were "loss-making", or whether the BoA should have taken into account valid commercial reasons for their loss-making status before excluding them.

7.163. We note that the explanation that these companies were excluded on the basis of their loss-making status was first presented not by the BoA, but by Thailand, in the course of bilateral consultations between the Philippines and Thailand.[428] In our review of the evidence *on the record of the BoA determination*, we can see no indication that the BoA opted to exclude BAT and JTI on the basis that they were loss-making.[429] We therefore consider that Thailand's explanation that the BoA excluded BAT and JTI on the basis of their loss-making status may constitute an *ex post* rationalization, in which case the exclusion of these companies could not be justified on that basis. Nevertheless, in accordance with our approach above, we consider it appropriate to proceed on an *arguendo* basis and address the parties' arguments in relation to the exclusion of JTI and BAT.[430]

7.164. We consider that paragraph 5 of the Interpretative Note to Article 6 of the CVA is instructive.[431] Paragraph 5 explains that:

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[425] Thailand's first written submission, paras. 5.18-5.27; second written submission, para. 2.42; response to Panel question Nos. 8(b)-8(c) and 81; opening statement at the meeting of the Panel, para. 83.

[426] Philippines' first written submission, paras. 263.

[427] See paragraph 7.137. above.

[428] See Philippines' first written submission, para. 262; Letter from the Permanent Mission of Philippines to the WTO to the Permanent Mission of Thailand to the WTO, 27 September 2013, (Exhibit PHL-58), p. 2; Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 27 March 2014, (Exhibit PHL-59), p. 2.

[429] We note that there is indeed evidence before the Panel suggesting that the BoA may have excluded BAT and JTI on the basis that they were loss-making. Specifically, the Philippines has submitted: (i) a letter sent from the Permanent Mission of Thailand to the WTO to the Philippine Mission to the WTO on 27 March 2014, almost a year and a half after the BoA Ruling was issued, stating that "BAT and JTI were not included because … these companies made a loss on their operations in 2002 and therefore including them … would have been adverse to PMTL"; and (ii) a BoA "presentation" of 1 August 2013 that indicates that no P&GE rates were calculated for certain companies that were loss-making. (See BoA Presentation, 1 August 2013 (Exhibit PHL-54) and Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 27 March 2014, (Exhibit PHL-59)) However, Thailand itself argues that both of these documents "were prepared after the BoA's decision by officials that [w]ere not directly involved in the BoA's process. These documents do not form part of the decision." (Thailand's comment on Panel question No. 5, p. 10) We agree with Thailand's characterization of these documents and consider that these documents do not form part of the record of the BoA's determination. We also note that our caution in this respect is further reinforced by the fact that: (i) the BoA presentation appears to predominantly relate to "test calculations" conducted between 2002 and 2007, and the context of the presentation has not been explained; and (ii) the letter from Thailand to the Philippines asserts that the four companies other than PMTL included in the industry group not only imported factory manufactured cigarettes in 2002, but distributed those imported cigarettes in the Thai cigarette market to "wholesalers, retailers and consumers" − yet, as we have found above, three of those companies did *not* sell imported cigarettes in Thailand, and the fourth company only sold imported cigarettes at the retail level. (See Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 27 March 2014, (Exhibit PHL-59), p. 2. See also paragraph 7.140. above)

[430] See paragraph 7.147. above.

[431] Article 6 governs customs valuations conducted using a "computed value", which consists of the sum of certain costs, as well as an amount for P&GE that is "equal to that usually reflected in sales of goods of the

> It should be noted in this context that the "amount for profit and general expenses" has to be taken as a whole. It follows that if, in any particular case, the producer's profit figure is low and the producer's general expenses are high, the producer's profit and general expenses taken together may nevertheless be consistent with that usually reflected in sales of goods of the same class or kind. Such a situation might occur, for example, if a product were being launched in the country of importation and the producer accepted a nil or low profit to offset high general expenses associated with the launch. Where the producer can demonstrate a low profit on sales of the imported goods because of particular commercial circumstances, the producer's actual profit figures should be taken into account provided that the producer has valid commercial reasons to justify them and the producer's pricing policy reflects usual pricing policies in the branch of industry concerned. Such a situation might occur, for example, where producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or where they sell goods to complement a range of goods being produced in the country of importation and accept a low profit to maintain competitivity.

7.165. Thus, in the context of conducting a computed value calculation of the customs value, the determination of the P&GE rate "usually reflected" in sales of comparable goods must include P&GE rates for producers who have "accepted a low or nil profit", on two conditions: (i) there are valid commercial reasons to justify the low profits; and (ii) the pricing policy reflects usual pricing policies in the relevant sector. We recognize that the methodology for conducting a computed value calculation pursuant to Article 6 differs from an examination of the circumstances of sale pursuant to Article 1.2(a), second sentence. Nevertheless, this guidance in the context of a computed value calculation strongly suggests that similar considerations should be taken into account in conducting an examination of the circumstances of sale under Article 1.2(a), where such an examination involves a comparison of P&GE rates, given that the interpretative note directly governs a determination of a proxy P&GE rate to be used in determining customs value.

7.166. We note that Thailand argues that Article 2.2.1 of the Anti-Dumping Agreement indicates that sales below the cost of production may be treated as not being in the "ordinary course of trade".[432] As a general matter, we note that the subject matter of Article 2.2.1 of the Anti-Dumping Agreement (rules governing the determination of normal value for purposes of determining the existence of dumping) is different from the subject matter of Articles 1 through 7 of the CVA (rules governing the determination of the value of goods for the purpose of levying *ad valorem* duties). Therefore, we are wary of according undue weight to these provisions of the Anti-Dumping Agreement in interpreting the CVA. However, even if we were to rely on Article 2.2.1 of the Anti-Dumping Agreement as relevant context for the question of assessing whether customs authorities may exclude loss-making companies from an industry comparator group used for customs valuation purposes, we note that Article 2.2.1 does not support Thailand's argument. Rather, Article 2.2.1 states explicitly that sales below the cost of production may be treated as not being in the ordinary course of trade "only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time." Thus, Article 2.2.1 provides strict conditions that must be satisfied in order for sales below cost to be treated as not being made in the ordinary course of trade.

7.167. We are also unconvinced by Thailand's suggestion that the reference in Article 5 of the CVA to "additions *usually made* for profit and general expenses" implies that there are "usually" profits in an importing country, and that when "determining whether those profits are within the 'usual' range … it is reasonable to exclude companies that sell at a loss".[433] We consider that the expression "profit and general expenses" is an accounting term of art, and the adverb "usually" merely implies the "typical" P&GE. Furthermore, the interpretative note to Article 6 clearly indicates that the usual, or typical, P&GE can include "nil" profits.

7.168. We further disagree with Thailand's argument that, "presumably, companies in the same industry are affected by the same commercial factors", and consequently, "there is no basis to distinguish between companies in a particular sector on the basis of the commercial factors affecting

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same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation".

[432] Thailand's first written submission, paras. 5.18-5.27; second written submission, para. 2.42; response to Panel question Nos. 8(b)-(c) and 81; opening statement at the meeting of the Panel, para. 83.

[433] Thailand's first written submission, para. 5.23.

them".[434] We consider that firstly, this is a presumption that may not be true in every case, and secondly, there may indeed be commercial factors affecting all (or many) companies in a particular industry, with the result that all (or many) companies are operating at a loss. Far from suggesting that these companies should not be taken into account, we consider that in such a situation where the entire (or almost the entire) industry is loss-making, the importer *must* be compared with the entire industry, including those companies that are loss-making, in order for the comparison to meaningfully reveal how the importer's situation compares to that of the relevant industry, in the particular circumstances of that market.

7.169. Additionally, we disagree with Thailand that a requirement to investigate valid commercial reasons for a company's lack of profitability would "increase, rather than decrease, the level of subjectivity in a tribunal's decision", and that "it is more objective and reasonable to exclude loss-making companies" *per se*.[435] The CVA clearly requires that when conducting a computed-value calculation under Article 6, a customs authority is obliged to examine valid commercial reasons for a "low" or "nil" profit, regardless of the subjectivity of such an examination. Furthermore, where valid commercial reasons[436] could explain a particular company's "low" or "nil" profits, and a customs authority failed to take those considerations into account, that would be a *less* objective analysis of the circumstances of sale than if it *did* take those considerations into account.

7.170. With respect to Thailand's argument that "it would be excessively burdensome and indeed impossible for a tribunal such as the BoA to investigate why a company such as BAT might have made a loss in a given period"[437], we first note that when conducting a computed value calculation under Article 6 of the CVA a customs authority is obliged to examine valid commercial reasons despite the burden such an examination imposes. However, we also recall in this connection that, under Article 1.2(a), the process of examining the circumstances of sale is one that is supposed to involve consultation between the customs authority and the importer. In this respect, the Philippines itself indicates that "if PM Thailand had been given the opportunity to address whether loss-making (or other) companies should have been included in an industry group, it should have provided any relevant information."[438] Taking account of the balance under the CVA between the respective rights and responsibilities of the importer and the customs authority, we agree with the Philippines that the burden of indicating "valid commercial reasons" for a company being loss-making should be placed on the importer.[439]

7.171. We consider that it would indeed be an excessive burden to impose on a customs authority a requirement to independently identify and examine any and all "valid commercial reasons" that might explain why a particular company is loss-making. In our view, a private importer may well be more aware of "valid commercial reasons" that might explain a company's loss-making status, than an administrative tribunal that does not operate in the private market. Furthermore, and recalling that the Philippines itself considers that a company's loss-making status is a valid consideration in

[434] Thailand's response to Panel question No. 8(b), p. 13.

[435] Thailand's response to Panel question No. 8(b), pp. 13-14.

[436] For instance, paragraph 5 of the Interpretative Note to Article 6 provides as examples of such valid commercial reasons, "a situation … where producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or where they sell goods to complement a range of goods being produced in the country of importation and accept a low profit to maintain competitivity."

[437] Thailand's response to Panel question No. 8(b), p. 13.

[438] Philippines' response to Panel question No. 8(c), para. 94.

[439] We recall the original panel's statements that the CVA "aims at striking the balance between respecting the customs authorities' need to address cases where it has reason to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a declared value and protecting the legitimate commercial interests of traders" and that "[t]he process of examining the circumstances of the sale under Article 1.2(a) … resembles that of consultation as both the importer and the customs administration respectively need to make a good faith effort on the one hand to provide relevant information and on the other hand to provide a reasonable opportunity to the importer to submit information and review the information provided in reaching a final determination". (Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.171-7.172) Additionally:

> [C]ustoms authorities and importers have respective responsibilities under Article 1.2(a). The customs authorities must ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price. Importers are responsible for providing information that would enable the customs authority to examine and assess the circumstances of sale so as to determine the acceptability of the transaction value. (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.171)

selecting companies for inclusion[440], we consider that it is fully consistent with the requirements of Article 1.2(a), as set forth above, that a customs authority may consider that a company should be excluded from the comparator group on the basis that it is loss-making, and communicate this position to the importer, thereby allowing the importer to explain why, in its view, certain companies should nonetheless be included in the comparator group despite their loss-making status.[441]

7.172. Applying this legal standard, we note the Philippines' explanation that PMTL was not informed of the BoA's selection of the industry group, and therefore was not given the opportunity to provide any information regarding valid commercial reasons to justify the inclusion of BAT or JTI in the group.[442] On the basis of the evidence before us, we agree with the Philippines that the BoA did not indicate to PMTL that BAT and JTI were excluded from the group, nor did the BoA indicate its reasons for excluding those companies from the group.[443] Consequently, PMTL was precluded from being able to provide potentially valid commercial reasons that could explain BAT and JTI's loss-making status.

7.173. For these reasons, we are not persuaded that JTI and BAT, two companies that were comparable to PMTL, were excluded from the industry group on the basis of objectively justifiable reasons. Consequently, we consider that the decision to compare PMTL with an industry group that did not actually comprise "imported cigarette wholesalers in the year 2002", other than PMTL itself, cannot be defended on the grounds that JTI and BAT were loss-making. We do not consider it necessary to address whether the exclusion of JTI and BAT from the industry group, by itself, necessarily renders the entire industry group inapt to reveal whether the relationship influenced the price, or gives rise, by itself, to a violation of Article 1.2(a) of the CVA.

7.174. Regarding the exclusion of Macrorich and Classic Cigars, we note that the Philippines' arguments in this respect are based on the fact that "like Lee Intertrade and KHS, which were included in the final group, Macrorich and Classic Cigars import and distribute tobacco and cigars (but not cigarettes)."[444] As a factual matter the similarities between the operations of these companies are uncontested. We have already concluded that, given the significant differences between PMTL's business operations and those of KHS and Lee Intertrade (as well as Chemical Resins and Piriyapul), we do not see how the P&GE rates of these companies can, in principle, reveal anything about the P&GE rate of PMTL. Recalling our conclusion above that Lee Intertrade and KHS were themselves not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price, we consider that, for the same reason, Classic Cigars and Macrorich also should not have been included in the industry group.

7.175. Having said that, we do not consider that Thailand has demonstrated that there was any objectively justifiable reason for excluding Macrorich and Classic Cigars from the group, *given the BoA's decision to include Lee Intertrade and KHS in the industry comparator group*. First, we can find no indication in the record of the determination as to why the BoA excluded Macrorich and Classic Cigars from the industry group.[445] Therefore, as with Thailand's references to the TSIC, and

[440] The Philippines indicates that "it may sometimes be appropriate to exclude unprofitable companies when drawing comparisons under the *CVA*". (Philippines' first written submission, para. 263)

[441] We note, in this respect, that it is conceivable that a customs authority may, prior to consulting with the importer, already be in possession of information that is directly pertinent to the question of whether "valid commercial reasons" explain a particular company's loss-making status. In such a scenario, and without prejudice to the question of whether the customs authority is obliged to communicate that information to the importer, we consider it unlikely that an examination of the circumstances of sale that excludes a comparator company on the basis of its loss-making status without taking into account such information could be apt to reveal whether the relationship influenced the price.

[442] Philippines' response to Panel question No. 8(c), paras. 95-97.

[443] We note that the names of the companies included in the group were only released to PMTL on 16 June 2016. (See Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B))

[444] Philippines' first written submission, para. 265 (referring to Macrorich Co. Ltd., Audited Financial Statement, 2002 (English translation), (Exhibit PHL-60-B); and Classic Cigars Co., Ltd. Audited Financial Statement, 2002 (English translation), (Exhibit PHL-61-B)).

[445] We cannot find in any of the documents on the record of the BoA's determination, or indeed any of the evidence submitted by the parties whether on or off the record of the determination, any indication that the BoA excluded Macrorich on the basis that its P&GE rate was too high. Similarly, we can find no indication that the BoA excluded Classic Cigars on the basis that no financial information could be found for that firm. To the contrary, at least one document on the record, namely the Minutes of the BoA Meeting of 14 January 2010, indicates that the BoA did, in fact, have financial information for Classic Cigars in 2010, two years prior to the 2012 determination. (See Minutes of the BoA Meeting of 14 January 2010 (English translation), (Exhibit PHL-42-B), p. 10)

the exclusion of JTI and BAT, we consider that Thailand's explanation for the exclusion of these companies may constitute an *ex post* rationalization.[446] Nevertheless, in accordance with our approach above, we consider it appropriate to proceed on an *arguendo* basis and address the parties' arguments in relation to the exclusion of Macrorich and Classic Cigars.[447]

7.176. Regarding Thailand's explanation that the BoA excluded Macrorich because its P&GE rate was disproportionately high, we do not consider that an examination of the circumstances of sale would be apt to reveal whether the relationship influenced the price if a company were excluded from a comparator group solely on the basis that its inclusion would affect the comparison. In our view, the mere characterization of a company's P&GE rate as "too high" or "too low", absent any further explanation, is not an objectively justifiable reason for excluding that company from a comparator group. Indeed, absent some other kind of explanation, there is no basis for regarding a company with a high P&GE rate as anything other than representative of the industry.[448]

7.177. As for Thailand's explanation that Classic Cigars was excluded because the BoA did not have access to relevant financial information, we note that the record of the BoA's determination demonstrates that the BoA did, in fact, have financial data for Classic Cigars in 2010, sufficient to calculate a P&GE rate for Classic Cigars for 2002.[449] Furthermore, we note that in the course of this proceeding, the Philippines has submitted Classic Cigars' Audited Financial Statement for 2002 with the date of receipt by the Thai Commercial Registration Department of 28 March 2003.[450] Had the BoA indicated in the course of the required consultations[451] with PMTL that it was conducting an examination of the circumstances of sale based on a comparison of P&GE rates, and that it excluded Classic Cigars from the industry group on the basis that no financial information was available, there appears to be no reason that PMTL could not have provided that same audited financial statement to the BoA, much as the Philippines has provided it to us. Regarding Thailand's argument that "the newly-composed BoA in 2011-2012 conducted its own analysis using different sources of information (TSIC data, Revenue Department data, and Customs data) than the 2010 BoA"[452], we do not consider that Thailand has adequately explained how either the BoA's reliance over time on different sources of information, or changes in the composition of the BoA itself, has a bearing on the question of whether the BoA had access to relevant financial information. In short, we do not consider that Thailand has adequately explained the exclusion of Classic Cigars from the group.

7.178. Given the BoA's decision to include Lee Intertrade and KHS in the industry comparator group, we consider that there was a degree of arbitrariness in the BoA's decision to exclude Macrorich and Classic Cigars from the group. As our earlier findings regarding the inclusion of Lee Intertrade and KHS make clear, we consider that the BoA's inclusion of these companies in the industry group was problematic. The reason is that from the significant differences in business operations between Lee Intertrade and KHS (and Chemical Resins and Piriyapul) and PMTL, it is not clear how the P&GE rates of these companies can, in principle, reveal anything about the P&GE rate of PMTL, a company that exclusively sells cigarettes at the wholesale level. For the same reason, we consider that it would have been problematic for the BoA to include Macrorich and Classic Cigars in the industry comparator group. However, given the BoA's decision to include Lee Intertrade and KHS in the industry comparator group, there was a degree of arbitrariness in the BoA's decision to exclude Macrorich and Classic Cigars from the industry comparator group. We do not consider it necessary to address whether the exclusion of Macrorich and Classic Cigars from the industry group renders the entire

[446] See paragraphs 7.121. , 7.146. , 7.147. and 7.163. above.
[447] See paragraph 7.147. above.
[448] We do not preclude the possibility that it may be appropriate, using specific statistical methodologies, to exclude so-called "outliers" from a particular analysis. In such circumstances, it may be the case that the exclusion of certain companies from a comparator group is indeed objectively justified, on the basis of reasons based on valid statistical methodologies. In the present dispute, no such arguments or reasons have been presented, neither in an *ex post* sense, nor on the record of the determination itself. We further note in this regard that the extremely small size of the comparator group at issue here (namely consisting of only five observations, or seven observations if one were to include BAT and JTI) reinforces our view that Thailand has not demonstrated that there was any objectively justifiable reason for excluding Macrorich from the industry group, given the BoA's decision to include Lee Intertrade and KHS in the group.
[449] See Minutes of the BoA Meeting of 14 January 2010 (English translation), (Exhibit PHL-42-B), p. 10.
[450] Classic Cigars Co., Ltd. Audited Financial Statement, 2002, (Exhibit PHL-61-A) and Classic Cigars Co., Ltd. Audited Financial Statement, 2002 (English translation), (Exhibit PHL-61-B).
[451] See paragraph 7.106. above.
[452] Thailand's comments on the Philippines' response to Panel question No. 82, p. 17.

industry group inapt to reveal whether the relationship influenced the price or gives rise to a violation of Article 1.2(a) of the CVA.

7.179. At this point, we consider it useful to recapitulate the intermediate conclusions that we have reached above with regard to the composition of the industry group. As elaborated above, we consider that the authorities enjoy a margin of discretion regarding the means or methodology that they choose to follow when engaging in comparisons, but that certain principles of comparability are inherent in the essential legal standard to be applied under that provision, as read in its context and in light of its object and purpose. We consider that it is axiomatic that the inclusion of PMTL within the industry group is not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL. We note that, despite the representation made in the BoA Ruling that PMTL's P&GE rates were compared to a benchmark range derived from the P&GE rates of "imported cigarette wholesalers in the year 2002", Thailand does not contest that none of the other companies included in the group were actually "imported cigarette wholesalers in the year 2002".[453] We further consider that, given the significant differences in business operations between PMTL and Chemical Resins, KHS, Lee Intertrade and Piriyapul, it is not clear how the P&GE rates of these companies can, in principle, reveal anything about the P&GE rate of PMTL, a company that exclusively sells cigarettes at the wholesale level. We are not persuaded that the BoA's composition of the industry group can be defended on the grounds that these companies were included in the TSIC, or by the BoA's reference to the OECD guidelines, or because the BoA encountered difficulties identifying comparable companies as a consequence of its decision to engage in a comparison of PMTL's P&GE rates with those of an industry comparator group for the purpose of examining the circumstances of sale. Furthermore, we are not persuaded that JTI and BAT, two companies that were comparable to PMTL, were excluded from the industry group on the basis of objectively justifiable reasons. Finally, we consider that there was a degree of arbitrariness in excluding Macrorich and Classic Cigars from the group, given the BoA's decision to include Lee Intertrade and KHS in the industry comparator group.

7.180. Based on all of the foregoing, we consider that the Philippines has established that the BoA constructed an industry comparator group composed of companies that were not comparable to PMTL, and consequently were not, in principle, apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL. However, we consider that it may be premature to arrive at a conclusion as to whether this intermediate finding gives rise, by itself, to a violation of Article 1.2(a) of the CVA. As we have already indicated, a customs authority is not precluded from conducting an examination of the circumstances of sale on the basis of a comparison of P&GE rates in situations where the market circumstances do not allow for a perfect apples-to-apples comparison. We agree with Thailand that a particular market situation could be such that any examination of the circumstances of sale will suffer from certain limitations. Such shortcomings in the comparison may not give rise to any inconsistency with Article 1.2(a) insofar as relevant and identifiable differences that would affect the comparison are taken into account. We therefore proceed to examine the remaining aspects of the BoA's comparison, addressing, in turn, the BoA's determination of the industry benchmark P&GE range, and the manner in which the BoA compared PMTL's P&GE rates with that industry benchmark P&GE range. Finally, we will conduct an overall assessment of the BoA's examination of the circumstances of sale.

7.2.2.3.2.2 The determination of the benchmark range

7.181. Having constructed an industry group, the BoA proceeded to determine a P&GE rate for each of the five companies in the industry group and calculated an "industry average" P&GE rate of 12.44% for the five companies, using a simple average calculation.[454] From that industry average, the BoA created a "benchmark range" of P&GE rates, by adding and subtracting 2.64% from the industry average − the resulting benchmark range fell between 9.8% and 15.08%.[455] It is

[453] See paragraph 7.140. above.

[454] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 8; Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B). We note that this factual aspect of the BoA's approach is uncontested by the parties.

[455] BoA Ruling, (Exhibit PHL-21-B), p. 3; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 8.

uncontested that the BoA used the statistical measurement of "standard error" to determine the benchmark range, by adding and subtracting two "standard errors" from the industry average.[456]

7.182. As elaborated below, the Philippines argues that the BoA's determination of the benchmark range was flawed because: (i) the BoA used different definitions of corporate income in determining the numerator and denominator for its calculation of P&GE; (ii) the BoA used an incorrect P&GE rate for PMTL when determining the industry average; (iii) the BoA calculated the industry average on the basis of a simple average, instead of a weighted average, thereby failing to account for differences in sales volumes between PMTL and the other companies[457]; and (iv) the BoA used an inappropriate statistical measurement of "standard error" to calculate the benchmark range.

7.183. We first set out the parties' arguments on these issues in greater detail, before providing our analysis of the BoA's determination of the industry P&GE range in the light of the issues raised.

7.184. Regarding the BoA's determination of a P&GE rate for each of the companies in the industry group, the Philippines explained that the BoA's calculation was based on a formula, by which the P&GE rate was calculated by dividing the sum of "net profit", "selling and administrative expenses", and "corporate income tax" (if any), by a denominator comprising simply the income of the company.[458] The Philippines notes that, in determining the net profit for the purpose of giving a value to the numerator in the P&GE calculation, the BoA deducted operating expenses from "total income" (which includes ordinary operating income as well as extraordinary income).[459] However, when determining the denominator for the P&GE calculation, the BoA used "main income" (which excludes extraordinary income).[460] The Philippines notes that although one of the five companies did not have any extraordinary income, the other four companies did, resulting in different income figures being used in the numerator and denominator for those four companies.[461] In the Philippines' view, the "use of inconsistent income figures for four companies in the industry group had an impact on the calculation of: the P&GE rates for the four companies concerned; the average P&GE rate for the industry group; the standard deviation used to calculate the standard error of the mean; and, hence, the normal range for the industry group."[462]

7.185. Regarding the BoA's determination of a P&GE rate for PMTL as part of the industry comparator group, the Philippines argues that the BoA incorrectly used a rate of 9.22%.[463] The Philippines explains that the 9.22% rate was calculated from data in PMTL's financial statements, which reflect the customs duties and taxes paid by PMTL on the revised customs value determined by the Customs Department, and not the actual transaction value.[464] The Philippines argues that the

[456] We note in this respect that we can see no evidence submitted to the Panel conclusively demonstrating that the BoA relied on the "standard error of the mean" to calculate the benchmark range. However, the Philippines has demonstrated mathematically that a range of 9.79% - 15.09% could have been calculated by adding and subtracting two standard errors of the mean from the industry average of 12.44%. (See P&GE rates based on consistent and inconsistent use of income, (Exhibit PHL-140)) We note that this calculated range is slightly different to the range actually used by the BoA. Nevertheless, given the extremely close approximation, and in particular given that Thailand itself in the context of this proceeding has acknowledged that "the BoA used the standard error of the industry-average P&GE ratio as the statistical tool to establish the range", we proceed on the presumption that, *factually speaking*, the BoA did indeed rely on standard error when calculating the benchmark range. (See Thailand's first written submission, para. 5.60) We emphasize in this respect that, since this concerns a factual matter regarding the BoA's actions, and not an explanation for those actions, we do not consider that this constitutes an *ex post* rationalization, within the meaning set forth in paragraph 7.121. above.

[457] Regarding this aspect of the BoA's approach, we note that the Philippines argues that the failure to account for the vast differences in sales volumes between PMTL and the other companies included in the comparator group pertains not only to the manner in which the BoA determined the industry benchmark range, but also to the BoA's comparison of PMTL's P&GE rate to that range. (See Philippines' response to Panel question No. 83)

[458] Philippines' second written submission, para. 214 (referring to Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 27 March 2014, (Exhibit PHL-59), response to Question 8). The Philippines describes the formula as "[N]umerator = net profit + selling and administrative expenses + corporate income tax (if any). The denominator was the income of the company."

[459] Philippines' second written submission, para. 222.

[460] Philippines' second written submission, para. 223.

[461] Philippines' second written submission, para. 224.

[462] Philippines' second written submission, para. 224 (referring to P&GE rates based on consistent and inconsistent use of income, (Exhibit PHL-140)).

[463] Philippines' first written submission, para. 284.

[464] Philippines' first written submission, paras. 283-284; second written submission, paras. 205-207.

BoA should have therefore used a P&GE rate of 18.47% rate, adjusted to reflect the customs duties and taxes that would have been paid on the transaction value.[465] The Philippines argues that, "[a]s a result, the benchmark P&GE rates used in the comparison were necessarily *lower*, through the inclusion of an *unadjusted* PM Thailand rate of 9.22 percent, than they would have been had the BoA used an *adjusted* PM Thailand rate of 18.47 percent on both sides of the comparison. This lack of even-handedness … inevitably skewed the comparison".[466] In the Philippines' view, a comparison based on the rate of 9.22% could reveal "only whether the Customs Department's assessment of higher customs values led to P&GE rates that were consistent with those of the industry group."[467] The Philippines also points out that if the BoA had used the adjusted rate of 18.47% for both inclusion in the benchmark group as well as the comparison with PMTL itself, that rate "would have fallen very close to the upper limit of the range" established by the BoA.[468]

7.186. The Philippines argues that, once the BoA had determined P&GE rates for each company, the BoA failed to account for significant differences in the sales volumes of the companies in the benchmark group when determining the industry average, by using a simple average calculation instead of a weighted average calculation.[469] The Philippines considers that the purpose of a comparison of P&GE rates is to shed light on the circumstances of sale, and if one of the companies included in the benchmark group is substantially larger than the others, this should be accounted for, or else "the benchmark will *not* be apt to represent normal commercial behavior in the industry; rather, the range will be skewed by the disproportionate sizes of the companies included."[470] The Philippines highlights that, in 2002, PMTL had sales amounting to THB 8.5 billion, whereas by comparison, Piriyapul, the largest of the other four companies in the benchmark group, had net sales of THB 200 million (or 2.4% of PMTL's net sales), while the three other benchmark companies had combined net sales of less than THB 110 million (just over 1% of PMTL's net sales).[471] The Philippines notes that if the BoA had weighted the calculation to account for different sales volumes, PMTL's figures would have dominated the calculation, such that the BoA's "basis for rejecting PM Thailand's transaction values would have disappeared."[472] Thus, in the Philippines' view, "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 of companies included in the comparator group".[473] The Philippines also states that the differences in size between PM Thailand and the companies included in the comparator group are also relevant "in assessing whether PM Thailand's P&GE rate was 'inconsistent' with those of the industry group in the sense of Paragraph 6 of the Interpretative Note to Article 5 of the *CVA*".[474]

7.187. Regarding the BoA's determination of the benchmark range from 9.8% to 15.08%, the Philippines argues that the BoA inappropriately applied the statistical measurement of "standard error of the mean" to construct this range. The Philippines argues, first, that statistical methods in general were inappropriate, because the industry group of only five P&GE rates "was far too small to yield any statistically valid result" and was a "deficient population due to the small number of companies used".[475] In any event, the Philippines explains that the BoA's reliance on standard error was particularly inappropriate, since standard error effectively measures the precision of a sample mean, and does not "identify whether a particular value in a distribution is abnormally high or low relative to the sample mean".[476] The Philippines elaborates that, because the standard error is calculated by dividing standard deviation by the square root of the number of observations, mathematically speaking the standard error necessarily becomes smaller as the number of

[465] Philippines' first written submission, paras. 283-284; second written submission, paras. 202 and 205-207.
[466] Philippines' first written submission, para. 286. (emphasis original)
[467] Philippines' second written submission, para. 208.
[468] Philippines' first written submission, para. 287.
[469] Philippines' first written submission, paras. 269-279; second written submission, paras. 187-198.
[470] Philippines' response to Panel question No. 12, para. 114. (emphasis original)
[471] Philippines' first written submission, paras. 271-273 (referring to Chemical Resins Thailand Limited, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-46-B); Lee Intertrade Co. Ltd., Audited Financial Statement, 2002 (English translation), (Exhibit PHL-63-B); and K H S Company Limited, Audited Financial Statement, 2002 (English translation), (Exhibit PHL-47-B)). The Philippines explains that Chemical Resin's net sales represented 0.98% of PMTL's net sales, Lee Intertrade's net sales represented 0.28% of PMTL's net sales; and KHS's net sales represented 0.02% of PMTL's net sales.
[472] Philippines' first written submission, para. 275.
[473] Philippines' second written submission, para. 191.
[474] Philippines' response to Panel question No. 83, para. 143.
[475] Philippines' first written submission, paras. 302 and 397.
[476] Philippines' first written submission, para. 313.

observations becomes larger, with the consequence that, with a sufficient number of observations, the standard error would be close to zero, resulting in a "range" based on standard error that would exclude all (or almost all) observations.[477] The Philippines further asserts that the correct statistical method for determining whether PMTL's rates fell within the normal range of industry rates was to establish a range of values based on standard deviation.[478]

7.188. Thailand explains, regarding the allegedly inconsistent definition of income in determining the numerator and denominator of its calculation of P&GE rates for the companies in the industry comparator group, that the calculation of profit was based on total income (including extraordinary income) because "the total expenses used in the calculation of the numerator for each of the five companies was reported on a corporate-wide or total basis", and that "it was necessary to use total income and total expenses, because that was the basis on which the expenses were reported or available".[479] According to Thailand, the "resulting figure was then divided by the operating or main income in order to allocate the total profit over operating income only, to reflect as accurately as possible the P&GE ratios that would be achieved on operations."[480] Thailand also notes that this calculation "was used consistently for all companies in the group" and that even if the denominator had been based on total income, there "would have been no effect on the overall calculation."[481]

7.189. With respect to the BoA's choice of a P&GE rate of 9.22% for PMTL when treating it as part of the industry benchmark group, Thailand notes that the BoA used the rate of 9.22% in order to be consistent with how the rates were established for the other companies included in the benchmark group.[482] Thailand considers that the BoA could not have gone "behind" the financial statements of other companies to see whether their P&GE rates could have been higher or lower than expected, and therefore "the only reasonable approach was for the Board of Appeals to rely on the available audited information."[483] As to the Philippines' argument that this rate was incorrect because it would have been lower if Thai Customs had accepted the transaction values, Thailand notes that for purposes of the comparison, "it was appropriate" for the BoA to use figures for PMTL and the other companies based on the "financial results" in the audited financial statements because it was "the only basis on which to make a fair apples to apples comparison".[484]

7.190. Regarding the differences in sales volumes between PMTL and the other companies included in the industry group, Thailand defends the BoA's reliance on a simple average instead of a weighted average, in determining the average P&GE rate for the industry comparator group. Thailand asserts that the fact of PMTL having significantly larger sales volumes than the other companies "does not mean that … the BoA cannot compare PM Thailand to other companies", which would put PMTL "beyond review by Thai customs law, simply because it is the largest importer".[485] Thailand further notes that expert evidence provided by the Philippines itself in this dispute indicates that there is a problem with making comparisons with PMTL in Thailand, since there are so few "comparable operators that transact with unrelated parties".[486] Thailand considers that it is "objectively justifiable" for the BoA to conduct a comparison with "companies selling the same product" rather than "companies of the same size".[487] In Thailand's view, the BoA's approach "in the absence of perfect solutions or mandated approaches in the CVA" was not inherently unreasonable, and was objective and unbiased.[488] Thailand also argues that "a comparison with companies of the same size as PMTL would have required the BoA to look at companies in entirely different sectors".[489] Thailand further asserts that "the Philippines itself acknowledges that the asymmetry in the relative sizes of sales was a matter considered by the BoA", however the BoA did not ascribe as much "weight and

[477] Philippines' second written submission, paras. 246-249 and 254-259.
[478] Philippines' first written submission, paras. 322-323; second written submission, paras. 251-252
[479] Thailand's response to Panel question No. 15, p. 17.
[480] Thailand's response to Panel question No. 15, p. 17.
[481] Thailand's response to Panel question No. 15, p. 17 (referring to calculations of P&GE ratios/ranges (Exhibit THA-40)).
[482] Thailand's second written submission, para. 2.62. In Thailand's view, in order to determine whether PMTL's P&GE rates "were within a benchmark range, the PM Thailand rate used had to be calculated on the same basis as the other rates in the benchmark range".
[483] Thailand's second written submission, fn 36.
[484] Thailand's second written submission, para. 2.64.
[485] Thailand's first written submission, para. 5.30.
[486] Thailand's first written submission, para. 5.31 (quoting Expert witness statement of Paulette Vander Schueren, 16 September 2010, (Exhibit PHL-115), p. 7).
[487] Thailand's second written submission, para. 2.47.
[488] Thailand's second written submission, para. 2.53.
[489] Thailand's response to Panel question No. 14, p. 16.

significance" to this consideration "as the Philippines would have liked".[490] Furthermore, Thailand recalls that the Philippines itself explains that if the BoA had weighted the calculation to account for differences in sales volumes, PMTL's figures would have "dominated any weighting of the figures".[491] Thailand considers that this would have "led to the BoA comparing PM Thailand with itself … [which would] have prejudged the outcome" of the comparison.[492] Thus, according to Thailand, it was reasonable for the BoA to rely on a simple average P&GE rate, instead of a weighted average.[493] Thailand also considers that, even if PMTL had been excluded from the benchmark group, its P&GE rates would still have been outside the benchmark range.[494]

7.191. Turning to the BoA's determination of the benchmark range around the industry average, Thailand argues that the Philippines does not indicate what sample size would be sufficient for "the use of the sample and statistical tools", and that under the Philippines' suggested approach of simply comparing PMTL's P&GE rates with the range of P&GE rates in the benchmark group, from lowest to highest, PMTL's rates still fall outside that range when excluding PMTL's own rates from the benchmark range. [495] As for the BoA's reliance on "standard error" to create the benchmark range, Thailand argues that Article 1.2(a) does not prescribe a statistical tool for determining ranges for comparison.[496] In Thailand's view, the BoA's reliance on the mean "makes sense as, in statistics, the 'mean' is the expected value of a given variable, and … is the measure of 'central tendency' of the values in the distribution".[497] Thailand explains that the standard error of the mean "'measures how precisely the population mean is estimated by the sample mean' … [and thus] predicts the range around the sample mean within which the actual mean of the entire population would be expected to fall".[498] Thailand considers that the BoA's approach is supported by the WCO Commentary on the application of the deductive value method[499], that other possible approaches to the comparison of P&GE rates demonstrate the reasonableness of the BoA's approach[500], and that the Philippines' reliance on standard deviation is misplaced.[501]

7.192. We first address the Philippines' argument that the BoA's use of different definitions of corporate income in determining the numerator and denominator for the calculation of P&GE was inconsistent with Article 1.2(a). Before turning to the parties' specific arguments, we note at the outset that the CVA does not impose any specific obligations on customs authorities with respect to how corporate income is treated in the context of calculating a company's P&GE rate. This means that customs authorities have a degree of discretion in how they treat corporate income in the context of calculating a company's P&GE rate. However, a customs authority does not have licence to define corporate income in any manner that it wishes. In light of the legal standard that we have articulated above, we consider that the relevant question is whether the BoA's calculation of the P&GE rates of the companies in the industry comparator group using different figures for corporate income in the numerator and the denominator was apt for the purpose of determining whether PMTL's P&GE rate was consistent with the industry, in order to assess whether the relationship between the buyer and seller influenced the price.

7.193. The parties' arguments in this proceeding reveal that there was a lack of clarity surrounding the manner in which the BoA actually conducted its calculation, which has only been clarified in the course of this proceeding. We consider it useful to recount how the parties' understanding of the BoA's calculation of P&GE rates has evolved through the course of this proceeding.

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[490] Thailand's first written submission, para. 5.34 (referring to the Philippines' first written submission, paras. 276-278).

[491] Thailand's first written submission, para. 5.35 (referring to the Philippines' first written submission, para. 275).

[492] Thailand's first written submission, para. 5.35.

[493] Thailand's first written submission, para. 5.35.

[494] Thailand's first written submission, para. 5.35.

[495] Thailand's first written submission, paras. 5.51-5.52.

[496] Thailand's first written submission, para. 5.54.

[497] Thailand's first written submission, para. 5.57. See also Thailand's second written submission, para. 2.70.

[498] Thailand's first written submission, para. 5.60 (quoting Betty R. Kirkwood and Jonathan A.C. Sterne, *Essential Medical Statistics*, 2nd ed (Blackwell Publishing, 2003) (excerpts only), (Exhibit THA-12), p. 39).

[499] Thailand's first written submission, para. 5.62 (referring to World Customs Organization, Customs Valuation Compendium, Commentary 15.1 "Application of Deductive Value Method", 2nd ed., November 2008 (Exhibit PHL-85), para. 11).

[500] Thailand's first written submission, paras. 5.65-5.69.

[501] Thailand's first written submission, paras. 5.70-5.73.

7.194. In its first written submission, the Philippines claimed that the BoA Ruling is inconsistent with Article 1.2(a) of the CVA because the BoA used different approaches to calculating the P&GE rates for the five benchmark companies.[502] Specifically, the Philippines understood that, in determining the *profit* for two of the five companies in the benchmark group (namely KHS and Lee Intertrade), the BoA used a "profit before income tax" method, but for the other three companies (namely PMTL, Chemical Resins and Piriyapul), the BoA used a "profit after income tax" method.[503]

7.195. In its first written submission, Thailand responded that the Philippines' arguments concerning the figures for the benchmark companies were factually incorrect, and that for all comparator companies, the BoA used profits before tax plus general expenses.[504] Thailand noted that certain companies did not pay taxes, meaning that profit before tax and profit after tax were the same figure.[505]

7.196. In its second written submission, the Philippines stated that it accepted Thailand's clarification of the facts, but maintained that, in the light of Thailand's explanations regarding corporate income tax, the Philippines had been able to identify the "real source of the anomalies".[506] The Philippines explained that the anomalies that it identified arose from the fact that the BoA's calculation for the rate of P&GE was determined by dividing the sum of net profit, selling and administrative expenses, and corporate income tax (if any), by a denominator consisting of the income of the company.[507] The Philippines explained that, in determining the *net profit* for the purpose of determining the numerator in the P&GE calculation, it appeared that the BoA had deducted operating expenses from *total income* (which includes ordinary operating income as well as extraordinary income)[508]; however, when determining the denominator for the P&GE calculation, the BoA had used "main income" consisting of ordinary operating income only, and *excluding* extraordinary income.[509] Proceeding on that understanding, the Philippines noted that although one of the five companies did not have any extraordinary income, the other four companies did, resulting in different income figures being used in the numerator and denominator for those four companies.[510] In the Philippines' view, the "use of inconsistent income figures for four companies in the industry group had an impact on the calculation of: the P&GE rates for the four companies concerned; the average P&GE rate for the industry group; the standard deviation used to calculate the standard error of the mean; and, hence, the normal range for the industry group."[511]

7.197. In its second written submission, Thailand did not specifically respond to this point, or explain whether the Philippines' understanding was correct, and if so why the BoA's approach was reasonable. Rather, Thailand simply asserted that the Philippines "is incorrect" in arguing that the BoA calculated the P&GE ratios for the relevant companies inconsistently, and noted that there was nothing inconsistent or unreasonable about the BoA's approach.[512] However, Thailand acknowledged that "the Philippines also suggest[ed] that there is a minor computational error in some of the calculations underlying the above table", and that as of that time, "Thailand is still reviewing this issue and will provide any necessar[y] clarification as appropriate".[513]

7.198. In response to a question from the Panel asking Thailand to clarify, Thailand then explained that "there does not appear to be any computational error as such".[514] Thailand then explained what the BoA had done, and why:

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[502] Philippines' first written submission, paras. 289-295.
[503] Philippines' first written submission, para. 294.
[504] Thailand's first written submission, paras. 5.42-5.44; second written submission, paras. 2.57-2.58.
[505] Thailand's first written submission, para. 5.43.
[506] Philippines' second written submission, paras. 218.
[507] Philippines' second written submission, paras. 214 (referring to Letter from the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, 27 March 2014, (Exhibit PHL-59), response to Question 8).
[508] Philippines' second written submission, para. 222.
[509] Philippines' second written submission, para. 223.
[510] Philippines' second written submission, para. 224.
[511] Philippines' second written submission, para. 224 (referring to P&GE rates based on consistent and inconsistent use of income, (Exhibit PHL-140)).
[512] Thailand's second written submission, paras. 2.57-2.58. Thailand noted that, for each company, the numerator was profit plus general expenses (before tax), and the denominator was operating income (not including non-operating income, such as interest income). (Thailand's second written submission, para. 2.58)
[513] Thailand's second written submission, para. 2.57 and fn 31.
[514] Thailand's response to Panel question No. 15, p. 17.

> The total income was used in the calculation of profit because the total expenses used in the calculation of the numerator for each of the five companies was reported on a corporate-wide or total basis also. In other words, to arrive at a profit figure, it was necessary to use total income and total expenses, because that was the basis on which the expenses were reported or available. Thus, the calculation of profit was done on an "apples minus apples" basis.
>
> The resulting figure was then divided by the operating or main income in order to allocate the total profit over operating income only, to reflect as accurately as possible the P&GE ratios that would be achieved on *operations.* This is, in effect, the final calculation used by the BoA.[515]

7.199. In the light of the foregoing, we are able to draw two sets of conclusions regarding the alleged inconsistencies in the BoA's P&GE calculations, and in particular its treatment of corporate income. First, we are now able to arrive at a factual conclusion as to what the BoA actually did. We understand that the BoA's determination of P&GE rates for the companies in the benchmark group consisted of a calculation as follows:

$$\text{P\&GE} = \frac{\text{(net profit + selling and administrative expenses + corporate income tax)}}{\text{(total income)}}$$

7.200. We further understand that it is uncontested that, in determining the *numerator* ("net profit"), the BoA relied on a figure representing ordinary operating income (earned in sales of goods) as well as *extraordinary* income (not earned through sales of goods). It is also undisputed that, when determining the *denominator* (i.e. "total income") for the P&GE calculation, the BoA used a figure consisting of ordinary operating income only and *excluding* extraordinary income.[516] Thus, the BoA used different definitions of income in determining the numerator and denominator for its calculation of P&GE. We understand that it is also undisputed that the BoA followed the same approach in determining the numerator and the denominator for all companies in the industry comparator group. It is uncontested that, of the five companies for which the BoA calculated a P&GE rate, one of the companies did not have any "extraordinary income", meaning that, for this one company, their profit figures used to derive the numerator and denominator were in fact identical, whereas for the other companies, the profit figures used to derive the numerator and the denominator were different.

7.201. Second, we consider that the manner in which the above explanation has unfolded demonstrates shortcomings in the BoA's approach to examining the circumstances of sale under Article 1.2(a), second sentence. We recall that the process of examining the circumstances of sale is one of consultation between the customs authority and the importer. As explained above, the manner in which the BoA addressed corporate income had still not been clarified as of the time of the Philippines' first written submission, and it was only in the light of Thailand's first written submission that the Philippines was able to discern how the BoA had actually conducted its calculation. Furthermore, it was only in response to a question from the Panel that Thailand elaborated on why the BoA had apparently conducted its calculation in this manner. None of this was discussed by the BoA and PMTL in the context of the customs valuation determination itself, nor in any subsequent explanations provided to PMTL or the Philippines by the BoA (or any other Thai entity). We further note that the Philippines' argument is based on its understanding of the calculation conducted by the BoA, as explained in two documents that, in our view, are not on the record of the BoA's determination.[517]

7.202. To the extent that we were to address the parties' arguments, we consider that certain questions may remain despite Thailand's explanation for why the BoA calculated the P&GE rates in this way. Having said that, we also note that the Philippines has not specifically responded to the explanation and justification that Thailand provided in response to a question from the Panel. In any event, we do not consider it necessary to resolve that issue, given the BoA's failure to communicate this aspect of its methodology to PMTL. In particular, we consider that PMTL was precluded from

[515] Thailand's response to Panel question No. 15, p. 17. (emphasis original)
[516] Philippines' second written submission, para. 223.
[517] Specifically, the Philippines refers to a letter sent from the Permanent Mission of Thailand to the WTO to the Philippine Mission to the WTO, 27 March 2014 (Exhibit PHL-59), and BoA Presentation, 1 August 2013 (Exhibit PHL-54). As explained in footnote 429 above, we consider that these documents do not form part of the record of the BoA's determination.

ever raising its concerns regarding this aspect of the methodology to the BoA at the time of the customs valuation determination.

7.203. Turning to the second flaw alleged by the Philippines, which concerns the manner in which the BoA calculated the P&GE rate for PMTL when treating it as part of the industry comparator group, we note that this argument relates to the inclusion of PMTL itself in the industry group. We have already found above that the BoA's inclusion of PMTL itself within the group was not apt to reveal whether the relationship influenced the price. However, we do not consider that this necessarily renders the Philippines' argument moot. Rather, we consider that it relates more generally to a methodological issue of how the BoA should have determined the P&GE rate of the companies included in the industry group, taking into account that the group included PMTL itself. In light of the legal standard that we have articulated above, we consider that the relevant question is whether the BoA's determination of the P&GE rates of the companies in the industry comparator group, derived from their financial statements and in the case of PMTL, reflecting the P&GE rates derived from the customs values as determined by Thai Customs as opposed to a P&GE rate derived from the declared transaction values, was apt for the purpose of determining whether PMTL's P&GE was consistent with the industry, in order to assess whether the relationship between the buyer and seller influenced the price.

7.204. Regarding the P&GE rate that the BoA used for PMTL, we recall that, according to the Philippines, the BoA incorrectly ascribed a P&GE rate of 9.22% to PMTL, when it should have used a rate of 18.47%.[518] We agree with the Philippines that, for the purpose of determining PMTL's P&GE rate, the BoA should not have used the rate of 9.22% derived from PMTL's financial statements. As the Philippines explains, and Thailand does not dispute, the 9.22% rate used by Thailand was based on PMTL's financial statement, prepared on the basis of the *revised customs values* as determined by the Thai Customs Department.[519] Thus, these figures do not correspond to PMTL's transaction values. We agree with the Philippines that the 9.22% figure is only useful for assessing whether the revised customs value assessed by the Thai *Customs Department* is consistent with that of an industry benchmark group. In our view, that reveals nothing about whether the P&GE rates calculated on the basis of PMTL's *transaction values* were consistent with the P&GE rates of the industry group, and therefore whether those transaction values were influenced by the relationship between the buyer and seller.[520]

7.205. We are not convinced by Thailand's argument that, because the P&GE rates of the other companies were determined based on the financial statements, the BoA was forced to also use PMTL's financial statements to determine its P&GE rate. We recall that the BoA's comparison of P&GE rates was in the context of an examination of the circumstances of sale, conducted in order to determine whether PMTL's transaction values *should* have been accepted by the Customs Department. We further recall that, under the CVA, any revised customs value determined pursuant to Articles 2 through 7 can only be assessed *after* the transaction value has been validly rejected.[521] It is a fact that, in the context of an appeal of an initial customs valuation determination, an importer may challenge not only the initial rejection of the transaction value, but also the manner in which the revised customs duties were calculated by the Customs Department. An importer may also refrain from challenging the determination of revised customs value, notwithstanding any concerns it may have regarding that determination, if the importer is confident that the transaction values should have been accepted. It is therefore inappropriate, in our view, for an appellate tribunal such as the BoA to conduct its examination of the circumstances of sale in assessing *whether* the transaction value should have been rejected, by accepting at face value that the revised customs duties calculated by the Customs Department accurately reflect the value of the importer's goods.

7.206. Having found that 9.22% was not an appropriate rate to use in respect of PMTL, we further note that, in total, the BoA ascribed three different rates to PMTL in the process of conducting its comparison: 9.22% when including PMTL within the industry group, and two different rates of 9.36%

[518] Philippines' first written submission, paras. 283-287; second written submission, paras. 205-207.

[519] Thailand explains that the "PM Thailand's audited financial statement P&GE for 2002 was 9.36%, which, corrected to account for interest income/expenses, was adjusted to 9.22%." (Thailand's first written submission, para. 5.45 (referring to Philippines' first written submission, paras. 282-286))

[520] Philippines' second written submission, para. 208.

[521] See the interpretative note regarding the Sequential Application of Valuation Methods in Annex I to the CVA

and 18.47% when comparing PMTL to the benchmark range.[522] We note that the rates of 9.22% (not taking into account interest) and 9.36% (taking into account interest) were both based on PMTL's financial statements for 2002, which were themselves based on the taxes and duties paid on the revised customs values as determined by the Customs Department.[523] By contrast, the 18.47% rate was a rate calculated by PMTL as to what its P&GE rate *would* have been had the transaction value, as declared by PMTL, been accepted by the Customs Department.[524] As explained above, we consider that the BoA should have based its determination on the transaction value, and therefore the BoA should have used a rate that appropriately reflected this. We understand that the 18.47% rate is indeed a rate that the BoA could have used as it does not suffer from the same shortcomings as the 9.22% and 9.36% rates.[525]

7.207. Turning to the third flaw alleged by the Philippines, namely the BoA's use of a simple average instead of a weighted average to calculate the industry average P&GE rate, we recall the Philippines' contention that the BoA failed to account for significant differences in the sales volumes of the companies in the benchmark group when determining the industry average, by using a simple average calculation instead of a weighted average calculation.[526] We recall that, in response to a Panel question, the Philippines states that the differences in size between PMTL and the companies included in the comparator group are also relevant "in assessing whether PM Thailand's P&GE rate was 'inconsistent' with those of the industry group in the sense of Paragraph 6 of the Interpretative Note to Article 5 of the *CVA*".[527]

7.208. We recall that the purpose of constructing a benchmark group was to ascertain a benchmark figure for P&GE rates, to determine whether PMTL's rate was consistent with that benchmark group. We consider that differences in sales volumes can have a direct impact on different companies' P&GE rates, and therefore, in principle, a comparison of P&GE rates should account for meaningful differences in sales volumes. We note that the principle of economies of scale implies that companies with significantly different sales volumes may have different levels of profits and general expenses. Consistent with this understanding, Article 1.2(b) of the CVA, which prescribes a number of methods by which an importer can demonstrate that the transaction value was not influenced by a relationship with the seller, explicitly indicates that "due account shall be taken of demonstrated differences in … quantity levels". Furthermore, Articles 2 and 3 of the CVA indicate that, in determining the customs value for a particular good, the transaction value of an "identical" or "similar" good can be used if the transaction value was for a sale "at the same commercial level and in substantially the same quantity as the goods being valued". Both Articles 2 and 3 indicate that the transaction value of goods sold "in different quantities" may be used if "adjusted to take account of differences attributable to … quantity … provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment". These provisions confirm that differences in sales volumes, generally, are a relevant consideration that should be taken into account when making comparisons. Furthermore, where an industry group comprises only four other companies, large differences in sales volumes could have particularly significant implications for the determination of what is "usual" for the industry. Since any comparison must be apt to shed light on whether the relationship between the buyer and seller influenced the price, we do not consider that a customs authority can simply disregard significant differences in sales volumes.

7.209. Having said this, we disagree with the Philippines that the BoA was necessarily required to take into account the differences in sales volumes between PMTL and the other companies in the context of determining an industry P&GE average, whether in the form of using a weighted average

[522] See BoA Ruling, (Exhibit PHL-21-B), p. 3; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 8. We note that, according to Thailand, PMTL also proposed rates of 15.05%, and 18.36%. (Thailand's first written submission, para. 5.45; second written submission, para. 2.65)

[523] Thailand's first written submission, para. 5.45; second written submission, fn 39.

[524] Philippines' first written submission, para. 283 and fn 180. See also Letter from PMTL to Chief of Analysis and Appeal Section, 15 December 2005, (Exhibit PHL-191-B).

[525] We note that, in addition to its argument concerning the nature of the rate, the Philippines also argues that the BoA used two different rates (namely 9.36% and 18.47%) when comparing PMTL to the benchmark range, and that the BoA should have used the same rate for P&GE when including it within the benchmark group, and when comparing it to that group. (Philippines' first written submission, paras. 282-288; second written submission, paras. 199-212; and response to Panel question No. 14) In our view, this latter argument relates to the comparison conducted by the BoA as between PMTL and the benchmark range. We therefore address this argument in that context. (See paragraphs 7.227. to 7.230. below)

[526] Philippines' first written submission, paras. 269-279; second written submission, paras. 187-198.

[527] Philippines' response to Panel question No. 83, para. 143.

or otherwise. It is uncontested that the combined sales volumes of the four other companies included in the industry comparator group represent a tiny fraction of PMTL's sales, and that the next-largest of the other four companies included in the industry group, Piriyapul, had net sales amounting to just 2.4% of PMTL's net sales, of which only a fraction is attributable to imported cigarettes.[528] It is further uncontested that if the BoA had weighted the calculation to account for differences in sales volumes, while including PMTL itself in the industry comparator group, then PMTL's figures would have "dominated any weighting of the figures"[529] in a way that would have "led to the BoA comparing PM Thailand with itself".[530] In this respect, the Philippines accepts that there would have been no need to use a weighted average if PMTL itself had not been included in the comparator group, as the other four companies were of comparable size to one another.[531] We do not consider that, having decided to include PMTL in the industry comparator group, the BoA was then required to perfect the inaptness of the industry comparator group, and its comparison of PMTL with that group, by using a weighted average that would have led to a comparison of PMTL with itself. We also note that the Philippines itself has indicated that the difference in sales volumes is something that the BoA could have taken into account when comparing PMTL to the benchmark range.[532] Based on our review of the CVA[533], and in accordance with our findings above concerning the BoA's composition of the industry group, we consider that relevant differences can be taken into account in different ways. Therefore, not only do we consider that it would have been inappropriate for the BoA to use a weighted average when determining the industry P&GE average, given that this would have fundamentally distorted the outcome of the comparison for the reasons explained above, but we also consider that it would be inappropriate for us to assess this aspect of the BoA's examination in isolation from how the BoA conducted its overall comparison. For these reasons, we do not consider that the BoA's failure to account for differences in sales volumes when calculating the industry P&GE average was flawed or inappropriate in the circumstances of this case. We do, however, return to this issue in the context of assessing the BoA's comparison of PMTL to the benchmark range.[534]

7.210. Turning to the Philippines' fourth set of arguments, concerning the BoA's determination of the benchmark range based on the standard error of the mean, we note that the Philippines has made two distinct arguments. The Philippines argues that: (i) the size of industry group was too small to apply statistical methods to determine a benchmark range; and (ii) in any event, the BoA's reliance on "standard error" was misplaced.

7.211. Before turning to these specific arguments, we note at the outset that the CVA does not impose any specific obligations on customs authorities with respect to the use of samples or statistical tools.[535] This means that a customs authority's degree of discretion in deciding how to conduct the examination extends to the use of statistical tools in determining an industry benchmark P&GE range.[536] However, a customs authority does not have licence to use statistical tools in any manner it wishes. In light of the legal standard that we have articulated above, we consider that the relevant question is whether the BoA's determination of an industry benchmark P&GE range by adding and subtracting two "standard errors" from the mean was apt for the purpose of determining whether PMTL's P&GE rate was consistent with the industry, in order to assess whether the relationship between the buyer and seller influenced the price.[537]

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[528] The Philippines' first written submission, para. 272.

[529] Thailand's first written submission, para. 5.35 (referring to the Philippines' first written submission, para. 275).

[530] Thailand's first written submission, para. 5.35.

[531] In its response to Panel question No. 12, asking whether the BoA would have been free to determine the benchmark P&GE range based on a simple average of the other four companies if PMTL had not been included in the industry group, the Philippines responds that it "does not object, in principle, to the use of a simple average when assessing P&GE rates, provided the companies in question are of a sufficiently similar size". (Philippines' response to Panel question No. 12, para. 113. See also Philippines' response to Panel question No. 83)

[532] See Philippines' response to Panel question No. 83.

[533] For instance, Article 1.2(b) of the CVA, concerning methods that an importer can use to demonstrate that the relationship did not influence the price, indicates only that "due account shall be taken of demonstrated differences in … quantity levels", and the interpretative note to that provision indicates that such differences might be taken into account "in determining whether one value 'closely approximates' to another value".

[534] See paragraph 7.231. below.

[535] Thailand's first written submission, para. 5.49.

[536] See, e.g. Thailand's second written submission, paras. 2.24-2.28.

[537] Our understanding is consistent with how panels and the Appellate Body have reviewed the use of statistical tools in the trade remedies context. In *US – Anti-Dumping Methodologies (China)*, the complainant

7.212. On the basis of our review of the evidence that it has provided[538], we agree with the Philippines that sample size is an important and relevant consideration in assessing whether an examination of the circumstances of sale, where it relies on statistical methodologies, is apt to reveal whether the relationship influenced the price. We further consider that the evidence provided by the Philippines raises doubts about whether the size of the industry group was sufficiently large to justify the BoA's resort to any statistical methods for the purpose of determining a P&GE benchmark range. We agree with the Philippines that "[i]t is axiomatic in statistical analysis that the statistical validity of the results depends upon the number of observations"[539] and that "a customs administration should only have recourse to statistical tools … when the number of observations … is sufficiently large for statistical analysis to yield meaningful results".[540] Recalling the relevant legal standard, we are convinced that a statistical analysis that is not capable of yielding "meaningful results" would not be apt to reveal whether the relationship between a buyer and seller influenced a transaction value. We further note that the Technical Committee on Customs Valuation's Commentary 15.1, regarding the "Application of Deductive Value Method", states that:

> The usual amount for commission or profit and general expenses could constitute a range of amounts which probably would vary according to the class or kind of the goods being valued. In order for a range to be acceptable it should be neither too wide *nor too deficient in population*. The range should be obvious and easily discernible in order for it to be the 'usual' amount. Other approaches might also be possible, e.g. the use of a preponderant amount (where such an amount exists) or an amount derived by simple – or weighted averaging.[541]

Having noted that sample size is an important consideration, we proceed to assess the BoA's use of "standard error" to define the benchmark range.

7.213. Turning to the Philippines' arguments concerning the BoA's use of "standard error of the mean" in particular, we understand from the parties' arguments that standard error is calculated by dividing the standard deviation of the sample by the square root of the number of observations in the sample.[542] The Philippines has demonstrated that the necessary and inevitable consequence of dividing the standard deviation by the square root of the number of observations in the sample is that the size of the standard error necessarily and inevitably decreases in size as the number of observations increases.[543] This means that the larger the industry group, the more companies would fall outside a P&GE "range" that was calculated using the standard error.[544] If there were a sufficient

argued that the investigating authority was free to use statistical tools to identify a "pattern" of pricing for purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, but claimed that the respondent's use of a "one standard deviation threshold" led to "arbitrary conclusions" as to the existence of a pattern. The Appellate Body agreed with the panel that investigating authorities "enjoy a margin of discretion regarding the methods or tools they wish to use in establishing the existence of a pattern", but that irrespective of the method used, investigating authorities are required to identify a "pattern" of export prices within the meaning of Article 2.4.2 and consistently with their obligations under the Anti-Dumping Agreement. (Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.22.) The Appellate Body, like the panel, conducted a detailed analysis of whether the investigating authority's use of the "one standard deviation threshold" was improper in the context of the obligation in Article 2.4.2 of the Anti-Dumping Agreement. (Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, paras. 5.13-5.31)

[538] Timothy Bock and John Sergeant, "Small sample market research", in *International Journal of Market Research*, Vol. 44, Quarter 2 (2002), (Exhibit PHL-194), pp. 240-242; Anne Hawkins, Flavia Jolliffe and Leslie Glickman, *Teaching Statistical Concepts*, (Longman, 1992) (extract), (Exhibit PHL-192); Robin Hill, "What Sample Size is 'Enough' in Internet Survey Research?", in *Interpersonal Computing and Technology: An Electronic Journal for the 21st Century*, Vol. 6, No. 3-4 (1998), (Exhibit PHL-193), p. 3.

[539] Philippines' response to Panel question No. 16(a), para. 133.

[540] Philippines' response to Panel question No. 16(a), para. 132.

[541] World Customs Organization, Customs Valuation Compendium, Commentary 15.1, "Application of Deductive Value Method", 2nd edition, November 2008, (Exhibit PHL-85), para. 11.

[542] Philippines' second written submission, para. 246 and statistical appendix, para. 11 (referring to Jack Levine, James Alan Fox, David R. Forde, *Elementary Statistics in Social Research*, 2nd edn (Pearson Education, 2014), (Exhibit PHL-70), pp. 172-217).

[543] Philippines' second written submission, para. 246 and statistical appendix, para. 11 (referring to Jack Levine, James Alan Fox, David R. Forde, *Elementary Statistics in Social Research*, 2nd edn (Pearson Education, 2014), (Exhibit PHL-70), pp. 172-217).

[544] See, e.g. Philippines' second written submission, paras. 245-260 and statistical appendix, paras. 4-32.

number of companies in the group, every single company would fall outside a range established on the basis of standard error.

7.214. Recalling the legal standard under Article 1.2(a), second sentence, we consider that a P&GE industry range that necessarily shrinks as the number of observations increases is simply not adequately representative of the industry. Notwithstanding any other concerns related to the use of standard error to establish the range[545], the fact that a benchmark range based on standard error narrows the range in a way that necessarily excludes P&GE rates that properly reflect the industry demonstrates that a comparison between an importer's P&GE rate and such a benchmark range is not apt to reveal whether an importer's relationship influenced the price.

7.215. We note that there is little explanation in any of the evidence on the record of the BoA's determination as to why the BoA constructed a range from 9.8% to 15.08%. In fact, it appears that the only explanation for this approach is provided in the Minutes of the BoA Meeting of 26 September 2012, which state that the range was determined on the basis of a "Confidential Interval at 95%". The relevance of this reference to a "confidential interval of 95%" is not clarified. However, we understand that in the field of statistics, a 95% *confidence* interval in a *normal distribution* "is an approximation of the proportion of observations that falls outside a range based on plus and minus two *standard deviations* from the average."[546] It therefore appears to us, on the basis of the BoA Minutes, that the BoA may have intended to calculate a range based on standard deviation. Mathematically speaking, a range based on two standard deviations would not have stretched from 9.8% to 15.08%, but rather from 6.51% to 18.37%.[547] Thus, the explanation on the record of the BoA's determination for *why* the BoA constructed its range may contradict the range it *actually* established.

7.216. We are unconvinced by Thailand's argument that standard error is appropriate since standard error measures the precision within which a population mean is estimated by a sample mean, and therefore predicts that range within which the actual mean would be expected to fall.[548] We agree with this characterization of standard error, but fail to see how that demonstrates the validity of using such a range − which necessarily gets smaller as the size of the sample increases − for assessing whether a particular observation is representative of the whole.

7.217. We find similarly unconvincing Thailand's argument that the BoA's approach is supported by the WCO Commentary on the application of the deductive value method, which states that for purposes of comparison with an importer's own P&GE figures, a "usual" amount of P&GE "could constitute a range of amounts … [that] should be neither too wide nor too deficient in population", and "[o]ther approaches might also be possible, e.g. the use of a preponderant amount … or an amount derived by simple - or weighted averaging."[549] Again, we fail to see how this reference to a preponderant amount is any way related to a determination of a range which decreases as the size of the companies in the group increases.

[545] We note, for instance, that standard error is only relevant when it is applied to a sample that is intended to represent a portion of a larger population. Specifically, standard error measures the likelihood of the *sample* mean correctly predicting the *population* mean. (See Philippines' second written submission, statistical appendix, para. 11 (referring to R. Mark Sirkin, *Statistics for the Social Sciences*, 3rd edn (SAGE Publications, 2006), (Exhibit PHL-72), pp. 127-141). Given the BoA's methods of determining the industry group we have doubts as to whether the industry group can be considered a "sample" and not the entire "population". Although Thailand considers that the total population would be "a broader category such as, for example, the 29 companies in the industry group", it seems obvious that, to the extent that those companies properly represent the total population, those additional companies should have been included in the comparison. (See Thailand's response to Panel question No. 17(b), p. 19) If the BoA had legitimate reasons for *excluding* those companies from the *sample*, then it seems to us that those same reasons would also mitigate against *including* those companies in the total *population*.

[546] Philippines' second written submission, fn 141 (referring to Jack Levine, James Alan Fox, David R. Forde, *Elementary Statistics in Social Research*, 2nd edn (Pearson Education, 2014), (Exhibit PHL-70)) (emphasis added). See also Philippines' second written submission, statistical appendix, paras. 6-7.

[547] See P&GE rates based on consistent and inconsistent use of income, (Exhibit PHL-140).

[548] Thailand's first written submission, para. 5.60 (quoting Betty R. Kirkwood and Jonathan A.C. Sterne, *Essential Medical Statistics*, 2nd ed (Blackwell Publishing, 2003) (excerpts only), (Exhibit THA-12), p. 39).

[549] Thailand's first written submission, para. 5.62 (referring to World Customs Organization, Customs Valuation Compendium, Commentary 15.1 "Application of Deductive Value Method", 2nd ed., November 2008, (Exhibit PHL-85), para. 11).

7.218. We note that Thailand argues that various other possible approaches to the comparison of P&GE rates would have led to the same result, i.e. that PMTL's P&GE rates were outside the benchmark range, and that this demonstrates the reasonableness of the BoA's approach. According to Thailand, these other possible approaches include using the full range of the sample group P&GE rates from highest to lowest, or relying on the interquartile range of the average-industry P&GE ratio, or relying on one standard deviation. [550] In our view, the fact that a different approach may have resulted in the same outcome does not obviate any flaws in the approach actually used. If a customs authority were to arbitrarily reject a transaction value on the basis of a coin-toss, but subsequently it was demonstrated that there is an alternative WTO-consistent approach to conducting the examination of the circumstances of sale that, if applied, would *also* result in the transaction value being rejected, the fact of the latter could not be used to justify the former.

7.219. In sum, we find that the BoA's determination of the benchmark range was problematic in several respects. First, we consider that there was a lack of clarity in the BoA's use of different definitions of profit in determining the numerator and denominator for its calculation of P&GE. Second, we consider that, having included PMTL in the industry group, the BoA then used an inappropriate P&GE rate for PMTL in the context of determining the industry average, because it used a P&GE rate that reflected the Thai Customs Department's revised customs values for PMTL, rather than the price actually paid. Third, we consider that the determination of the benchmark range using statistical tools, in particular the standard error of the mean, was also flawed.

7.220. We consider that it may be premature to arrive at a conclusion as to whether these intermediate findings give rise to a violation of Article 1.2(a) of the CVA. Rather, we consider that we must continue with our analysis to address the manner in which the BoA compared PMTL's P&GE rates with that industry benchmark P&GE range. Thus, we now turn to review the basis upon which the BoA established that PMTL's P&GE rate was "inconsistent" with the industry benchmark range.

7.2.2.3.2.3 The comparison between PMTL and the benchmark range

7.221. Once the BoA had constructed its benchmark range (including by relying on a P&GE rate for PMTL of 9.22%), it proceeded to compare two different P&GE rates for PMTL, specifically 9.36% (based on PMTL's financial statements) and 18.47% (the rate requested by PMTL), with the benchmark range of 9.8% to 15.08%.[551] Having determined that both of PMTL's rates fell outside the benchmark range, the BoA concluded that the relationship between PMTL and PM Indonesia affected the price paid by PMTL, and on that basis rejected PMTL's transaction value.[552]

7.222. The Philippines argues that the BoA's comparison of PMTL to the industry group was flawed in multiple respects, including its reliance on a mechanical, bright-line test. We first set out the parties' arguments on these aspects of the BoA's approach, before proceeding with our analysis of the issues raised.

7.223. The Philippines argues that the legal standard under Article 1.2(a) "accommodates differences between the things being compared, particularly when these differences are explained by commercial considerations or are not commercially significant."[553] The Philippines indicates that, under Articles 5 and 6 of the CVA, when determining whether an importer's P&GE rates are "inconsistent with" those of an industry group, a customs authority must take into account the degree to which the P&GE amounts are different, and "differences between an importer's figures and those of a comparator group do not suggest that the relationship influenced the price, provided the differences do not render the two amounts incompatible or incongruous."[554] In the Philippines' view, "[i]n assessing whether the importer's P&GE amounts are inconsistent with those of an appropriate industry group, an authority must consider explanations for any quantitative differences between them."[555] The Philippines asserts that even if the BoA's selection of the benchmark group was sufficient, the imperfections present in the choice of benchmark group mean that, although a comparison of P&GE rates could suggest the influence of a relationship on the transaction values,

[550] Thailand's first written submission, paras. 5.65-5.69.
[551] Minutes of the BoA Meeting of 26 September (English translation), (Exhibit PHL-39-B), p. 8.
[552] BoA Ruling, (Exhibit PHL-21-B), Clause 2, para. 1; Minutes of the BoA Meeting of 26 September (English translation), (Exhibit PHL-39-B), p. 9.
[553] Philippines' first written submission, para. 326.
[554] Philippines' first written submission, para. 327.
[555] Philippines' first written submission, para. 328.

qualitative factors should also be taken into account.[556] The Philippines argues more specifically that the BoA should have taken into account the differences in sales volumes between the companies that were included in the benchmark group and PMTL when conducting the comparison.[557] Additionally, the Philippines argues that even where a quantitative assessment is not flawed, a customs authority "cannot … draw rigid bright lines on the basis of that quantitative assessment alone … [T]he administration must accompany the quantitative assessment with a qualitative assessment of relevant factors."[558] The Philippines suggests that such a qualitative assessment "could, for example, reveal that any differences between the P&GE rates are explained by commercial considerations, or are not commercially significant."[559]

7.224. The Philippines argues that the BoA acted inconsistently with Article 1.2(a), second sentence, by failing to use the same P&GE rates for PMTL when including PMTL in the industry group when determining the benchmark range and when comparing PMTL's P&GE rates to the benchmark range.[560] The Philippines argues that the only rate the BoA should have used for PMTL was 18.47%, given that the P&GE rates of 9.22% and 9.36% were not based on the transaction value, but rather the revised customs value as determined by the Thai Customs Department.[561] The Philippines also clarifies that, regardless of which rate the BoA used, it should have used the same rate when including PMTL in the industry group and when comparing PMTL to that group.[562] Additionally, the Philippines argues that the differences in size between PM Thailand and the companies included in the comparator group are also relevant "in assessing whether PM Thailand's P&GE rate was 'inconsistent' with those of the industry group in the sense of Paragraph 6 of the Interpretative Note to Article 5 of the *CVA*".[563]

7.225. Regarding the legal standard under Article 1.2(a), Thailand explains that the BoA's standard for assessing the extent to which the relatedness of the buyer and seller influenced the price was whether PMTL's P&GE rates were "'consistent' with those of the industry group".[564] Thailand considers that this approach is supported by the expert witness testimony submitted by the Philippines as evidence in this dispute.[565] Thailand further argues that "paragraph 6 of the Interpretive Note to Article 5 and paragraph 5 of the Interpretive Note to Article 6 do not define the term 'inconsistent' or 'inconsistency' as the Philippines suggests", and consequently it is up to WTO Members to define what they consider to be "inconsistent".[566] In Thailand's view, the BoA conducted its comparison by establishing "reasonable parameters within which, with an almost absolute level of confidence, the representative P&GE ratio of the industry would be expected to be found".[567] Thailand considers that "this kind of objective approach achieves reasonable, reasoned and adequate outcomes".[568] Thailand notes that it was on this basis that the BoA considered that there were reasonable grounds to conclude that PMTL's transaction value was inconsistent with the industry benchmark.[569] Thailand emphasizes that "the BoA's approach need not be the *only* reasonable approach" and, in Thailand's view, the Panel "cannot set aside the BoA's approach simply because

[556] Philippines' second written submission, paras. 271-276. The Philippines highlights the inherent imprecision of the test adopted by the BoA, which, in the Philippines' view, further suggests that the BoA "should not have adopted a rigid, brightline approach in which the mere existence of some quantitative difference … led, for that reason alone, to rejection of the transaction values, without consideration of other factors." (Philippines' first written submission, para. 337)

[557] Philippines' response to Panel question No. 83.

[558] Philippines' response to Panel question No. 19, para. 156.

[559] Philippines' response to Panel question No. 19, para. 156.

[560] Philippines' first written submission, paras. 282-288; second written submission, paras. 199-212; and response to Panel question No. 14

[561] Philippines' second written submission, paras. 204-212.

[562] Philippines' response to Panel question No. 14(a). The Philippines explains that "[s]uch inconsistencies distort the comparison. An appearance of a discrepancy between the importer's P&GE rate and the industry group's P&GE rates may, in that event, be due to the administration's inconsistent use of P&GE rates." (Philippines' response to Panel question No. 14(a), para. 121)

[563] Philippines' response to Panel question No. 83, para. 143.

[564] Thailand's first written submission, para. 5.56. See also Thailand's second written submission, para. 2.70.

[565] Thailand's first written submission, para. 5.59 (referring to Expert witness statement of Paulette Vander Schueren, 16 September 2010, (Exhibit PHL-115), p. 8). Thailand refers to the statement by Ms Vander Schueren that the purpose of the tests is to determine whether the importer's figures are "commensurate" with the figures of other distributors in the industry.

[566] Thailand's response to Panel question No. 18, p. 20.

[567] Thailand's first written submission, para. 5.50.

[568] Thailand's response to Panel question No. 18, p. 20.

[569] Thailand's first written submission, para. 5.50 and 5.56-5.57.

there may be other reasonable approaches".[570] Thailand also considers that the Philippines "appears to consider that the BoA was obliged to engage in an endless search for a subjective ('qualitative') method, based on a potentially endless consideration of unknown or unspecified facts that might somehow be relevant, and ending only when there was an outcome favourable to the importer."[571]

7.226. Thailand explains that the P&GE rate in PMTL's audited financial statement for 2002 was 9.36%, which was modified to 9.22% to account for interest income and expenses.[572] Thailand notes that on 15 September 2004, PMTL requested that a rate of 15.05% be used, and, on 15 December 2005, PMTL requested that a rate of 18.47% (calculated based on the transaction values as initially declared by PMTL) be used.[573] The BoA subsequently "considered both the 9.22/9.36% figure and the 18.47% figure and found that both were outside the benchmark range".[574] Furthermore, Thailand contends that, because PMTL had argued that a rate of 18.47% should be used, the BoA "without prejudice to whether this rate was correct, also compared this rate with the benchmark range" to ensure "completeness in the analysis".[575] Thus, in Thailand's view, the BoA did not act inconsistently by using both of these figures to compare against the benchmark range.[576] Thailand does not specifically address the Philippines' argument that the differences in size between PMTL and the companies included in the comparator group were relevant to the assessment of whether PMTL's P&GE rate was inconsistent with the industry P&GE range that the BoA determined.[577]

7.227. We recall that the BoA constructed an industry benchmark P&GE range of 9.8% to 15.08%. The final step in the BoA's methodology for determining whether the relationship influenced the price was to determine whether PMTL's P&GE rates were inconsistent with the P&GE rates calculated for the industry group. The BoA concluded that PMTL's transaction values were influenced by the relationship between the buyer and seller solely on the basis that PMTL's rates of 9.36% and 18.47% fell outside of that industry benchmark P&GE range. The BoA conducted no further analysis, of either quantitative or qualitative factors, as part of its examination of the circumstances of sale.

7.228. Leaving aside the parties' disagreement over the precise meaning of the terms "inconsistent with" in the context of certain CVA provisions[578], we consider that the BoA's decision to adopt a mechanical, bright-line test to compare PMTL's P&GE rate with the industry benchmark range was inappropriate, taking into account the totality of the circumstances before it. First, the quantitative differences between the P&GE rates attributed to PMTL and the industry benchmark range are small. PMTL's P&GE rates of 9.36% and 18.47% fell outside the benchmark range of 9.80% to 15.08%, by margins of only 0.44% and 3.39% respectively. These differences are also relatively small as compared with the P&GE ratios for many of the other 15 companies under the TSIC heading 51.233 (wholesale of "tobacco and tobacco products") for which the BoA calculated P&GE ratios for 2002.[579]

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[570] Thailand's first written submission, para. 5.65. See also Thailand's second written submission, para. 2.76.

[571] Thailand's response to Panel question No. 18, p. 20.

[572] Thailand's first written submission, para. 5.45.

[573] Thailand's first written submission, para. 5.45. Thailand further notes that, in addition to the three rates described by PMTL (namely 9.22%, 9.36% and 18.47%), PMTL also proposed an alternative rate of 18.36%. (Thailand's second written submission, para. 2.65) Thailand highlights that all four rates proposed by PMTL fall outside the benchmark range. Thailand considers that this "is not a question of being generous to PM Thailand" but merely reflects "that *none* of the rates proposed by PM Thailand or derived from its financial statements would fall within the range". (Thailand's second written submission, para. 2.66)

[574] Thailand's first written submission, para. 5.45.

[575] Thailand's first written submission, para. 5.46.

[576] Thailand's first written submission, para. 5.46. See also Thailand's second written submission, para. 2.66.

[577] Thailand's comments on the Philippines' response to Panel question No. 83.

[578] We note that Paragraph 3 of the Interpretative Note to Article 1.2(a) envisages an examination of whether the parties' pricing methods were "consistent" with those of the industry, or with the seller's usual pricing practices; Article 1.2(b) calls for an authority to assess whether the declared transaction value "closely approximates" the transaction or customs values used as test values; and Paragraph 6 of the Interpretative Note to Article 5 provides that an importer's P&GE amounts are acceptable, unless the importer's figures are "inconsistent with" the P&GE amounts obtained in sales in the country of importation of imported goods of the same class or kind.

[579] BoA Presentation, 1 August 2013, (Exhibit PHL-54), pp. 24-25. We note that there were a total of 29 companies that Thailand initially identified as possible comparators, but it appears that, for those companies that were loss-making it did not indicate a P&GE ratio. For reasons indicated earlier, we do not consider that this document forms part of the contemporaneous record of the BoA's determination. (See footnote 429 above) However, we do not see any reason why we should not look at this document for information on the P&GE

7.229. Second, most of the other companies in the "tobacco and tobacco products" industry fell outside of the benchmark range of 9.80% to 15.08% which the BoA constructed. This included one of the four companies (other than PMTL) included in the industry comparator group, Chemical Resins, which had a P&GE rate of 17.75%.[580]

7.230. Third, the BoA applied a bright-line test in circumstances where it was confronted with different methods of calculating P&GE rates for the same companies, which yielded different P&GE rates for PMTL. We have already addressed above the Philippines' concerns regarding the P&GE rate used by the BoA in respect of PMTL when including PMTL within the industry group, and found that the BoA's reliance on a P&GE rate of 9.22% for PMTL was flawed, since it was calculated based on the revised customs values determined by the Customs Department.[581] We further found above that a relevant P&GE rate that could have been used for PMTL when calculating the benchmark range was the rate of 18.47%, calculated based on PMTL's declared transaction values.[582] For the same reasons set forth above in respect of the benchmark group, we consider that the BoA could have used this rate of 18.47% for PMTL when comparing PMTL to the benchmark range.[583] Furthermore, and of relevance to the manner in which the BoA conducted its comparison, we agree with the Philippines that, regardless of the actual rates used, by assigning different P&GE rates to PMTL when constructing the benchmark group versus when comparing PMTL against that benchmark group, the BoA's comparison was flawed.[584] We note that, in effect, the BoA compared three different things: a benchmark range, calculated using a figure based on revised customs values determined by the Customs Department to be the appropriate customs values for PMTL's purchases of the cigarettes, taking into account interest (i.e. 9.22%); an individual rate determined based on the revised customs value determined by the Customs Department, not taking into account interest (i.e. 9.36%); and an individual rate determined based on the declared transaction value actually paid by PMTL to PM Indonesia (i.e. 18.47%).[585] We do not see how a comparison based on such different things can reveal anything about any one of those three things.

7.231. Fourth, the BoA's comparison of PMTL's P&GE rate with the industry benchmark range did not take into account the vast differences in sales volumes between PMTL and the companies in the comparator group. We have already found above that significant differences in sales volumes must be taken into account when conducting a comparison of P&GE rates for the purpose of assessing the circumstances of sale.[586] The BoA did not take into account such differences when comparing PMTL's P&GE rate to the benchmark range.

7.232. Fifth, the BoA's reliance on a bright-line test for conducting its comparison is particularly problematic given the shortcomings in its composition of the industry comparator group, and its determination of the benchmark range. Specifically, we have found that the BoA compared PMTL's P&GE rates to a benchmark range of P&GE rates using an industry comparator group that was not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL. We have further found that the BoA's determination of that benchmark range was flawed in several respects. Taken together, we agree with the Philippines that "the serial flaws in the BoA's comparison mean that there was no basis for the BoA to apply rigid quantitative bright lines, without consideration of qualitative factors, in assessing [whether] PM Thailand's P&GE rates that fell slightly outside the calculated range".[587]

7.233. In other words, even assuming that the BoA was entitled to compare PMTL's P&GE rate with P&GE rates derived from a handful of companies selling different products at different commercial

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rates of the companies that BoA initially identified as potential candidates for the industry comparator group, and neither party has suggested otherwise.

[580] Furthermore, we note that there is information before us which indicates that of the 15 companies under the TSIC heading 51.233 for which the BoA calculated P&GE ratios for 2002, every single company other than Lee Intertrade, Piriyapul, and KHS fell outside of this range. We are not suggesting that these companies should have been included in the industry comparator group, or that the BoA's reasons for excluding them from the industry group were invalid. Rather, we consider it a relevant circumstance, in the context of appraising the BoA's application of a bright-line test, that four-fifths of the companies that it initially identified fell outside of the industry P&GE benchmark range that it constructed.

[581] See paragraphs 7.204. to 7.205. above.

[582] See paragraph 7.206. above.

[583] See paragraphs 7.204. to 7.206. above.

[584] Philippines' response to Panel question No. 14, para. 121.

[585] See paragraph 7.206. above.

[586] See paragraph 7.208. above.

[587] Philippines' second written submission, para. 273.

levels when defining a range for the industry comparator group, such differences would still be relevant for assessing whether PM Thailand's rate is "inconsistent" with the P&GE rates for this industry. Taking into account the apparent difficulties that the BoA faced, we agree with the Philippines' argument that the fact that such companies are a far less-than-perfect proxy for the industry itself needs to be taken into account when drawing conclusions from the comparison of P&GE rates.[588] In addition to the problems with the comparator group, we recall that the BoA calculated the P&GE rate for PMTL based on the customs values as determined by Thai Customs as opposed to PMTL's declared transaction values, and that the benchmark range of 9.80% to 15.08% was derived by adding/subtracting two "standard errors" from the mean P&GE rate of only five companies (as indicated above, the BoA's statistical analysis resulted in two of those same five companies falling outside of the industry benchmark P&GE range).[589] Furthermore, the application of a bright-line test was inappropriate given the vast differences in sales volumes between PMTL and the companies in the comparator group.

7.234. Finally, we consider that, although there could be circumstances in which a comparison of P&GE rates could be sufficient in and of itself to constitute grounds for finding that the relationship influenced the price, the legal standard under Article 1.2(a), second sentence, requires a process of consultation between the customs authority and the importer. Most pertinently, we recall that:

> [C]ustoms authorities and importers have respective responsibilities under Article 1.2(a). The customs authorities must ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price. Importers are responsible for providing information that would enable the customs authority to examine and assess the circumstances of sale so as to determine the acceptability of the transaction value.[590]

Furthermore, we recall that a customs authority is under an obligation to "review the information provided [by the importer] in reaching a final determination".[591] In our view, given that the parties do not dispute that a comparison of P&GE rates is, in principle, a valid indicator of whether the relationship influenced the price, we consider that any obligation on a customs authority to take into account *additional* information will depend on the information provided by the importer to the customs authority in the context of the consultations. Specifically, where an importer provides certain evidence or information that is relevant to the examination of the circumstances of sale, be it quantitative or qualitative, a customs authority is under an obligation to address such evidence or information.[592] We therefore disagree with the Philippines that a customs authority "*always* has to take into account both quantitative *and* qualitative factors in order to have an objective basis for rejecting an importer's declared transaction value."[593] Rather, we consider that the nature of the factors to be taken into account depends on the specific information that is provided to the customs authority by the importer. Where an importer provides relevant qualitative information, a customs authority is indeed obliged to take that information into account.

7.235. We note, however, that in the particular circumstances of this dispute, the Philippines has argued that the BoA failed to communicate to PMTL its grounds for considering that the relationship influenced the price, and therefore PMTL was precluded from being able to respond, inconsistently

[588] Philippines' second written submission, paras. 270-271.

[589] The BoA's analysis also resulted in the P&GE rate for the other 12 companies initially considered by the BoA falling outside of the benchmark range. See footnote 580 above.

[590] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.171.

[591] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.172.

[592] For instance, it may be the case that, in examining the circumstances of sale, a customs authority considers that the relationship influenced the price on the basis of a purely quantitative assessment which is in itself a valid indicator, or is suggestive, of whether the relationship influenced the price. Once the customs authority has communicated its grounds to the importer, as required under Article 1.2(a), third sentence, the importer may respond by providing qualitative evidence that is relevant to the examination of the circumstances of sale (either directly related to the customs authority's quantitative methodology, or unrelated to that methodology but still relevant to a determination of whether the relationship between the buyer and seller influenced the price). In such a situation, if the customs authority failed to take into account such information the customs authority would essentially be failing to conduct an examination of the circumstances of sale that is apt to reveal whether the relationship influenced the price. However, in a situation where the importer *does not* provide any relevant qualitative information, it would be fully consistent with the requirements of Article 1.2(a) for the customs authority to reject the declared transaction value on the basis of its initial grounds.

[593] Philippines' response to Panel question No. 19, para. 154. (emphasis original)

with Article 1.2(a), third sentence.[594] Without prejudice to the Philippines' claim under Article 1.2(a), third sentence, we consider that in reviewing the evidence before us, there is no indication that, prior to its final determination, the BoA indicated to PMTL that it considered that PMTL's P&GE rate was inconsistent with a benchmark range established around an industry average, or indeed any other information that would have put PMTL in a position to provide relevant qualitative information to the BoA. Consequently, the BoA deprived PMTL of an opportunity to provide relevant qualitative information that could have been taken into account. We therefore consider that, by precluding PMTL of an opportunity to provide potentially relevant information, the BoA's examination of the circumstances of sale was not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL.

7.236. In sum, we consider that the BoA's decision to adopt a mechanical, bright-line test to compare PMTL's P&GE rate with the industry benchmark range was inappropriate, taking into account the totality of the circumstances before it. These circumstances included the small quantitative differences between the P&GE rates attributed to PMTL and the industry benchmark range; the number of other companies in the "tobacco and tobacco products" industry that fell outside of the range constructed; the vast differences in sales volumes between PMTL and the industry group; the different methods of calculating P&GE rates for the same companies resulting in different sets of figures; the shortcomings in the composition of the industry group; the additional shortcomings in the determination of the benchmark range; and PMTL having had no opportunity to provide the BoA with potentially relevant qualitative information for purposes of the comparison.

7.237. Based on the foregoing, we conclude that the manner of the comparison undertaken by the BoA, i.e. its application of a simple bright-line test in these circumstances, did not establish that PMTL's P&GE rate was "inconsistent" with the industry benchmark range that it had constructed.

7.2.2.3.2.4 Overall assessment

7.238. We have concluded that the BoA compared PMTL's P&GE rates to a benchmark range of P&GE rates using an industry comparator group that was not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL. We have considered the composition of the industry group in conjunction with the manner in which the BoA determined the industry benchmark P&GE range, and also in conjunction with the manner in which the BoA compared PMTL's P&GE rates with that industry benchmark P&GE range. In this regard, we have concluded that the manner of the comparison undertaken by the BoA did not establish that PMTL's P&GE rate was "inconsistent" with the industry benchmark range, taking into account the flaws in how that benchmark range was determined, as well as the flaws in the composition of the industry group itself.

7.239. In light of these findings in respect of these different aspects of the BoA's examination of the circumstances of sale, we consider that the BoA's examination, taken as a whole, was not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL for the relevant cigarettes. The BoA's examination was therefore inconsistent with Article 1.2(a), second sentence, of the CVA. Consequently, the BoA lacked a proper basis for rejecting the transaction value under Article 1.1 of the CVA.

7.2.2.4 Conclusion

7.240. In the original proceeding, the panel found that Thailand had acted inconsistently with Articles X:3(a) and (b) of the GATT 1994 by virtue of delays in the administrative review proceedings before the BoA.[595] For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, the BoA acted inconsistently with Articles 1.1 and 1.2(a) of the CVA by rejecting PMTL's transaction values without a valid basis, and in particular that the BoA acted inconsistently with Article 1.2(a), second sentence, by failing to properly examine the circumstances surrounding the sale of the cigarettes to PMTL because its examination of the circumstances of sale was not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL for the relevant cigarettes.

[594] See paragraphs 7.242. and 7.245. , and footnote 596 below.

[595] See Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 8.4(e) and (f). See also paragraph 7.15. above.

7.2.3 Claim under Articles 1.1 and 1.2(a), third sentence, of the CVA

7.2.3.1 Introduction

7.241. As stated above, Article 1.1(d) of the CVA requires that the customs value of imported goods shall be the transaction value, including in situations where the buyer and seller are related if the transaction value is acceptable under Article 1.2. As discussed in detail above, Article 1.2(a), second sentence, requires that, in a situation where the buyer and seller are related, the customs authority must examine the circumstances surrounding the sale and accept the transaction value, unless the customs authority demonstrates that the relationship did indeed affect the price. Article 1.2(a), third sentence, further requires that when a customs authority has grounds for considering that the relationship influenced the price, it must communicate those grounds to the importer and give the importer a reasonable opportunity to respond.

7.242. The Philippines claims that the BoA acted inconsistently with Article 1.2(a), third sentence, because it failed to communicate its grounds for considering that the relationship influenced the price, and failed to allow a reasonable opportunity for the importer to respond.[596] The Philippines also asserts that, as a consequence, the BoA's rejection of the transaction value was inconsistent with Article 1.1.[597]

7.243. Thailand submits that the procedural requirements of Article 1.2(a), third sentence, are not applicable to decisions of appellate tribunals covered by Article 11 of the CVA, and that even if such requirements were applicable such requirements were satisfied since PMTL was aware that the BoA was conducting a comparison of P&GE rates, and had the opportunity to present its case to the BoA.[598]

7.2.3.2 Main arguments of the parties

7.244. The Philippines contends that the procedural requirements of Article 1.2(a) do apply to decisions of appellate tribunals, since such obligations apply to the "customs administration", and, as Thailand itself states, the BoA is an authority within the customs administration that is not independent of the customs administration.[599] The Philippines notes that in this case the BoA undertook a *de novo* assessment of PMTL's customs values, and developed "an entirely new ground for considering that the transaction value was not acceptable".[600] The Philippines highlights that "[w]here there are new grounds, the BoA's duty to communicate them … is especially important, because the importer has never before had a chance to address the particular grounds."[601]

7.245. The Philippines argues that Article 1.2(a) requires a customs authority to provide an importer with a "meaningful opportunity" to understand the basis for the authority's doubts and the nature of the information that would be required to dispel those doubts.[602] The Philippines asserts that the BoA failed to satisfy this requirement, because it did not inform PMTL that it was examining the circumstances of sale, nor did it inform PMTL of: how it had selected the benchmark companies; which benchmark companies it had selected; its methodology for calculating the P&GE rates for each company; or why it considered PMTL's P&GE rates to be inconsistent with the benchmark group.[603] The Philippines explains that PMTL was not made aware of the BoA's intention to use the comparison of P&GE rates for considering the acceptability of the transaction value.[604] Additionally, the Philippines notes that, even if PMTL was made aware of the general nature of the testing that the

[596] Philippines' first written submission, paras. 218-222 and 338-346; second written submission, paras. 348-366; response to Panel question Nos. 28, 73 and 92; opening statement at the meeting of the Panel, paras. 41-46; comments on Thailand's response to Panel question No. 77.
[597] Philippines' first written submission, para. 348.
[598] Thailand's first written submission, para. 5.123-5.124; Thailand's second written submission, paras. 2.119-2.121; response to Panel question Nos. 27, 48 and 77; comments on the Philippines' response to Panel question Nos. 73, 92 and 95.
[599] Philippines' second written submission, para. 353 (quoting Thailand's first written submission in the original proceeding, para. 289); response to Panel question Nos. 28(a) and 92; opening statement at the meeting of the Panel, para. 43.
[600] Philippines' second written submission, para. 355; opening statement at the meeting of the Panel, para. 44.
[601] Philippines' response to Panel question No. 28(a), para. 236.
[602] Philippines' first written submission, para. 220.
[603] Philippines' first written submission, paras. 341-342.
[604] Philippines' second written submission, paras. 358-368.

BoA intended to use, this would not satisfy the requirements under Article 1.2(a), since PMTL would still not have known the BoA's grounds for doubting the transaction value.[605] Thus, in the Philippines' view, the BoA "failed to communicate its grounds for rejecting the transaction values and, as a necessary and inevitable consequence, it failed to provide a reasonable opportunity for [PMTL] to respond."[606]

7.246. Thailand submits that the procedural requirements of Article 1.2(a) are not applicable, "*mutatis mutandis*"[607], to decisions of appellate tribunals under Article 11 of the CVA.[608] Thailand agrees with the Philippines that the BoA is part of the customs administration, but disagrees that the procedural provisions of Article 1.2(a) consequently apply to the BoA.[609] According to Thailand, "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".[610] In Thailand's view, the "logic and purpose" of an appeal imply that different procedures could apply, given that "the issues and evidence would normally be different at an appellate stage".[611] Thailand states that the procedures of Article 1.2(a) "might not be adaptable or appropriate" to all possible approaches taken by an appellate tribunal.[612] Additionally, Thailand submits that the requirement in Article 1.2(a) to provide the importer with notice of the grounds may be redundant in an appellate proceeding, since by virtue of the appeal the customs administration would have necessarily determined that the relationship affected the price.[613] In Thailand's view, "[i]f the appellate tribunal is not replicating the method of the original determination … there is no reason why the appellate tribunal should be compelled to follow the procedures of the original determination."[614] Additionally, Thailand points out that the right of appeal under Article 11 may be to an authority within the customs administration or to a judicial authority.[615] Thailand argues that, under the Philippines' logic, the procedures of Article 1.2(a) would apply to appellate authorities in the customs administration but not to judicial authorities, even though they perform the same function under Article 11.[616] Thailand also disagrees with the Philippines that the BoA conducted a *de novo* determination of the customs valuation.[617] Thailand notes that, in this dispute, the BoA did not conduct the "same enquiry as a customs officer would have done when goods were first imported".[618]

7.247. Thailand also argues that, even if the requirements of Article 1.2(a), third sentence, were applicable to the BoA, such requirements were satisfied since PMTL was made aware that the BoA was conducting a comparison of P&GE rates, and PMTL had ample opportunity to present its case to the BoA.[619] Thailand asserts "that there was an extensive process of oral and written interaction between PMTL and the BoA and that this process satisfied the due process requirements of Article

[605] Philippines' second written submission, paras. 363-367; opening statement at the meeting of the Panel, paras. 45-46.

[606] Philippines' response to Panel question No. 28(b), paras. 237-239.

[607] In the context of our discussion of the parties' comments on the Interim Report, we observe that Thailand's use of the term "mutatis mutandis" in this context has the potential to cause confusion. See paragraph 6.24. above.

[608] Thailand's first written submission, para. 5.120-5.122; second written submission, paras. 2.109-2.118; comments on the Philippines' response to Panel question Nos. 73 and 92.

[609] Thailand's second written submission, paras. 2.111-2.113.

[610] Thailand's first written submission, para. 5.120.

[611] Thailand's first written submission, para. 5.120.

[612] Thailand's second written submission, para. 2.115. Thailand notes that Article 1.2(a) applies to determinations of customs value, whereas the BoA's task is to resolve an "appeal of a determination of customs value". (Thailand's second written submission, para. 2.112)

[613] Thailand's second written submission, para. 2.116. Thailand elaborates that:

> In many cases, the manner in which the appeal under Article 11.2 proceeds will depend on the nature of the appeal. Depending on the nature or scope of the appeal, the requirement to provide grounds under Article 1.2(a) third sentence may be more or less redundant. This is not to say that an importer does not have due process rights in an appeal. To the contrary, Thailand agrees that importers have due process rights in an appeal. Thailand has provided a detailed list of the communications between the BoA and Philip Morris over the course of this appeal, in which Philip Morris was given repeated full opportunities to provide information. (Thailand's comments on the Philippines' response to Panel question No. 73, p. 11)

[614] Thailand's second written submission, para. 2.117.

[615] Thailand's second written submission, para. 2.113.

[616] Thailand's second written submission, para. 2.113.

[617] Thailand's second written submission, para. 2.114.

[618] Thailand's second written submission, para. 2.114.

[619] Thailand's first written submission, para. 5.123-5.124; second written submission, paras. 2.119-2.121.

1.2(a)".[620] Thailand points to a number of letters sent between the BoA and PMTL concerning the P&GE rate to be used and the timing of a meeting to discuss the matter.[621] Thailand considers that PMTL "had, in effect, an open-ended opportunity to interact with the Board of Appeals, in both writing and in person".[622] Thailand notes that Article 11 does not prescribe specific procedures for instances of appeals, and if the drafters had intended specific procedures to apply, they "could and would have done so".[623] Thailand considers that the Philippines is effectively complaining that PMTL was "not given an advance opportunity to comment on the Board of Appeals' final decision", which is a requirement similar to that under Article 6.9 of the Anti-Dumping Agreement, but which does not exist in the CVA.[624] Thailand notes that Section I of the Trade Facilitation Agreement (TFA) addresses the procedures for appeals of customs decisions, but does not impose the kind of detailed procedural requirements which the Philippines reads into Article 11.3 of the CVA.[625]

7.2.3.3 Analysis by the Panel

7.2.3.3.1 General considerations

7.248. As explained above, Article 1.1 of the CVA provides that, in principle, a customs authority must use the transaction value of the imported goods as the customs value. Article 1.1(d) read in conjunction with Article 1.2(a) clarifies that this applies also in situations in which the buyer and the seller are related, unless it is established that the relationship influenced the price.[626] The third and fourth sentences of Article 1.2(a) of the CVA state that:

> If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.

7.249. As indicated above in the context of Article 1.2(a), second sentence, the original panel explained that customs authorities and importers have respective responsibilities under Article 1.2(a):

> The customs authorities must ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price. Importers are responsible for providing information that would enable the customs authority to examine and assess the circumstances of sale so as to determine the acceptability of the transaction value. Provided with such information, the 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.[627]

7.250. The original panel stressed that the process of examining the circumstances of sale under Article 1.2(a) resembles that of consultation "as both the importer and the customs administration respectively need to make a good faith effort on the one hand to provide relevant information and on the other hand to provide a reasonable opportunity to the importer to submit information and review the information provided in reaching a final determination".[628]

7.251. Regarding the requirement to communicate "grounds" to the importer, the original panel considered that the term "grounds" means the "reasons for considering".[629] The original panel also

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[620] Thailand's response to Panel question No. 27, p. 24.
[621] Thailand's first written submission, para. 5.123 (referring to Chronology of the BoA appeals, (Exhibit THA-11)).
[622] Thailand's second written submission, para. 2.199.
[623] Thailand's first written submission, para. 5.121; second written submission, para. 2.120.
[624] Thailand's second written submission, para. 2.120.
[625] Thailand's second written submission, para. 2.121.
[626] See paragraphs 7.100. to 7.102. .
[627] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.171.
[628] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.171-7.172.
[629] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.218. This interpretation is consistent with the Spanish and French versions of the CVA, which refer to "razones" and "motifs" respectively. In the Spanish version, Article 1.2(a) states that "[s]i, por la información obtenida del importador o de otra fuente, la Administración de Aduanas tiene razones para creer que la vinculación ha influido en el precio, comunicará

noted that, where an importer has provided information and evidence to the customs authority, "the grounds for [the customs authority's] consideration that the relationship between the buyer and the seller influenced the price must be linked to that concerned evidence so as to assist the importer in understanding the authority's consideration".[630] Additionally, the original panel stated that it was neither "necessary [n]or useful … to define the exact extent and scope of 'grounds' to be provided under Article 1.2(a) as they may vary depending on the factual circumstances presented in each case."[631]

7.252. However, the original panel explained that:

> [I]n order for the importer to have a reasonable opportunity to respond to the customs authorities' consideration … the importer must not be left to guess the reasons for the customs authorities' consideration. The right of the importer to have "a reasonable opportunity to respond" under Article 1.2(a) would lose its meaning unless the importer is informed of at least the reason(s) why the customs authority continues to question the acceptability of the transaction value despite the evidence and information presented or otherwise in the possession of the customs authority until that point.[632]

7.253. The original panel highlighted the importance of giving the importer the opportunity to respond, because "while customs authorities are responsible for providing a 'reasonable opportunity' to the importer to provide information, once given this opportunity, importers are in principle liable for supplying the customs authorities with information that would indicate that the relationship did not influence the price."[633] In this respect, the original panel emphasized that, "[t]o the extent that Thai Customs was presented with certain evidence, the grounds for its consideration that the relationship between the buyer and the seller influenced the price must be linked to that concerned evidence so as to assist the importer in understanding the authority's consideration."[634]

7.254. In short, to comply with the third sentence of Article 1.2(a), a customs authority must give the importer sufficient information regarding the authority's grounds for doubting the transaction value, such that the importer is able to meaningfully respond to those grounds. Additionally, the customs authority must give the importer an opportunity to respond.

7.255. The parties do not contest the legal standard described above. The parties disagree on two main issues. First, whether the obligations contained in Article 1.2(a), third sentence, apply to an appellate tribunal such as the BoA. Second, in the event such obligations do apply to the BoA, whether the BoA satisfied those obligations.

7.2.3.3.2 The applicability of Article 1.2(a), third sentence, to the BoA

7.256. In the original proceeding, Thailand explained that the BoA is an authority within the Thai Customs Department that hears appeals from importers or exporters in relation to initial valuation decisions by the Customs Department. Thailand elaborated that:

> The Board of Appeals is headed by the Director-General of Customs (who serves as Chairman). 'A civil servant attached to the Customs Department' serves as secretary to the Board. The Director-General and the Secretary both may vote on appeals. The Director-General exercises the deciding vote in the event of a tie. In addition, the Board of Appeals is supported by a 'team of officers of the Customs Standards Procedure and Valuation Bureau [of the Customs Department] that acts as secretariat of the Board of Appeal.' This secretariat presents an initial report to the Sub-Committee for Customs Valuation of the Board of Appeal. This Sub-Committee is charged with the 'power and

esas razones al importador y le dará oportunidad razonable para contestar." In the French versión, Article 1.2(a) states that "Si, compte tenu des renseignements fournis par l'importateur ou obtenus d'autres sources, l'administration des douanes a des motifs de considérer que les liens ont influencé le prix, elle communiquera ses motifs à l'importateur et lui donnera une possibilité raisonnable de répondre."

[630] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.220.

[631] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.214.

[632] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.214.

[633] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.170 (referring to Case Study 10.1 on the application of Article 1.2 of the Customs Valuation Agreement by the WTO Technical Committee on Customs Valuation).

[634] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.220.

> responsibility to ... consider the appeal' and to reach initial conclusions for the purposes of presenting a 'Report of the Conclusion of the Appeal Sub-Committee' to the Board of Appeals. It is composed entirely of Customs Department officials.[635]

7.257. In response to a question from the Panel, Thailand confirms that, at the time of the BoA Ruling at issue, the structure and composition of the BoA had not changed since the original proceeding.[636]

7.258. Beginning with the text of Article 1.2(a), we note that Article 1.2(a) explicitly indicates that the obligations therein apply to the "customs administration" conducting the process of determining whether the transaction value is acceptable. It is uncontested that the BoA is formally part of the Thai Customs Department, and is therefore part of the "customs administration" in the narrowest understanding of these terms.[637] There is no textual limitation in Article 1.2(a) confining the scope of the obligations therein to certain types of entities, in a way that would exclude parts of a customs administration from the scope of the term. Thus, there is no textual basis in Article 1.2(a), third sentence, to justify the exclusion of appellate tribunals like the BoA from the scope of the obligations contained therein.

7.259. Turning to the nature of the obligations in Article 1.2(a), third sentence, and the function that they serve, we see nothing therein that would justify excluding appellate tribunals such as the BoA from the scope of those obligations. Rather, we consider that the obligations in Article 1.2(a), third sentence, to communicate the grounds to an importer and provide a reasonable opportunity to respond are consistent with due process. Indeed, it could be contrary to the CVA's object and purpose of providing for a "fair, uniform and neutral" system of valuation if a customs authority's examination of the circumstances of sale, whether initially or at the point of appeal, provided no opportunity for the importer to provide relevant information to the customs authority in order to inform its determination.[638] We understand that Thailand may even agree on this point, given its insistence that PMTL was given "repeated full opportunities to provide information" to the BoA.[639] In our view, as a consequence of the consultative nature of an examination of the circumstances of sale under Article 1.2(a), second sentence, the obligations under the second and third sentences of Article 1.2(a) are necessarily related.[640] Indeed, certain of our findings above emphasize the importance of the customs authority adequately consulting with the importer, in assessing whether the customs authority acted inconsistently with Article 1.2(a), second sentence.[641]

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[635] Philippines' first written submission, para. 84 (referring to Thailand's opening statement at the second meeting of the original panel, para. 96).

[636] Thailand's response to Panel question No. 77(a). Thailand notes that while it is not directly relevant to this proceeding, under the changes to the Thai Customs Act that will be effective on November 13, 2017, the composition of the BoA will be reduced from ten to five individuals: the Director General of the Customs Department, and representatives of the Excise and Revenue Departments, and of the Council of State and the Office of the Attorney General.

[637] Philippines' first written submission, paras. 84 and 441; second written submission, paras. 351-353; response to Panel question No. 28; Thailand's second written submission, para. 2.111.

[638] See the fourth recital to the preamble of the CVA.

[639] Thailand's comments on the Philippines' response to Panel question No. 73, p. 11.

[640] The Philippines explains that, "if a Member failed to communicate its grounds under the third sentence, it is unlikely that the Member could conduct a proper examination of the circumstances of sale under the second sentence." (Philippines' response to Panel question No. 73(b)) Canada states that "the obligations in the second and third sentences of Article 1.2(a) are part of the same process ... [and] they may need to be analyzed together. For example, if the customs authorities do not provide a reasonable opportunity for the importer to provide information that the relationship did not influence [the] price and the importer had information that it could have provided in order to establish this fact, the customs authority's determination not to accept the transaction value would be inconsistent with the second sentence of Article 1.2(a)." (Canada's third-party response to Panel question No. 7(b), paras. 46-47) The European Union explains that ,"in practice the obligations contained in Article 1.2(a) arise in a single process and are logically interlinked, as customs authorities must examine all circumstances surrounding the sale, of course having due regard to evidence submitted by importers." (European Union's third-party response to Panel question No. 7(b), para. 21) The United States also points to paragraph 3 of the Interpretative Note to Article 1.2 of the CVA, which explains that "[w]here the customs administration is unable to accept the transaction 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." (See United States' third-party response to Panel question No. 7(b), para. 43)

[641] See paragraphs 7.170. to 7.171. , 7.177. and 7.234. , and footnote 592 above.

7.260. Furthermore, we consider that the nature of the obligations in Article 1.2(a) third sentence serves the same objective as Article 16 of the CVA, which, as the original panel stated, is to "enable[] importers and foreign governments to effectively exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations".[642] It is consistent with this objective that an appeals tribunal within the customs administration be subject to the requirements set forth in Article 1.2(a), third sentence. In sum, we see nothing in the nature of the legal obligations contained in Article 1.2(a), third sentence, that would justify excluding appellate tribunals such as the BoA from the scope of those obligations.

7.261. Furthermore, it is not clear how any practical difficulties would arise by subjecting an appeal tribunal within a customs administration, like the BoA, to the procedural obligations contained in the third sentence of Article 1.2(a). Assuming for the sake of argument that the procedures of Article 1.2(a) might not be adaptable or appropriate in the context of some appellate tribunals, Thailand has not presented any basis to show that this is actually the case with the BoA. We note that the BoA communicated with PMTL over a long period leading up to its Ruling, on a variety of substantive issues, and Thailand itself emphasizes that PMTL had an "open-ended opportunity" to communicate with the BoA.[643] In short, we see no practical challenges to the imposition of the obligations under Article 1.2(a), third sentence, on an appellate tribunal within a "customs administration", such as the BoA.

7.262. We note, however, that Thailand raises a number of arguments that, in its view, demonstrate why it "would not make sense" for the exact same procedural obligations of Article 1.2(a) to apply to an appellate tribunal such as the BoA.[644] In this regard, we understand Thailand's argument to be that if Article 1.2(a), third sentence, were to apply to appeals tribunals such as the BoA this would mean that the exact same procedural obligations would apply, and that, because it would not make sense for the exact same procedures to apply, it follows that the procedural obligations in Article 1.2(a), third sentence, are not legally applicable to the BoA.

7.263. First, Thailand argues that, "[d]epending on the nature or scope of the appeal, the requirement to provide grounds under Article 1.2(a) third sentence may be more or less redundant."[645] Thailand argues that the procedures at the appellate level can be different because "the issues and evidence would normally be different at an appellate stage"[646] and that "[i]f the appellate tribunal is not replicating the method of the original determination … there is no reason why the appellate tribunal should be compelled to follow the procedures of the original determination."[647]

7.264. In our view, however, if the issues and evidence are different at the appellate stage than during the initial determination, then the procedural requirements of Article 1.2(a) may take on particular importance. We recall that the purpose of the procedural obligations in Article 1.2(a) is, in general terms, to "ensure that importers be given a reasonable opportunity to provide information

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[642] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.

[643] Thailand's first written submission, para. 5.123-5.124; second written submission, paras. 2.119-2.121. Thailand argues that:

> PM Thailand was clearly aware that the BoA was using a test method based on a comparison of P&GE ratios and submitted various P&GE ratios for this purpose. For example, PM Thailand submitted a letter on 31 March 2010 regarding the P&GE ratio to be used. When, on 15 October 2010, the BoA sent a letter to PM Thailand inviting the company to meet to discuss the matter, on 4 November 2010, PM Thailand sent a letter requesting a postponement of the meeting. When, on 14 September 2011, the BoA sent a letter requesting further information regarding the relationship between the seller and buyer and whether the relationship affected the prices, PM Thailand sent a letter on 13 October in which it continued to maintain that the transaction value should be used but also addressing how the BoA should apply the deductive method if it chose to take that approach. It cannot, therefore, be asserted that PM Thailand was not aware of the type of methodology under consideration, that it had not an opportunity to participate or even, as the Philippines suggests, that the BoA did not engage in good faith. (Thailand's first written submission, para. 5.123 (referring to Chronology of the BoA appeals, (Exhibit THA-11)))

[644] Thailand's second written submission, paras. 2.112-2.113.

[645] Thailand's comments on the Philippines' response to Panel question No. 73, p. 11. See also Thailand's second written submission, para. 2.116.

[646] Thailand's first written submission, para. 5.120.

[647] Thailand's second written submission, para. 2.117.

that would indicate that the relationship did not influence the price".[648] In this dispute, it is uncontested that the BoA developed its P&GE comparison methodology during the appeal, as an entirely new ground for considering that the transaction value was not acceptable.

7.265. Furthermore, it would be a straightforward task for customs authorities to circumvent the obligations under Article 1.2(a), third sentence, if appellate tribunals within the administration were not subject to those obligations. For example, a customs authority could make an initial rejection of the customs value on WTO-inconsistent grounds, while respecting the requirements of the third sentence, and on appeal the appellate tribunal could reject the transaction value on entirely distinct grounds from the original determination, without consulting the importer (i.e. without notifying the importer of its grounds for considering rejection of the transaction value, and without giving the importer an opportunity to respond to those grounds). In that scenario, the grounds for the customs authority's final rejection of the transaction value would be grounds of which the importer was completely ignorant. This would not serve the purpose of "ensur[ing] that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price".[649]

7.266. Second, Thailand argues that "Article 1.2(a) by its express terms, applies to a determination of customs value", whereas by contrast, the "task" of the BoA is "to resolve an *appeal of a determination of customs value*", and because these "are not the same thing" there is "no reason to assume that the same procedures necessarily apply *mutatis mutandis* to both".[650]

7.267. In our view, Thailand's argument rests on a tenuous distinction between an initial "determination of customs value" and an "appeal of a determination of customs value". We consider that to the extent that an appellate tribunal such as the BoA is "resolving an appeal of a determination of customs value", to use Thailand's terminology, it may also be making a customs value determination. Indeed, in the appeal in question the BoA developed its P&GE comparison methodology during the appeal as an entirely new ground for considering that the transaction value was not acceptable, and on that basis the BoA proceeded to revise the customs values that were initially determined by the Customs Department. In such circumstances, we do not see how a decision by an appellate tribunal as to the correct customs value is *not* a customs value determination within the meaning of Article 1.2(a), and the CVA more generally.[651]

7.268. We agree with Thailand that there is "no reason to assume"[652] that the exact same procedures necessarily apply to any tribunal, regardless of relevant institutional differences. As a general matter, we agree with Thailand that it would be inappropriate for any panel to make assumptions about the obligations in the covered agreements. Rather, any conclusion as to the applicability of any substantive or procedural obligations, including those in the CVA, must be anchored in the text of the relevant provision, read in the light of their context, and the object and purpose of the relevant agreement. We therefore do not assume that the procedural obligations in Article 1.2(a), third sentence apply to the BoA, but rather proceed by conducting a proper textual analysis of the relevant provision.

7.269. Third, Thailand argues that it would lead to absurd consequences if the procedures of Article 1.2(a) would apply to appellate authorities *within* the customs administration, but not to other judicial authorities *outside* of the customs administration, even though both types of entities perform the very same function under Article 11 of the CVA.[653]

7.270. Assuming for the sake of argument that appeals tribunals outside of the "customs administration" are not subject to the specific obligations in Article 1.2(a), third sentence, there are

[648] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.171.
[649] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.171.
[650] Thailand's second written submission, para. 2.112.
[651] For this same reason we have difficulty with Thailand's argument that "the procedures of Article 1.2(a) may simply be redundant at the appellate stage … [because b]y the time the case gets to appeal, the customs administration has already determined that the relationship affected the price". (Thailand's second written submission, para. 2.116) For the reasons explained above, it is our view that, at the stage of an appeal to a body within the "customs administration" in the narrowest sense, by definition the "customs administration" has *not* yet made a final determination that the relationship affected the price. Consequently, the procedures of Article 1.2(a) are *not* redundant.
[652] Thailand's second written submission, para. 2.112.
[653] Thailand's second written submission, para. 2.113; comments on the Philippines' response to Panel question No. 92.

several plausible explanations as to why that may be. For example, there may have been an assumption, by the drafters of the CVA, that such tribunals would not be expected to go as far as appeals tribunals within the "customs administration" in terms of developing and applying their own customs valuation methodology (as the BoA did in this case). Insofar as appeals tribunals outside of the customs authority are typically confined to reviewing the correctness of the initial customs valuation determination, without embarking on a customs valuation determination afresh, then it may well be that the procedural obligations in Article 1.2(a), third sentence, would have less scope for application. Regardless, given that the entity at issue here is an appeals tribunal within the customs administration, and taking into account not only that it conducted its own customs valuation determination but that no practical difficulties have been shown to arise as a consequence of subjecting it to the obligations in the third sentence of Article 1.2(a), we do not consider it necessary to address the extent to which these obligations may apply to other appeals tribunals.

7.271. In conclusion, we consider that if the customs administration − whether in the form of an appellate tribunal within the customs administration, or the customs officer(s) conducting the initial valuation − considers that the relationship between the importer and exporter influenced the price, then Article 1.2(a), third sentence, requires that the importer be informed of the grounds for that consideration, and be given a reasonable opportunity to respond, before the customs authority makes its final determination.

7.2.3.3.3 The communications between the BoA and PMTL

7.272. Recalling the legal standard above, to satisfy Article 1.2(a), third sentence, the BoA was required to provide to PMTL sufficient information regarding its grounds for considering rejection of the transaction values, to enable PMTL to understand the BoA's reasons and meaningfully respond to those reasons.

7.273. The Philippines asserts that the BoA did not inform PMTL that it was examining the circumstances of sale, and "failed to communicate its grounds for rejecting the transaction values and, as a necessary and inevitable consequence, it failed to provide a reasonable opportunity for [PMTL] to respond."[654]

7.274. Thailand does not directly assert that the BoA ever "communicate[d] its grounds" for doubting the transaction values to PMTL prior to the BoA Ruling. However, Thailand argues that this obligation was satisfied since PMTL was aware that the BoA was conducting a comparison of P&GE rates, and because PMTL had an "open-ended opportunity" to communicate with the BoA.[655] Thailand points to letters sent from PMTL to the BoA that refer to P&GE rates, which in Thailand's view, constitute evidence that PMTL "was clearly aware" that the BoA was conducting a comparison of P&GE rates.[656] Thailand elaborates that it:

> [C]onsiders that there was an extensive process of oral and written interaction between PMTL and the BoA and that this process satisfied the due process requirements of Article 1.2(a) of the CVA to the extent that they might apply *mutatis mutandis* to proceedings of a review tribunal such as the BoA.[657]

7.275. We do not find this argument to be convincing. At no time in this proceeding has Thailand indicated when or how the BoA actually communicated the grounds to PMTL. Besides providing a "chronology" of the events in the BoA proceeding, Thailand has not submitted any evidence or exhibits to demonstrate that the grounds for the BoA's consideration were communicated to PMTL (for instance, Thailand has not submitted as exhibits the letters which, in its view, evidence PMTL's awareness that the BoA was conducting a comparison of P&GE rates). Presumably, had the BoA actually communicated any grounds to PMTL, there would be evidence of that communication which Thailand could have submitted.[658]

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[654] Philippines' response to Panel question No. 28(b), paras. 237-239.

[655] See footnote 643 above.

[656] Thailand's first written submission, para. 5.123 (referring to Chronology of the BoA appeals, (Exhibit THA-11)).

[657] Thailand's response to Panel question No. 27.

[658] Without prejudice to the burden of proof, if the BoA had communicated *any* grounds to PMTL, Thailand could submit that evidence to the Panel. Thailand has not done so.

7.276. Furthermore, the Philippines directly contradicts Thailand's characterization of these letters as evidence of PMTL's awareness that the BoA was conducting a comparison of P&GE rates. The Philippines explains that, in previous appeals from that period, the BoA had tested the transaction values by performing a "deductive value calculation", which included in the methodology a deduction for P&GE.[659] Thus, through the exchange of letters discussed by Thailand, the Philippines understood that the BoA intended to use this same method, and not that a different test would be conducted based on a comparison of PMTL's P&GE rate with the P&GE rates of comparable companies.[660]

7.277. Having reviewed these letters[661], we consider that PMTL's references to P&GE rates were indeed in relation to the application of the deductive method (whether in the context of using the deductive method to test the transaction values, or in the context of applying the deductive method to determine a revised customs value). Specifically, a letter from PMTL to the Director-General of the Thai Customs Department states that "[a]s discussed during our meeting, we are concerned that the Board of Appeal (BOA) plans to rule on 210 appeals relating to Marlboro cigarette imports in 2002 *using a deductive value calculation* with a profit and general expense (gross margin) of 9.36%".[662] Moreover, Thailand's own summary of the letters from PMTL indicates that PMTL "maintain[ed] that the transaction value should be used but also address[ed] *how the BoA should apply the deductive method if it chose to take that approach*".[663] For these reasons, we consider that PMTL's references to P&GE rates in its communications with the BoA were not in the context of a comparison of P&GE rates. Furthermore, we note that as late as 12 October 2012 (approximately one month prior to the issuance of the BoA Ruling on 16 November 2012), PMTL was still indicating to the BoA that it was "unaware of any evidence that provides grounds for doubting the transaction values, much less evidence that would warrant the rejection of the transaction values", and requested that "if … any grounds exist for doubting the transaction values, the BOA … communicate such grounds to the importer in writing."[664]

7.278. Based on the evidence and arguments of the parties, we do not consider that the BoA communicated to PMTL its grounds for considering that the relationship between PMTL and PM Indonesia influenced the price, sufficiently for PMTL to meaningfully respond. We note that the Philippines describes in its submissions the precise information that it considers should have been provided to PMTL in order to satisfy this requirement under Article 1.2(a).[665] In light of the BoA's failure to communicate any grounds, we do not consider it necessary to delineate the precise information that should have been provided.

7.2.3.4 Conclusion

7.279. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, the BoA acted inconsistently with Articles 1.1 and 1.2(a) of the CVA by rejecting PMTL's transaction values without a valid basis, and in particular that the BoA acted inconsistently with Article 1.2(a), third sentence, by failing to communicate to PMTL its grounds for considering that the relationship influenced the price, and by failing to give PMTL an opportunity to respond.

7.2.4 Claim under Article 5.1(a)(i) of the CVA

7.2.4.1 Introduction

7.280. Article 5.1(a)(i) of the CVA requires that, when applying the deductive method, a deduction should be made for commissions usually paid or agreed to be paid, or for additions that are usually made for P&GE. In the course of applying the deductive method, instead of using PMTL's P&GE figures, the BoA made a deduction for P&GE based on the 12.44% industry average of the industry

[659] Philippines' second written submission, paras. 359-360.
[660] Philippines' second written submission, para. 361.
[661] We note that the Philippines itself submitted such letters to the Panel as evidence.
[662] See Letter from PMTL to the Customs Department, 31 March 2010 (English translation), (Exhibit PHL-146-B). (emphasis added) See also Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010 (English translation), (Exhibit PHL-75-B).
[663] Thailand's first written submission, para. 5.123. (emphasis added)
[664] Letter from PMTL to the Sub-Committee for Appeal Consideration, 12 October 2012 (English translation), (Exhibit PHL-43-B), p. 2. See also Letter from PMTL to the Sub-Committee for Appeal Consideration, 5 October 2012 (English translation), (Exhibit PHL-25-B), p. 1
[665] Philippines' first written submission, paras. 338-346.

group determined in the process of conducting the examination of the circumstances of sale under Article 1.2(a).[666]

7.281. The Philippines claims that the BoA acted inconsistently with Article 5.1(a)(i) of the CVA by failing to deduct the correct amount of P&GE.[667] The Philippines asserts that, under Article 5.1(a)(i), the BoA was not entitled to rely on figures other than PMTL's figures, and that even if the BoA was entitled to use figures other than PMTL's, the BoA's reasons for not using PMTL's own P&GE figures were flawed and the BoA used a rate that was determined through a flawed process.

7.282. Thailand argues that the BoA acted consistently with Article 5.1(a)(i) of the CVA.[668] Thailand argues that, once the BoA had determined that the relatedness of the buyer and seller affected the transaction value it could no longer continue to use PMTL's own P&GE rate since this would simply have recreated PMTL's own calculation of the transfer price. Consequently, Thailand argues, it was reasonable and logical for the BoA to use the average P&GE rate that it determined for the benchmark group instead of PMTL's claimed P&GE rate, reiterating that the BoA properly determined the average P&GE rate.

7.2.4.2 Main arguments of the parties

7.283. The Philippines explains that "if an administration does validly reject an importer's own figures as an integral part of its assessment under Article 1 on the grounds that they are not consistent with the figures of a properly constituted industry group, the administration is entitled to reject the importer's figures under Article 5."[669] The Philippines maintains, however, that the BoA did not have valid grounds to reject PMTL's figures under Article 1.[670] The Philippines contends that the "numerous flaws" that it identifies with respect to the BoA's assessment of P&GE rates for the industry group "vitiate the BoA's conclusion that PMTL'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'".[671] Additionally, the Philippines considers that even if the BoA had properly rejected PMTL's own figures, it incorrectly relied on the average P&GE rate of 12.44% that the BoA determined to be the industry average.[672]

7.284. Thailand notes that the Philippines does not object to the use of the average P&GE rate determined by the BoA, *per se*, but rather makes the same objections that it raises in the context of its claims under Articles 1.1 and 1.2(a) of the CVA.[673] Thailand asserts that, once the BoA had determined that the relatedness of the buyer and seller affected the transaction value, it could no longer continue to use PMTL's own P&GE rate, since this would simply have "re-created PM Thailand's own calculation of its transfer price".[674] It was therefore "obvious and reasonable" to use the average P&GE rate.[675] Regarding the Philippines' arguments that the comparison group and average P&GE rate were improperly determined, Thailand refers back to its arguments regarding how the BoA identified the comparison group and determined the P&GE rates.[676]

7.2.4.3 Analysis by the Panel

7.2.4.3.1 General considerations

7.285. Article 5.1(a)(i) of the CVA provides that:

> 1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods

[666] See BoA Ruling, (Exhibit PHL-21-B), p. 4; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 11.
[667] Philippines' first written submission, paras. 380-399; second written submission, paras. 281-295; response to Panel question No. 21.
[668] Thailand's first written submission, paras. 5.81-5.83.
[669] Philippines' response to Panel question No. 21, para. 184.
[670] Philippines' response to Panel question No. 21, para. 184.
[671] Philippines' first written submission, para. 390.
[672] Philippines' first written submission, para. 395.
[673] Thailand's first written submission, paras. 5.81-5.82.
[674] Thailand's first written submission, para. 5.82.
[675] Thailand's first written submission, para. 5.82.
[676] Thailand's first written submission, para. 5.83.

> under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:
>
> > (i) either the commissions usually paid or agreed to be paid or *the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind*;[677]

7.286. Paragraph 6 of the Interpretative Note to Article 5 states that:

> It should be noted that "profit and general expenses" referred to in paragraph 1 of Article 5 should be taken as a whole. The figure for the purposes of this deduction should be determined on the basis of information supplied by or on behalf of the importer unless the importer's figures are inconsistent with those obtained in sales in the country of importation of imported goods of the same class or kind. Where the importer's figures are inconsistent with such figures, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the importer.

7.287. In sum, under Article 5.1(a)(i), in applying the deductive method to calculate a revised customs value, a customs authority must make a deduction for "additions usually made for profit and general expenses". Furthermore, paragraph 6 of the Interpretative Note sets forth a hierarchy in the usage of figures for a P&GE deduction, pursuant to which a customs authority must necessarily use the figures provided by the importer unless the customs authority establishes that the importer's figures are inconsistent with P&GE rates "obtained in sales in the country of importation of imported goods of the same class or kind".

7.288. We recall that Article 15.3 of the CVA defines "goods of the same class or kind" as goods which fall "within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods."

7.289. We note that our assessment of the Philippines' claims under Article 5 is conducted in accordance with the evidentiary principles set forth above in respect of our assessment of the Philippines' claim under Article 1.2(a), second sentence.[678]

7.290. The issue before us is whether the BoA acted inconsistently with Article 5.1(a)(i) by making a deduction for P&GE based on the 12.44% rate that the BoA determined to be the average P&GE rate of the industry benchmark group it composed in the process of examining the circumstances of sale under Article 1.2(a), instead of using PMTL's own P&GE figures.

7.2.4.3.2 The BoA's deduction for P&GE

7.291. We recall that paragraph 6 of the Interpretative Note to Article 5 of the CVA indicates that a customs authority is required, in principle, to use the figures supplied by the importer. However, this obligation is not absolute. Paragraph 6 also indicates that a customs authority may reject the importer's figures if it concludes that those figures are inconsistent with the figures obtained in sales of imported goods "of the same class or kind" in the country of importation.

7.292. In our view, if a customs authority, in the course of an examination of the circumstances of sale under Article 1.2(a) (for the purpose of determining whether to reject the transaction value), finds that an importer's P&GE figures are inconsistent with P&GE figures obtained in sales in the country of importation of imported goods "of the same class or kind", then the customs authority is under no obligation to rely on the importer's P&GE figures when making deductions under Article 5. Essentially, in such a scenario, the customs authority would have satisfied the requirements of Article 5.1(a)(i) relating to the rejection of the importer's own figures for the P&GE deduction. Applying this to the present dispute, if the BoA's examination of the circumstances of sale under Article 1.2(a) properly established that PMTL's P&GE rate was inconsistent with the P&GE rates for sales in Thailand of imported goods "of the same class or kind" as PMTL's imported cigarettes, then the BoA would

[677] Emphasis added.
[678] See paragraphs 7.119. to 7.121. above.

have satisfied the requirement under Article 5.1(a)(i) relating to the rejection of PMTL's figures for the P&GE deduction, and consequently would be no longer obliged to use the importer's own figures.

7.293. We recall our finding above that the BoA's examination of the circumstances of sale was inconsistent with Article 1.2(a), second sentence. Specifically, we found that, taken together, the composition of the industry group, the way the BoA determined the benchmark range, and the manner in which the BoA compared PMTL's P&GE figures with the benchmark range, rendered the BoA's comparison of P&GE rates inapt to reveal whether the relationship between the buyer and seller influenced the price.[679]

7.294. We note that the legal standard in respect of Article 5 concerning comparisons of P&GE rates is not, in principle, identical to that under Article 1, concerning the examination of the circumstances of sale. However, in the specific circumstances of this dispute, we consider that our findings above regarding the BoA's comparison of P&GE rates are directly relevant to a determination of whether the BoA satisfactorily determined whether PMTL's P&GE figures are inconsistent with P&GE figures obtained in sales in Thailand of imported goods "of the same class or kind". Indeed, we recall that the entirety of the BoA's examination of the circumstances of sale consisted of a comparison of the importer's P&GE figures with an industry benchmark, and that it was exclusively on this basis that the BoA rejected the transaction value. Furthermore, we consider that, for the reasons set forth in Section 7.2.2.3.2 above, the BoA did not adequately determine that PMTL's P&GE rates were inconsistent with those obtained in sales in Thailand of imported goods "of the same class or kind" as PMTL. We recall that Thailand has advanced almost no argumentation in this proceeding to establish that the companies (other than PMTL itself) included in the industry comparator group produce goods "of the same class or kind" within the meaning of the CVA.[680] Simply put, for the same reasons set forth above, we do not consider that the BoA's comparison reveals anything about the P&GE rate of PMTL itself. We therefore do not consider that the BoA appropriately determined that PMTL's P&GE figures were "inconsistent" with P&GE figures obtained in sales in Thailand of imported "goods of the same class or kind".

7.295. Consequently, we consider that, since the BoA failed to properly establish that PMTL's figures were inconsistent with the P&GE figures for such sales, the BoA failed to act in accordance with the requirements of Article 5.1(a)(i).

7.2.4.4 Conclusion

7.296. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, the BoA acted inconsistently with Article 5.1(a)(i) of the CVA by failing to deduct an appropriate amount in respect of P&GE.

7.2.5 Claim under Article 5.1(a)(ii) of the CVA

7.2.5.1 Introduction

7.297. Article 5.1(a)(ii) of the CVA requires that, when applying the deductive method, a deduction should be made for the usual costs of transport and insurance, as well as associated costs, that are incurred in the country of importation. In applying the deductive method, the BoA did not make any deduction for transportation costs.[681]

7.298. The Philippines claims that the BoA acted inconsistently with Article 5.1(a)(ii) of the CVA by failing to make a deduction for transportation costs when applying the deductive method.[682] The Philippines asserts that any waiver of such a deduction by PMTL was on a conditional basis, that the BoA failed to satisfy such conditions, and that the BoA should have consulted with PMTL regarding the transportation costs.

[679] See paragraphs 7.122. to 7.240. above.
[680] See paragraph 7.142. above.
[681] See BoA Ruling, (Exhibit PHL-21-B), p. 4; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 18.
[682] Philippines' first written submission, paras. 416-424; second written submission, paras. 332-342; response to Panel question Nos. 20(b) and 25-26.

7.299. Thailand submits that the BoA acted consistently with Article 5.1(a)(ii).[683] Thailand argues that PMTL waived its right to any adjustment for transportation costs. Additionally, Thailand argues that the burden of requesting such an adjustment (and proving that the adjustment is required) falls on the party claiming the adjustment, and that in this case PMTL did not claim or substantiate such an adjustment.

7.2.5.2 Main arguments of the parties

7.300. The Philippines notes that Article 5.1(a)(ii) requires that, in determining the customs value, deductions are to be made for "the usual costs of transport".[684] The Philippines further notes that the BoA made no adjustment for transport costs, on the basis that PMTL had "voluntarily accepted that … transportation cost may not be considered for the calculation by way of deductive value method."[685] The Philippines contends that PMTL did not waive its right to such a deduction, but rather offered to waive its right on the condition that the BoA would "act expeditiously in resolving the appeal".[686] At the time of making the offer, the appeal process had been ongoing for nine years – a delay that was found to be WTO-inconsistent in the original proceeding.[687] The Philippines explains that, two months after PMTL made the initial offer, PMTL sent the BoA a letter indicating that its offer was no longer valid, and requesting deductions for transportation costs.[688]

7.301. Since the BoA Ruling was only issued 15 months after PMTL made the offer, the Philippines argues that the BoA should have consulted with PMTL as to whether PMTL wished to provide additional information in respect of a deduction for transportation costs.[689] The Philippines submits that PMTL had, in any case, provided an estimate of domestic transportation costs to the BoA in its letter of 9 December 2010.[690] The Philippines refers to the original panel report for the proposition that "an importer's request for expeditious assessment cannot justify an authority's failure to respect the due process requirements inherent in the process of consultations between customs and the importer, as foreseen by the CVA".[691] The Philippines contends that the BoA was "required to conduct the deductive valuation as a process involving 'consultation between an importer and a customs administration'", and if the BoA had questions concerning the amount of transportation costs to be deducted, it was obliged to consult with PMTL, but chose not to do so.[692]

7.302. Thailand argues that if PMTL had "wished to claim an adjustment for transportation costs, it could, at any time after it sent its letter saying that it did not intend to claim an adjustment, [have] changed its mind, notified the BoA that it intended to claim the adjustment, and submitted the necessary information for review by the BoA."[693] Thailand submits that PMTL did not do so.[694] Thailand refutes the Philippines' assertion that PMTL sought any reduction for transportation costs in its letter, or on any other occasion.[695] Thailand considers that in the letter to which the Philippines refers, "[c]ertainly PM Thailand pointed out that in a deductive method calculation, transportation costs are to be deducted."[696] However, Thailand asserts that PMTL did not request a deduction for any specific amount in that letter, whereas, by comparison, PMTL did provide figures through that letter on what it considered to be the correct P&GE rate.[697]

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[683] Thailand's first written submission, paras. 5.96-5.100; second written submission, paras. 2.97-2.104; response to Panel question No. 25; opening statement at the meeting of the Panel, para. 93.

[684] Philippines' first written submission, para. 416.

[685] Philippines' first written submission, para. 418.

[686] Philippines' first written submission, para. 419.

[687] Philippines' first written submission, para. 422.

[688] Philippines' second written submission, para. 338 (referring to Letter from PMTL to the Sub-Committee for Appeal Consideration, 13 October 2011 (English translation), (Exhibit PHL-145-B), p. 3).

[689] Philippines' first written submission, para. 420; second written submission, para. 336.

[690] Philippines' second written submission, para. 340 (referring to Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010 (English translation) (Exhibit PHL-75-B), pp. 8-9).

[691] Philippines' first written submission, para. 423 (referring to Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.331).

[692] Philippines' second written submission, para. 341 (quoting Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.384).

[693] Thailand's first written submission, para. 5.99.

[694] Thailand's first written submission, para. 5.99.

[695] Thailand's second written submission, paras. 2.93-2.104.

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

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

7.303. Thailand also states that the BoA did not have access to information about "how PM Thailand incurred transportation costs or how to quantify any transportation costs".[698] Thailand asserts that PMTL's submission to the BoA only made an "unsubstantiated 'estimate'" of the transportation costs, and made no further effort to identify the amount to be deducted for transport costs, whereas again, by contrast, PMTL "actively pursued … what it considered to be the correct P&GE ratio and amounts for provincial taxes".[699] Thailand submits that PMTL similarly did not "claim the adjustment or provide anything more than the unsubstantiated 'estimate' it had originally provided" when it sent its letter in which it allegedly "withdrew" its offer to waive the adjustment.[700] Thailand highlights that a company like PMTL would most likely have sufficient accounting records to identify transportation costs relatively easily, in which case it did not pursue the deduction because the estimated amount was so insignificant (approximately €0.001 per pack) that it was not worth the effort.[701] Alternatively, Thailand submits that PMTL simply did not have the records.[702]

7.2.5.3 Analysis by the Panel

7.2.5.3.1 General considerations

7.304. Article 5.1(a)(ii) of the CVA provides that:

> 1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:
>
> > …
> >
> > (ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;

7.305. According to the original panel, the process of customs valuation, including the application of the deductive method under Article 5, requires consultation between the importer and the customs authority.[703] The original panel referred to the General Introductory Commentary of the CVA, which explains that the customs valuation process consists of cooperation and collaboration between the customs valuation authority and the importer.[704] The original panel observed that the CVA "aims at striking the balance between respecting the customs authorities' need to address cases where it has reason to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a declared value and protecting the legitimate commercial interests of traders."[705] Specifically concerning the Thai Customs Department's failure to deduct transportation costs in the process of applying the deductive method, the original panel stated:

> Regarding the deduction of transportation costs, we note that although PM Thailand (mistakenly) omitted to request deduction of these costs, Thailand should have inquired as to whether such a deduction was needed. First, deduction of "the usual costs of transport" is specifically mentioned in Article 5.1(a)(ii), and therefore a common item to be deducted. Second, the minutes of the 6 March meeting show that Thailand was aware of the fact that in the calculation of the deductive value, transportation costs must be deducted. Third, Thai Customs was aware of the fact that PM Thailand had included a deduction for internal transportation costs in annual filings covering the three year period from 2003 to 2005 for either "inland freight" or "domestic transportation". We believe, therefore, that although PM Thailand did not specifically request deduction of the transportation costs, Thailand should have deducted these costs based on the

[698] Thailand's first written submission, para. 5.98.
[699] Thailand's second written submission, para. 2.100.
[700] Thailand's second written submission, para. 2.102.
[701] Thailand's second written submission, paras. 2.100-2.102 and fn 55.
[702] Thailand's second written submission, para. 2.102.
[703] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.172 and 7.326-7.327.
[704] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.326-7.327.
[705] Panel Report, *Thailand – Cigarettes (Philippines)*, para.7.172.

> information put forward by PM Thailand, or if it considered this information to be insufficient, it again could and should have communicated such views to the importer during the valuation process.[706]

7.306. The original panel also stated the following regarding the Thai Customs Department's decision not to deduct transportation costs:

> The next issue raised by the parties in relation to transportation costs is whether Thai Customs' decision not to deduct this item was not inconsistent with the principles of Article 5 because PM Thailand failed to make a specific request for its deduction. In respect of the transportation costs at issue in this case, as the Philippines acknowledges, PM Thailand mistakenly omitted them in its letter of 21 February 2007. Thailand argues that due to PM Thailand's failure to claim a deduction for transportation costs, it did not have to deduct these costs, but even if the deduction had been claimed, the documents submitted by PM Thailand do not establish that PM Thailand incurred transportation costs with respect to the sales on which the GAQ price was based. Nonetheless, we note the following Thai Customs' statement relating to the deductive valuation method in the original minutes of the 6 March 2007 meeting:
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> > "To prescribe customs prices by using deductive value, the deductive value must comprise the following: selling price of the imported thing per unit sold at the first sale in the country, and sold in the biggest volume to the person with no relationship less commission or normal profit and general expenses less insurance cost, *transportation cost in the country* and less import tariff, other taxes for the import and the sale of such things."
>
> This shows that Thai Customs understood and discussed at the 6 March 2007 meeting that transportation costs in the country of importation, as one of the items that are subject to deductions under Article 5, had to be deducted in calculating the customs value of the cigarettes at issue. As we explained above, a valuation process must be that of consultation between an importer and a customs administration. To the extent that transportation costs usually are incurred in the resale of goods in the country of importation, Thai Customs had to rely on the available evidence or, if not, consult PM Thailand as regard this item if it had queries on the available evidence.[707]

7.307. Importantly, we note that the parties do not contest that an importer can "waive" its right to a deduction under Article 5, in a practical sense. Specifically, the parties agree that, if an importer fails to provide relevant information to substantiate a requested deduction under Article 5.1, the customs authority cannot be found to have acted inconsistently with Article 5.1 for not making the deduction.[708] While we consider that the legal obligations that Members assume under the covered agreements cannot strictly speaking be waived by importers or other private parties, we agree with the parties that, in the circumstances of a customs valuation determination, it is possible that an importer may, practically speaking, "waive" its rights in a particular set of circumstances. This does not amount to a waiver of the treaty obligation assumed by a Member.

7.308. The original panel indicated that Article 5 imposes an obligation on the customs authority to engage in a process of consultation with the importer during the course of the customs valuation determination. Furthermore, we consider that the customs authority must make its deduction on the basis of the information provided by the importer. Furthermore, in a situation where the customs authority has doubts about the information provided by the importer, then, in accordance with the consultative nature of the process, the customs authority should communicate its doubts to the

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[706] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.330. (footnote omitted)

[707] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.383-7.384. (footnote omitted) (emphasis added by original panel)

[708] The Philippines acknowledges that due to the nature of the customs valuation process, the customs authority is required to specify the information it requires to make a deduction and the importer must provide the same in order for the deduction to be made. As a result, it is possible that the importer fails to provide the required information that would allow the authority to make the deduction, thereby preventing the deduction from being made. (Philippines' response to Panel question No. 25) Thailand states that "[w]hen the importer decides not to provide substantiated amounts … it is perfectly reasonable for the [customs authority] to proceed on the basis that any right to adjustment for transportation expenses has not been exercised and, rather than delaying the matter further, to proceed to make a decision." (Thailand's response to Panel question No. 25, p. 23-24)

importer and invite the importer to submit additional information. We note that it may so happen that an importer declines to submit the necessary evidence, despite a good faith effort by the customs authority to consult with the importer. It is entirely plausible that an importer may elect not to supply such information. Furthermore, in such a situation the importer may explicitly inform the customs valuation authority that it does not intend to supply such information. We do not consider that a customs authority can be found to have acted inconsistently with its obligations under Article 5 in such a situation. In short, a practical consequence of the nature of the consultative process under Article 5.1 is that an importer is *entitled* to submit the necessary information, but is not *required* to do so, and may prefer not to do so. In this "practical" sense, an importer can indeed "waive" its right to a deduction for transportation costs.

7.309. The parties also do not disagree that, if an importer initially indicates its intention not to substantiate a particular deduction, the importer is not necessarily precluded from changing its mind and subsequently requesting (and substantiating) that deduction.[709] We note that the purpose of the deduction itself, as contemplated in Article 5, is to enable the customs authority to determine a customs value that is as accurate as possible. We therefore agree with the parties that a declaration by an importer that it does not intend to claim or substantiate a particular deduction does not necessarily preclude an importer from changing its mind and subsequently requesting the relevant deduction. Having said that, we also consider that the importer itself must approach the customs valuation process in good faith. If an importer intends to request (and substantiate) a particular deduction, it must do so within a reasonable period of time, sufficient to enable the customs authority to operate efficiently and effectively. A customs authority could not be found to have acted inconsistently with Article 5 for failing to make a deduction in a situation where an importer utilizes the flexibilities of the consultative customs valuation process to delay or frustrate the customs authority's own rights under the CVA.

7.2.5.3.2 The BoA's deduction for transport costs

7.310. The issue before the Panel is whether PMTL "waived" its right to have transportation costs deducted from the resale value in the process of customs valuation. In this connection, we briefly recount key aspects of PMTL's communications with the BoA.

7.311. On 9 December 2010, PMTL sent a position paper to the BoA in connection with the appeal, detailing its views on various matters.[710] With regard to transportation costs, PMTL expressed its concerns that the BoA appeared to believe that it was not required to deduct transportation costs, and expressed the view that failing to do so would violate Thailand's obligations under the CVA. PMTL further provided an estimate of the transportation costs, and indicated that if further information was required, it was ready to provide whatever information was needed. The letter stated in relevant part that:

> PMTL is concerned that the BOA appears to believe that it is not required to deduct domestic transportation costs paid by PMTL as part of the deductive value calculation. … [F]ailing to make a deduction for domestic transportation costs in a deductive value calculation would be contrary to Thai law and Thailand's obligations under the CVA … Thailand's obligation to deduct domestic transportation costs in a deductive value calculation was confirmed in the WTO Panel Ruling … The WTO Panel further held that a customs authority must consult with the importer to secure the information it needs to calculate the amount of deductions to be made, and it must request additional information as necessary … Therefore, in order to assist the BOA, PMTL is providing the amount to be deducted as the domestic transportation costs of THB 2.57/1,000 sticks in respect of the 210 Marlboro entries at issue. … Should the BOA require additional information in order to determine the amount of domestic transportation costs to be deducted, PMTL is ready to provide whatever information is needed.[711]

[709] Thailand states that "[h]ad PM Thailand wished to claim an adjustment for transportation costs, it could, at any time after it sent its letter saying that it did not intend to claim an adjustment, changed its mind, notified the BoA that it intended to claim the adjustment, and submitted the necessary information for review by the BoA." (Thailand's first written submission, para. 5.99) The Philippines does not contest that an importer can change its mind, and claim an adjustment if it wishes to do so.

[710] Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010, (English translation), (Exhibit PHL-75-B), pp. 8-9.

[711] Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010, (English translation), (Exhibit PHL-75-B), p. 8.

7.312. In a subsequent letter to the BoA dated 24 August 2011, PMTL reminded the BoA of its obligation to deduct transport costs, and the original panel's finding that further information had to be requested from the importer if necessary. However, in the same letter, PMTL indicated that to facilitate the "immediate conclusion" of the longstanding appeals, it was prepared, for the purposes of these appeals only, to not include transportation costs in the deductive calculation. The letter stated in relevant part that:

> PMTL would like to remind the BOA that the WTO Panel Report, as adopted by the WTO's Dispute Settlement Body on 15 July 2011, states that sales allowance and transport costs, among other elements, must be deducted in a deductive calculation, and if necessary, further information should be requested from the importer (please see paragraph 7.332 at attachment 2). PMTL expects that Thailand, including the BOA, will adhere to this and other elements of the WTO's Panel and Appellate Body Reports. Nonetheless, to facilitate the immediate conclusion of these long outstanding appeals (with respect to entries made in 2002), PMTL is willing, for these appeals only, to accept that sales allowance and transport costs are not taken into consideration in a deductive calculation. However, such acceptance shall not be deemed as any waiver of PMTL's rights under Thai law and international agreements.[712]

7.313. Based on the foregoing we understand that PMTL offered to accept that transportation costs not be taken into consideration. However, as the paragraph above indicates, the purpose of PMTL foregoing this deduction was to facilitate the immediate conclusion of the appeals. We note that the appeal process continued for approximately 15 months after this initial offer.

7.314. On 13 October 2011, two months after PMTL made the relevant offer, PMTL sent the BoA another letter covering various points relating to the ongoing appeal, and noting the need to deduct transportation costs. The letter stated:

> [I]n light of the WTO Report, in respect of the Provincial Tax and the use of adjusted gross margin for the calculation according to the deductive value, the Company is of the view that the following points should be considered by the BOA, which follows the guidelines and the WTO Report for the consideration of the pending appeals totalling 210 entries: … In addition, the deduction of Sales Allowance and Transport Costs were all confirmed in the WTO Report as the proper steps to be taken when applying a deductive calculation. If the proper amounts for these items are NOT deducted, the resulting deductive value is inflated and inconsistent with the Ministerial Regulation and the [CVA].[713]

7.315. Thus, this subsequent letter reminded the BoA of its obligation to deduct transportation costs from the resale value. Even if this letter did not specifically claim a deduction in relation to transportation costs, and only generally reminded the BoA of its duty to make deductions, we consider that the letter, at a minimum, created ambiguity as regards the initial offer that PMTL had made in the letter dated 24 August 2011. In light of the ambiguity created as a result of this letter, we consider that the BoA was required to consult with PMTL to confirm PMTL's intention to forego its right to a deduction for transportation costs. If PMTL did in fact intend to forego this deduction, it would have confirmed the same in the course of the consultation.[714]

7.316. Regarding Thailand's argument that PMTL waived its right to a deduction because it only provided an "estimate" of transport costs in its December 2010 letter, we consider that the absence of substantiation by itself cannot demonstrate a company's intention to forego its right to a deduction, unless this absence of substantiation is preceded by the customs authority's attempt to engage with the company in a process of consultations. The original panel found that even where an importer omits to request a deduction for transportation costs, an administration should inquire as to whether such a deduction is needed.[715] Additionally, the original panel found that "[t]o the

[712] Letter from PMTL to the Director of Customs Valuation Appeal Division, 24 August 2011 (English translation), (Exhibit PHL-76-B), p. 1.

[713] Letter from PMTL to the Sub-Committee for Appeal Consideration, 13 October 2011 (English translation), (Exhibit PHL-145-B), p. 3. (footnotes omitted)

[714] We note that this finding accords with the original panel's findings in respect of the Thai Customs Department's failure to make deductions for sales allowances, provincial taxes and transportation costs. (See Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.332)

[715] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.330.

extent that transportation costs usually are incurred in the resale of goods in the country of importation, Thai Customs had to rely on the available evidence or, if not, consult PM Thailand as regard this item if it had queries on the available evidence."[716] In this respect, we highlight that PMTL's initial letter conveying its estimate for transportation costs states unambiguously that, "[s]hould the BOA require additional information in order to determine the amount of domestic transportation costs to be deducted, PMTL is ready to provide whatever information is needed."[717] We therefore consider that the BoA was indeed required to rely on PMTL's "rough estimate" unless it communicated its concerns to PMTL and gave PMTL an opportunity to provide further substantiation.

7.317. Regarding Thailand's argument that "in anti-dumping disputes … the burden of proving entitlement to an adjustment lies with the party claiming the adjustment", we agree that a customs authority may request an importer to substantiate any claimed deduction.[718] However, as explained above, where an importer does provide certain estimations to the customs authority, a customs authority cannot simply reject the importer's figures without attempting to consult with the importer, including by explaining its concerns to the importer and giving the importer an opportunity to respond to those concerns.

7.318. In sum, we consider that PMTL did not forego its right to a deduction for transport costs, and that PMTL's submission of its estimate of transport costs was, in the circumstances, sufficient to require the BoA to consult with PMTL if it had any misgivings regarding PMTL's estimations. As a consequence of the BoA's failure to do so, it was not justified in failing to make any deduction for transportation costs, as it is in principle required to do when applying the deductive method under Article 5.1(a)(ii).

7.2.5.4 Conclusion

7.319. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, the BoA acted inconsistently with Article 5.1(a)(ii) of the CVA by failing to make a deduction in respect of transport costs.

7.2.6 Claim under Article 5.1(a)(iv) of the CVA

7.2.6.1 Introduction

7.320. Article 5.1(a)(iv) of the CVA requires that, when applying the deductive method, a deduction should be made for customs duties and other national taxes payable in the country of importation as a consequence of the importation or sale of the goods to be valued. PMTL claimed a deduction of THB 0.033/stick in respect of provincial taxes payable.[719] In applying the deductive method, the BoA made a deduction of only THB 0.021/stick in respect of provincial taxes payable by PMTL.[720]

7.321. The Philippines claims that the BoA acted inconsistently with Article 5.1(a)(iv) of the CVA, by improperly determining the amount to be deducted in respect of provincial tax, by disregarding the evidence provided by PMTL and relying exclusively on certain tax receipts to determine the total amount of provincial tax that PMTL had paid, and by improperly determining the total amount of cigarettes sold by PMTL in Thailand in 2002.[721] The Philippines argues that the BoA did not have a valid basis for deducting a lower amount than that claimed by PMTL, because the BoA failed to properly consult with PMTL regarding its calculation of the amount to be deducted.

[716] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.384.
[717] Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010, (English translation), (Exhibit PHL-75-B), p. 8.
[718] See Thailand's second written submission, para. 2.98.
[719] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 16.
[720] BoA Ruling, (Exhibit PHL-21-B), p. 4; Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 17.
[721] Philippines' first written submission, paras. 400-415; second written submission, paras. 296-331; response to Panel question Nos. 20, 22, 24, 86, 89 and 90; comments on Thailand's response to Panel question Nos. 86-90; opening statement at the meeting of the Panel, paras. 35-39.

7.322. Thailand considers that the BoA acted consistently with Article 5.1(a)(iv).[722] Thailand argues that it was reasonable for the BoA to request proof in support of the adjustment claimed by PMTL, due to the particular circumstances of the requested deduction. Thailand argues that the burden of producing the relevant tax receipts was on PMTL, not the BoA, and in light of the circumstances described above, it was reasonable for the BoA to determine the total amount of tax payable exclusively on the basis of those tax receipts indicating that PMTL had paid the provincial tax.

7.2.6.2 Main arguments of the parties

7.323. The Philippines argues that PMTL provided the BoA with extensive evidence to demonstrate that PMTL paid THB 162,347,608.85 of total provincial tax for the relevant period, including all receipts for payment of provincial tax that it had received from the provincial authorities for the period.[723] Other evidence provided by PMTL included data on the total amount of provincial tax paid during the relevant period, the total volume of sales during that period, and the average provincial tax rate, which in three previous appeals had sufficed for the BoA to make a deduction in respect of provincial tax.[724] PMTL also provided: receipts for provincial taxes actually paid during a representative period of the year; monthly data from January 2002 to December 2002 showing for each province the sales volume of *Marlboro* and *L&M* cigarettes, the value of the sales, and the average provincial tax rate in Thailand, from which PMTL calculated the amount of provincial tax paid in 2002 (THB 162,347,608.85); and an Expense and Cost Statement from 2002 indicating the amount of tax paid (THB 162,347,608.85).[725] The Philippines explains that the Secretary of the BoA had also initially concluded that the total amount of provincial tax paid by PMTL for the relevant period was THB 162,347,609.00.[726]

7.324. The Philippines emphasizes that the BoA failed to act in accordance with the requirements of Article 5, by failing to consult with PMTL regarding the BoA's perceived deficiencies in the evidence provided by PMTL.[727] Additionally, the Philippines has argued that the BoA essentially "imposed an evidentiary burden that the importer could not meet", since certain provincial tax authorities failed to provide the relevant receipts to PMTL and certain receipts provided by PMTL were not in the precise format requested by the BoA.[728] The Philippines considers that PMTL could have provided additional evidence to the BoA in the form of evidence from its SAP accounting system, or statements from its customers, had the BoA adequately consulted with PMTL.[729] The Philippines has also contested Thailand's characterization of the receipts provided by PMTL to the BoA, the nature of the obligation to pay provincial tax on cigarettes in Thailand, and the format of the receipts that PMTL provided to the BoA.[730] The Philippines has also suggested that the BoA's calculation of the amount of provincial tax to be deducted was flawed.[731] The Philippines explains that "there is a lack of clarity as to which categories of receipts the BoA accepted, and which it rejected".[732] The Philippines has elaborated that PMTL is not legally obliged under Thai law to pay provincial tax on behalf of retailers but that it does so, in accordance with Thai Excise Department guidelines and in accordance with industry practice.[733] The Philippines has also explained that its claim under Article 5.1(a)(iv) is that "irrespective of which specific receipts the BoA included in the deduction, 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 envisaged under the CVA."[734]

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[722] Thailand's first written submission, paras. 5.84-5.95; second written submission, paras. 2.81-2.82; response to Panel question Nos. 23-24 and 86-90; comments on the Philippines' response to Panel question Nos. 86(b) and 90; opening statement at the meeting of the Panel, paras. 93-94.

[723] Philippines' second written submission, paras. 311-312.

[724] Philippines' second written submission, para. 305.

[725] Philippines' second written submission, paras. 306-308.

[726] Philippines' second written submission, para. 318.

[727] Philippines' second written submission, paras. 319 and 324-325; and response to Panel question No. 22(c), paras. 210-211 and 218-220, and Panel question No. 89, paras. 161-162.

[728] Philippines' first written submission, paras. 413-414.

[729] Philippines' response to Panel question No. 22, para. 219; comments on Thailand's response to Panel question No. 90(b), para. 122.

[730] Philippines' first written submission, paras. 360-361 and 372-375; and second written submission, paras. 311-316 and 320.

[731] Philippines' response to Panel question No. 22(b), paras. 201-210.

[732] Philippines' response to Panel question No. 89, para. 158.

[733] Philippines' response to Panel question No. 86(b), paras. 154-157.

[734] Philippines' response to Panel question No. 89, para. 162.

7.325. Thailand argues that, for a number of reasons, the BoA acted reasonably by requesting PMTL to provide evidence in the form of all relevant tax receipts demonstrating that it paid the amount of provincial tax claimed. Thailand emphasizes that in assessing PMTL's claimed amount for provincial taxes, the BoA calculated that PMTL would have paid provincial taxes on cigarettes at a rate higher than the rate applicable under the provincial tax law, which constituted "reasonable grounds to consider that the amount claimed by PM Thailand … was too high."[735] Since the receipts provided by PMTL to the BoA included receipts that did not indicate that PMTL was the payer, or that the amounts were paid by retailers on behalf of PMTL, Thailand asserts that it was reasonable for the BoA to conclude that "the claimed adjustment had not been substantiated in full".[736] Additionally, Thailand asserts that provincial tax liability in Thailand falls on the retailer, not the importer.[737] Consequently, according to Thailand, "the amount of provincial taxes paid on PM Thailand's sales cannot be determined with accuracy simply with reference to the amounts paid by PM Thailand itself … [and] it was reasonable to verify the claims of the importer regarding the provincial tax actually paid on its sales".[738] Thailand explains that it was on the basis of these circumstances that the BoA requested evidence in the form of tax receipts explicitly identifying that the tax was paid by PMTL on behalf of the retailers.[739]

7.326. Regarding the requirement imposed by the BoA on PMTL, Thailand explains that, in "determining the adjustment for provincial taxes, the BoA included all receipts that showed any indication that the taxes were paid by or on behalf of PMTL or related to Philip Morris' cigarettes."[740] Additionally, in response to the Philippines' argument that in some provinces no receipts were issued by the tax authorities, Thailand argues that Section 16(i) of the Regulations governing the collection of provincial tax requires that the official collecting the tax shall provide a receipt in the required form.[741] Thailand further adds that it is the responsibility of the tax payer to "obtain a receipt and to furnish the relevant information to enable the receipt to be filled out in the manner required by the payor."[742] Furthermore, Thailand explains that any failure by an official to comply with the requirements of these Regulations would be enforceable under Section 157 of the Thai Criminal Code.[743] Thailand also argues that, because it is PMTL and the retailers that have access to records of proof of payment, and not the Thai central government, it was reasonable for the BoA to request PMTL to provide evidence that the claimed provincial taxes "had in fact been paid".[744] Thailand notes that certain of the receipts submitted by PMTL did not indicate the importer or brand of cigarettes, and consequently there was nothing in these receipts to demonstrate "that they actually related to PM Thailand['s] sales of Philip Morris-brand cigarettes".[745]

7.2.6.3 Analysis by the Panel

7.2.6.3.1 General considerations

7.327. Article 5.1(a)(iv) of the CVA states that:

> 1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:
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> …

[735] Thailand's second written submission, para. 2.84.
[736] Thailand's second written submission, para. 2.87.
[737] Thailand's first written submission, paras. 5.89-5.91; and response to Panel question Nos. 23(a) and 24.
[738] Thailand's first written submission, para. 5.91.
[739] Thailand's response to Panel question No. 24, p. 223.
[740] Thailand's response to Panel question No. 88, p. 18.
[741] Thailand's response to Panel question No. 23(b).
[742] Thailand's response to Panel question No. 23(b), p. 22.
[743] Thailand's response to Panel question No. 23(c).
[744] Thailand's first written submission, para. 5.92.
[745] Thailand's first written submission, para. 5.93.

> (iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

7.328. Paragraph 8 of the Interpretative Note to Article 5 states that "[l]ocal taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5," implying that a deduction for local taxes such as provincial taxes shall be made either under Article 5.1(a)(i) or Article 5.1(a)(iv).

7.329. In the course of the original panel proceeding, the original panel was confronted with a question regarding the type of evidence required from an importer for the deduction of the items listed in Article 5.1(a). More specifically, the original panel was required to analyse whether the importer needed to show that the expenses for which deductions were sought were, in fact, tied to the sales made in the greatest aggregate quantity (GAQ) based on which the unit price of the good was decided.[746] In relation to the issue of provincial taxes, the Philippines claimed that deductions were required to be made for taxes "payable", whereas Thailand had argued that deductions could only be made for those taxes which were "actually paid" on the GAQ sales.[747] The original panel found that the ordinary meaning of the word "payable", understood in its context, did not require that the importer provide evidence for every payment made in relation to GAQ sales, but rather that taxes payable be deducted if the information showed that usual payments had been made for local taxes.[748] The original panel stated that:

> The term "payable" can be defined as "*adj*. (Of a sum of money or a negotiable instrument) that is to be paid. An amount may be payable without being due. Debts are commonly payable long before they fall due". It can also be defined as "*adjective*. 1 Of a sum of money, a bill, etc: that is to be paid; falling due (usu. At or on a specified date or to a specified person). 2 Able to be paid". Therefore, the ordinary meaning of the term "payable" refers to both "a sum of money that is to be paid without being due" and "that is due to be paid". This suggests that national taxes and provincial taxes subject to the deduction under Article 5 need not be related to the GAQ sale. The phrase "by reason of the importation or sale of the goods" also supports the view that these taxes refer to those usually to be paid upon importation and upon sale in the market.
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> Furthermore, paragraph 8 of the Interpretative Note to Article 5 states that "local taxes payable ... for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5". Article 5.1(a)(i) refers to "either the commission *usually* paid or agreed to be paid or the additional *usually* made for profit and general expenses ...". Therefore, we consider that provincial taxes *payable* must be deducted if the information shows *usual* payments made for local taxes even if they are not included in the sales price based on which the deductive valuation method will be applied under Article 5.[749]

7.330. In interpreting the term "payable", and distinguishing it from the term "paid", the original panel indicated that the evidence to be submitted by the importer need not be related to every single instance of tax paid in relation to a GAQ sale. Thus, the original panel understood the term "payable" to be distinct from the term "paid" in that corroboration of the former does not burden the importer with the need to prove each and every instance of tax payment.

7.331. The original panel also highlighted:

> [T]he Technical Committee's commentary on Article 5.1 that "in general, the application of the deductive valuation method under Article 5 of the Customs Valuation Agreement may differ on a set of circumstances from another and thus the practical application of Article 5 requires a flexible approach, having regard to the circumstances in each case".[750]

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[746] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.333.
[747] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.341-7.342.
[748] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.358-7.359.
[749] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.358-7.359. (footnote omitted) (emphasis original)
[750] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.348.

7.332. As elaborated in paragraph 7.305. above, the original panel also found that, when applying the deductive method as part of the customs valuation process, the customs authority and the importer must engage with each other in good faith. A deduction claimed by the importer, and supported by sufficient evidence, must be accepted by the customs authority unless it has sufficient reason to believe that the figures provided by the importer are incorrect. If the customs authority comes to such a conclusion, it remains under an obligation to consult with the importer and arrive at the correct figure for a deduction.

7.333. We note that the deductive method, under Article 5, is a process of valuation that takes as a starting point the transaction value of the first *unrelated-party* transaction. In this dispute, that first sale to an unrelated party was the first sale from PMTL to customers in Thailand. Importantly, the provincial tax at issue under this claim is *not* a tax that is clearly required, in law, to be paid on the sale of cigarettes by PMTL to retailers; rather the provincial taxes are, in principle, on the "retail sale of cigarettes".[751] However, the Philippines claims deductions for these taxes because it argues that, under Thai law, the importer-distributor (i.e. PMTL) is "expected" to pay the provincial tax *on behalf of the retailer*, and as a consequence, PMTL incorporates the amount of that tax into its sales price when it sells the cigarettes to the retailers.[752] Additionally, the Philippines asserts that, as a practical matter, PMTL has treated this expectation as a "requirement", and PMTL does indeed pay the relevant provincial taxes on behalf of all retailers to whom it sells cigarettes.[753] We understand that Thailand does not dispute that provincial taxes payable should be deducted if those taxes are payable by PMTL and included in the price of the cigarettes when sold by PMTL to the retailers.[754]

7.334. The parties also agree that an importer must substantiate a claimed deduction, and provide evidence in support of a requested amount.[755] In accordance with our findings above concerning the requirement to make a deduction for transportation costs, we consider that the customs authority must make its deduction on the basis of the information provided by the importer, and that in a situation where the customs authority has doubts about the information provided by the importer, then in accordance with the consultative nature of the process, the customs authority should communicate its doubts to the importer and invite the importer to submit additional information.

7.335. Finally, regarding the specific facts of this dispute, it is uncontested that no provincial tax is paid in Bangkok, and that any determination of the amount of provincial tax to be deducted from the sales price must take this into account.[756] It is also uncontested that one possible way of doing so is to calculate an average provincial tax rate payable per cigarette stick, by dividing the *total amount of provincial tax paid* in a particular year by *the total number of cigarette sales* made in all provinces in Thailand in that year.[757] The result of this calculation yields an average tax rate per cigarette stick, which can be deducted from the sales price of a single cigarette stick in applying the deductive method. This is indeed the same approach that the BoA followed in making the relevant deduction at issue here.[758] The Philippines does not contest the BoA's use of that calculation, but argues that the BoA's approach to determining the figures for the purpose of applying the calculation was inconsistent with Article 5.1(a)(iv).

7.2.6.3.2 The BoA's deduction for provincial taxes

7.336. As explained, the evidence provided by the parties indicates that, in determining the amount to be deducted in respect of provincial taxes, the BoA calculated an average amount of provincial tax paid per cigarette stick, by dividing a figure representing the *total amount of provincial tax paid by PMTL in 2002* by another figure representing the *total volume of cigarettes sold by PMTL in 2002*.[759] It is uncontested that the BoA did not communicate the content or result of this calculation

[751] Philippines' first written submission, para. 360.
[752] Philippines' response to Panel question No. 86(b), para. 154.
[753] Philippines' response to Panel question No. 86(b), para. 156.
[754] However, the parties disagree over whether, in fact, PMTL does pay such provincial taxes on behalf of retailers.
[755] Philippines' first written submission, para. 323; Thailand's first written submission, paras. 5.87-5.88.
[756] Philippines' second written submission, paras. 299-304; Thailand's first written submission, paras. 5.89-5.90; Thailand's response to Panel question No. 24, p. 23.
[757] Philippines' second written submission, paras. 299-304; BoA's calculation of the revised customs value, (Exhibit THA-13), p. 2.
[758] See paragraph 7.336. below.
[759] See Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 17.

to PMTL prior to issuing its Ruling, at which time it only indicated the outcome of the calculation, without explaining the figures used in the calculation.

7.337. We note that, unlike Article 1.2(a), which imposes distinct (albeit related) substantive and procedural obligations under its second and third sentences respectively, Article 5 does not impose a distinct obligation in respect of consultations as between the importer and the customs authority. Rather, the obligation to conduct consultations is integral to the manner in which the customs authority applies the deductive value method. We proceed by addressing, in turn, the parties' arguments concerning the BoA's determination of the total volume of PMTL's cigarette sales in 2002, before turning to address the BoA's determination of the total amount of provincial tax paid in 2002. As we address these distinct aspects of the BoA's determination we also assess whether the BoA adequately consulted with PMTL. Finally, we conduct an overall assessment of whether the BoA acted inconsistently with Article 5.1(a)(iv).

7.2.6.3.2.1 The determination of the total volume of cigarettes sold in 2002

7.338. The BoA's determination of the final amount to be deducted in respect of provincial taxes was calculated by dividing a figure representing the total amount of provincial taxes paid in 2002, by another figure representing the "[s]ale amount of cigarettes pursuant to 12 months sale invoices in 2002".[760] In making this calculation, the BoA used a figure of 4,754,577,380 cigarettes in respect of the total volume of sales in 2002.[761]

7.339. The Philippines argues that the BoA used the wrong figure since, in its letter of 15 December 2005, PMTL had provided to the BoA the figure of 4,895,968,580 cigarettes sold in Thailand in 2002.[762] In highlighting this discrepancy in the BoA's calculations, the Philippines emphasizes that it "is not asking the Panel to decide which particular figures for stick sales are correct."[763] Rather, the Philippines argues that the BoA acted inconsistently with Article 5.1(a)(iv) by failing to properly engage in consultations with PMTL, with the consequence that PMTL was never given the opportunity to address this discrepancy.[764]

7.340. Thailand has not directly responded to this argument by the Philippines. However we note that the Minutes of the BoA Meeting indicate that the sales amount was calculated "pursuant to 12 months sale invoices in 2002".[765] Furthermore, we note that in the context of its arguments concerning other aspects of the BoA's determination of the deduction for provincial tax, Thailand argues that a similar figure that also allegedly was calculated "pursuant to 12 months sale invoices in 2002" was determined by reference to "the sales volumes shown on PMTL's monthly VAT returns".[766]

7.341. We note that the total sales amount on which the BoA ultimately made its deduction was lower than the total sales amount that PMTL requested. Further, by making its calculation using a denominator of approximately 4.8 billion instead of approximately 4.9 billion, the final average provincial tax rate calculated by the BoA was (marginally) higher than it would have been had the BoA used the larger figure, and was therefore closer to the deduction that PMTL initially claimed.[767]

7.342. We recall from the legal standard described in paragraphs 7.305. and 7.332. above that Article 5 contemplates a process of consultation between the customs authority and the importer. In this respect, the original panel found, regarding the Thai Customs Department's failure to make a deduction for sales allowances and provincial taxes, that "if upon receiving the specific request for

[760] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 17.
[761] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 17.
[762] Philippines' response to Panel question No. 22(c), paras. 201-206 (referring to Letter from PMTL to Chief of Analysis and Appeal Section, 15 December 2005 (English translation), (Exhibit PHL-191-B)).
[763] Philippines' response to Panel question No. 22(c), para. 207.
[764] Philippines' response to Panel question No. 22(c), paras. 207-208.
[765] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 17.
[766] Thailand's response to Panel question No. 87, p. 17. See paragraph 7.354. below.
[767] We note that, had the BoA used the higher figure, but continued to rely on the same figure for provincial taxes payable, the higher denominator would have resulted in an amount approximately 0.0005 THB/stick less, which rounded up would have come to the same amount of average provincial tax paid that the BoA ultimately determined. However, had the BoA used the total amount of provincial tax payable as initially claimed by PMTL (and discussed further below), the difference would have been approximately 0.001, which would indeed have changed the average amount of provincial tax per stick.

the deduction of sales allowances and provincial taxes, Thai Customs had doubts about the deductibility of those items, as it explained to the Panel in this proceeding, it could and should have communicated such views to the importer during the valuation process."[768] Thus, in the event that a customs authority determines that the figures provided by the importer are incorrect or unreliable, it must consult with the importer in order to allow the importer an opportunity to explain its figures. In this process, the customs authority might come to the conclusion that additional evidence from the importer is required to make a proper assessment of the deductions claimed. In such event, the customs authority must inform the importer why its figures are considered insufficient or unreliable, and what new evidence is required.

7.343. We consider that the BoA's failure to inform PMTL of the figures on which it intended to rely for purposes of the calculation is inconsistent with the consultative process required to be undertaken under Article 5.1(a)(iv). In our view, the apparent discrepancy between the figures apparently based on PMTL's monthly VAT returns and the figures provided by PMTL in its letter of 5 December 2005[769] should have been resolved by giving PMTL the opportunity to explain its figures. We can see no evidence that the details of the BoA's determination of the total amount of cigarettes sold by PMTL in Thailand in 2002 were provided to PMTL prior to the BoA's determination of the amount to be deducted, nor was any summary or allusion to this aspect of the BoA's reasoning communicated to PMTL. Furthermore, assuming that PMTL's monthly sales figures were correctly accounted for when determining the total amount of cigarettes sold, we note that there is no rationale or reason indicated in any of the evidence on the record of the BoA's determination as to why the BoA opted to use the lower figure instead of the higher figure. We note in this respect that the Minutes of the BoA Meeting of 26 September 2012 explicitly identify the total sale amount claimed by PMTL as 4,895,968,580 sticks, without explaining why this amount was not used when calculating the final deduction.[770] For these reasons, we agree with the Philippines that the BoA's determination of the total volume of cigarettes sold in 2002 was not in accordance with the requirements of Article 5.1(a)(iv).

7.2.6.3.2.2 The determination of the total amount of provincial tax paid in 2002

7.344. The BoA conducted the following process for determining the total amount of provincial tax payable by PMTL in 2002.[771] Between 12 March 2007 and 9 December 2010, PMTL provided the BoA with "relevant information showing that the usual provincial taxes to be deducted are THB 33.16/1,000 sticks".[772] Such information consisted of PMTL's "[l]edger account, revenue, costs and expenses account showing the total amount of provincial taxes paid … in the amount of THB 162,347,609 … Monthly VAT returns Form PorPor. 30 in 2002, together with the attachments, i.e. Sale Invoice (output VAT report) showing the total amount of monthly sale in each area … [a] Provincial tax filing form … [and r]eceipts supporting payments of provincial tax in each area".[773] Regarding the latter tax receipts, such documents indicated three different types of language in the relevant space indicating from whom the money was received: (i) language indicating that PMTL itself was the taxpayer; (ii) language indicating only the name of the retailer as the taxpayer; and (iii) and language indicating the name of the retailer, followed by the words "by Philip Morris (Thailand) Limited", as the taxpayer.[774]

7.345. The BoA then conducted a "test calculation" allegedly using the figures provided by PMTL.[775] In that calculation, the BoA divided the total amount of provincial taxes allegedly paid in 2002 by

[768] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.329.

[769] Compare Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 17, and Letter from PMTL to Chief of Analysis and Appeal Section, 15 December 2005 (English translation), (Exhibit PHL-191-B).

[770] See Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 16.

[771] For the purposes of considering the process undertaken by the BoA, we do not distinguish between the Secretary of the BoA and the BoA itself, to the extent that the BoA relied on the actions of the Secretary of the BoA in determining the revised customs value.

[772] See Position Paper for the BoA, attached to Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010 (English translation), (Exhibit PHL-75-B), p. 7. We note that PMTL provided this information on the basis that, "[w]hile PMTL does not agree that the use of the deductive value method is correct as there is no legal basis for the rejection of its transaction value, PMTL is nevertheless prepared to accept this approach in this specific case only in order to bring this matter to a prompt conclusion." (Ibid, p. 1)

[773] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 13; PMTL's submission of its expense and cost statement FY 2002) (English translation), (Exhibit PHL-82).

[774] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 13.

[775] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 13.

PMTL (namely THB 162,347,609) by 1,102,317,440 cigarette sticks, representing the "[s]ale amount of cigarettes pursuant to 12 months sale invoices in 2002" in provinces *other than Bangkok*. This yielded an average amount of THB 0.147/stick.[776] The BoA noted that such average amount was higher than the average amount claimed by PMTL itself (namely THB 0.033/stick), and was also in excess of the maximum amount of provincial tax permitted under Thai law, namely THB 0.10 per stick.[777] It is uncontested that the BoA did not communicate the content or result of this calculation to PMTL.

7.346. On 17 August 2012, the BoA sent a letter to PMTL "to clarify and provide information".[778] Specifically, the BoA asked PMTL about: the provinces in which PMTL sold the relevant cigarettes; the rate of provincial tax per stick paid by PMTL; and "evidence of receipt of payment of the provincial tax" paid by PMTL.[779] On 21 August 2012, PMTL responded to the letter of 17 August 2012, providing monthly sales data for 2002 showing the sales volume of *Marlboro* and *L&M* cigarettes for each of the 75 Thai provinces, the value of those sales, and the average provincial tax rate in Thailand.[780] In that letter, PMTL indicated that if the BoA wished to receive additional evidence, over and above that which had already been given to the BoA, PMTL would require "a reasonable time-frame in which [it could] complete this immense task".[781] PMTL also referred the BoA to its financial statements for 2002, "which were audited and verified by the independent auditor, to the Revenue Department and the Ministry of Commerce", as well as the provincial tax "submitted" to the Excise Department, which "was accepted by the Excise Department without further query or investigation".[782] PMTL also indicated that its previous determination of the average provincial tax rate was lower than the actual provincial tax rate, but that PMTL would have "no objection" if the BoA chose to apply the lower rate.[783]

7.347. On 27 September 2012, the BoA requested that PMTL provide receipts for all payments of provincial tax claimed by PMTL for 2002.[784] On 5 October 2012, PMTL sent a letter to the BoA, indicating that the additional information requested by the BoA was "unnecessary, for several reasons".[785] That letter indicated that PMTL was still, at that time, under the impression that the BoA was requesting such information for the purpose of assessing "PMTL's declared transaction values".[786] However, the letter also elaborates on PMTL's view that, in the event the information were being requested for the purpose of applying the deductive method, the relevant evidence already provided by PMTL was sufficient for that purpose.[787] The letter invites the BoA to "advise" PMTL if the BoA "disagrees" with PMTL's position in this respect.[788] Subsequently, on 12 October 2012, PMTL again wrote to the BoA indicating that PMTL had "in good faith made an effort to collect

[776] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 13.
[777] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 14.
[778] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 14. See also Letter from PMTL to the Secretary of the Sub-Committee for the Appeal, 21 August 2012, (Exhibit PHL-204-B), p. 1
[779] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 14. See also Letter from PMTL to the Secretary of the Sub-Committee for the Appeal, 21 August 2012, (Exhibit PHL-204-B), pp. 1-2.
[780] Philippines' first written submission, para. 364; Letter from PMTL to Secretary of the Sub-Committee for the Appeal, 21 August 2012, (Exhibit PHL-204-B); Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 14.
[781] Letter from PMTL to Secretary of the Sub-Committee for the Appeal, 21 August 2012, (Exhibit PHL-204-B), p. 1.
[782] Letter from PMTL to Secretary of the Sub-Committee for the Appeal, 21 August 2012, (Exhibit PHL-204-B), p. 2.
[783] Letter from PMTL to Secretary of the Sub-Committee for the Appeal, 21 August 2012, (Exhibit PHL-204-B), pp. 1-2.
[784] Philippines' first written submission, para. 369 (referring to Letter from the Sub-Committee for Appeal Consideration to PMTL No. GorKor 0519(GorOr)/91, 27 September 2012 (English translation), (Exhibit PHL-83-B)). We note that in its initial request for such information, the BoA imposed a 15-day time-frame. Subsequently, however, the BoA granted a 6-week extension on that time-frame. (See parties' responses to Panel question No. 90(b))
[785] Letter from PMTL to the Sub-Committee for Appeal Consideration, 5 October 2012 (English translation), (Exhibit PHL-25-B), p. 1.
[786] Letter from PMTL to the Sub-Committee for Appeal Consideration, 5 October 2012 (English translation), (Exhibit PHL-25-B), p. 1.
[787] Letter from PMTL to the Sub-Committee for Appeal Consideration, 5 October 2012 (English translation), (Exhibit PHL-25-B), p. 1.
[788] Letter from PMTL to the Sub-Committee for Appeal Consideration, 5 October 2012 (English translation), (Exhibit PHL-25-B), p. 3.

the requested documentation" and submitting such evidence to the BoA.[789] PMTL's letter states that "in those instances where a receipt is not provided, the failure to provide such receipt is solely because the relevant provincial authority did not issue such receipt, which factors are beyond PMTL's control".[790]

7.348. On 16 November 2012, the BoA issued its Ruling, in which it indicated that the deduction for provincial tax had been calculated "by using the total amount of payment of the provincial tax pursuant to the receipts specifying that money is received from PMTL and the name of retailers by PMTL of the year 2002 according to the information provided by PMTL".[791]

7.349. We note that the BoA determined the total amount of provincial tax payable by PMTL in 2002 exclusively on the basis of receipts indicating that PMTL had actually paid the provincial tax. We recall that the legal standard articulated by the original panel in respect of Article 5.1(a)(iv) highlights a distinction between "taxes actually paid" and "taxes payable". Specifically, the original panel understood the term "payable" to be distinct from the term "paid", in the context of Article 5.1(a)(iv) of the CVA, and that, under Article 5.1(a)(iv), in order for the customs authority to be obliged to make a deduction for taxes payable, an importer is not obliged to prove each and every instance of tax actually paid.[792] The Philippines, supported by the European Union as a third party, has argued that the BoA's deduction on the basis of evidence of taxes "actually paid" is inconsistent with the legal standard under Article 5.[793] For its part, Thailand agrees with the distinction made by the original panel, but argues that, "in the circumstances of this case, it was not an unreasonable burden to require proof of the amounts claimed by PM Thailand as provincial taxes paid".[794]

7.350. We do not consider that the distinction between "tax paid" and "tax payable", as elaborated upon by the original panel, indicates that a customs authority is strictly precluded, under Article 5, from requiring *any* evidence of taxes actually paid. Some evidence of such taxes actually paid could be useful or even necessary, in certain circumstances, to ascertain the precise amount of tax "payable". Indeed, we note that the Philippines accepts "that determining what taxes are *payable* requires an evidentiary basis"[795] and "[a]s a general matter … an importer must furnish proof of the amounts of tax that an importer claims should be deducted".[796] The European Union also indicates that its view "does not mean that the national authority is not allowed to request evidence to determine the precise amount of payments usually made".[797]

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[789] Letter from PMTL to the Sub-Committee for Appeal Consideration, 12 October 2012 (English translation), (Exhibit PHL-43-B), p. 1. See also Philippines' first written submission, paras. 371-372; and response to Panel question No. 22.

[790] Letter from PMTL to the Sub-Committee for Appeal Consideration (English translation), (Exhibit PHL-43-B), p. 2.

[791] BoA Ruling, (Exhibit PHL-21-B), p. 4. The translation of the BoA Ruling submitted by the Philippines to the Panel includes a "Translation Note", in a footnote, which explains that the wording of the Ruling "includes receipts which either show PMTL as the payee or the name of the retailer and then 'by PMTL' in the same receipt." (BoA Ruling, (Exhibit PHL-21-B), fns 1 and 2) The Translation Note elaborates that in the view of the translators, the "intention is not to include those receipts without any mention of PMTL."

[792] We note that this is a logical approach to the deductive method, since a good that is yet to be valued is most likely a good that is sitting at the border, i.e. a good that has *yet* to have any taxes paid on its sale within the country of importation. Thus, when using the deductive method to determine the value of a good, in a typical customs valuation determination, the deduction for tax *must* be for "tax payable", and not "tax paid".

[793] The European Union highlights in its third party submission that the original panel considered that deductions must be made for taxes "payable, in the sense of payments usually made, and not actual payments made and evidenced as such for each instance". (European Union's third party submission, para. 26 (referring to Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.356-7.360)) The European Union states that it "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." (European Union's third party submission, para. 26) The Philippines agrees with the position of the European Union and states that "in order to calculate the amount of [p]rovincial tax *payable,* the BoA demanded *receipts* in a specific format for *each and every actual* payment of [p]rovincial tax that [PMTL] made. In effect, the BoA required evidence of [p]rovincial taxes *actually paid.* This, as the European Union notes, is *not* the legal standard under Article 5." (Philippines' response to Panel question No. 24, para. 223)

[794] Thailand's first written submission, para. 5.89. See also Thailand's response to Panel question No. 24.

[795] Philippines' response to Panel question No. 24, para. 222.

[796] Philippines' second written submission, para. 323.

[797] European Union's third party submission, para. 27. The European Union emphasizes that national authorities may request evidence in order to determine the amount of payments usually made, but that such "evidentiary requirements must take account of the fact that what needs to be proven are not actual payments

7.351. Furthermore, we understand that, in the specific circumstances of this dispute, since no provincial tax is paid in Bangkok, a valid method of calculating the amount to be deducted is by determining an average provincial tax rate payable per cigarette stick, by dividing the *total amount of provincial tax paid* in a particular year by *the total number of cigarette sales* made in all provinces in Thailand in that year. Indeed, to substantiate its claim for a deduction and inform the BoA's calculation, PMTL did, in fact, submit evidence of provincial taxes actually paid *prior* to being requested to submit further such evidence.[798] We therefore do not consider that the mere fact of the BoA basing its ultimate determination of the amount to be deducted on evidence of taxes "actually paid" was, in and of itself, inconsistent with the requirements of Article 5.

7.352. We therefore turn to address whether the other aspects of the BoA's determination of the amount of provincial tax paid in 2002 were consistent with the requirements of Article 5.1(a)(iv). In this respect, we recall that the Philippines submitted evidence indicating PMTL had paid THB 162,347,609 of total provincial tax in 2002, whereas the BoA used a figure of THB 100,497,347.41 when performing the final calculation.

7.353. Thailand argues that the BoA's determination of the total amount of provincial tax paid, exclusively on the basis of tax receipts indicating that PMTL had paid the tax, was justified because of the result of the test calculation, which indicated that the amount claimed by PMTL was higher than what could be payable or usually paid, and the fact that Thai law requires retailers, and not importers, to pay the provincial tax.[799] In respect of this latter point, Thailand emphasizes that, although an importer such as PMTL may pay on behalf of the retailer, it may also be the case that a retailer pays on its own behalf.[800]

7.354. First, and importantly, we note that the BoA did not communicate either the content or the outcome of its "test calculation" to PMTL, on which basis the BoA proceeded to request additional evidence from PMTL. It is uncontested that this test calculation constituted a fundamental aspect of the BoA's process of determining the total amount of provincial tax payable by PMTL, since it was on this basis that the BoA doubted the evidence provided by PMTL, and requested the additional evidence on which the BoA ultimately relied.[801] The Philippines argues that in making the calculation for a per stick rate of provincial tax, the BoA did not use the figure provided by PMTL for the total volume of sticks sold outside Bangkok.[802] Specifically, PMTL had reported to the BoA that it had sold approximately 3.57 billion sticks outside Bangkok in 2002 whereas the BoA, in its test calculation, used a figure of approximately 1.1 billion for the total volume of cigarette sales outside Bangkok in 2002.[803] Thailand responds that the BoA's calculation was based on monthly sales data that was specifically provided by PMTL.[804] The Philippines counters that Thailand's allegation is unsupported by the evidence on the record of the BoA's determination, and that Thailand "has offered no evidence whatsoever in support of its ... assertion".[805]

7.355. Regardless of whether Thailand has substantiated its view, or even whether Thailand's argument or explanation constitutes an *ex post* rationalization, we consider that the BoA's failure to inform PMTL of this calculation (including the figures on which it relied) is inconsistent with the consultative process that Article 5.1(a)(iv) requires. It is uncontested that, *first* in its letter of 4 June 2004, and *second* in its letter of 21 August 2012, PMTL indicated a different figure for total

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but usual payments, i.e. averages". For example, the European Union suggests that "[s]ample evidence for tax levels and sales statistics per province" could suffice.

[798] See paragraph 7.344. above.

[799] Thailand's first written submission, para. 5.91; Thailand's response to Panel question No. 24.

[800] Thailand's response to Panel question No. 24.

[801] Thailand argues that the test calculation created a "perfectly reasonable" circumstance for the BoA to require additional substantiation of the claimed deduction. (Thailand's second written submission, paras. 2.84-2.85)

[802] Philippines' response to Panel question No. 22.

[803] Philippines' response to Panel question No. 22 (referring to Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B)). According to the Philippines, if the BoA had used the correct figures, as supplied by PMTL, the resulting per-stick tax rate would have been THB 0.045, which is well below the maximum applicable rate of 0.10 baht per stick. (Philippines' response to Panel question No. 22) The Philippines explains, however, that it "is not asking the Panel to decide which particular figures for stick sales are correct", but rather that "the BoA's failure to engage in a process of consultation in this respect is contrary to Article 5 of the *CVA*." (Philippines' response to Panel question No. 22, paras. 207-208).

[804] Thailand's response to Panel question 87(b) (referring to Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 13).

[805] Philippines' comments on Thailand's response to Panel question No. 87.

sales volume outside Bangkok than that on which the BoA relied in conducting its test calculation. In our view, any possible discrepancy between the figures allegedly based on PMTL's monthly VAT returns and the figures provided by PMTL in its letters of 4 June 2004 and of 21 August 2012[806] should have been resolved by giving PMTL the opportunity to explain its figures.[807] We can see no evidence that the details of the BoA's test calculation were provided to PMTL prior to the BoA's determination of the amount to be deducted.

7.356. Furthermore, even assuming that PMTL's monthly sales figures were correctly accounted for when determining the total amount of cigarettes sold in provinces other than Bangkok, we note that there is no rationale or reason indicated in any of the evidence on the record of the BoA's determination as to why the BoA opted to use the lower figure instead of the higher figure. In response to a question from the Panel, Thailand asserted that the BoA's reliance on the lower figure was reasonable, in light of PMTL's concession in its letter to the BoA of 21 August 2012 that "the adjustment of THB 0.033 was acceptable".[808] We do not find this argument or rationalization reflected in any of the contemporaneous evidence regarding the BoA's application of the deductive method, and this argument may consequently constitute an *ex post* rationalization. In any event, we do not consider that Thailand has demonstrated how the concession by PMTL to use the lower *average* rate is in any way related to the BoA's decision to use the lower figures in respect of *total volume of sales* when conducting its test calculation.

7.357. Turning to Thailand's argument that the BoA was justified in relying exclusively on the tax receipts identifying that PMTL paid the tax, on the basis that certain retailers may pay on their own behalf, we recall Thailand's assertion that, under Thai law, retailers (and not importers) are generally liable for provincial tax, although in certain circumstances "retailers may authorize the importers to pay the provincial taxes on their behalf".[809] Consequently, according to Thailand, "the amount of provincial taxes paid on PM Thailand's sales cannot be determined with accuracy simply with reference to the amounts paid by PM Thailand itself … [and] it was reasonable to verify the claims of the importer regarding the provincial tax actually paid on its sales".[810] The Philippines, for its part, acknowledges that the relevant legal instruments imposing this requirement, namely the 1999 Excise Department guidelines, "are not, as a formal matter, *legally* binding."[811] However, the Philippines insists that the Thai Excise Department "expects compliance with its desired method of duty collection" as set forth in those guidelines, and that PMTL "has always complied fully with the Excise Department guidelines and treated them as if they impose a requirement".[812]

7.358. We note that Thailand has also argued in the course of this proceeding that the BoA's doubts regarding whether PMTL actually pays on behalf of all retailers were borne out by the fact that certain of the receipts submitted by PMTL to the BoA indicated that the tax was paid by the retailer, without any mention of PMTL.[813] The Philippines has argued that although certain provincial authorities did issue receipts that indicated the taxpayer to be the retailer, all such receipts were accompanied by a cover letter from the relevant provincial tax authority indicating that such tax was paid by PMTL

[806] Compare Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 13, Letter from PMTL to the Secretary of the Sub-Committee for Appeal Consideration, (Exhibit PHL-204-B), attachment no. 2, and Letter of 4 June 2004 to the Sub-committee for Appeal Consideration (Exhibit PHL-205-B).

[807] We further recall that the Minutes of the BoA Meeting of 26 September 2012 explicitly indicate that PMTL claimed that the total sales amount in 2002 was 4,895,968,580 sticks. (See Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 16)

[808] Thailand's response to Panel question No. 87, p. 26.

[809] Thailand's first written submission, para. 5.91.

[810] Thailand's first written submission, para. 5.91. Thailand submits that, in practice, PMTL may have entered into agreements with retailers to do so, but was not required under Thai law to do so. (Thailand's second written submission, para. 2.89)

[811] Philippines' response to Panel question No. 86(b), para. 154. We note that the Philippines' position on this issue changed during the proceeding. (See Philippines' first written submission, para. 361; second written submission, paras. 316 and 328-329)

[812] Philippines' response to Panel question No. 86(b), paras. 154 and 156.

[813] See Thailand's second written submission, para. 2.90. Thailand contends that if the *importer* was indeed required to pay the provincial tax, then the relevant tax "receipts would show PMTL (or another importer) as the payor in every case", however this is not the case. Additionally, Thailand states that "there are receipts that show *retailers* as the payor", and points to Exhibit THA-32, which Thailand asserts is a sample of the receipts actually provided by PMTL. (Thailand's second written submission, para. 2.90 (referring to Provincial tax receipts provided by PMTL in 2002 (English translation), (Exhibit THA-32)))

on behalf of a retailer[814], to which Thailand responds that, if such receipts were accompanied by cover letters then they would have been taken into account by the BoA.[815]

7.359. Regardless of the factual question of whether PMTL actually pays tax on behalf of all retailers, we consider that the BoA did not adequately convey this aspect of its reasoning to PMTL at any point during the customs valuation process, thereby precluding PMTL from responding to the BoA's rationale for relying exclusively on evidence of taxes "actually paid". In this respect, we note that, in its letter of 9 December 2010 to the BoA, PMTL explained that "[b]y way of background, the provincial tax is payable to the provincial administration by PMTL and the tax is passed on in PMTL's selling prices to its customers."[816] It is uncontested that at no time did the BoA contradict this assertion by PMTL.

7.360. Furthermore, similarly to our findings above in respect of the test calculation conducted by the BoA, we consider that the BoA's failure to adequately consult with PMTL on this issue had important substantive consequences for its determination of the total amount of provincial tax payable by PMTL. We note that, in the course of this proceeding, Thailand and the Philippines have exchanged extensive argumentation over the issue of whether, in fact, PMTL pays provincial tax on behalf of all retailers.[817] Indeed, Thailand has argued that it is specifically because PMTL is not obliged to do so that the BoA determined the amount to be deducted by relying exclusively on those tax receipts indicating that PMTL had paid.[818] For its part, the Philippines accepts that PMTL is not legally obliged to pay provincial taxes on behalf of retailers, but has argued strenuously that PMTL does, in fact, pay provincial tax on behalf of all retailers.[819]

7.361. None of this was discussed by the BoA and PMTL in the context of the customs valuation determination itself. In effect, the parties would have us make a finding of fact regarding an issue that the BoA did not adequately address at the time of the determination. We are wary of making a factual finding on an issue that should have been raised during the customs valuation process itself. However, we do wish to make the following observations regarding the arguments of the parties.

7.362. First, we note that neither Thailand (in the course of this proceeding), nor the BoA (in any of the documents on the record of the determination), has explained how the receipts bearing the names of the retailers paying the provincial tax would have been in possession of PMTL in the first place, if the retailers had been paying the provincial tax on their own behalf rather than PMTL paying the provincial tax indicated in the receipt. Second, Thailand's argument seems to carry with it the implication that PMTL overstated the amount of provincial taxes paid by PMTL when completing its 2002 audited financial statements.[820] Third, to effectively rebut the Philippines' arguments and evidence, Thailand would need to only submit convincing evidence of a single instance where it was incontrovertible that a retailer had paid tax on its behalf. Thailand has failed to do so. By contrast, we note that the Philippines has provided evidence indicating that PMTL itself pays *all* provincial tax

[814] Philippines' response to Panel question No. 22, para. 215. The Philippines provides ten examples of such cover letters from 2003, and notes that it is unable to provide such evidence from 2002 since all such evidence was provided to the BoA following the request for such evidence on 27 August 2012, and PMTL did not have sufficient time to make photocopies of this evidence. (Philippines' response to Panel question No. 22, paras. 215-216 (referring to Provincial tax receipts from 2003 with cover letter, 23 April 2003 (English translation), (Exhibit PHL-196-B))

[815] Thailand's response to Panel question No. 88.

[816] Letter from PMTL to the Director of Customs Valuation Appeal Division, 9 December 2010 (English translation), (Exhibit PHL-75-B), p. 7.

[817] Philippines' first written submission, para. 361; Philippines' second written submission, paras. 316 and 328-329; Philippines' response to Panel question Nos. 22 and 86(b); Philippines' response to questioning at the meeting of the Panel; Thailand's first written submission, para. 5.91; Thailand's second written submission, paras. 2.89-2.90.

[818] Thailand's first written submission, para. 5.91; second written submission, paras. 2.89-2.90.

[819] Philippines' response to Panel question No. 86(b), paras. 154-156. At the meeting of the Panel, the Philippines stated that it could "confirm ... that Philip Morris Thailand pays the provincial tax in 100% of cases for all of its sales". (Philippines' response to questioning at the meeting of the Panel)

[820] We note that Thailand itself acknowledges this implication, stating that "when the [BoA] performed a reasonableness check on the amount claimed by PM Thailand as its provincial taxes paid from its 2002 financial statements, the amount seemed to be too high". (Thailand's second written submission, para. 2.83)

on behalf of retailers, as well as evidence indicating that PMTL's main competitor in Thailand, TTM, also pays provincial tax on behalf of all retailers.[821]

7.363. In any event, notwithstanding the BoA's failure to engage with PMTL regarding PMTL's assertion of 9 December 2010 that all provincial taxes were paid by PMTL itself, we further note that on 5 October 2012, PMTL sent a letter to the BoA explaining in detail why, in its view, the evidence submitted up to that date was sufficient for the BoA to make its determination of the amount, and inviting the BoA to "advise" PMTL if it disagreed with PMTL's position.[822] It is uncontested that the BoA did not indicate to PMTL any reason for doubting the total amount of provincial tax paid by PMTL, as claimed by PMTL and supported by the other evidence provided by PMTL.

7.364. Furthermore, on 12 October 2012, when PMTL did submit all of the tax receipts in its possession, PMTL explicitly indicated to the BoA that "in those instances where a receipt is not provided, the failure to provide such receipt is solely because the relevant provincial authority did not issue such receipt, which factors are beyond PMTL's control".[823] Thus, PMTL explicitly acknowledged to the BoA, and explained, that it was *not* providing all receipts for all tax payments. The BoA proceeded to rely on the limited number of receipts provided by PMTL, without acknowledging or responding to PMTL's explanation.

7.365. We note that Thailand has argued in the context of this proceeding that it was up to PMTL to provide all relevant receipts to the BoA, and that it was within PMTL's power to utilize the Thai legal system to get the provincial tax authorities to provide all relevant tax receipts.[824] The Philippines argues, however, that the requirement imposed by the BoA on PMTL, namely to provide all tax receipts for all tax payments claimed by PMTL in a format that identified PMTL as the taxpayer, was "an impossible evidentiary burden", because certain provincial authorities did not provide receipts to PMTL in the format required by the BoA, and in some transactions the provincial authority did not provide any receipts at all.[825]

7.366. In our view, Thailand has indeed indicated a means by which PMTL could at least have attempted to obtain the relevant tax receipts in a format that would have satisfied the BoA. Furthermore, we agree with Thailand that the Philippines has not indicated why PMTL could not have utilized such legal recourses. However, we note that the BoA was essentially requesting tax receipts for a 12-month period, in respect of each individual retailer outside Bangkok to whom PMTL sells cigarettes in Thailand, and for tax payments that had occurred ten years previously. As Thailand itself concedes, the task was "onerous".[826] Furthermore, the BoA did not indicate to PMTL, at any

[821] See Philippines' response to Panel question No. 86(b), para. 155; Letter from PMTL confirming adherence to Excise Department Guidelines, 25 September 2017, (Exhibit PHL-224); TTM, Annual Report, 2004, pp. 100-102 (English and Thai), (Exhibit PHL-222), p. 101; TTM, Annual Report, 2013, pp. 102-103, (English and Thai), (Exhibit PHL-223), p. 103). The Philippines argues that "[g]iven that the dominant player in the market, TTM, pays Provincial tax on behalf of retailers, PM Thailand is not in a position to impose additional burdens on retailers by disregarding the Excise Department guidelines." (Philippines' response to Panel question No. 86(b), para. 156)

[822] Letter from PMTL to the Sub-Committee for Appeal Consideration, 5 October 2012 (English translation), (Exhibit PHL-25-B), p. 2.

[823] Letter from PMTL to the Sub-Committee for Appeal Consideration, 12 October 2012, (Exhibit PHL-43-B), p. 2.

[824] Thailand argues that Section 16(i) of the Regulations governing the collection of provincial tax requires that the official collecting the tax shall provide a receipt in the required form. (Thailand's response to Panel question No. 23(b)) Thailand further adds that it is the responsibility of the tax payer to "obtain a receipt and to furnish the relevant information to enable the receipt to be filled out in the manner required by the payor." (Thailand's response to Panel question No. 23(b), p. 22) Thailand explains that any failure by an official to comply with the requirements of these Regulations would be enforceable under Section 157 of the Thai Criminal Code. (Thailand's response to Panel question No. 23(c)) Thailand points out that PMTL did not ask for an extension of the six-week deadline for submitting the receipts, nor has the Philippines in the course of this proceeding presented any evidence that any provincial tax authorities refused to provide such receipts or that PMTL was otherwise precluded from requesting the receipts in the required format. (Thailand's response to Panel question No. 23(c); comments on the Philippines' response to Panel question No. 90(b))

[825] Philippines' first written submission, paras. 411 and 414; second written submission, para. 312. In the Philippines' view, the BoA thus required "that the importer provide Thailand with receipts that Thailand itself had failed to issue to the importer", which is "an evidentiary burden that the importer could not meet". (Philippines' first written submission, paras. 412-413) The Philippines asserts that Thailand thus required PMTL to provide the BoA "with evidence that it did not possess and could never have possessed". (Philippines' second written submission, para. 320)

[826] Thailand's second written submission, para. 2.91.

time, that its determination of the amount of provincial tax to be deducted would be based on only those receipts that indicated that PMTL had paid the tax, nor did the BoA indicate to PMTL that PMTL should pursue legal recourse to get all relevant receipts in an acceptable format. As a consequence, when PMTL submitted the receipts in its possession, it did so without knowing that no deduction would be made in respect of payments for which no receipt was provided, and therefore without knowing that it could (and should) go through the onerous and lengthy process of invoking Thai law to get all relevant receipts.

7.367. On the basis of the foregoing, we consider that the BoA failed to determine the amount of provincial tax paid by PMTL in accordance with the requirement in Article 5.1(a)(iv) to determine the customs value through a process of consultations with the importer. We highlight in this regard that the BoA declined to inform PMTL of both the test calculation conducted by the BoA and its doubts concerning whether PMTL pays provincial tax on behalf of all retailers. In addition to failing to inform PMTL of the reasons for doubting the claimed deduction, the BoA also neglected to inform PMTL that the determination of the amount to be deducted would be based on only those tax receipts provided by PMTL that identified PMTL as the taxpayer.

7.368. Furthermore, we consider that these procedural failings by the BoA had important substantive consequences for its determination of the total amount of provincial tax paid by PMTL in 2002. Having considered Thailand's arguments as to why the BoA relied exclusively on evidence in the form of tax receipts indicating that PMTL paid the tax, we consider that the BoA's failure to adequately consult with PMTL regarding the test calculation and its doubts over whether PMTL actually paid provincial tax on behalf of all retailers, effectively precluded PMTL from addressing the BoA's concerns or providing the BoA with additional and relevant information that could and should have informed its determination.[827] As a consequence, we do not consider that the test calculation, or the BoA's doubts about whether PMTL actually paid provincial tax on behalf of all retailers, constituted valid grounds to reject the evidence submitted by PMTL and to rely exclusively on evidence in the form of tax receipts indicating that PMTL had "actually paid" the provincial tax, to determine the total amount of provincial tax payable by PMTL in 2002.

7.2.6.3.2.3 Overall assessment

7.369. As explained, the BoA determined the amount of provincial tax to be deducted by dividing a figure representing the total amount of provincial taxes paid in 2002, by another figure representing the "[s]ale amount of cigarettes pursuant to 12 months sale invoices in 2002".[828] We have addressed above the BoA's determination of the total volume of cigarette sales in Thailand in 2002, and similarly found that the BoA failed to make this determination in accordance with the requirements of Article 5.1(a)(iv). We have also addressed above the BoA's determination of the total amount of provincial taxes paid in 2002, and found that the BoA failed to make this determination in accordance with the requirements of Article 5.1(a)(iv). Taken together, we consider that the BoA's determination of the amount of provincial tax to be deducted, and in particular its determination of the total amount of provincial tax paid in 2002, was inconsistent with Article 5.1(a)(iv).

7.2.6.4 Conclusion

7.370. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, the BoA acted inconsistently with Article 5.1(a)(iv) of the CVA by failing to deduct an appropriate amount in respect of provincial taxes payable.

[827] Specifically, we note the Philippines' argument that, had PMTL been given the opportunity to properly consult with the BoA, PMTL could have provided additional evidence from PMTL'S "SAP accounting system" or "statements from customers that PM Thailand had paid Provincial tax on their behalf". (Philippines' opening statement at the meeting of the Panel, para. 38; response to Panel question No. 22, para. 219; comments on Thailand's response to Panel question No. 90(b), para. 122)

[828] Minutes of the BoA Meeting of 26 September 2012 (English translation), (Exhibit PHL-39-B), p. 17.

7.2.7 Claim under Article 11.3 of the CVA

7.2.7.1 Introduction

7.371. Article 11.1 of the CVA requires that Members provide for a right of appeal for importers with respect to customs value determinations. Article 11.3 requires that notice of the decision on appeal must be given to the appellant, and the reasons for the decision must be provided in writing. The BoA Ruling, which constituted the BoA's notice of its decision with respect to PMTL's appeal concerning the 210 entries imported from January to December 2002, was issued on 16 November 2012.[829]

7.372. The Philippines claims that the BoA acted inconsistently with Article 11.3 of the CVA by failing to provide adequate reasons for its decision in the BoA Ruling.[830] The Philippines does not deny that the BoA Ruling contains reasons. However, it considers that such reasons "must be sufficient to make clear and give details of how the customs value … was determined, including the basis for rejecting the transaction value".[831] In its view, the reasons contained in the BoA Ruling are insufficient.

7.373. Thailand does not contest that Article 11.3 is applicable to the BoA Ruling.[832] However, Thailand argues that the BoA satisfied the obligation in Article 11.3 because the BoA Ruling adequately conveyed to PMTL the reasons for the BoA's decision.[833] In its view, the legal standard proposed by the Philippines is stricter than that required under Article 11.3.[834]

7.2.7.2 Main arguments of the parties

7.374. The Philippines considers that the BoA failed to provide sufficient reasons with respect to the rejection of the transaction values, because the BoA failed to explain: the basis for selecting the benchmark companies; the number of companies in the benchmark group, and the names of those companies; the commercial activities of the benchmark companies, and how any differences in commercial activities as compared to PMTL were accounted for; the P&GE rates of the benchmark groups and how they were determined; the method of calculating the industry average P&GE rate as well as the benchmark range; and the standard for determining whether PMTL's P&GE rates were inconsistent with the benchmark group.[835] Further, the Philippines asserts that the inadequacy of the BoA's statement of reasons is demonstrated by its incorrect assertion that "it conducted a comparison involving the P&GE rates of *wholesalers of imported cigarettes*".[836] The Philippines also considers that the BoA did not provide sufficient reasons with respect to the deductive valuation, for the same reasons indicated above in respect of the deduction for P&GE rates, as well as the BoA's failure to explain certain aspects related to the deduction for provincial taxes, specifically: the criteria used to include or exclude an amount on a tax receipt; which receipts were included or excluded; whether the BoA made a deduction in instances where the provincial authority did not provide a receipt; and how the BoA determined the total amount to deduct.[837] The Philippines also asserts that the inadequacy of the BoA's statement of reasons is demonstrated by its incorrect assertion that "it conducted a comparison involving the P&GE rates of *wholesalers of imported cigarettes*".[838]

7.375. Thailand notes that nothing in Article 11.3 "remotely suggests that the 'reasons for such decision' must be provided in the exhaustive level of detail alleged by the Philippines".[839] Thailand

[829] See BoA Ruling, (Exhibit PHL-21-B).
[830] Philippines' first written submission, paras. 428-457; second written submission, paras. 369-382; response to Panel question Nos. 29(a), 91, 93 and 95; opening statement at the meeting of the Panel, paras. 47-55.
[831] Philippines' first written submission, para. 449 (quoting Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.240).
[832] Thailand's first written submission, para. 5.116.
[833] Thailand's first written submission, paras. 5.104-5.112; second written submission, paras. 2.123-2.130; response to Panel question Nos. 29(b), 31 and 94; comments on the Philippines' response to Panel question Nos. 90(b) and 92.
[834] Thailand's first written submission, para. 5.109-5.110.
[835] Philippines' first written submission, paras. 452-453.
[836] Philippines' first written submission, para. 379. (emphasis original)
[837] Philippines' first written submission, paras. 454-455.
[838] Philippines' first written submission, para. 379. (emphasis original) See also Philippines' second written submission, para. 115.
[839] Thailand's first written submission, para. 5.109.

notes that certain other procedural obligations in the covered agreements "provide detailed specifications of the type of information that must be provided in the 'public notice and explanation' of certain decisions in anti-dumping and countervailing duty investigations", and that the "failure of the drafters to spell out such detailed requirements in Article 11.3 … must be given meaning".[840] Thailand also notes that Members are considering a proposal to amend Article 6.9 of the Anti-Dumping Agreement to impose a number of requirements on investigating authorities in respect of specific information that must be provided to exporters or producers, and that "if Members have not yet agreed to add these requirements to Articles 6.9 and/or 12.2 of the Anti-Dumping Agreement, which already have more detailed requirements than Article 11.3, it cannot be appropriate for the Panel to read these or similar requirements into Article 11.3."[841] Thailand also recalls from its arguments in respect of Article 1.2(a) of the CVA, that the TFA addresses procedures for appeal or review of customs decisions, and "had the drafters wished to include the level of detail sought by the Philippines … they could have done so", but did not.[842]

7.376. Thailand considers that the information provided in the BoA Ruling "was sufficient under Article 11.3, in that PMTL was able to exercise, and in fact, exercised, its right to appeal in Thai courts."[843] Thailand notes that the BoA Ruling "explains that its decision 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", and further explains that it compared PMTL's P&GE rates to a range established for a benchmark industry group in the year 2002, and determined that PMTL's P&GE rates were not consistent with the benchmark rates.[844] Thailand highlights that the BoA Ruling indicates that, when applying the deductive method, the BoA used a rate of 12.44% for deducting P&GE, based on the industry average.[845]

7.2.7.3 Analysis by the Panel

7.2.7.3.1 General considerations

7.377. Article 11.3 of the CVA requires that:

> Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

7.378. Article 11.3 of the CVA was not subject to any claims before the original panel, and this provision has not been addressed in WTO dispute settlement prior to this proceeding.[846] As elaborated below, however, we consider that the legal standards under Article 1.2(a), third sentence, and Article 16 of the CVA provide useful guidance for interpreting Article 11.3.

7.379. In terms of textual meaning, the dictionary definition of "reasons" refers to "[a] statement used as an argument to justify or condemn some act, or to prove or disprove some assertion or

[840] Thailand's first written submission, para. 5.110 (referring to Article 12 of the Anti-Dumping Agreement and Article 22 of the SCM Agreement). See also Thailand's second written submission, para. 2.126 (referring to Article 6.9 of the Anti-Dumping Agreement).
[841] Thailand's second written submission, para. 2.128.
[842] Thailand's second written submission, para. 2.129.
[843] Thailand's response to Panel question No. 94, p. 21. See also Thailand's first written submission, para. 5.108.
[844] Thailand's first written submission, para. 5.106.
[845] Thailand's first written submission, para. 5.107.
[846] We note that the original panel referred to Article 11.1 (and briefly Article 11.2) in the context of an argument made by Thailand that Article X:3(b) of the GATT 1994 did not apply to guarantee decisions in the customs valuation context, but the panel did not consider the legal standard in Article 11.3. (Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.1046-7.1052) In this respect, we note that the original panel considered that, although Article X:3(b) and Article 11.1 both "address an obligation to provide for the right of appeal concerning customs issues … the scope of the subject matter under Article X:3(b) ('administrative action relating to *customs matters*') is broader than that under Article 11.1 ('a determination of customs value')". (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1047) The original panel also considered that "the right to appeal a determination of a customs value to a judicial authority provided under Article 11.1 would not address the obligations envisaged under Article X:3(b), namely to maintain an independent tribunal or procedure for the prompt review and correction of administrative actions that adversely affect importers concerning customs matters." (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1049)

belief".[847] We recall that "dictionary definitions have their limitations in revealing the ordinary meaning of a term"[848], and may "leave many interpretive questions open".[849] Moreover, they may vary among the different official languages of the WTO. Indeed, the definition of the word "reasons" referred to above does not take us very far in ascertaining the scope of the duty to provide reasons, because it explains what a "reason" is but does not speak to the issue of how detailed those reasons must be. Accordingly, we consider that it is necessary to look to the context of the obligation in Article 11.3, notably other provisions of the CVA and the covered agreements containing similar obligations, and consider the general purpose of those provisions as reflected in prior panel and Appellate Body reports.

7.380. In this respect, we consider that the requirement to provide "reasons" in Article 11.3 is directly comparable to the requirement in Article 1.2(a) of the CVA to communicate to the importer the "*grounds* for considering that the relationship influenced the price", as described above.[850] Therefore, the relevant legal standard for determining whether the "grounds" were communicated to the importer under Article 1.2(a) is also relevant for determining whether the "reasons" for the decision on appeal were provided to the importer in writing. We recall that the relevant legal standard under Article 1.2(a), third sentence, is that the "grounds" for considering that the relationship influenced the price provided to the importer must be sufficient to enable the importer to meaningfully respond to those grounds.[851] In other words, the standard is inherently functional in nature.

7.381. Article 11.3 also bears similarities to the requirement in Article 16 of the CVA that "[u]pon written request, the importer shall have the right to an *explanation* in writing from the customs administration … as to how the customs value … was determined."[852] Indeed, the Philippines contends that "the substantive content of the explanation due under Articles 11.3 and 16 is the same"[853], and, for its part, Thailand is also of the view that the standard of reasons required under Article 11.3 is not "lesser" than the standard that applies under Article 16.[854] In our view, there is little to distinguish between the plain meaning of a requirement to provide an "explanation"[855] and a requirement to provide "reasons".[856]

7.382. When defining the legal standard under Article 16 of the CVA, the original panel explained that, similarly to the legal standard under Article 1.2(a), third sentence, an explanation under Article 16 "must be sufficient to make clear and give details of how the customs value of the importer's goods was determined, including the basis for rejecting the transaction value and other valuation methods that sequentially precede the method actually used by the customs authorities."[857] In setting forth this legal standard, the original panel highlighted that Article 16 serves an important "transparency and due process objective", by enabling importers and WTO Members to "effectively

[847] Shorter Oxford English Dictionary (2007), p. 2481. Amongst other definitions, the Shorter Oxford English Dictionary also refers to a "fact or circumstance forming a motive sufficient to lead a person to adopt or reject some course of action, belief, etc.; a fact etc. adduced or serving as this (Foll. by *why*, *that*; *of*, *for*; *to do*.) … A cause of a fact, situation, event, or thing, *esp*. one adduced as an explanation; cause, ground".

[848] Appellate Body Report, *US – Softwood Lumber IV*, para. 59.

[849] Appellate Body Report, *Canada – Aircraft*, para. 153. See also Appellate Body Reports, *US – Gambling*, para. 164; *China – Publications and Audiovisual Products*, para. 348.

[850] (emphasis added) Indeed, the original panel found that the reference to "grounds" in Article 1.2(a) meant the "*reasons* for considering". Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.218. Furthermore, the Spanish version of the CVA uses the word "reasons" in both Article 1.2(a) and Article 11.3, referring to "razones" that must be communicated to the importer.

[851] See paragraph 7.254. above.

[852] Emphasis added.

[853] Philippines' response to Panel question No. 29, para. 245.

[854] Thailand's response to Panel question No. 29(b).

[855] The original panel stated that "[t]he term 'explanation' can be defined as '*noun.* 1 The action or act of explaining. 2 A statement, circumstance, etc., which makes clear or accounts for something.'" (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.232 (quoting *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 895 (2002)))

[856] As explained above, the dictionary definition of "reasons" refers to "[a] statement used as an argument to justify or condemn some act, or to prove or disprove some assertion or belief". (Shorter Oxford English Dictionary (2007), p. 2481)

[857] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.240. The original panel explained that a customs authority's explanation under Article 16 must include, "at the minimum, the basis for rejecting the transaction value in the light of the information provided by the importer, the identification of the method used and the illustration of how the method was applied in reaching the final customs value." (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.238)

exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations".[858] The original panel elaborated that the explanation under Article 16 "provides a window through which domestic tribunals and WTO panels review and understand a customs authority's valuation determination."[859] Thus, here again, the applicable legal standard is inherently functional in nature.

7.383. We note that similar interpretations have also been developed in the context of other provisions in the covered agreements that, consistent with principles of due process, require domestic tribunals to provide reasons for their decisions.[860] As one panel has observed, the purpose of Article 12.2.2 of the Anti-Dumping Agreement, concerning "explanations" for anti-dumping determinations, is to "ensure that the investigating authority's reasons for concluding as it did can be discerned and understood by the public".[861] Another panel has indicated that Article 12.2.2 "seek[s] to guarantee that interested parties are able to pursue judicial review of a final determination".[862] Article 12.7 of the DSU, a provision which "reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU", provides that a panel report must contain the "basic rationale" for a panel's findings.[863] One of the main reasons behind the requirement to set out a "basic rationale" in the panel report is that it assists a Member to understand "whether and what to appeal".[864] Thus, here again, the applicable legal standard has been understood as being inherently functional in nature.

7.384. We further observe that Article 4.1 of the TFA requires that "[e]ach Member shall provide that any person to whom customs issues an administrative decision has the right, within its territory, to: (a) an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision; and/or (b) a judicial appeal or review of the decision." Article 4 further articulates a number of specific obligations concerning the "procedures" for such appeal or review. In this respect, Article 4.5 of the TFA states that "[e]ach Member shall ensure that [any person to whom customs issues an administrative decision] is provided with the reasons for the administrative decision *so as to enable such a person to have recourse to procedures for appeal or review where necessary*". We consider that this further reinforces our interpretation of Article 11.3 as articulated above.

7.385. The fourth recital to the CVA expressly recognizes, as an object and purpose of the CVA, the "need for a fair, uniform and neutral system for the valuation of goods for customs purposes". In light of this express recognition by WTO Members of the importance of fairness in customs valuation, we consider that Article 11.3 serves the purpose of preventing arbitrary decisions by imposing an obligation on the domestic appellate tribunal to provide written reasons sufficient to enable the decisions to be properly reviewed by the importer, as well as superior courts, and WTO dispute settlement panels.[865]

7.386. We note that Article 11.3 does not contain any specific requirements regarding the type of information that must be provided. This is entirely consistent with the functional nature of the legal standard that should be applied to assess the sufficiency of the reasons, which by definition requires a case-by-case analysis and which cannot be specified *a priori* and in the abstract.[866] In this respect,

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[858] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.

[859] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.

[860] See, e.g. Appellate Body Report, *EC – Fasteners (China)*, paras. 542-544; and Panel Report, *China – Autos (US)*, paras. 7.26-7.27.

[861] Panel Report, *China – HP-SSST (Japan/EU)*, para. 7.275.

[862] Panel Report, *China – X-ray Equipment*, para. 7.459. See also Article 22 of the SCM Agreement, and Article 3 of the Safeguards Agreement.

[863] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

[864] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

[865] We note that Article 11.2 provides that the importer must have a right of appeal to a judicial authority. Thus, where the importer initially appeals to an appellate tribunal other than a judicial authority, the reasons for that initial decision on appeal will be critical to the importer's choice as to whether to pursue recourse to judicial proceedings following the initial appeal. In any event, whether in domestic proceedings or in WTO dispute settlement, the "reasons" provided by the appellate tribunal pursuant to Article 11.3 would in principle form the basis for the panel's consideration of the determination.

[866] In the context of applying Article 12.7 of the DSU, the Appellate Body has concluded that it is "neither necessary, or desirable, to attempt to define the scope of the obligation provided for" in the abstract, and that compliance with Article 12.7 must necessarily be determined "on a case-by-case basis, taking into

we agree with Thailand that it would be inappropriate to read into Article 11.3 any specific requirements that are universally applicable to any and all situations where an appellate tribunal is required to provide reasons.[867] Rather, in the absence of specific guidance in Article 11.3 governing the relevant information that must be provided, and in accordance with the legal standard under Article 16, we consider that it is to be assessed on a case-by-case basis whether the reasons provided under Article 11.3 sufficiently make clear and give details of how the customs value was determined.[868]

7.387. Finally, we note the original's panel's explanation that Article 16 imposes a "formal" requirement, and not a "substantive" requirement.[869] In other words, the assessment of whether the requirement to provide an explanation has been satisfied does not require examining the consistency of the provided "explanation" with the substantive requirements of the CVA. We consider that the original panel's reasoning on this issue is equally applicable in respect of Article 11.3, and thus the requirement to provide "reasons" under Article 11.3 is a procedural requirement that does not require a reviewing Panel to assess, at the level of a claim made under Article 11.3, whether the alleged "reasons" are consistent with the substantive obligations in the CVA.

7.388. On the basis of the foregoing, we consider that the obligation on appellate tribunals under Article 11.3 to give "reasons" requires that they must make clear and give details of the reasons for their decisions. Such reasons may be expected to include the basis for rejecting the transaction value, the identification of the method used to determine the final customs value, and a description of how that method was applied. Fundamentally, such reasons must be sufficient to meet the purpose of enabling importers, WTO Members and superior courts within the domestic legal system of the Member concerned, to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations.

7.2.7.3.2 The reasons provided in the BoA Ruling

7.389. The issue presented is whether the BoA Ruling sufficiently explains the BoA's basis for rejecting the transaction value, the BoA's method for determining the customs value, and how the BoA applied that method, for an observer to adequately assess whether the decision was consistent with the requirements of the CVA.

7.390. The BoA Ruling is a document consisting of seven pages, including a cover letter, three pages constituting the substance of the Ruling, and a three-page attachment concerning the details of the specific shipments under appeal. The substance of the Ruling contains the BoA's conclusion, namely that the transaction value was rejected because, following an examination of the circumstances surrounding the sale, it was determined that the buyer and seller were related and that the relationship affected the sale and purchase price, as well as the conclusion that the customs value shall be determined through the "deductive value" method and the outcome of that determination. The BoA Ruling contains a sub-heading entitled "Reasons for the Ruling", which states that "the customs valuation for the imports … shall be in accordance with … the principles of customs valuation of the World Trade Organization".

7.391. For the purposes of our analysis, we distinguish between the BoA's rejection of the transaction value, and the BoA's determination of the revised customs value. We proceed by addressing these two aspects separately.

7.2.7.3.2.1 The BoA's rejection of the transaction value

7.392. The BoA Ruling provides, in respect of the rejection of the transaction value, that:

> When examining the circumstances surrounding the sale by comparing the [P&GE] rate according to the 2002 financial statements of PMTL, certified by the auditor, and the

account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a panel". (Appellate Body Reports, *Korea – Alcoholic Beverages*, para. 168, and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 108)

[867] See Thailand's first written submission, para. 5.110; and Thailand's second written submission, paras. 2.126-2.129 (referring to Article 12 of the Anti-Dumping Agreement, Article 22 of the SCM Agreement, Article 6.9 of the Anti-Dumping Agreement, and Article 4.5 of the TFA).

[868] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.240.

[869] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.241.

> profits and general expenses rate as requested by PMTL with the [P&GE] rate of the industry group of imported cigarette wholesalers in the year 2002 (9.80 − 15.08 per cent), [the BoA] found that both [P&GE] rates of PMTL are not consistent with those of the industry group of imported cigarette wholesalers, which is the information for the sale of the goods of the same class or kind in the Kingdom. The test with the deductive value proposed by PMTL is not in accordance with Clause 16 of the Ministerial Regulation No. 132 (B.E. 2543 (2000)). It can be concluded that the relationship between the purchaser and the seller affects the sale and purchase price. The customs value, thus, cannot be determined by way of Method 1 transaction value of imported goods.[870]

7.393. We recall from our examination of the Philippines' substantive claim under Article 1.2(a), second sentence, that the following information, *inter alia*, was essential to our assessment:

a. Regarding the composition of the industry group − the identities of the companies included in the industry group, and the BoA's reasons for including certain companies within the group and excluding others from that group;

b. Regarding the determination of the benchmark range − the BoA's manner of calculating the P&GE rates of the companies included in the industry group, as well as the actual P&GE rates themselves (including the P&GE rate used for PMTL when including it in the group), its use of a simple average to determine the industry average notwithstanding the differences in sales volumes, and its use of standard error to determine the benchmark range around the industry average; and

c. Regarding the comparison of PMTL to the benchmark group − the legal standard by which it determined that PMTL's P&GE rates are "not consistent" with those of the industry group, its reasons for using different P&GE rates for PMTL within and without the group, the extent to which it took into account the differences between PMTL and the companies in the industry comparator group when making its determination, as well as all relevant details pertaining to how it determined the composition of the industry group and the benchmark range (as described above).

7.394. We observe that none of this information can be found within the BoA Ruling itself. Taking into account these omissions in the BoA Ruling, and recalling the legal standard articulated above, we do not consider that we would be able to properly assess whether the BoA's examination of the circumstances of sale was in accordance with the substantive requirements of Article 1.2(a), second sentence, if we were to limit ourselves to the reasons contained in the BoA Ruling itself.

7.395. Furthermore, we emphasize that the BoA Ruling is misleading, to the extent that it indicates that the industry group was composed of "imported cigarette wholesalers". We have found above that none of the companies in the industry group was an "imported cigarette wholesaler".[871] We understand that, according to Thailand, the BoA based its determination of the industry group on the TSIC, used by the Thai Business Development Department, Heading 51.233 of which allegedly refers to "wholesale of tobacco and tobacco products".[872] However, this does not appear to be reflected in the contemporaneous evidence, and most importantly for our purposes here, is not reflected in the BoA Ruling itself. Furthermore, where the TSIC allegedly refers to wholesalers of "tobacco and tobacco products", the BoA Ruling refers to "cigarette" wholesalers. Thus, the BoA Ruling not only fails to accurately reflect the nature of the benchmark group, but it fails to even represent the benchmark group in accordance with the information on which it relied to actually determine the benchmark group. Clearly, a misleading representation of the BoA's methodology cannot satisfy the requirements of Article 11.3 to provide "reasons".[873]

7.396. Shifting perspective to the level of domestic appeal proceedings, we recall that under the legal standard described above, the reasons given by the BoA for rejecting the transaction values

[870] BoA Ruling, (Exhibit PHL-21-B), p. 3.
[871] See paragraph 7.140. above.
[872] See Thailand's response to Panel question No. 6(a).
[873] We recall that the requirement under Article 11.3 is a "procedural" and not "substantive" requirement, in accordance with the legal standard under Article 16. (See paragraph 7.387. above) In our view, providing inaccurate reasons is inconsistent with the *formal* requirement to provide reasons, without prejudice to the substantive obligations of the CVA, which are still applicable to the *actual* reasons and basis for the customs determination.

should have been sufficient for PMTL to determine whether there were grounds to appeal the BoA's conclusion that the relationship between the purchaser and the seller affected the sale and purchase price. In our view, the unrebutted evidence of the Philippines is that PMTL was in fact hindered in its appeal, based on the information that is missing from the BoA Ruling.[874] Specifically, we note the Philippines' explanation that, when PMTL challenged the BoA Ruling before the Central Tax Court, it "was hampered … because critical aspects of the reasons for the BoA's decision were not disclosed by the BoA, such as the number and identity of the comparator companies in the industry group. PM Thailand could not, for example, argue that the industry group was not comparable to PM Thailand, because the identity of the companies making up the industry group was not disclosed to PM Thailand."[875]

7.397. We further note that in that domestic court proceeding, the Central Tax Court ordered the Thai Customs Department to provide the names of the companies in the industry benchmark group, and the Customs Department refused to do so.[876] Indeed, it was only on 16 June 2016, "following formal consultations in these proceedings", that Thailand provided the names of the five companies to PMTL.[877] Additionally, we note that the Minutes of the BoA Meeting of 26 September 2012, on which the parties and the Panel have relied heavily in assessing the consistency of the BoA's decision, were only "released to the importer during the proceedings before the Thai courts".[878] Given the extent to which we have ourselves relied on the information contained in the BoA Minutes in our assessment of the BoA's determination, we consider that, without this information, PMTL was indeed hindered in assessing the BoA's decision.

7.398. We note that, in response to a question from the Panel, Thailand stated that "[t]he BoA did not disclose the names of the companies [in the benchmark industry group] due to confidentiality concerns as to whether it would be permissible to disclose the information. This issue was raised several times in discussions between the parties before clearance was finally obtained to provide the information."[879] Responding to this assertion, the Philippines explained that "there was no basis for the BoA to withhold the names of the companies on grounds of confidentiality. The business activities and financial information of the relevant companies, on which the BoA relied, was publicly available."[880] In response, Thailand asserts that "the names of these companies, in the sense that they had been identified by the BoA for comparison purposes, was not a matter of public record and the BoA was trying to be careful to avoid any commercial harm to these companies by publicising their names and/or information."[881]

7.399. While we have considered Thailand's argument that "the BoA was trying to be careful to avoid any commercial harm to these companies by publicising their names and/or information"[882], we do not consider that Thailand has demonstrated how commercial harm may have arisen from revealing the names of the companies to PMTL when the business activities and financial information of the relevant companies was publicly available. Additionally, Thailand has not presented any legal arguments regarding the extent to which Article 11.3 takes into account confidentiality concerns.[883] We note, in particular, that Thailand has not referred to, or relied on, Article 10 of the CVA, concerning non-disclosure of confidential information. We therefore do not consider that Thailand has demonstrated that confidentiality concerns precluded the BoA from revealing the names of the companies, or any of the other relevant information discussed above, to PMTL.

7.400. We therefore consider that the reasons provided in the BoA Ruling do not satisfy the requirement in Article 11.3 to make clear and give details about the BoA's rejection of the transaction value, sufficient to enable importers, domestic tribunals, WTO Members, and this Panel to assess

[874] As we discuss in the context of the Philippines' claim under Article 16, the BoA also refused to provide this information in response to a request from PMTL made in December 2012.
[875] Philippines' first written submission, para. 115.
[876] Philippines' first written submission, para. 116 (referring to Motion requesting the Court to summon documentary evidence or material evidence, 27 September 2013 (English translation), (Exhibit PHL-30-B), and Statement Explaining the event that the Defendant failed to submit the documents pursuant to the summons, 24 June 2014 (English translation), (Exhibit PHL-31-B)).
[877] Philippines' first written submission, para. 439.
[878] Philippines' first written submission, para. 138.
[879] Thailand's response to Panel question No. 30, p. 26.
[880] Philippines' response to Panel question No. 91, para. 165.
[881] Thailand's comments on the Philippines' response to Panel question No. 91, p. 21.
[882] Thailand's comments on the Philippines' response to Panel question No. 91, p. 21.
[883] See Thailand's comment on the Philippines' response to Panel question No. 91, p. 21.

whether the manner or means of valuation by the BoA was consistent with Thailand's WTO obligations.

7.2.7.3.2.2 The BoA's determination of the customs value using the deductive method

7.401. Turning to the BoA's determination of a revised customs value using the deductive method, the BoA Ruling indicates that, having rejected the transaction value, the BoA used a "deductive" method for determining the customs value for the 210 entries, by "applying the selling price per unit of the imported goods sold in the Kingdom [of Thailand] to the unrelated purchaser in the same condition as when imported at the first level of sale and in the greatest aggregate quantity according to the information provided by the importer".[884] In calculating the customs value, the BoA Ruling states that the BoA made deductions for PMTL's P&GE, using the industry average P&GE rate in place of PMTL's stated P&GE value.[885] The BoA Ruling also states that, in determining the customs value, PMTL "voluntarily accepted" that such costs would not be considered for the calculation of the customs value by the BoA, and that "[a]s such, there was no information for considering the deduction".[886] Regarding the deductions for "taxes and duty", the BoA Ruling states that the deduction shall be made by:

> [D]educting value added tax, tobacco tax, health promotion foundation levy, customs duty at the rates prevailing at the time of importation and *provincial tax, calculated by using the total amount of payment of the provincial tax pursuant to the receipts specifying that money is received from PMTL and the name of retailers by PMTL of the year 2002 according to the information provided by PMTL and comparing in proportion to the cigarette sales amount in 2002* at the rate of 0.021 Baht/stick or 21.14 Baht/1,000 sticks.[887]

7.402. We recall that the Philippines' concerns with respect to this aspect of the BoA's decision focus on the deduction for P&GE, and the deduction for provincial taxes payable by PMTL. Concerning P&GE, the Philippines argues that the same information which was omitted from the BoA Ruling's description of the comparison of P&GE rates (in respect of the rejection of the declared transaction value) is also relevant to the BoA's determination of the amount of P&GE to be deducted (in respect of the determination of a revised customs value), and therefore this information should have been included. In respect of provincial taxes, the Philippines argues that the BoA Ruling failed to indicate: the criteria used to include or exclude an amount on a tax receipt; which receipts were included or excluded; whether the BoA made a deduction in instances where the provincial authority did not provide a receipt; how the BoA determined the total amount to be deducted; the deficiencies in the evidence already provided by PMTL; the BoA's reasons for requiring actual receipts substantiating the claimed amount; its reasons for requiring a particular format for those receipts; and the deficiencies in the receipts that the BoA rejected.[888]

7.403. Regarding the alleged lack of information in the BoA Ruling concerning *the deduction in respect of P&GE*, we consider that our findings above on the rejection of the transaction value are equally applicable in respect of the determination of the customs value.[889] Given that the BoA decided to use the industry average P&GE rate as a proxy for PMTL's own P&GE rate, the BoA should have indicated all of the relevant information concerning its determination of that proxy rate.

7.404. Regarding the alleged lack of information in the BoA Ruling concerning *the deduction in respect of provincial taxes*, we are not convinced that all of the information alleged by the Philippines to be missing is, in fact, missing. Importantly, we consider that the BoA Ruling does identify that the BoA based its determination on those receipts which identified PMTL as the taxpayer. However, we also consider that the BoA Ruling omits a significant amount of information which was material to the Panel's assessment of whether the BoA acted in accordance with Article 5.1(a)(iv) of the CVA.

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[884] BoA Ruling, (Exhibit PHL-21-B), pp. 3-4. The BoA Ruling also indicates that the customs value could not be determined using the transaction value of identical or similar goods, because "no such goods had already been accepted as the customs value by the Customs Department". (BoA Ruling, (Exhibit PHL-21-B), p. 3).

[885] BoA Ruling, (Exhibit PHL-21-B), p. 4.

[886] BoA Ruling, (Exhibit PHL-21-B), p. 4.

[887] BoA Ruling, (Exhibit PHL-21-B), p. 4. (emphasis added) Regarding the translation note concerning the determination of the deduction for provincial taxes, see footnote 791 above.

[888] Philippines' first written submission, paras. 454-455; response to Panel question No. 95.

[889] See paragraphs 7.392. to 7.399. above.

Specifically, we emphasize that the BoA Ruling indicates only that the "total amount" of provincial tax paid was "compar[ed] in proportion to the cigarette sales amount in 2002". The BoA Ruling fails to indicate the formulae or figures used, and fails to explain why the BoA was using these particular formulae or figures. Furthermore, the BoA Ruling does not explain why the determination of the provincial tax was limited to only the amounts on tax receipts that indicated "that money [was] received from PMTL" and identified "the name of the retailers". In particular, the BoA Ruling omits any mention of the "test calculation" conducted by the BoA allegedly on the basis of PMTL's figures. In our view, aspects of the BoA's determination that are fundamental to our assessment of the BoA's actions, and which are reflected in the Minutes of the BoA Meeting of 26 September 2016, are not reflected in the BoA Ruling.[890]

7.405. We therefore consider that the reasons provided in the BoA Ruling do not fully satisfy the requirement in Article 11.3 to make clear and give details about the BoA's determination of the revised customs value, using the deductive method, sufficient to enable importers, domestic tribunals, WTO Members, and this Panel to determine whether the manner or means of valuation by the BoA was consistent with Thailand's WTO obligations.

7.2.7.4 Conclusion

7.406. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, the BoA acted inconsistently with Article 11.3 of the CVA by failing to provide sufficient reasons for its decision.

7.2.8 Claim under Article 16 of the CVA

7.2.8.1 Introduction

7.407. Article 16 of the CVA requires that, upon written request, a customs authority must provide to the importer, in writing, an explanation of how the customs value was determined. The BoA Ruling was issued on 16 November 2012. On 18 December 2012, PMTL requested an explanation from the BoA concerning certain aspects of the BoA's decision.[891] On 16 June 2016, the Thai Customs Department sent a letter to PMTL, referring to PMTL's letter of 18 December 2012, and providing certain information.[892]

7.408. The Philippines claims that Article 16 applies to the BoA since the BoA forms part of the Thai customs administration, and that the BoA acted inconsistently with Article 16 of the CVA by failing to provide a written explanation of how it determined the customs value, following PMTL's written request of 18 December 2012.[893]

7.409. Thailand argues that Article 16 does not apply to decisions by appellate tribunals under Article 11.2 of the CVA, which are subject exclusively to the more specific procedural rules of Article 11.3.[894] Thailand also submits that, even if Article 16 does apply, then in any event the BoA Ruling itself "provides sufficient explanation that enables PM Thailand to understand the bases for its decision on customs valuation", for the reasons elaborated by Thailand in respect of Article 11.3.[895]

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[890] We emphasize, in particular, that the BoA Ruling omits to mention any details of the BoA's "test calculation", the fact that such test calculation was conducted, the assertion that PMTL does not pay tax on behalf of all retailers, the evidence provided by PMTL, the BoA's reasons for ignoring PMTL's explanation for not providing all relevant receipts, and the details of the BoA's final calculation. We do not wish to suggest that these omissions are the sum total of the information that should have been included in the BoA Ruling. We do, however, consider that these omissions are particularly glaring in light of our analysis above. (See paragraphs 7.344. to 7.369. above)

[891] Letter from PMTL to the BoA, 18 December 2012 (English translation), (Exhibit PHL-27-B), p. 1.

[892] Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B).

[893] Philippines' first written submission, paras. 428-440 and 458-462 (referring to Letter from PMTL to the BoA, 18 December 2012 (English translation), (Exhibit PHL-27-B)); second written submission, paras. 383-390; response to Panel question No. 29(a), 30, 92, and 94; comments on Thailand's response to Panel question No. 94; opening statement at the meeting of the Panel, paras. 47-55.

[894] Thailand's first written submission, paras. 5.114-5.116; second written submission, paras. 2.131-2.136; and response to Panel question No. 29(b).

[895] Thailand's first written submission, para. 5.117; response to Panel question No. 94. See also para. 7.376. above.

7.2.8.2 Main arguments of the parties

7.410. The Philippines argues that Article 16, by its explicit terms, applies to the "customs administration", and, as Thailand concedes, the BoA is an "authority within the customs administration".[896] The Philippines contends that cumulative application of Articles 11.3 and 16 does not render Article 16 redundant, since the "application of one WTO obligation is not rendered redundant or inutile merely because it overlaps with another obligation on the facts of a particular case".[897] The Philippines explains that the obligations in Articles 11.3 and 16 do not conflict, and the "concurrent application of the obligations in Articles 11.3 and 16 … is fully consistent with the principle that obligations under the covered agreements apply cumulatively, unless there is a conflict".[898] The Philippines notes that, because "the substantive content of the explanation due under Articles 11.3 and 16 is the same … in practice, an importer is unlikely to seek an explanation under Article 16".[899] Nevertheless, in the Philippines' view, the right to seek an explanation is important in those cases "where the initial statement of reasons from the appeal body does not meet the requisite standard."[900] The Philippines also considers that an overlap in coverage does not render Article 16 redundant, since Article 16 provides an "*additional* opportunity" to request a "*further* explanation", in addition to the reasons for the decision that must be provided under Article 11.3.[901]

7.411. Regarding the alleged failure by the BoA to satisfy the requirements of Article 16, the Philippines asserts that the BoA never responded to PMTL's 18 December 2012 request, made to the Director General of the Customs Department, asking for an explanation of certain aspects of the decision.[902] The Philippines acknowledges that a letter sent from the Customs Department to PMTL on 16 June 2016 provided a "partial explanation"[903] of the BoA's decision, however the Philippines emphasizes that, although the letter asserts itself to be an explanation, "the content of the letter does not meet the standard of explanation required under" Article 16.[904] Additionally, the Philippines argues that the letter of 16 June 2016 was "provided too late to satisfy the obligation in Article 16".[905] In the Philippines' view, "an explanation under Article 16 must be sufficiently timely to enable an importer to exercise effectively its right to appeal under domestic law in light of the explanation given for the determination."[906] The Philippines also explains that, in its view, the fact that an importer exercises its right to appeal does not imply that the customs authority satisfied its obligations under Article 16.[907]

7.412. Thailand argues that the obligation in Article 16 is inapplicable to appeal tribunals like the BoA. Thailand points out that Article 16 only indicates that an importer "shall have the right to an explanation … of how the customs value was determined" whereas Article 11.3, governing decisions on appeals, indicates that "notice of the decision and the 'reasons for such decision shall be provided in writing' even without a request from the importer".[908] In Thailand's view, Article 11.3 therefore provides "more detailed rules … than Article 16" and applies specifically to appeals.[909] Thailand submits that Article 16 therefore does not apply to appeals, since "it would essentially be a repetition of the disciplines contained in Article 16", which would "render Article 11.3 redundant".[910] In Thailand's view, it would make no sense to apply Article 16 to appellate tribunals such as the BoA, since Article 11 explicitly "requires a disclosure of the reasons for a decision without a request in writing", and Article 16 "would require an importer to make a request in writing".[911] Thailand responds to the Philippines' argument that Article 16 applies to decisions by appellate tribunals

[896] Philippines' second written submission, para. 386.
[897] Philippines' second written submission, para. 387.
[898] Philippines' response to Panel question No. 29, para. 243 (referring to Appellate Body Reports, *Guatemala – Cement I*, para. 65; *Argentina – Footwear (EC)*, para. 89).
[899] Philippines' response to Panel question No. 29, para. 245.
[900] Philippines' response to Panel question No. 29, para. 245.
[901] Philippines' response to Panel question No. 29, para. 244. (emphasis original)
[902] Philippines' first written submission, para. 435; and second written submission, para. 384.
[903] Philippines' response to Panel question No. 30(a), para. 246 (referring to Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B)) (emphasis omitted).
[904] Philippines' response to Panel question No. 30(a), para. 249. See also Philippines' response to Panel question No. 94, para. 193.
[905] Philippines' response to Panel question No. 94, para. 193.
[906] Philippines' response to Panel question No. 94, para. 195.
[907] Philippines' comment on Thailand's response to Panel question No. 94.
[908] Thailand's first written submission, para. 5.115.
[909] Thailand's first written submission, para. 5.115.
[910] Thailand's first written submission, para. 5.115.
[911] Thailand's second written submission, para. 2.135.

because of the reference to "customs administration" in the text, arguing that the Philippines essentially "ignores the difference between the nature of the determinations – a determination of customs value versus an appeal of a determination of customs value … [U]nder the Philippines' approach, Article 16 by its terms would apply only to appeals … before bodies such as the Board of Appeals but not appeals before judicial authorities … [which] would make no sense".[912]

7.413. Thailand also submits that, even if the BoA is subject to the obligation in Article 16, then "[i]n any event … the BoA Ruling provides sufficient explanation that enables PM Thailand to understand the bases for its decision on customs valuation".[913] Thailand also states that the information provided in the BoA Ruling "was sufficient under Article 11.3, in that PMTL was able to exercise, and in fact, exercised, its right to appeal in Thai courts".[914]

7.2.8.3 Analysis by the Panel

7.2.8.3.1 General considerations

7.414. Article 16 of the CVA states that:

> Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's goods was determined.

7.415. In the original proceeding, the panel found that the Thai Customs Department failed to provide an explanation of how the customs value of the importer's goods was determined, inconsistently with Thailand's obligations under Article 16.[915]

7.416. In our analysis of the Philippines' claim under Article 11.3 of the CVA, we set forth the fundamental aspects of the legal standard under Article 16.[916] We briefly recall in this respect that an explanation under Article 16 must "make clear and give details of how the customs value of the importer's goods was determined, including the basis for rejecting the transaction value and other valuation methods that sequentially precede the method actually used by the customs authorities."[917] Such an explanation must indicate, "at the minimum, the basis for rejecting the transaction value in the light of the information provided by the importer, the identification of the method used and the illustration of how the method was applied in reaching the final customs value."[918] Furthermore, the relevant explanation must be sufficient for "domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations".[919] We reiterate that the principle of due process is fundamental to the CVA, as expressed in various provisions including the fourth recital of the preamble which recognizes the need for a "fair, uniform and neutral" system of customs valuation. In our view, the original panel's formulation of the legal standard under Article 16 espouses this principle of due process.[920]

7.417. In proceeding with our analysis, we note that the parties' arguments raise the threshold issue of whether the obligation in Article 16 applies to the BoA. We therefore address this issue first, before turning to address the issue of whether the BoA failed to provide to PMTL an adequate explanation as to how the customs value was determined.

7.2.8.3.2 The applicability of Article 16 to the BoA

7.418. The parties disagree on whether Article 16 applies to appellate tribunals. We note that their arguments resemble in part their arguments regarding the applicability of the procedural obligation in Article 1.2(a), third sentence, to the BoA.[921] In this respect, we consider that certain interpretative

[912] Thailand's second written submission, para. 2.134.
[913] Thailand's first written submission, para. 5.117.
[914] Thailand's response to Panel question No. 94, p. 21.
[915] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.249-7.266.
[916] See paragraph 7.382. above.
[917] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.240.
[918] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.238
[919] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.
[920] See paragraph 7.382. above.
[921] See paragraph 7.246. above.

elements that we identified in the context of our analysis of the applicability of Article 1.2(a), third sentence, are similarly relevant here.

7.419. Beginning with the text of Article 16, we note that Article 16 explicitly imposes an obligation on the "customs administration" to provide an explanation in writing "as to how the customs value … was determined". We recall that it is uncontested that the BoA is formally part of the Thai Customs Department, and is therefore part of the "customs administration" in the narrowest understanding of this term.[922] There is no textual limitation in Article 16 confining the scope of the obligation therein only to certain types of entities that operate within the "customs administration". Nor does Article 16 distinguish between different types of customs value determinations (i.e. initial determinations versus determinations on appeal), in any way that would exclude tribunals like the BoA from its scope. Thus, there is no textual basis in Article 16 to justify the exclusion of appellate tribunals like the BoA from the scope of the obligation contained therein.

7.420. Turning to the nature of the obligation in Article 16 and the function that it serves, we have already found above that there are some core commonalities between the legal standards in Article 1.2(a), third sentence, Article 11.3, and Article 16. Most importantly, as elaborated above[923], all of these provisions establish obligations that are inherently functional in nature. The fundamental purpose of Article 16 is to "enable[] importers and foreign governments to effectively exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations".[924] As indicated in the context of Article 1.2(a), third sentence, it is consistent with this objective that an appeals tribunal within the customs administration is subject to that requirement.[925] Thus, we see nothing in the nature of the legal obligation contained therein that would justify excluding appellate tribunals such as the BoA from the scope of that obligation.

7.421. Furthermore, as indicated above in the context of our analysis of Article 1.2(a), third sentence, Thailand has not demonstrated that any practical difficulties would arise as a consequence of the BoA being subject to the procedural obligation contained in that provision.[926] In our view, the same conclusion holds in respect of Article 16. Importantly, we note that the Customs Department did, in fact, eventually respond to PMTL's request for an explanation on behalf of the BoA.[927] Similarly to our analysis in respect of Article 1.2(a), third sentence, we do not consider that Thailand has demonstrated how subjecting the BoA to the requirement in Article 16 would be impractical or inappropriate. Thus, we see nothing in how the BoA conducts its work to justify a finding that it is excluded from the scope of that obligation.

7.422. This brings us to Thailand's principal argument, which is that Article 16 cannot be applicable to appellate tribunals because if it were applicable, it would render Article 11.3 redundant (or vice versa). We recall the well-established rule of "effective" treaty interpretation, which precludes interpreting one provision in a way that renders another provision redundant, and that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[928]

7.423. It is uncontested that Article 11.3 applies to the BoA, and to appellate tribunals generally. We further recall the overlapping requirement that both Article 11.3 and Article 16 impose, namely to provide sufficient "reasons" (under Article 11.3) or "explanation" (under Article 16) to clarify how and why the transaction value was rejected and the customs value determined. In addition, we note that it is further uncontested that the legal standards under Articles 11.3 and 16 are sufficiently similar to one another, such that if Article 16 does apply to the appellate tribunal, it could be the case that the information provided by a customs authority in the context of giving its "reasons" would also be sufficient, if provided in response to a request from the importer, to discharge the obligation under Article 16. In this regard, the Philippines contends that "the substantive content of

[922] See paragraphs 7.256. to 7.258. above.
[923] See paragraphs 7.380. , 7.382. and 7.383. above.
[924] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.
[925] See paragraph 7.259. above.
[926] See paragraph 7.261. above.
[927] See Letter from Customs Department to PMTL of 16 June 2016, (Exhibit PHL-38-B).
[928] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at p. 21. See also Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1997:I, 97, at p. 106.

the explanation due under Articles 11.3 and 16 is the same"[929], and, for its part, Thailand is also of the view that the standard of reasons required under Article 11.3 is not "lesser" than the standard that applies under Article 16.[930] In our view, there is little to distinguish between the plain meaning of a requirement to provide an "explanation"[931] and a requirement to provide "reasons"[932], and we recall that the nature of the obligations in these provisions is similar.[933]

7.424. None of these points is contested, and we consider that they establish that there is a substantial degree of overlap between the obligation in Article 11.3 to provide "reasons" and the obligation in Article 16 to provide an "explanation" upon request, at least insofar as they apply to domestic appellate tribunals within the "customs administration". However, we do not consider that the foregoing renders Article 16 redundant or inutile, such that as a matter of treaty interpretation we must find that appellate tribunals fall outside of the scope of the obligation contained therein. Our reasons are as follows.

7.425. First, we accept that the obligation in Article 11.3 that is specific to appellate tribunals means that the obligation in Article 16 will typically be more relevant and useful in the context of *initial* determinations because, under the CVA, a customs authority is normally *not required* to provide reasons for its final decision on rejection of declared customs values or a choice of a particular valuation method. However, this does not by itself establish that the concurrent application of the obligations in Article 11.3 and Article 16 to appellate tribunals would render one of those provisions redundant. The Appellate Body has found that, in the absence of conflict, different WTO provisions can apply cumulatively[934], and that "[t]he fact that an interpretation of" one WTO provision in accordance with customary rules of interpretation "implies a less frequent recourse to" another provision "does not deprive" the second provision "of *effet utile*".[935]

7.426. Second, we consider that even if the legal standards under Articles 11.3 and 16 are identical, such that the information provided in accordance with Article 11.3 may obviate the need to ever request an explanation under Article 16, the fact that they are temporally distinguishable is significant.[936] In this regard, we agree with the Philippines that the right to seek an explanation would be important in those cases "where the initial statement of reasons from the appeal body does not meet the requisite standard."[937] The additional obligation under Article 16 can make a significant practical difference to an importer faced with a situation where insufficient reasons were provided with the initial decision on appeal. In such a circumstance, the customs authority would not prevent a finding of WTO inconsistency in respect of Article 11.3 by subsequently providing an explanation that is consistent with Article 16. However, a subsequent explanation provided pursuant to Article 16 may enable an importer to exercise its right of appeal in domestic proceedings, or preclude additional litigation by an importer in domestic proceedings, or even preclude resort by a Member to WTO dispute settlement. Thus, the imposition of the obligation under Article 16 can serve a critical practical role in those situations where the initial reasons provided under Article 11.3 are insufficient.

7.427. Finally, it appears to us that the *lex specialis* argument that Thailand is advancing in relation to Articles 11.3 and 16 of the CVA in this proceeding resembles the *lex specialis* argument that Thailand advanced in relation to Article 11.2 of the CVA and Article X:3(b) of the GATT 1994, and

[929] Philippines' response to Panel question No. 29, para. 245.

[930] Thailand's response to Panel question No. 29(b).

[931] The original panel stated that "[t]he term "explanation" can be defined as "*noun.* 1 The action or act of explaining. 2 A statement, circumstance, etc., which makes clear or accounts for something." (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.232, referring to *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 895 (2002)).

[932] As explained above, the dictionary definition of "reasons" refers to "[a] statement used as an argument to justify or condemn some act, or to prove or disprove some assertion or belief". (Shorter Oxford English Dictionary (2007), p. 2481)

[933] We note the Philippines' explanation that, "in practice, an importer is unlikely to seek an explanation under Article 16, if the statement of reasons under Article 11.3 meets the requisite standard. However, nothing prevents an importer from seeking an explanation under Article 16." (Philippines' response to Panel question No. 29(a), para. 245)

[934] See, e.g. Appellate Body Reports, *Guatemala – Cement I*, para. 65; and *Argentina – Footwear (EC)*, para. 89.

[935] Appellate Body Report, *EC – Asbestos*, para. 115.

[936] We recall that the original panel attached significance to the temporal scope of application of the obligations in Article 16 and Article 1.2(a), third sentence, for the purpose of distinguishing between these obligations. (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.213)

[937] Philippines' response to Panel question No. 29, para. 245.

which the original panel rejected.[938] In the original proceeding, the Philippines claimed that the conduct of the BoA vis-à-vis PMTL was inconsistent with the Article X:3(b), and Thailand responded that the BoA was not subject to the obligation in Article X:3(b). The panel concluded that these provisions, i.e. Article 11 of the CVA and Article X:3(b) of the GATT 1994, applied concurrently according to the plain meaning of the terms of each provision. The Appellate Body upheld the panel's finding.[939]

7.428. Taking these interpretative elements into account, we consider that the ordinary meaning of Article 16 indicates that the BoA, as part of the Thai customs authority, is indeed subject to the requirement in Article 16. We consider that this is further reinforced by both the nature of the obligation in Article 16, and our consideration that there are no apparent practical constraints on the BoA to provide an explanation in accordance with Article 16. We do not consider that the concurrent application of the obligations in Articles 11.3 and 16 to appellate tribunals such as the BoA renders either of those provisions redundant, and consider that the obligation under Article 16 could be particularly useful to importers in a situation where the reasons initially provided do not meet the requirements of Article 11.3. For these reasons, we consider that the obligation in Article 16 applies to the BoA.

7.429. Having said that, we wish to stress that the applicability of Article 16 does not, in any way, relieve an appellate tribunal within the customs administration of its obligation under Article 11.3 to provide to the importer sufficient reasons for the decision on appeal, at the time that it gives notice of its decision to the importer. Although Article 16 may serve a useful role in and of itself, for the reasons given above, under Article 11.3 an appellate tribunal is obliged to communicate the reasons for the decision on appeal, regardless of whether any specific request for an explanation in writing has been made by the importer.

7.2.8.3.3 The explanation provided after the BoA Ruling

7.430. In assessing whether the BoA failed to provide a sufficient explanation in response to PMTL's request, we consider that two issues are raised. First, Thailand argues that even if the BoA is subject to the obligation in Article 16, the information provided in the BoA Ruling itself was sufficient to discharge any obligation that the BoA may have been under, by virtue of Article 16, to provide a sufficient explanation. In respect of this argument, we recall our findings above that the BoA Ruling does not provide sufficient reasons to satisfy the requirements of Article 11.3.[940] Consequently we consider, on the basis of our findings above in respect of Article 11.3, that the BoA Ruling itself did not provide reasons that were sufficient to discharge the BoA's obligation under Article 16 to provide the explanation, subsequently requested by PMTL, on how the customs value of the importer's goods was determined.

7.431. Second, we note that on 16 June 2016 the Thai Customs Department did respond to PMTL's request of 18 December 2012. At no time during this proceeding has Thailand argued that this response satisfies the requirement of Article 16.[941] Nevertheless, given that this letter purports to respond to PMTL's request for an explanation, and since this letter was submitted as evidence to the Panel, we consider it necessary to examine whether this letter satisfies the requirements of Article 16.[942]

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[938] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.1046-7.1052.

[939] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 182-222.

[940] See paragraphs 7.389. to 7.405. above.

[941] Indeed, when questioned directly regarding the timeliness of the Thai Customs Department's letter of 16 June 2016, in the context of the requirements of Article 16, Thailand stated only that "information [provided] by the BoA was sufficient under Article 11.3, in that PMTL was able to exercise, and in fact exercised, its right to appeal in Thai courts." (Thailand's response to Panel question No. 94, p. 21) Additionally, we note that, in response to a question from the Panel, the Philippines noted that it had "overlooked" that the June 2016 letter from the Thai Customs Department was "styled" as a response to PMTL's request for information. (Philippines' response to Panel question No. 30, para. 248)

[942] We acknowledge the statement of the Appellate Body that "[w]here there is an absence of argumentation … a panel cannot intervene to raise arguments on a party's behalf and make the case for the complainant." (Appellate Body Report, *EC – Fasteners (China),* para. 566) Although the Appellate Body made this statement with reference to the complainant, we consider that it would be equally inappropriate for a panel to construct arguments on behalf of a respondent. We therefore refrain from constructing arguments on behalf of Thailand. However, given that the burden lies on the Philippines to demonstrate that the BoA acted inconsistently with Article 16, and given that the letter at issue was submitted by the Philippines itself in

7.432. We recognize that the text of Article 16 does not explicitly impose a time-period during which an explanation must be provided. However, it is clear that certain provisions of the covered agreements that establish procedural obligations may, depending on the nature of the procedural obligation contained therein, necessarily carry an implied limitation on when the required action must be performed.[943] In this respect, we recall the original panel's statement that Article 16 serves an important transparency and due process objective, by enabling "importers and foreign governments to effectively exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations."[944] The original panel elaborated that the explanation provided under Article 16 "provides a window through which domestic tribunals and WTO panels review and understand a customs authority's valuation determination".[945]

7.433. We therefore consider that an explanation provided three and a half years after it was requested, and, in the specific context of this dispute, several years after the conclusion of the appeal of the customs valuation determination before the Thai Tax Court, does not satisfy the requirements of Article 16. A delay of three and a half years is an excessively long period of time to provide an explanation irrespective of the circumstances. Furthermore, in the circumstances of PMTL's appeal, it is clear that an explanation provided well after the conclusion of the domestic court proceeding initiated by the importer, in response to a request that preceded the initiation of that domestic proceeding, cannot be sufficient to satisfy Article 16.[946] In light of the lack of timeliness in the Customs Department's response, we do not consider it necessary to examine the actual content of the June 2016 letter to determine whether it would have satisfied the requirements of Article 16 had it been delivered in a timely manner.

7.2.8.4 Conclusion

7.434. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, the BoA acted inconsistently with Article 16 of the CVA by failing to provide a timely explanation of how the customs value was determined.

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support of its claims, we are compelled to at least address this evidence in determining whether the Philippines has met its burden of proof. In this respect, we recall the Appellate Body's statements that "[a] panel must examine and consider all of the evidence placed before it" (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 240) and "the Panel's … role as the trier of facts requires it to review and consider all the evidence that it receives from the parties". (Appellate Body Report, *Australia – Apples*, paras. 275-276)

[943] For example, in *US – Offset Act (Byrd Amendment)*, the Appellate Body acknowledged that the text of Article 9.2 of the DSU "contains no requirement for the request for a separate panel report to be made *by a certain time*". (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 310 (emphasis original)) However, the Appellate Body considered that the provision had to be read in the light of the object and purpose of the DSU, and upheld the panel's decision to deny the US request for separate reports on the grounds that the request came too late. (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 311-316) We further recall the un-appealed findings of the original panel that the Thai Customs Department had acted inconsistently with Articles X:3(a) and (b) of the GATT 1994 due to the "overall delays shown throughout the course of the review process" and the "excessive delays that have been caused in the … appeals before the BoA", respectively. (See Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.969 and 7.1015)

[944] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.

[945] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.

[946] We recall our finding in footnote 356 above that the letter provided by the Customs Department on 16 June 2016 is part of the "record" of the determination. We do not consider that this alters our conclusion that the letter was sent too late to satisfy the obligation in Article 16. In accordance with the original panel's findings in respect of Article X:3(a) and (b) of the GATT 1994, a ruling by an appellate tribunal would certainly constitute part of the "record" of the determination, but if that ruling were issued ten years after the request for an appeal was filed, it would seem to be inconsistent with Article X:3(a) and (b). Similar reasoning is applicable, in our view, in respect of the letter sent by the Customs Department on 16 June 2016 vis-à-vis Thailand's obligations under Article 16 of the CVA.

7.3 The Criminal Charges

7.3.1 General

7.3.1.1 Factual description of the Charges

7.435. This section provides a general factual description of the criminal charges (the Charges), beginning with a review of the events that culminated in the Public Prosecutor issuing them on 18 January 2016. The parties disagree on several related fundamental factual issues. We address these disputed factual issues in Section 7.3.5 below, in the context of assessing whether the Charges reflect a "customs valuation" determination for purposes of the CVA.

7.3.1.1.1 Events culminating in the Charges

7.436. Between July 2003 and June 2006, PMTL imported into Thailand 272 entries of *Marlboro* and *L&M* cigarettes from the Philippines. PMTL's declared transaction values for each of these entries was in the range of THB 7.60-8.14 per pack for *Marlboro* cigarettes, and THB 5.75-6.16 per pack for *L&M* cigarettes.[947] The Thai Customs Department accepted PMTL's declared transaction values for these 272 entries of cigarettes.[948]

7.437. The Customs Department conducted a post-clearance audit of an unspecified number of entries from 2006, and, in June 2008, the Customs Department concluded this audit by issuing a letter confirming that PMTL had engaged in "no wrongdoing".[949] In subsequent testimony to the Thai Senate, a senior official with the Customs Department stated that "none of the information available to [the Customs Department] indicates that the prices/values declared by [PMTL] were not the correct transaction values of the imported goods".[950]

7.438. In August 2006, the Thai Department of Special Investigations (DSI), a unit within the Ministry of Justice, initiated a criminal investigation into the transaction values declared by PMTL. The investigation covered 292 entries of cigarettes imported from the Philippines over the period 2003-2007.[951] These 292 entries included the 272 entries imported between July 2003 and June 2006, and an additional 20 entries: 18 entries that took place between June 2006 and February 2007 and 2 entries that were wrongly included, as determined later.[952] When the original panel was established in 2008, the DSI investigation was still ongoing and had not yet arrived at any conclusion on whether to recommend prosecution.

7.439. In April 2009, while the original panel proceeding was ongoing, the DSI issued a Memorandum of Allegation against PMTL and 13 of its current and former employees.[953] In the Memorandum of Allegation, the DSI alleged that PMTL committed offences under several provisions of the Customs Act of Thailand (B.E. 2469 (1926)) (the "Customs Act"), including Section 27 thereof. More specifically, the DSI alleged that, over the period July 2003 through February 2007, PMTL imported 292 entries of *Marlboro* and *L&M* cigarettes, and that "the declared values of cigarettes imported into Thailand from the Philippines by Philip Morris pursuant to such import entries were *undervalued* and did not reflect the *actual* value of the cigarettes".[954] The Memorandum of Allegation

[947] Philippines' first written submission, para. 517, figure 6. The Philippines explains that for the first 111 of the 272 entries subject to the Charges, the prices expressed in THB fluctuate because the relevant entries were priced in USD. (Philippines' first written submission, fn 323)

[948] Philippines' first written submission, para. 638; Thailand's first written submission, para. 6.35.

[949] Philippines' first written submission, para. 65 (referring to Letter from the Customs Department to the Managing Director of PMTL No. Gor Kor 0514(Sor)/656, 19 June 2008 (English translation), (Exhibit PHL-18-B)).

[950] Senate Committee on Justice and Police Affairs, Report on Review and Study of Investigation into and Consideration of Case Concerning Actual or Attempted Tax Evasion by PMTL et al., 10 October 2013 (English translation), (Exhibit PHL-87-B), p. 7.

[951] The DSI simultaneously opened an investigation covering other entries imported over the period between 2000 and 2003. This separate investigation culminated in the Charges filed in January 2017. See paragraphs 1.32. to 1.34. above.

[952] The Public Prosecutor identified one entry that had been double-counted by the DSI, and one entry that did not pertain to *Marlboro* or *L&M* cigarettes. Those two entries were excluded from the scope of the Charges brought in January 2016. (Philippines' first written submission, para. 500)

[953] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B).

[954] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), p. 2. (emphasis added)

set out multiple grounds for arriving at this conclusion[955], beginning with "the comparison of the cost price of cigarettes imported by Philip Morris with the cost price of cigarettes in other ASEAN countries", and "the comparison of the price of cigarettes imported by Philip Morris with the price of cigarettes imported by other importers, namely, Alis Inter Co., Ltd. and Bangkok Airways Co., Ltd." (both of which are duty-free operators).

7.440. The DSI's Memorandum of Allegation also included the following comparison with the declared import price of King Power, another duty-free operator, for the same brands:

> [W]hen compared with the declared import price set forth by King Power International Co., Ltd. of Marlboro brand cigarettes of 27.46/pack and of L&M brand cigarettes at 16.81/pack, the special investigation team found that, based upon the declared import prices of Philip Morris, taxes and duties were lost in the approximate amount of 68,881,394,278 Baht 69 Satang (as detailed in the list accompanying the Memorandum of Allegation) … Moreover, by sending sample cigarettes for testing, it was found that imported cigarettes from the Philippines by Philip Morris and imported cigarettes from Malaysia by King Power International Co., Ltd. have the same overall quality, proportions and ingredients. Additionally, the overall forms of evaporating substances in the cigarettes is not different as King Power used the certificate for importation (Form YorSor. 3) issued by the Department of Disease Control to Philip Morris to support its importation.

7.441. Thus, the DSI's Memorandum of Allegation suggested that the cigarettes imported by PMTL are identical to those imported by King Power ("the same overall quality, proportions and ingredients", and the same certificate for importation), and calculated the taxes and customs duties "lost" based on a comparison between the declared transaction values of PMTL and King Power's prices. The Memorandum of Allegation was accompanied by a list of the entries in question, and a table that calculates the "shortage of duty" at THB 68.8 billion. The calculation states that "the difference in price is derived from the comparison with the import price declared by King Power at THB27.47/pack for Marlboro and at THB16.81/pack for L&M".[956]

7.442. The Memorandum of Allegation additionally stated that "customs officials previously inspected the price structure of Philip Morris on 3 March 1999 and the import price of its cigarettes has been used for several years despite the fact that the price of ingredients used for manufacturing cigarettes have risen every year".[957] The Memorandum of Allegation also stated that "from the investigation, it was found that Philip Morris, the importer, and Philip Morris Philippines Manufacturing Inc., the seller, have a relationship that resulted in the undervaluation of cigarettes declared for importation into Thailand".[958] The Memorandum of Allegation added that "[f]rom the investigation of Philip Morris financial documents, evidence of transfer of inaccurate expenses to related persons or juristic persons was found".[959]

7.443. In September 2009, the DSI recommended that the Public Prosecutor bring charges against PMTL and its employees.[960] While the recommendation itself was not made public, the DSI issued a press release reporting its recommendation. The press release explained that PMTL's under-declaring of the transaction values resulted in under-taxation, in the sense that "fictitious values have been fixed … to evade taxes and duties", and that these arrangements "have cost the country's tax revenues approximately THB [68.8 billion]".[961] The September 2009 press release further noted "problems in collecting excise taxes on imported liquor and tobacco products", and stated that "[f]alse and underdeclarations of import values as part of tax-evasive planning are widespread and have cost enormous tax revenues each year".[962] As with the April 2009 Memorandum of Allegation, the September 2009 DSI press release included a comparison of the transaction values declared by "the foreign entity" for *Marlboro* and *L&M* cigarettes with several benchmarks, including "C.I.F.

[955] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), pp. 1-2.
[956] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), note accompanying the table appearing at p. 4/44.
[957] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), p. 1.
[958] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), pp. 1-2
[959] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), p. 2.
[960] DSI, Press Release, 2 September 2009 (English translation), (Exhibit PHL-90-B).
[961] DSI, Press Release, 2 September 2009 (English translation), (Exhibit PHL-90-B), p. 2.
[962] DSI, Press Release, 2 September 2009 (English translation), (Exhibit PHL-90-B), p. 2.

Values of King Power"[963], and notes that they are "vastly different".[964] In subsequent testimony to the Thai Senate, a senior official with the Customs Department confirmed that in "the DSI case forwarded to the public prosecutors, the Department of Special Investigation used the import prices/values of King Power, a duty free operator, as the basis of its allegations".[965]

7.444. However, this was not the sole ground specified in the September 2009 press release, as it also referred to the transaction value of Alis Inter Co., Ltd. and Bangkok Airways Co., Ltd. (other duty-free operators); retail prices in other ASEAN countries; and the ex factory values of domestically produced Thai cigarettes.[966] As with the April 2009 Memorandum of Allegation, the September 2009 press release also noted that the distributor/buyer and the manufacturer/seller are both affiliates of the world's largest multinational tobacco group, and that it could be said that their selling transactions "were not at arm's length"; it referred to "overseas money transfers which are claimed to be expenses [but] are actually not expenses" in the sense of the Revenue Code, and this "indicates tax-evasive schemes in Thailand, in terms of customs duties, [excise] taxes, and other taxes"; and it stated that the C.I.F. value declared had remained unchanged over a period of years, notwithstanding variations in freight costs and exchange rates.[967]

7.445. In January 2011, the Public Prosecutor determined that the evidence did not warrant bringing charges against PMTL and its employees for the under-declaration of the customs values.[968] The reasons that led the Public Prosecutor not to prosecute were not made public at that time. However, they were publicly revealed in October 2013, in a report by the Thai Senate Committee on Justice and Police Affairs, which conducted a parliamentary inquiry into the investigation of PMTL. That report included evidence given by DSI officials, who cited the following reasons for the Public Prosecutor's decision not to prosecute PMTL: (i) the Public Prosecutor concluded that the cigarette prices/values declared by King Power and the prices/values deemed by the DSI to be likely actual prices/values could not be held to be the actual prices/values for PMTL (on the grounds that the imported cigarettes were of different places of origin, their distribution methods differed from each other, and the purchase prices/values as declared by King Power did not include taxes and duties); (ii) the Public Prosecutor concluded that to commence criminal proceedings, there would need to be evidence showing a difference between the amount of the actual price/value paid by PMTL and the price/value declared by PMTL; and (iii) the Public Prosecutor took into account that the Customs Department, in a post-clearance audit, had found that PMTL had engaged in no wrongdoing in declaring its transaction values.[969]

7.446. In January 2011, the Attorney-General returned the file to the DSI, for its reconsideration and to decide whether to issue a "dissenting opinion", as provided for under the applicable criminal procedure. In August 2011, the DSI issued such a dissenting opinion, objecting to the Public Prosecutor's decision not to bring charges, and re-asserting its own recommendation that charges be brought.[970] The document itself was not made public at the time. However, a related press release from the DSI, dated 17 August 2011, provided a summary of the DSI's dissenting opinion. The DSI's August 2011 press release recalled its earlier opinion that the accused "declared the import value which caused the shortage of the customs duty in the approx. amount of THB [68.8 billion]".[971] As with the DSI's Memorandum of Allegation from April 2009, and also the DSI's subsequent September 2009 recommendation, this dissenting opinion referred to several grounds for rejecting PMTL's declared transaction value, including that the declared transaction value had remained unchanged over a period of years, notwithstanding increases in the cost of goods, insurance, transportation cost, and changes in currency exchange rates; the distributor/buyer and the manufacturer/seller are both affiliates of Philip Morris, and their selling transactions were not at arm's length; and that

[963] DSI, Press Release, 2 September 2009 (English translation), (Exhibit PHL-90-B), p. 1.
[964] DSI, Press Release, 2 September 2009 (English translation), (Exhibit PHL-90-B), p. 2.
[965] Senate Committee on Justice and Police Affairs, Report on Review and Study of Investigation into and Consideration of Case Concerning Actual or Attempted Tax Evasion by PMTL et al., 10 October 2013 (English translation), (Exhibit PHL-87-B), p. 7.
[966] DSI, Press Release, 2 September 2009 (English translation), (Exhibit PHL-90-B), p. 1.
[967] DSI, Press Release, 2 September 2009 (English translation), (Exhibit PHL-90-B), p. 2.
[968] Senate Committee on Justice and Police Affairs, Report on Review and Study of Investigation into and Consideration of Case Concerning Actual or Attempted Tax Evasion by PMTL et al., 10 October 2013 (English translation), (Exhibit PHL-87-B), p. 4.
[969] Senate Committee on Justice and Police Affairs, Report on Review and Study of Investigation into and Consideration of Case Concerning Actual or Attempted Tax Evasion by PMTL et al., 10 October 2013 (English translation), (Exhibit PHL-87-B), pp. 4-5.
[970] DSI, Press Release, 17 August 2011 (English translation), (Exhibit PHL-93-B).
[971] DSI, Press Release, 17 August 2011 (English translation), (Exhibit PHL-93-B), p. 2.

PMTL's declared transaction value, of THB 7.76 per pack, was THB 0.1 lower than the price of Thai cigarettes, and was THB 16 per pack lower than the price of Philip Morris cigarettes in Indonesia.[972] It further stated that:

> In addition, the case was important in terms of international trade. The Philippines had filed a claim against Thailand and a panel of the World Trade Organisation (WTO) had ruled that Thailand had acted in violation of the General Agreement on Tariffs and Trade (GATT). If no objection was made to the prosecutor's decision to drop charges, Thailand's national security or interests might be seriously affected.[973]

7.447. Given that the Public Prosecutor and the DSI disagreed on whether to file charges against PMTL, the ultimate decision on whether to prosecute was left to Thailand's Attorney-General.[974] In September 2013, it was reported in the Thai press that the Attorney-General at the time had decided to follow the DSI's recommendation, and had issued a Prosecution Order. This order was not made public, but the *Post Today Online* reported at the time that:

> Mr. Chulasingh Vasantasingh, the former Attorney General, had considered and decided to order a prosecution against Philip Morris (Thailand) Limited and 12 other persons for offences under the Customs Act B.E. 2469 (1926) and Tobacco Act B.E. 2509 (1966) for jointly declaring the import prices of Marlboro and L&M from the Philippines below the normal [price], to pay excise tax for cigarettes less than actual [tax], causing the State to suffer damages of more than THB 68 billion.[975]

7.448. On 18 January 2016, these events culminated in a decision taken by the Thai Public Prosecutor to file criminal charges against PMTL and seven of its current and former employees. The competent Thai Criminal Court accepted and issued the Charges on the same day.[976] The Charges cover 272 entries of *Marlboro* and *L&M* cigarettes imported from the Philippines between July 2003 and June 2006. While the DSI had recommended that PMTL be prosecuted with respect to 292 entries[977], the Public Prosecutor decided to exclude 20 of the 292 entries from the Charges, to arrive at a total of 272 entries subject to the Charges. As a result, the Charges cover a continuous sequence of 272 entries, running from July 2003 to June 2006. The 20 entries excluded from the Charges included 18 entries that were among the 118 entries covered by the DSB's recommendations and rulings in the original proceeding, one entry that had been double-counted by the DSI, and one entry that did not pertain to *Marlboro* or *L&M* cigarettes.[978]

7.449. In respect of these 272 entries of *Marlboro* and *L&M* cigarettes by PMTL, the Charges allege that offences have been committed under Section 27 of the Customs Act, as well as other offences that are consequential to a violation of Section 27.[979]

7.3.1.1.2 Section 27 of the Customs Act

7.450. Section 27 of the Customs Act makes it a crime to avoid or attempt to avoid the payment of any customs duties with the intention to defraud the government of the customs duties and taxes

[972] DSI, Press Release, 17 August 2011 (English translation), (Exhibit PHL-93-B), pp. 2-3.
[973] DSI, Press Release, 17 August 2011 (English translation), (Exhibit PHL-93-B), p. 1.
[974] According to Criminal Procedure Code, Section 145 (English translation and Thai original), (Exhibit PHL-94-B).
[975] Post Today Online, "Attorney General ordered a prosecution against Philip Morris for evasion of cigarette tax", 2 October 2013 (English translation), available at: http://www.posttoday.com/economy/finance/250676 (last accessed 19 January 2017), (Exhibit PHL-95-B). The Philippines states that the Prosecution Order was widely reported in the Thai press, but was neither published nor shared with the accused. (Philippines' first written submission, para. 492)
[976] The Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation), (Exhibit PHL-1-B).
[977] See DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), p. 1.
[978] Philippines' first written submission, paras. 496-497 and 500.
[979] The other alleged violations are: Section 115 quarter of Custom Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (English translation), (Exhibit PHL-34-B); Section 3 of the Customs Act (No. 11), B.E. 2490 (1947) (English translation), (Exhibit PHL-98-B); Section 10 of the Customs Act (No. 17), B.E. 2543 (2000) (English translation), (Exhibit PHL-8-B); Sections 83 and 91 of the Criminal Code, Section 4 of the Amendment Act of the Criminal Code (No. 6) B.E. 2526 (1983) (English translation), (Exhibit PHL-99-B); Sections 4, 5, 6, 7, 8 and 9 of The Reward Giving to Offender Suppression Act. B.E. 2498 (1946) (English translation), (Exhibit PHL-16-B).

which must be paid for such goods. The English translation of Section 27 submitted by the Philippines reads as follows, with relevant terms highlighted:

> Any person who shall import or bring into the Kingdom any uncustomed, restricted, or prohibited goods, or any goods which have not been duly passed through the Customs; or shall export or take out of the Kingdom any such goods; or shall assist in any way in importing or exporting such goods; or shall, without official authority, remove or assist in removing any such goods from any ship, wharf, godown, warehouse, place of security, or store; or shall harbour, keep, or conceal, or permit or cause to be harboured, kept, or concealed, any such goods; or shall be in any way concerned in carrying, removing, or dealing with such goods; *or shall be in any way concerned in any evasion or attempted evasion of any duties of Customs*, or of any of the laws and restrictions relating to the importation, exportation, landing, warehousing, and delivery of goods *with intent to defraud His Majesty's Government of any duties due on such goods* or to evade any prohibition or restriction of or applicable to such goods; shall for each offence be liable to *a fine equal to quadruple the duty-paid value of the goods*, or imprisonment for a period not exceeding ten years, or both fine and imprisonment.[980]

7.451. Thus, Section 27 of the Customs Act makes it a criminal offense to evade the payment of "duties on Customs", with the "intention to "defraud the government" of the "duties" that is "due on such goods". It further provides that the "fine" for such offense shall be four times the "duty-paid value of the goods".

7.3.1.1.3 The content of the Charges and the Annex

7.452. The Charges set forth the allegation that PMTL violated Section 27 of the Customs Act by declaring a "false price" for *Marlboro* and *L&M* cigarettes contrary to the "actual price", with the intention to defraud the government of taxes and customs duties. The Charges repeat this allegation in the context of providing particulars on each of the 272 entries of *Marlboro* and *L&M* cigarettes set forth therein. For each of those 272 entries, the Charges repeat that "the Exhibit attached to the Complaint" shows the details with respect to price per pack of cigarettes "falsely" declared, and the "actual price" of cigarettes of each brand. The content of the Charges and the Annex is addressed in greater detail below in Section 7.3.5 , in the context of our assessment of whether the Charges reflect a "customs valuation" determination for purposes of the CVA.

7.453. Under Section 27 of the Customs Act, the penalties upon conviction include the imprisonment of seven of PMTL's current and former employees, and the payment of fines by PMTL in an amount that shall equal four times the duty-paid value, which is approximately THB 80,800,000,000 (approximately USD 2.3 billion). The Charges also request the Court to order "the payment of a bounty to the informant according to the law".

7.3.1.1.4 Events subsequent to the issuance of the Charges

7.454. On 19 January 2016, the day after the Charges were filed by the Public Prosecutor and issued by the competent Thai Criminal Court, at least two articles in the Thai press reported on the filing of the Charges.[981] These press reports contained various information, including PMTL's declared

[980] Customs Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (English translation), (Exhibit PHL-34-B). After the Philippines submitted an English translation of Section 27 of the Customs Act as Exhibit PHL 34-B, Thailand subsequently submitted its own English translation of Section 27, as Exhibit THA 3-B. In response to a question from the Panel, Thailand subsequently confirmed that the Panel was correct in its understanding that Thailand did not object to the English translation of Section 27 submitted by the Philippines as Exhibit PHL 34-B. (Thailand's response to Panel question No. 96) We note that paragraph 11 of the Working Procedures provides that:

> 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.

[981] King-Oua Laohong, "Philip Morris tax evasion case reaches court", Bangkok Post, 19 January 2016, available at http://www.bangkokpost.com/news/general/831708/philip-morris-tax-evasion-case-reaches-court (last accessed 6 December 2016), (Exhibit PHL-119); and The Phuket News, "Philip Morris tax evasion case reaches court", 19 January 2016, available at http://www.thephuketnews.com/philip-morris-tax-evasion-case-reaches-court-55840.php (last accessed 6 December 2016), (Exhibit PHL-120).

transaction values for *Marlboro* (THB 7.76/pack) and *L&M* cigarettes (THB 5.88/pack), and the price reported by other companies (THB 27.46/pack and THB 16.81/pack, respectively).

7.455. The proceedings before the Thai Criminal Court are ongoing. The court's initial hearing on the evidence took place on 27 June 2016, and various other procedural hearings took place between that date and 23 January 2017. At the hearing on 23 January 2017, the court decided that hearings on the evidence would be conducted between 7 November 2017 and 4 April 2018. Assuming there are no delays or postponements, the decision of the court would be announced by about June 2018.[982]

7.456. On 27 June 2016, at the hearing on the exchange of evidence, the Public Prosecutor filed an application for an order to prevent information regarding the criminal proceedings from being shared with third parties, including the Philippines, and to have the criminal proceedings heard behind closed doors. The Public Prosecutor stated that the application was to counter the "possibility that the Philippines may use such publicly disclosed evidence against Thailand in the WTO settlement of the compliance dispute".[983]

7.3.1.2 Claims and order of analysis

7.457. The parties' requests for findings in relation to the Charges are set out in greater detail in Section 3 of our Report. As reflected there, the Philippines' claims and Thailand's defences raise a number of issues, including several distinct preliminary objections to the Panel making findings on the WTO-consistency of the Charges.

7.458. We will begin by considering the two grounds underlying Thailand's request for a preliminary ruling that the Charges fall outside the scope of this Article 21.5 compliance proceeding. In this regard, Thailand asks the Panel to find that the Philippines is precluded from challenging the Charges in this compliance proceeding because it challenged essentially the same measure in the original dispute and failed to make a *prima facie* case of WTO-inconsistency. Thailand also submits that the Philippines has not demonstrated that the Charges have a sufficiently "close nexus" with the matters covered by the DSB's recommendations and rulings or the BoA's Ruling of 12 September 2012, and therefore they are not a measure "taken to comply" with the DSB's recommendations and rulings.

7.459. If we find that the Philippines' claims relating to the Charges fall within the scope of this compliance proceeding, we will address Thailand's argument that the Charges are not a matter "ripe" for adjudication as they constitute merely an allegation of criminal conduct and not a judgment by the Criminal Court. Thailand characterizes the "ripeness" issue as one going to the Panel's competence, and its submissions present this issue as a threshold issue to be resolved prior to addressing the applicability of the CVA to the Charges.[984]

7.460. If we find that there is no legal impediment to making findings on the Charges in the present Article 21.5 compliance proceeding, we will address the merits of the Philippines' claims relating to the Charges. We will begin with the principal point of contention between the parties, which is the applicability of the obligations in the CVA to the Charges. If we find that the Charges involve a "customs valuation" determination subject to the obligations of the CVA invoked by the Philippines, we will then determine whether the Philippines has demonstrated that the Charges are inconsistent with those obligations. If we find that they are, we will then address the questions of whether the general exceptions in Article XX of the GATT 1994 apply to the CVA, and if so, whether Thailand has demonstrated that the inconsistency with the CVA is justified under those provisions.

7.461. After addressing these issues relating to the Charges, we turn to the Philippines' separate and additional claim under Article 10 of the CVA concerning the alleged disclosure of PMTL's transaction values to the media.

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[982] Philippines' first written submission, para. 524; Thailand's first written submission, paras. 6.8-6.10.

[983] Philippines' first written submission, para. 528 (referring to Tilleke & Gibbins International Ltd., Hearing Report, 28 June 2016, (Exhibit PHL-103), p. 3).

[984] In its first written submission, Thailand considers that even if the Philippines' claims relating to the Charges "fall within the Panel's terms of reference" (para. 6.1), they are not "justiciable" (para. 6.49) by the Panel, and states that the Panel does not have the "competence" (paras. 6.81, 6.82, 6.89) to address claims relating to the Charges when the Charges have yet to be addressed by the Thai Criminal Court.

7.3.1.3 Claims not pursued

7.462. The Philippines' panel request contains a number of claims, some of which it has elected not to pursue in this proceeding. In its panel request, the Philippines claimed that different aspects of the Charges are inconsistent with several distinct obligations in the CVA and the GATT 1994. In the course of the proceeding, the Philippines pursued its claim that the Charges are inconsistent with the substantive obligations in Articles 1.1/1.2(a) of the CVA, because Thailand failed to use the transaction value as the basis for customs value and failed properly to examine the circumstances of sale. The Philippines also pursued its claims that the Charges are inconsistent with Articles 2.1 and/or 3.1 of the CVA to the extent that Thailand determined an alternative customs value based on King Power's purchase prices.[985] However, the Philippines did not pursue additional claims that were included in the panel request under Articles 7.1 and 7.2 of the CVA, or certain additional claims under Articles III:2 and X:3(a) of the GATT 1994.[986]

7.463. We further note that the panel request claimed that the Charges are also inconsistent with Article 1.2(a), third sentence, because Thailand "failed to communicate to the importer its grounds for considering the transaction values to be unacceptable; and it further failed to give the importer a reasonable opportunity to respond".[987] However, the Philippines has not pursued any claim under Article 1.2(a), third sentence, in relation to the Charges. In response to a question from the Panel, the Philippines confirms that, "[w]ith respect to the Charges, the Philippines limits its claims to violations of Thailand's substantive obligations under the CVA"[988] and that "it makes no procedural claims regarding the Charges"[989]. This means that the Panel need not, and indeed may not, examine the consistency of the Charges with the procedural obligation in Article 1.2(a), third sentence, of the CVA.[990] As a consequence, it is not necessary for us to rule on whether, and if so how, the obligation in Article 1.2(a), third sentence, would apply in the context of criminal charges relating to customs valuation, or on how that procedural obligation would be informed by the terms of the "Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value".[991] Nor is it necessary for us to resolve the question of whether the DSI's April 2009 Memorandum of Allegation could be characterized as a document that "communicates" the "grounds" to the importer.[992]

7.464. The panel request notes that "Thai law explicitly provides for the payment of 'bribes' and 'rewards' to informants and government officials assisting in bringing the Charges, in the amount of 55 percent of fines, which in this case amounts to approximately THB 44,440,000,000 (approximately USD 1,250,000,000)."[993] Although the panel request contains this information, the panel request does not appear to set out any claims under the CVA relating to the reward-sharing provisions of Thai law, either "as such", or "as applied" in the context of the investigation of PMTL and the Charges brought against it. In its submissions, the Philippines has not requested that the Panel make any finding that the alleged "bribes" or "rewards" are inconsistent with the CVA. The parties' submissions reveal that they hold different views on the proper characterization of the "bounty", the eligibility of government officials to receive such bounty, and the amount of any money that would be paid.[994] However, we agree with Thailand that "the Philippines has not challenged Thailand's system as being WTO-inconsistent", and therefore "the question of rewards is simply legally and factually irrelevant to the claims actually before the Panel". Based on the foregoing, we conclude that we are not called upon to make findings as to the WTO-consistency of Thailand's "bribes" and "rewards" scheme, and it is not necessary to make any finding on the identity of the "informant".

[985] Panel request, para. 14, third and fourth bullets.
[986] Panel request, para. 14, fifth bullet, and paras. 15-16.
[987] Panel request, para. 14, second bullet.
[988] Philippines' response to Panel question No. 92, para. 168.
[989] Philippines' response to Panel question No. 92, para. 189.
[990] See Thailand's comments on the Philippines' response to Panel question No. 92, p. 26.
[991] See parties' responses to Panel question No. 97; third parties' responses to Panel question No. 4(a).
[992] See Thailand's response to Panel question No. 107(b); Philippines' comment on Thailand's response to Panel question No. 107(b).
[993] Panel request, para. 13.
[994] Philippines' first written submission, paras. 520-521; Philippines' second written submission, paras. 397-398; Thailand's first written submission, paras. 6.14-6.17; Thailand's second written submission, paras. 3.24-3.32.

7.3.2 Preclusion

7.3.2.1 Introduction

7.465. In August 2006, the DSI, a unit within the Thai Ministry of Justice, initiated a criminal investigation into the import prices declared by PMTL.[995] The investigation covered 292 entries of cigarettes, imported from the Philippines, over the period 2003-2007.[996] When the original panel was established in 2008, the DSI investigation was still ongoing. The Philippines' request for the establishment of a panel included claims relating to the DSI investigation under Articles X:3(a) and (b) of the GATT 1994.[997]

7.466. In a preliminary ruling request, Thailand asked the Panel to find that the Philippines is precluded from challenging the Charges in this compliance proceeding because it included claims with regard to the underlying DSI investigation in the original proceeding, but did not pursue those claims.[998] According to Thailand, the Charges issued in January 2016 are the "same measure", or "a measure which remains essentially the same", as the DSI investigation that was initiated in 2006.[999] Thailand asks the Panel to find that the Charges issued in January 2016 are outside the scope of this Article 21.5 compliance proceeding because the Philippines initially challenged the DSI investigation before the original panel but failed to pursue its claim and therefore the Philippines is "precluded" from challenging the Charges in this compliance proceeding.[1000]

7.467. The Philippines agrees with Thailand that "if a complainant opted not to pursue a challenge to a measure in original proceedings, when it could have done so", or "did challenge the unchanged measure in the original proceedings and failed to establish a *prima facie* case", then due process precludes the complainant from challenging that measure in compliance proceedings.[1001] However, the Philippines argues that the preclusion doctrine is not triggered in this case because the Charges issued in January 2016 are not a measure that it could have challenged in 2008, nor the same measure as the DSI investigation that was ongoing at the time of the original proceeding.[1002]

7.3.2.2 Main arguments of the parties

7.468. Thailand emphasizes that the Philippines' 2008 panel request in the original proceeding contained claims with respect to the DSI investigation.[1003] Thailand argues that the Charges "are the same measure" as the DSI investigation initiated in 2006 because the Charges are the "culmination" of the investigation by the DSI that was the subject of one of the Philippines' claims in the original proceeding.[1004] Thailand emphasizes that the Philippines itself accepts that the

[995] Philippines' first written submission, para. 465. In August 2006, the DSI also commenced a second criminal investigation into 1094 entries imported by PMTL in the 2000-2003 period. That second investigation resulted in the Public Prosecutor filing a second set of criminal charges, on 26 January 2017, against PMTL and one of its former employees in respect of 780 entries of cigarettes imported by PMTL between January 2002 and August 2003. The competent Thai criminal court accepted and issued the Charges. It is these 2002-2003 Charges that are at issue in the second recourse to Article 21.5 referred to at paragraph 1.32. above.

[996] These 292 entries included the 272 entries imported between July 2003 and June 2006, and an additional 20 entries: 18 entries that took place between June 2006 and February 2007 and 2 entries that were wrongly included, as determined later. The Public Prosecutor identified one entry that had been double-counted by the DSI, and one entry that did not pertain to *Marlboro* or *L&M* cigarettes. Those two entries were excluded from the scope of the Charges brought in January 2016. (Philippines' first written submission, para. 500)

[997] Request for the establishment of a panel, 29 September 2008, WT/DS371/3, (Panel request), paras. 7 and 11.

[998] Request for a preliminary ruling by Thailand, para. 1.3.

[999] Thailand's response to Panel question No. 45, p. 42.

[1000] See generally Thailand's request for a preliminary ruling; rebuttal submission on the preliminary ruling request, paras. 2.1-2.21; first written submission, paras. 4.19-4.20; second written submission, paras. 3.33-3.38; response to Panel question Nos. 44-45; opening statement at the meeting of the Panel, paras. 31-42.

[1001] Philippines' first written submission, para. 700.

[1002] Philippines' first written submission, paras. 691-725; rebuttal submission on the preliminary ruling request, paras. 3-30; second written submission, paras. 46-464; response to Panel question No. 46; opening statement at the meeting of the Panel, paras. 60-63.

[1003] Thailand's request for a preliminary ruling, para. 2.2 (referring to the panel request in the original proceeding, para. 7). In response to question from the Panel, Thailand states that "the Philippines' decision to include in its original panel request a challenge against the DSI investigation is a key reason why the preclusion principle applies in this case". (Thailand's response to Panel question No. 44, p. 41)

[1004] Thailand's second written submission, para. 3.34.

Charges are a "culmination" of the DSI investigation[1005], and argues that the Philippines' claims rest on a "formalistic"[1006] and "artificial" distinction between the DSI investigation and its culmination – the Charges.[1007] In Thailand's view, the DSI investigation and the Charges are "the same measure"[1008], or "essentially"[1009] or "effectively"[1010] the same measure, and the Philippines' position that the Charges and the DSI investigation "are two different measures is simply hair-splitting".[1011] In response to a question from the Panel, Thailand clarifies that this is a situation in which the measure challenged in this compliance proceeding "is the same measure that was challenged in the original proceedings", as opposed to a measure that the Philippines could have challenged in the original proceeding but chose not to.[1012]

7.469. In Thailand's view, the fact that the Philippines raised claims with respect to the DSI investigation under WTO legal provisions different from those in the original proceeding does not render the preclusion doctrine inapplicable to those claims.[1013] Thailand argues that differences in the WTO legal provisions under which the claims were brought against the DSI investigation (Article X:3 of the GATT 1994) and the Charges (CVA Articles 1 to 3) do not show that the two measures are distinct.[1014] Thailand points out that the "legal concerns" of the Philippines have stayed essentially the same, since the Philippines' first written submission and the record of the original dispute show that the Philippines is now, and was then, concerned with "the rejection of PM Thailand's customs valuation on the basis of comparison with the products of King Power, a duty-free operator".[1015] Thailand also submits that the Philippines mentioned the DSI investigation as part of the factual background for the CVA-related claims in its first written submission in the original dispute.[1016] This, in Thailand's view, supports the argument that "the DSI investigation was relevant at least to some extent" to the Philippines' claims under the CVA."[1017]

7.470. The Philippines submits that the "factual premise on which the request is based is simply wrong", for "the simple reason that the Charges did not yet exist" at the time of the original proceeding.[1018] Regarding Thailand's argument that the Charges are a "continuation" of the DSI investigation, the Philippines responds that the Charges are a "distinct legal act" by the Public Prosecutor that ended the investigation that had been ongoing since August 2006, and constitute a new measure that could not have been challenged, and was not challenged, in 2008.[1019] The Philippines submits that the DSI investigation and the Charges cannot be seen as a single "measure" because of the differences in substance: in the original proceeding the measure consisted of the DSI's administration of an ongoing investigation while in the compliance proceeding the measure consists of a customs valuation decision taken by the Public Prosecutor[1020]; in this compliance proceeding, the Charges have been challenged under the CVA[1021], whereas in the original proceeding the Philippines challenged the investigation under Article X:3(a) of the GATT 1994; and finally, the measures were taken by different executive agencies of Thailand, since the investigation was conducted by the DSI while the Charges were brought by the Public Prosecutor.[1022] The Philippines further argues that even if the Charges are viewed as an "inseparable part" of the DSI investigation, which they are not, the relevant aspect of the measure being challenged has changed since 2008, for the simple reason that the Charges did not exist in 2008.[1023]

[1005] Thailand's rebuttal submission on the preliminary ruling request, para. 2.7.
[1006] Thailand's rebuttal submission on the preliminary ruling request, paras. 2.8 and 2.9 (referring to Panel Report, *Chile – Price Band System (Article 21.5 – Argentina)*, paras. 7.154-7.155).
[1007] Thailand's rebuttal submission on the preliminary ruling request, para. 2.6.
[1008] Thailand's rebuttal submission on the preliminary ruling request, section 2 (entitled "The Charges Are The Same Measure As The Criminal Investigation Challenged In The Original Proceedings").
[1009] Thailand's response to Panel question No. 45, p. 42.
[1010] Thailand's opening statement at the meeting of the Panel, para. 36.
[1011] Thailand's opening statement at the meeting of the Panel, para. 36
[1012] Thailand's response to Panel question No. 45.
[1013] Thailand's request for a preliminary ruling, para. 3.36.
[1014] Thailand's rebuttal submission on the preliminary ruling request, para. 2.18.
[1015] Thailand's rebuttal submission on the preliminary ruling request, para. 2.20.
[1016] Thailand's first written submission, para. 3.10 (referring to the Philippines' first written submission in the original proceeding, paras. 196-201).
[1017] Thailand's first written submission, para. 3.10.
[1018] Philippines' first written submission, para. 693.
[1019] Philippines' first written submission, para. 710; second written submission, para. 458.
[1020] Philippines' first written submission, para. 723.
[1021] Philippines' first written submission, para. 721.
[1022] Philippines' first written submission, para. 722.
[1023] Philippines' rebuttal submission on the preliminary ruling request, para. 16.

7.471. The Philippines contests Thailand's argument that the Philippines had the same "legal concerns" with regard to both the DSI investigation and the Charges and thus could have challenged the DSI investigation on the same basis in the original proceeding. The Philippines submits that it is clear from its panel request in the original proceeding that the aspect of the measure challenged by the Philippines in that proceeding was the DSI's "conduct [of] an investigation of the importer in relation to the declared customs value of imports from the Philippines [that] has been conducted in an unreasonable manner and is taking undue time to conclude"; and, the only claims raised by the Philippines with regard to such measure were under Articles X:3(a) and (b) of the GATT 1994.[1024] The Philippines further observes that the 2006 letter from PMTL to the DSI (on which Thailand relies to demonstrate the Philippines' customs valuation concerns with regard to the DSI investigation in the original proceeding) referred only to media reports, and as a WTO Member distinct from PMTL (the author of the letter) the Philippines never made the arguments contained in the letter.[1025] In addition, the Philippines states that "no customs valuation decision had been made" when the original dispute began, as the Charges had not been issued at that time, and that "[v]iolations of Articles 1.1, 1.2(a), 2.1(a), 2.1(b), 3.1(a), 3.1(b) and 10 of the CVA could not, therefore, have been brought then, because the violations had not yet been committed".[1026] The Philippines considers that the point in time at which there was a customs valuation "determination" was when the Public Prosecutor issued the Charges on 18 January 2016.[1027]

7.3.2.3 Analysis by the Panel

7.3.2.3.1 General considerations

7.472. We note that Thailand relies on the so-called "preclusion doctrine", a limitation on the scope of Article 21.5 proceedings that is well established in WTO case law.[1028] The Philippines largely agrees with Thailand's articulation of the legal standard relating to the preclusion doctrine, and accepts that "if a complainant opted not to pursue a challenge to a measure in original proceedings, when it could have done so, due process precludes the complainant from challenging that measure in compliance proceedings."[1029]

7.473. As we have previously emphasized, a compliance panel proceeding is not an opportunity to "re-litigate" issues that were addressed, or could have been addressed, in the original proceeding.[1030] It is well established that "[a] complainant that, in an original proceeding, fails to establish a prima facie case should not be given a 'second chance' in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a prima facie case but, ultimately, failed to prevail before the original panel".[1031] Thus, no distinction is drawn between a measure that could have been challenged at the time of the original proceeding but was not, a measure that was initially raised but not pursued by the complainant, and a measure that was challenged but rejected on the merits. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body stated that "a complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not".[1032] Additional

[1024] Philippines' second written submission, para. 461.
[1025] Philippines' rebuttal submission on the preliminary ruling request, paras. 26-28.
[1026] Philippines rebuttal submission on the preliminary ruling request, para. 29.
[1027] Philippines' response to Panel question No. 38(d), para. 34.
[1028] The preclusion doctrine has been considered in a number of Article 21.5 proceedings to date, including *US – Shrimp* (*Article 21.5 – Malaysia), EC – Bed Linen (Article 21.5 – India), US – Countervailing Measures on Certain EC Products (Article 21.5 – EC), US – Oil Country Tubular Goods Sunset Reviews, (Article 21.5 – Argentina), Chile – Price Band System (Article 21.5 – Argentina), US – Upland Cotton (Article 21.5 – Brazil), US – Zeroing (EC) (Article 21.5 – EC), US – Tuna II (Mexico) (Article 21.5 – Mexico), EC – Fasteners (Article 21.5 – China)*, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US),* and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU).*
[1029] Philippines' first written submission, paras. 700 and 705.
[1030] See paragraph above 7.10. (referring to Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 96; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210; and Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.35)
[1031] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96.
[1032] Request for a preliminary ruling by Thailand, para. 3.15 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211).

guidance on the scope and contours of the preclusion doctrine, and on how it applies in different sets of circumstances, has been developed through subsequent cases.[1033]

7.474. The "preclusion doctrine", as the parties refer to it, essentially stands for the proposition that the complainant cannot challenge, in an Article 21.5 proceeding, the same measure that the complaining party: (i) *could have challenged* in the original proceeding, but chose not to; or (ii) *did already challenge*, but did not successfully pursue, in the original proceeding. The preclusion doctrine applies at the level of unchanged *aspects* of a measure, insofar as they are separable from the measure taken to comply.[1034]

7.475. The parties, in addition to agreeing on the articulation of the legal standard that is to be applied, also agree on several key factual circumstances that are relevant to its application. Notably, it is not in dispute that the DSI investigation had been initiated as of August 2006, and that the Philippines raised claims of WTO-inconsistency in respect of that investigation in its 2008 panel request. It is also not in dispute that the Philippines elected not to pursue those claims, and that, as a result, the original panel made no findings in relation to those claims. Nor is it in dispute that the Charges filed on 18 January 2016 are the culmination of the DSI investigation initiated in 2006.

7.476. We understand the Philippines to accept the premise that if the complaining party raises a claim in the original panel request but chooses not to pursue that claim before the original panel, the complaining party may, as a consequence, be precluded from raising the same claim in relation to the same measure before a compliance panel. In other words, the Philippines has not argued that there is any significant distinction, for purposes of applying the preclusion doctrine, between claims that were pursued and ultimately rejected on the merits by the panel, on the one hand, and claims that were included in the panel request and abandoned by the complainant in the course of the proceeding. We see no significant distinction between these situations, and consider abandoned claims as akin to claims that were pursued and rejected for purposes of the preclusion doctrine. Indeed, it appears that in *EC – Bed Linen (Article 21.5 – India)*, India was precluded from making a claim that it had raised in the panel request but abandoned in the course of the proceeding.[1035]

7.477. Based on the parties' arguments, we consider that there are two main issues in dispute. First, whether the Charges issued in January 2016 and the DSI investigation initiated in 2006 are properly characterized as essentially the same "measure" for purposes of applying the preclusion doctrine, such that the Philippines is now challenging the same measure that it already challenged, but did not successfully pursue, in the original proceeding. Second, if the Charges and the DSI investigation are not the same measure, whether the Philippines' claim in this proceeding nonetheless relates to an "unchanged aspect" of the measure (a comparison with King Power's prices) that was challenged, but not successfully pursued, in the original proceeding.

7.3.2.3.2 Relationship between the Charges and the DSI investigation

7.3.2.3.2.1 "the same measure"

7.478. As explained above, Thailand argues that the Charges "are the same measure", or "essentially" or "effectively" the same measure, as the DSI investigation initiated in 2006. In this regard, Thailand considers that the Charges are "inseparable" from the investigation, and

[1033] We note that the preclusion doctrine is not unique to WTO dispute settlement proceedings, and iterations of the same doctrine, albeit with varying nomenclature, can be found in various jurisdictions. For instance, the doctrine of *res judicata,* which prevents parties from re-litigating certain matters previously raised before a court or a tribunal, is conceptually similar to the preclusion doctrine. As one panel has explained:

> In international jurisdictions where it is applicable, the doctrine is generally understood to mean that an issue that has been decided on in a final adjudication, that is, after exhaustion of any available appeal rights, must be considered as a settled matter between the parties to the dispute. Consequently the issue previously resolved cannot be re-opened in subsequent proceedings. This doctrine has found application in the jurisprudence of the International Court of Justice, whose Statute contains express provisions concerning the binding and final character of its judgments. (Panel Report, *India – Autos*, para. 7.62)

[1034] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 86*;* Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, paras. 432-435; Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 7.426.

[1035] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 6.41-6.42.

"necessarily part of" the investigation.[1036] Thailand considers that it would be "artificial" and "formalistic" to characterize the Charges as a "distinct measure" from the investigation.[1037]

7.479. Having carefully considered Thailand's arguments and taking into account the introductory considerations addressing the relationship of original panel proceedings in the context of the ordinary dispute settlement process and compliance proceedings under Article 21.5 of the DSU, we are unable to agree that the DSI investigation initiated in 2006, and the Charges filed by the Public Prosecutor in 18 January 2016, are "the same measure". We observe that the Charges are a legal instrument issued in 2016, approximately ten years after the DSI investigation was initiated in 2006, and approximately eight years after the panel request was filed in the original proceeding. The events between the DSI's initiation of its investigation in August 2006 and the Public Prosecutor's filing of the Charges on 18 January 2016 involved a series of steps, over a period of years, including: the information-gathering steps by the DSI over the period 2006-2009; a Memorandum of Allegation by the DSI in April 2009; a recommendation to prosecute by the DSI in September 2009; a rejection of that recommendation by the Public Prosecutor in 2011; a second recommendation by the DSI in August 2011; a subsequent Prosecution Order by the Attorney-General two years later, in September 2013; and then the issuance of the Charges by the Public Prosecutor two years after that, in January 2016. We further observe that the investigation was conducted by the DSI, whereas the Charges were issued by the Public Prosecutor, a separate authority. Finally, the Charges have direct legal consequences that the DSI investigation did not, including: (i) the accused becoming subject to the mandatory jurisdiction of the criminal court; (ii) the accused being required to appear before the court to answer the Charges and attend the hearings relating to the Charges; (iii) the accused having to apply for and pay bail to secure temporary release during the proceedings; (iv) the accused having an officially recorded indictment and accusations; and (v) the accused having to pay the costs of a defence for criminal proceedings.

7.480. It is not in dispute that the Charges were the culmination of the DSI investigation. However, in our view this does not serve as a basis for finding that they comprise a single measure for purposes of WTO dispute settlement or the application of the preclusion doctrine. By way of analogy, we observe that, in the context of countervailing and anti-dumping duty proceedings, there is a process that begins with the initiation of an investigation, and then continues through subsequent phases and steps that may include a preliminary determination, a final determination, the imposition of duties, and subsequent administrative and sunset review determinations. The Appellate Body has observed, in the countervailing duty context, that it sees "a decision to impose a definitive countervailing duty as the *culminating act* of a domestic legal *process* which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary determination and a final determination".[1038] In the anti-dumping context, the same understanding is reflected in the observation that "*successive determinations* of *different* types are made in the context of a *single* trade remedy *proceeding*" and since they all concern the imposition and collection of duties under a particular dumping order, they "form part of a *continuum* of events and measures that are all *inextricably linked*".[1039]

7.481. If the DSI investigation and the 2016 Charges must be treated as the same "measure" on account of the fact that the former "culminated" in the latter, then applying that same logic to the trade remedies context would lead to the conclusion that all of the sequential phases and steps in a single trade remedy investigation must also constitute inseparable components of a single "measure", given that a determination (and imposition of duties) is always the "culminating act" of the investigation. Taken to its logical conclusion, this would mean that, in the trade remedies context, a complainant would, in principle, be precluded from initiating any compliance proceeding against subsequent steps in the process, because any such steps (including, for instance, a re-determination on the basis of an administrative or sunset review) would always be part of the same "measure" that the complainant had already challenged in the original proceeding. It would evidently be at odds with WTO law and practice, including prior Article 21.5 proceedings in the trade remedies context, to conclude that all of the various phases and steps in a trade remedy investigation, spanning the initiation of the investigation to the imposition of duties, constitute a single "measure" in this manner.

[1036] Thailand's rebuttal submission on the preliminary ruling request, para. 2.7.
[1037] Thailand's rebuttal submission on the preliminary ruling request, paras. 1.2, 2.6, 2.7 and 2.8.
[1038] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 11, DSR 1997:I, 167, at p. 176. (emphasis added)
[1039] Panel Report, *US – Zeroing (Article 21.5 – EC),* para. 8.103. (emphasis added)

7.482. A somewhat similar issue was addressed by the panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* and we find that panel's analysis to be instructive. In that dispute, the complainant challenged payments made to Boeing pursuant to US Department of Defence research contracts. These individual research contracts were funded under broader research programs (or "program elements"). The respondent argued that the complainant was precluded from challenging certain research contracts that were funded through research programs (or "program elements") that were in existence at the time of the panel request, even though the specific research contracts were not yet in existence at the time of the original panel request. The panel stated that it was:

> [U]nable to endorse this argument, insofar as it concerns procurement *contracts* and assistance instruments entered into after the date of the European Communities' original panel request … albeit funded through program elements that already existed at that time. In this situation, the issue of "preclusion" does not arise because, even if the RDT&E program elements (or their antecedent program elements) were in existence at the time of the European Communities' original panel request, the legal instruments were not. It would not have been possible for the European Communities to have challenged the program elements independently of the legal instruments because the only way that Boeing receives payments or access to DOD facilities, equipment, and employees under the RDT&E program elements is through specific legal instruments, whether procurement contracts or assistance instruments.[1040]

7.483. Accordingly, the panel explained that it would examine the United States' "preclusion" arguments concerning particular R&D contracts on a contract-by-contract basis, by first "determining whether the procurement contract or assistance instrument existed at the time of the European Communities' original panel request".[1041] Thus, the challenged measure existing at the time of the original panel request was treated as a necessary pre-condition for triggering the application of the preclusion doctrine, and the fact that challenged instruments were the consequence of other measures that did exist at the time of the original panel request did not mean that the two measures could be agglomerated into the same "measure" for purposes of applying the preclusion doctrine.

7.484. We recognize that, in its argumentation on the preclusion issue, Thailand repeatedly emphasizes that the Philippines included, and then abandoned, a claim relating to the DSI investigation in the panel request in the original proceeding.[1042] Thailand indicated that it is "a key reason why the preclusion principle applies in this case".[1043] In our view, the fact that a claim relating to the DSI investigation was included in the 2008 panel request is contemporaneous evidence that the Philippines was aware of the existence of the DSI investigation at the time of the original proceeding. We do not consider, however, that this fact speaks to the issue of whether the DSI investigation and the Charges issued in January 2016 are the "same measure".

7.485. Based on the foregoing, we are unable to sustain the basic premise of Thailand's argument, which is that the Charges and the underlying DSI investigation are the same measure. Accordingly, we are unable to agree with Thailand that the Philippines is precluded from challenging the Charges on the grounds that they are the same measure that the Philippines already challenged in the original proceeding.

7.3.2.3.2.2 "unchanged aspect" of the measure

7.486. Turning to the second issue, namely whether the Philippines' claims relate to an "unchanged aspect" of the Charges that it had already challenged in the original proceeding, we recall that the preclusion doctrine applies at the level of unchanged *aspects* of a measure that are separable from the measure taken to comply.[1044] Thus, in principle, a complainant cannot challenge, in an Article 21.5 proceeding, an unchanged *aspect of* a measure that it could have challenged in the original proceeding, but chose not to, or which the complainant did already challenge, but did not successfully pursue, in the original proceeding. With this in mind, we recall Thailand's argument that, at the time of the original proceeding, the Philippines had the same "legal concern" with regard

[1040] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.158.
[1041] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.159.
[1042] See, e.g. Thailand's rebuttal submission on the preliminary ruling request, para. 2.4.
[1043] Thailand's response to Panel question No. 44, p. 41.
[1044] See cases cited in footnote 1034 above.

to the DSI investigation as it now has with regard to the Charges – namely, a customs valuation determination on the basis of a comparison with the products of King Power, the Thai duty-free operator.[1045] In this regard, Thailand refers to a letter, dated 1 September 2006 from PMTL to the DSI Director-General, in which PMTL objects to a comparison between its import prices and a duty-free import price.[1046]

7.487. Recalling our findings in the previous section as to the fundamental differences between the Charges and the DSI investigation, and our resulting conclusion that they are two distinct measures taken approximately eight years apart from one another, it is by no means clear that one or more commonalities between those measures could suffice to trigger the applicability of the preclusion doctrine. Insofar as it is necessary to proceed further and assess whether the preclusion doctrine applies on the grounds that the relevant *aspect* of the Charges being challenged by the Philippines was already brought into existence through the DSI investigation that preceded it by approximately eight years, we observe that Thailand has not demonstrated that the Philippines is actually challenging the same "aspect" of the DSI investigation that it challenged in the original proceeding. We recall that the Philippines' claims in the original panel request relating to the DSI investigation were made under Article X:3 of the GATT 1994, and not under Articles 1, 2 or 3 of the CVA. Specifically, the panel request included the following claim relating to the DSI investigation under Articles X:3(a) and (b) of the GATT 1994:

> II. CLAIMS UNDER ARTICLES X:3(A) AND X:3(B) OF THE GATT 1994
>
> ...
>
> 7. Moreover, Thailand's Department of Special Investigations (DSI) is conducting an investigation of the importer in relation to the declared customs value of imports from the Philippines. This investigation has been conducted in an unreasonable manner and is taking undue time to conclude. The unreasonable nature of this investigation is highlighted by the fact that Thai Customs has conducted a parallel investigation to that of the DSI and, on 19 June 2008, concluded with a finding that the importer had engaged in no wrong-doing.
>
> ...
>
> For all these reasons, Thailand violates Articles X:3(a) and X:3(b) of the GATT 1994.[1047]

7.488. It follows from the panel request that the Philippines raised two concerns in respect of its claims under Article X:3(a) and (b). First, the Philippines highlighted the protracted period of time the DSI investigation was taking, stating that: "[t]his investigation has been conducted in an unreasonable manner and is taking undue time to conclude". Second, the Philippines indicated that the DSI and Thai Customs were conducting parallel investigations which, in the Philippines' view, further demonstrated the "unreasonable nature" of the DSI investigation. Neither of these two aspects of the DSI investigation challenged by the Philippines in the original panel request related to doubts by the DSI - let alone the Public Prosecutor - as to PMTL's declared transaction values on the basis of a comparison with King Power's purchase prices. In our view, this is sufficient to conclude that the Philippines did not challenge this "aspect" of the DSI investigation in the original proceeding.

7.489. We emphasize that Thailand's argument is that this case presents a situation in which the measure challenged in this compliance proceeding "is the same measure that *was challenged* in the original proceedings", as opposed to a measure that the Philippines *could have challenged* in the original proceeding but chose not to.[1048] Based on the scope of Thailand's request, and the grounds that it is based on, the question before the Panel is limited to whether the Philippines is challenging essentially the same measure, or essentially the same *aspect* of a measure, as that which it *already raised*, but did not pursue, in the original proceeding. We do not consider that Thailand has further

[1045] Thailand's rebuttal submission on the preliminary ruling request, para. 2.20.
[1046] Letter from PMTL to the Director General of DSI, 1 September 2006 (English translation), (Exhibit THA-1-B).
[1047] Philippines' panel request in the original proceeding, paras. 7 and 11.
[1048] Thailand's response to Panel question No. 45. (emphasis added)

argued, even in the alternative, that the Philippines is precluded from challenging this aspect of the measure on the ground that it *could have been* challenged, even though it was not challenged in the original proceeding. However, Thailand's argumentation on this point is not entirely devoid of ambiguity[1049], and we therefore address this issue in the interest of completeness.

7.490. We are not persuaded that the Philippines could have challenged the same "aspect" of the Charges that it now challenges, i.e. the rejection of PMTL's transaction values and the determination of a revised customs value based on King Power's prices, in the context of its challenge of the DSI investigation. In our view, the Philippines has adequately demonstrated that, at the time of the original proceeding, there was no information available for the Philippines to bring claims other than "administrative" claims under Article X:3(a) and (b) of the GATT 1994 with regard to the DSI investigation.[1050] We recall that the DSI did not issue its Memorandum of Allegation until April 2009, and did not issue its recommendation to prosecute until September 2009. The DSI investigation was still ongoing at the time of the original proceeding, and it is not clear that it could have reached the threshold of being a customs valuation "determination" that could have been challenged under the CVA at that time. Indeed, Thailand has not suggested otherwise, and maintains that the Charges issued in January 2016 do not have the requisite degree of finality to be characterized as a "determination" under the CVA.[1051] Thus, even assuming for the sake of argument that the Philippines was aware, in 2008, that the DSI investigation involved doubts as to PMTL's declared transaction values, on the basis of a comparison with King Power, we still do not see how the Philippines could have been in a position to challenge this aspect of the DSI investigation in the original proceeding.

7.3.2.4 Conclusion

7.491. Based upon the considerations above, the Panel concludes that the Philippines is not precluded from challenging the Charges in this compliance proceeding under Article 21.5 of the DSU.

7.3.3 Close nexus

7.3.3.1 Introduction

7.492. In the original proceeding, the challenged measures included the rejection by the Thai Customs Department of PMTL's declared transaction values for 118 entries, imported over the period June 2006 to September 2007.[1052] On 12 September 2012, the BoA reversed the Customs Department's rejection of the transaction values for the 118 entries subject to the DSB's recommendations and rulings, and decided to accept the transaction values.[1053] This September 2012 BoA Ruling is one of Thailand's declared "measures taken to comply" with the DSB's recommendations and rulings.[1054]

7.493. The Philippines submits that the Charges are a "measure taken to comply" because they have a sufficiently close nexus to the September 2012 BoA Ruling and the related recommendations and rulings of the DSB.[1055] Thailand argues that the Charges do not have a sufficiently close nexus to the matters covered by the DSB's recommendations and rulings, or to the September 2012 BoA Ruling, to be considered a measure taken to comply with DSB's recommendations and rulings, and consequently the Charges fall outside of the scope of this proceeding.[1056]

[1049] At paragraph 41 of its opening statement at the meeting of the Panel, Thailand stated that "[t]hese are effectively the same arguments that the Philippines is now making before this compliance panel. Thus, the Philippines is simply incorrect that it did not *or could not have* raised exactly the same factual and legal concerns before the original panel." (emphasis added)

[1050] Philippines' rebuttal submission on the preliminary ruling request, para. 27.

[1051] See paragraph 7.586. below.

[1052] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.79.

[1053] See BoA Ruling No. GorOr 81/2555/Por7/2555(4.1) and cover letter No. GorKor 0519(8) (GotOr), 12 September 2012 (English translation), (Exhibit PHL-53-B).

[1054] See paragraph 1.9. b above.

[1055] Philippines' first written submission, paras. 541-555; Philippines' rebuttal submission on the preliminary ruling request, paras. 31-54; second written submission, paras. 465-522; opening statement at the meeting of the Panel, paras. 73-76; responses/comments to Panel question Nos. 40-41, 43, 103-104.

[1056] Thailand's rebuttal submission on the preliminary ruling request, paras. 3.1-3.48; first written submission, paras. 4.6-4.18; second written submission, paras. 3.39-3.62; opening statement at the meeting of the Panel, paras. 43-50; responses/comments to Panel question Nos. 40-41, 43 and 103-104.

7.494. On the basis of the relevant jurisprudence, the parties have focused their arguments relating to the existence of a "close nexus" on an examination of whether, in terms of timing, nature and effects, the Charges are sufficiently connected with the declared measures taken to comply, in particular the September 2012 BoA Ruling, and with the DSB's recommendations and rulings in the original proceeding.

7.3.3.2 Main arguments of the parties

7.495. The Philippines advances arguments relating to the timing, nature and effects of the measures in question. Beginning with the *timing* of the Charges, the Philippines submits that the Charges were brought on 18 January 2016, which post-dates the expiry of Thailand's reasonable period of time to implement the DSB's recommendations and rulings, in 2012, as well as the adoption of Thailand's declared measures taken to comply, and thus the timing of the Charges is such that they are capable of undermining compliance.[1057] The Philippines agrees with Japan that the Panel should consider "the course of events leading up to the Charges (including the institution of the investigation and the filing of the criminal charges) in relation to the DSB's recommendations and rulings as well as the BoA's decision".[1058] In this regard, the Philippines highlights that, although the DSI's investigation began in August 2006, before the DSB issued its recommendations and rulings in the original proceeding on 15 July 2011, it proceeded subsequent to that date, and resulted in the second recommendation to prosecute in August 2011 (which, as discussed above, specifically connected the recommendation to the original WTO ruling), and ultimately the Charges issued on 18 January 2016.[1059] The Philippines submits that "[t]his course of events shows that there is a substantive connection between the Charges and the DSB's recommendations and rulings. The relevant events continued after the DSB's recommendations and rulings, and the Charges themselves were adopted long thereafter".[1060] The Philippines further notes that, "in considering 'the course of events leading up to the Charges', the Panel must also take into account that the investigation *included* 18 of the 118 entries that were subject to the DSB's recommendations and rulings", and that "[i]t was not until shortly before the Charges were issued in January 2016 that the Public Prosecutor decided to exclude these 18 entries from the Charges."[1061]

7.496. In terms of the *nature* of the measures, the Philippines argues that the Charges, the BoA ruling issued on 12 September 2012, and the DSB's recommendations and rulings in the original dispute, share "specific close connections in terms of nature", specifically: the same importer (PMTL), the same exporter (PM Philippines Manufacturing Inc.), the same importing country (Thailand), the same exporting country (the Philippines), the same product and brands (*Marlboro* and *L&M* cigarettes produced by PMPMI), the same transaction values, under the same supply contract, the same type of legal determination (a customs valuation determination), and the same grounds for doubting the declared customs values (a comparison with the duty free prices of King Power International Co. Ltd.).[1062]

7.497. The Philippines disagrees with Thailand that "the lack of overlap in entries is *decisive* for purposes of determining whether there is a substantive connection"[1063], and argues that, "[t]aken to its logical conclusion, Thailand could continue to engage in the same WTO-inconsistency with respect to every new entry" and "the Philippines would be required to bring new disputes regarding each new entry".[1064] The Philippines argues that when the measures involve a certain type of "recurring decision" − decisions to calculate dumping margins, or assess customs value (in this dispute) − the decisions need not be identical to enjoy sufficient connections to be within the scope of a compliance proceeding.[1065] The Philippines submits that, contrary to Thailand's arguments, the fact that the Charges were issued by the Public Prosecutor while the DSB's recommendations and rulings were implemented by different agencies does not sever the close nexus as "municipal law

[1057] Philippines' second written submission, para. 479.
[1058] Philippines' response to Panel question No. 41(a), para. 342 (referring to Japan's third-party submission, para. 19).
[1059] Philippines' response to Panel question No. 41(a), paras. 342-343.
[1060] Philippines' response to Panel question No. 41(a), para. 344.
[1061] Philippines' response to Panel question No. 41(a), para. 345. (emphasis original)
[1062] Philippines' first written submission, para. 554; second written submission, para. 482.
[1063] Philippines' second written submission, para. 496. (emphasis original)
[1064] Philippines' rebuttal submission on the preliminary ruling request, para. 52.
[1065] Philippines' second written submission, para. 504.

classifications are not determinative of issues raised in WTO dispute settlement proceedings."[1066] Similarly, the Philippines submits that a municipal classification of the Charges as criminal is not dispositive of the existence of close nexus, and that the Charges involve the same type of legal determination that was at issue in the original proceeding − customs valuation.[1067] The Philippines maintains that the Charges involve a customs valuation determination for all of the same reasons set forth in its submission regarding the applicability of the CVA to the Charges.[1068]

7.498. With regard to the *effects* of the Charges, the Philippines reiterates that "as compared with the original measure concerning Thailand's rejection of customs value for 118 entries in 2006-2007, and the September 2012 BoA Ruling, the Charges involve a customs valuation decision to reject the transaction values for the same product and the same brands, imported by the same importer to the same importing country, from the same exporter in the same exporting country, under the same supply contract, and at the same prices."[1069] In the Philippines' view, "[t]he effect of the Charges is to aggravate the WTO inconsistencies that Thailand has been instructed by the DSB to resolve, because Thailand is making new WTO-inconsistent valuation decisions that perpetuate the WTO inconsistencies it is obliged to correct."[1070]

7.499. Thailand argues that, although the *timing* of a measure offers only limited guidance, long gaps between the adoption of the DSB's recommendations and rulings, the issuance of the BoA Ruling and the issuance of the Charges suggest that the connection between those elements is "too remote".[1071] In addition, the DSI investigation, which resulted in the Charges, started in August 2006, almost five years before the DSB adopted the original panel and the Appellate Body reports; this time gap, in Thailand's opinion, also shows that the Charges are not connected with the occurrence of the DSB's recommendations and rulings.[1072]

7.500. With regard to the *nature* of the Charges, Thailand does not contest the majority of the commonalities identified by the Philippines between the Charges and the BoA Ruling of September 2012 and the DSB's recommendations and rulings that it implemented, but submits that "these are simply not sufficient to meet the close nexus test".[1073] In fact, Thailand considers that "[t]he Charges have no connection with the DSB recommendations and rulings given that their subject matter is different."[1074] In its initial argumentation, Thailand focuses primarily on the fact that the 272 customs entries covered by the Charges are entirely different from those 118 entries covered by the DSB's recommendations and rulings under the CVA.[1075] In this connection, Thailand attaches significance to the finding of the original panel that the Philippines failed to demonstrate that Thailand maintains or applies a general rule requiring the rejection of the transaction value and the use of the deductive valuation method.[1076] In response to the Philippines' arguments, Thailand submits that there is no "recurring decision" because "[t]here is nothing 'recurring' between, on the one hand, a customs valuation by the customs authorities of certain entries, and, on the other hand, the decision to bring Charges by the Public Prosecutor with respect to different entries."[1077]

7.501. Thailand submits that although the lack of overlap between the 272 entries subject to the Charges and the 118 entries subject to the DSB's recommendations and rulings "is one of the main arguments" put forward by Thailand because it clearly shows that there is no nexus in terms of nature, it is "only one of the several factors presented by Thailand demonstrating the lack of close nexus".[1078] Thailand further argues that the agencies responsible for the implementation of the DSB rulings (the Thai Excise Department, the Thai Revenue Department, the Thai Customs Department

[1066] Philippines' second written submission, para. 487 (referring to Appellate Body Reports, *China − Measures Affecting Automobile Parts,* fn 244; *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 82; and *US − Softwood Lumber IV*, para. 56).
[1067] Philippines' second written submission, paras. 491-494.
[1068] Philippines' second written submission, paras. 486 and 493.
[1069] Philippines' second written submission, para. 516.
[1070] Philippines' second written submission, para. 516.
[1071] Thailand's rebuttal submission on the preliminary ruling request, paras. 3.29 and 3.31.
[1072] Thailand's rebuttal submission on the preliminary ruling request, para. 3.30.
[1073] Thailand's second written submission, para. 3.45.
[1074] Thailand's rebuttal submission on the preliminary ruling request, para. 3.33.
[1075] Thailand's rebuttal submission on the preliminary ruling request, para. 3.33.
[1076] Thailand's rebuttal submission on the preliminary ruling request, para. 3.35 (referring to Panel Report, *Thailand − Cigarettes (Philippines)*, para. 7.133).
[1077] Thailand's second written submission, para. 3.59.
[1078] Thailand's response to Panel question No. 42(a), p. 39.

and the BoA) have "clearly different mandates"[1079] from the actors involved in the issuance of the Charges (the DSI and the Public Prosecutor). Thailand emphasizes that the Charges are criminal in nature, and in particular that they lead to an examination of the matter by a Thai criminal court and may lead to sanctions, involving a fine and/or imprisonment upon conviction, whereas the measures taken to comply with the DSB's recommendations and rulings related to customs valuation.[1080] Thailand also argues that the "grounds for doubting the declared transaction values" were not the same for the 118 entries at issue in the original dispute and the 272 entries covered by the Charges, because a comparison with King Power prices is not the "sole ground" for doubting the accuracy of the customs value in the Charges; Thailand points in this regard to the Philippines' own recognition that the DSI identified in the 2009 Memorandum of Allegation several other grounds.[1081] Thailand also disagrees with the Philippines that the Charges involve "the same type of legal determination (customs valuation)" as in the original proceeding, reiterating its argument that the calculation of the "actual price" of cigarettes in the Charges does not amount to a customs valuation decision, but merely serves the purpose of establishing a possible benchmark on which the Criminal Court could impose a fine.[1082] In this regard, Thailand maintains that the Charges do not involve a "customs valuation" determination for all of the same reasons set forth in its submission regarding the applicability of the CVA to the Charges.[1083]

7.502. With regard to the *effects* of the Charges, Thailand argues that the Charges could not have had any impact on the customs valuation of the specific entries at issue in the original proceeding, because the BoA Ruling implemented the original panel's findings with regard to those entries, and the Charges concern a different set of entries.[1084] Thailand argues that, similarly, the Charges produce no effects on the DSB's recommendations and rulings, because any possible penalty would not consist of the levying of *ad valorem* customs duties, which was the subject of the DSB's recommendations and rulings.[1085]

7.3.3.3 Analysis by the Panel

7.3.3.3.1 General considerations

7.503. We recall that Article 21.5 of the DSU states in relevant part:

> Where there is disagreement as to the existence or consistency with a covered agreement of *measures taken to comply* with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

7.504. As we have previously observed, the scope of Article 21.5 is not limited to "measures taken to comply" that the responding Member identifies as such: the scope of Article 21.5 proceedings extends beyond such "declared" measures taken to comply to include other measures that share a sufficiently "close nexus" with one or more declared measures taken to comply, or with the DSB's recommendations and rulings. [1086]

7.505. The issue is whether the Charges have a sufficiently close nexus with the BoA Ruling of 12 September 2012 and the DSB's recommendations and rulings that the BoA sought to implement.[1087] The BoA Ruling of 16 November 2012, which is one of the measures at issue in this compliance proceeding, rejected PMTL's transaction values for 210 entries of cigarettes over the period 2002-2003; the BoA Ruling of 12 September 2012, which is not a measure at issue in this compliance proceeding, accepted PMTL's transaction values for 118 import entries made in 2006-

[1079] Thailand's second written submission, paras. 3.53-3.54 (referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 22 in para. 7.10).
[1080] Thailand's second written submission, para. 3.55.
[1081] Thailand's second written submission, para. 3.51.
[1082] Thailand's second written submission, para. 3.50.
[1083] Thailand's second written submission, paras. 3.50, 3.55 and 3.60.
[1084] Thailand's second written submission, paras. 3.60-3.61.
[1085] Thailand's rebuttal submission on the preliminary ruling request, para. 3.47.
[1086] See paragraph 7.11. above.
[1087] The BoA Ruling of 12 September 2012 was declared as taken to comply in Thailand's status report of September 2012, WT/DS371/15/Add.5, as noted by the Philippines at paragraph 500 of its first written submission. The BoA Ruling of 12 September 2012 has been submitted as Exhibit PHL-53-B and THA-2-B.

2007.[1088] Both of these BoA rulings are declared "measures taken to comply".[1089] The link between the September 2012 BoA Ruling and the DSB's recommendations and rulings arises from the fact that the original panel found that Thailand had no basis to reject PMTL's declared transaction values for those 118 entries and thus violated Articles 1.2(a) and 1.1 of the CVA.[1090] Thailand has not questioned that it is open to the Panel to find that the Charges fall within the scope of this compliance proceeding on the basis of a "close nexus" with either of these BoA Rulings. For the purposes of the Panel's assessment of the existence of a "close nexus" with Thailand's measures taken to comply, it is the BoA Ruling of 12 September 2012 that is pertinent.

7.506. A "nexus" means "a connection, bond or link", or "a connected group or series; a network".[1091] Similar notions are conveyed by other terms used interchangeably by the Appellate Body in this context, including its references to a "close relationship" or "closely connected" measures.[1092] Thus, the notion of a "close nexus" is inherently an examination of the degree of connection between two (or more) things, as opposed to a bright line or binary test in which decisive importance or formalistic reliance could be placed on any one similarity or difference. Indeed, by framing the analysis as an enquiry into the existence of a "*sufficiently* close nexus"[1093], involving the existence of "*sufficiently* close links"[1094], panels and the Appellate Body have reinforced that there is no bright-line or binary test.

7.507. In accordance with the case law developed on the "close nexus" standard, a compliance panel typically reaches a conclusion on the basis of "an examination of the timing, nature, and effects of the various measures".[1095] In this case, the parties have both proceeded on that basis, and have accordingly focused their arguments on the timing, nature and effects of the Charges. However, we note that in articulating the analytical framework to be applied in a close nexus analysis, the Appellate Body has made clear that the analysis "*may*, *depending on the particular facts*, call for an examination of the timing, nature, and effects of the various measures".[1096] In our view, this language clearly and expressly envisages that there may be situations in which the factual circumstances and legal provisions at issue in a particular compliance proceeding call for a different approach to be taken[1097], and that it is not always mandatory to consider each of these elements. Having said that, our own analysis in this case is naturally guided by the manner in which the parties have framed their arguments.

7.508. Both parties base their arguments on prior jurisprudence that provides guidance on the applicable analytical framework. Both parties recognize that the *timing* of the measure cannot of itself be determinative of whether it bears a sufficiently close nexus to a Member's implementation of the DSB's recommendations and rulings.[1098] In this proceeding, the parties further agree that the examination of whether there is a sufficient linkage in terms of timing may look not only at the dates that the Charges, the BoA Ruling of 12 September 2012, and the DSB's recommendations and rulings were adopted, but more broadly and holistically at the course of events leading up to the Charges.[1099]

7.509. The nexus in terms of *nature* involves an analysis of the *subject matter* of the measure, of the declared measures "taken to comply", and of the DSB's recommendations and rulings.[1100] We

[1088] Philippines' first written submission, para. 64.
[1089] See paragraphs 1.9. b and 1.9. d above.
[1090] Philippines' first written submission, para. 63; Panel Report, *Thailand − Cigarettes (Philippines)*, para. 8.2(b).
[1091] Shorter Oxford English Dictionary.
[1092] Initially panels referred to measures as "clearly connected" or "inextricably linked". (See, e.g. Panel Reports, *Australia − Salmon (Article 21.5 − Canada)*, para. 7.10, sub-para. 22; and *Australia − Automotive Leather II (Article 21.5 − US)*, para. 6.5) The term "close nexus" was first used by the panel in *US − Upland Cotton (Article 21.5 − Brazil),* para. 9.26.
[1093] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 230.
[1094] Panel Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 6.83.
[1095] Appellate Body Report, *US - Softwood Lumber IV (Article 21.5 − Canada)*, para. 77.
[1096] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 77. (emphasis added)
[1097] Panel Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, fn 190.
[1098] See Thailand's rebuttal submission on the preliminary ruling request, para. 3.16; Philippines' second written submission, para. 473 (quoting Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 224).
[1099] Parties' responses to Panel question No. 41(a).
[1100] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 230.

note that the terms "nature" and "subject matter" have been used by the Appellate Body interchangeably in this context.[1101] In this case, the parties hold opposing views on whether there is a sufficiently close nexus in terms of the nature of the relevant measures. We note, however, that their disagreement arises predominantly as a consequence of the varying significance that they attach to certain facts, as opposed to any dispute regarding the facts. For its part, Thailand does not contest that the Charges and the September BoA Ruling involve the same importer (PMTL), the same exporter (PM Philippines Manufacturing Inc.), the same importing country (Thailand), the same exporting country (the Philippines), the same product and brands (*Marlboro* and *L&M* cigarettes produced by PMPMI), and the same transaction values, imported under the same supply contract. At the same time, the Philippines does not contest that there is no overlap between the 272 entries covered by the Charges and the 118 entries covered by the September 2012 BoA Ruling, or that the Charges were issued by the Public Prosecutor whereas the DSB's recommendations and rulings were implemented by different agencies. Rather, the parties disagree as to whether the Charges involve a "customs valuation" determination for all of the same reasons set forth in their submissions regarding the applicability of the CVA to the Charges, including their opposing views on the meaning of the Charges and the references to King Power's prices contained therein.

7.510. With regard to the consideration of the *effects* of the Charges for purposes of the close nexus analysis, the examination may focus on whether "closely connected" measures could "undermine compliance".[1102] Considerations relating to the *effects* of a measure are informed by concerns of possible "circumvention", such as a Member complying through a declared measure "while, at the same time, negating compliance through another measure".[1103] In this case the parties' arguments on the *effects* of the Charges are largely derived from the same facts that they highlight in the context of addressing the *nature* of the Charges. The Philippines considers that the *effect* of the Charges "is to aggravate the WTO-inconsistencies that Thailand has been instructed by the DSB to resolve", and refers to the fact that "as compared with the original measure concerning Thailand's rejection of customs value for 118 entries in 2006-2007, and the September 2012 BoA ruling, the Charges involve a customs valuation decision to reject the transaction values for the same product and the same brands, imported by the same importer to the same importing country, from the same exporter in the same exporting country, under the same supply contract, and at the same prices".[1104] Thailand submits that the Charges could not have had any impact on the customs valuation of the 118 entries at issue in the original proceeding, based on the fact that, among other things, the implementation efforts concerned 118 entries distinct from the 272 entries covered by the Charges.[1105]

7.511. As indicated above, the issue before us is whether the Charges have a sufficiently close nexus to the September 2012 BoA Ruling and the DSB's recommendations and rulings which it sought to implement. In accordance with our understanding of the holistic nature of the examination that we are required to undertake to answer that question, and taking into account the manner in which the parties have presented their arguments in this case, we will proceed with a holistic assessment that focuses on the timing, nature and effects of the Charges.

7.3.3.3.2 Timing, nature and effects of the Charges

7.3.3.3.2.1 Introduction

7.512. For the purposes of assessing whether the Charges have a sufficiently close nexus to the September 2012 BoA Ruling and the DSB's recommendations and rulings that it implements, we proceed by considering various circumstances identified by the parties relating to the timing, nature and effects of these measures, and we then provide an overall assessment based on the totality of the circumstances.

[1101] Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230; *US - Softwood Lumber IV (Article 21.5 – Canada)*, paras. 77 and 83. See also Thailand's rebuttal submission on the preliminary ruling request, paras. 3.17 and 3.32-3.33; Philippines' rebuttal submission on the preliminary ruling request, fn 35.

[1102] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 256.

[1103] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71. This statement has been repeated by panels and the Appellate Body in several subsequent cases. (See, e.g. Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC),* para. 250)

[1104] Philippines' second written submission, para. 516.

[1105] Thailand's rebuttal submission on the preliminary ruling request, para. 3.46.

7.3.3.3.2.2 Timing

7.513. The Philippines highlights that the Charges were brought on 18 January 2016, which post-dates not only the expiry of Thailand's reasonable period of time to implement the DSB's recommendations and rulings, but also the September 2012 BoA Ruling, and therefore "the timing of the Charges is such that they are capable of undermining Thailand's compliance with the DSB's recommendations and rulings".[1106] Thailand considers that the fact that the DSI investigation started five years before the DSB's recommendations and rulings were adopted, as well as the long time gaps between the adoption of the DSB's recommendations and rulings (15 July 2011) and the BoA Ruling (12 September 2012) on the one hand, and the Charges (18 January 2016) on the other hand, are indicative of the lack of any nexus in terms of timing.[1107]

7.514. As a starting point, we note the observation by the panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* that:

> Ordinarily, timing would be expected to become an issue if the "undeclared" measure precedes the adoption of DSB recommendations and rulings (or even the panel request in the original proceeding), raising the potential that the complaining party is in reality using compliance proceedings to retroactively enlarge the scope of its original panel request.[1108]

7.515. In this dispute, the undeclared measure does not precede the adoption of the DSB's recommendations and rulings. Rather, the Charges were issued on 18 January 2016, which post-dates the expiry of Thailand's reasonable period of time to implement the DSB's recommendations and rulings (15 May 2012), as well as the adoption by Thailand of the relevant declared measure taken to comply (12 September 2012). Accordingly, the circumstance in which timing would ordinarily become an issue, in the sense of an obstacle to a compliance panel finding a sufficiently close nexus, is not present in this case.

7.516. Moreover, the parties agree that the examination of whether there is a sufficient linkage in terms of timing may include an assessment of the course of events leading up to the Charges in relation to the DSB's recommendations and rulings as well as the BoA's decision.[1109] In this respect, we note that the Charges are the culmination of the DSI investigation. The DSI investigation began in August 2006, five years before the DSB issued its recommendations and rulings in the original dispute on 15 July 2011. However, when the DSI recommended for a second time that Charges be filed, in August 2011, this took place only one month after the DSB's recommendations and rulings were adopted. Furthermore, when the DSI did so, it specifically connected its recommendation to the DSB's recommendations and rulings. In its press release, the DSI stated:

> The Philippines had filed a claim against Thailand and a panel of the World Trade Organization (WTO) had ruled that Thailand had acted in violation of the General Agreement on Tariffs and Trade (GATT). If no objection was made to the prosecutor's decision to drop charges, Thailand's national security or interests might be seriously affected. After due consideration, therefore, the DSI's suggestion that all alleged offenders be prosecuted was confirmed.[1110]

7.517. We further observe that while the Charges were not issued until January 2016, the Attorney-General ordered prosecution in September 2013, only one year after the September 2012 BoA Ruling. Additionally, in considering the course of events leading up to the Charges, we find it significant that the entries covered by the DSI investigation included 18 of the 118 entries that were subject to the DSB's recommendations and rulings, and that were also the subject of the 12 September 2012 BoA Ruling.[1111] In our view, the foregoing considerations relating to the *timing* of the Charges establish a nexus in terms of timing between the September 2012 BoA Ruling and the DSB's recommendations and rulings it implements, and the events culminating in the Charges.

[1106] Philippines' second written submission, para. 479.
[1107] Thailand's rebuttal submission on the preliminary ruling request, paras. 3.29-3.31.
[1108] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, fn 492.
[1109] Parties' responses to Panel question No. 41(a).
[1110] See Philippines' first written submission, para. 493 (quoting from Thailand's DSI, Press Release, 17 August 2011 (English translation), (Exhibit PHL-93-B)).
[1111] Philippines' response to Panel question No. 41(a), para. 345.

7.518. We note that Thailand points to the gap of several years between the date of the issuance of the Charges (18 January 2016), and the dates on which the DSB made its recommendations (four and a half years earlier, on 15 July 2011) and the BoA Ruling in question was issued (three and a half years earlier, on 12 September 2012). We note the Appellate Body's explanation that if a measure is adopted "simultaneously with, shortly before, or shortly after" specific actions introduced by Members with a view to implementing the recommendations and rulings of the DSB, this may be a relevant factor to take into consideration.[1112] Recalling the time gap of three and a half to four and a half years, we agree with Thailand that the Charges themselves were not issued "simultaneously with, shortly before, or shortly after" either the September 2012 BoA Ruling, or the DSB's recommendations and rulings that it implements. We are also mindful of the difficulties that could arise if Article 21.5 proceedings were used to challenge measures that were only taken many years after the original dispute, bearing in mind the limited scope and purpose of compliance proceedings.[1113]

7.519. However, even if we were to focus narrowly on the date that the Charges were issued, without regard to the fact that they are the culmination of the DSI investigation that had a nexus in terms of timing to the September 2012 BoA and the DSB's recommendations and rulings that it implements, we do not consider that these periods of three and a half to four and a half years are *per se* such long time gaps as to render any connections "too remote", and sever any nexus.[1114] In this regard, we consider it pertinent that a complainant (or respondent) may initiate multiple, successive compliance proceedings in the context of the same dispute. In disputes involving multiple recourses to Article 21.5 of the DSU, it may be expected that, depending on the dispute, there would be a time gap of several years between the original recommendations and rulings of the DSB and the measures taken to comply that are challenged in successive Article 21.5 compliance proceedings.[1115]

7.520. In its third-party submission, the United States highlights the fact that the 272 entries of cigarettes covered by the Charges were imported into Thailand between July 2003 and June 2006, which was not only years prior to the DSB's recommendations and rulings made in July 2011, but also prior to the entries of cigarettes covered by the September 2012 BoA Ruling (i.e. 118 entries, imported over the period June 2006 to September 2007). The United States submits that the timing of the entries should not be ignored.[1116] In response to a question from the Panel, Canada and Japan indicated that they agree.[1117] However, in response to a question from the Panel, Thailand considers that fact to be "of limited guidance" in the Panel's assessment of the close nexus[1118], and, for its part, the Philippines argues on the basis of Appellate Body jurisprudence that "the 'close nexus' analysis requires an evaluation that takes into account the course of events in relation to the *respondent's actions* in adopting the measure at issue", and that the date of importation of the underlying entries is irrelevant for that purpose.[1119]

7.521. The issue raised by the United States which we are considering at this juncture of our analysis concerns the fact that the entries subject to the Charges were imported into Thailand *prior to* the entries subject to the September 2012 BoA Ruling and the DSB's recommendations and rulings

[1112] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 225.

[1113] See Section 7.1.2 above.

[1114] Thailand's rebuttal submission on the preliminary ruling request, para. 3.29.

[1115] For example, in *US − Tuna II (Mexico)*, the DSB made its recommendations and rulings on 13 June 2012. The compliance measure examined by the panel in *US − Tuna II (Mexico), Second Recourse to Article 21.5 of the DSU by Mexico*, was adopted on 23 March 2016, i.e. over three and a half years later. See WT/DS381/36.

[1116] United States third-party written submission, para. 37; United States third-party statement, paras. 8-10.

[1117] Canada and Japan's third-party responses to Panel question No. 2(b). In its response to the same question, the European Union suggests that denying the existence of a close nexus simply because of the timing of the respective imports would seem to be "inappropriately formalistic", insofar as there is otherwise a close nexus in the form of the commercial relationship on the basis of which the goods were imported.

[1118] Thailand's response to Panel question No. 41(b), p. 38.

[1119] Philippines' response Panel question No. 41(b), para. 347. The Philippines submits that "the United States effectively seeks to resurrect an argument it made unsuccessfully in the Zeroing disputes", which was that it had no implementation obligations in respect of entries that had occurred prior to the expiry of the reasonable period of time. The Philippines recalls that the Appellate Body rejected that argument, finding instead that "*actions* taken by the implementing Member after the end of the reasonable period of time must be WTO-consistent, even if those *actions* are in respect of imports that entered the Member's territory *before* the end of the reasonable period of time". (Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 160)

that it implements.[1120] While we do not necessarily exclude that the timing of the entries covered by a measure could be relevant to the close nexus analysis, the relevance of that fact in the circumstances of this dispute is not apparent. While the 272 entries of cigarettes covered by the Charges were imported into Thailand years prior to the DSB's recommendations and rulings being adopted in July 2011, that is equally true of the entries of cigarettes covered by the September 2012 BoA Ruling, which is one of Thailand's declared "measures taken to comply" (i.e. 118 entries, imported over the period June 2006 to September 2007). The same is also true of the November 2012 BoA Ruling which is another of Thailand's declared "measures taken to comply" (i.e. 210 entries of *Marlboro* cigarettes imported by PMTL between January 2002 and January 2003).[1121] Just as we are mindful of the difficulties that could arise if Article 21.5 proceedings are used to challenge measures that were only taken many years after the original dispute, we recognize that it may be somewhat unusual for an Article 21.5 compliance panel to review customs valuation determinations concerning entries of cigarettes that were imported up to 13 years earlier. However, we note that this is simply the consequence of the Public Prosecutor issuing Charges in January 2016 with regard to entries of cigarettes that were imported into Thailand a decade earlier.

7.3.3.3.2.3 Nature

7.522. The Philippines argues that the Charges, the September 2012 BoA Ruling, and the initial valuation by Thai Customs that was found to be inconsistent in the original proceeding[1122] share a number of commonalities, which serve to establish a "close nexus" in terms of the nature of the Charges and these other measures. The Philippines submits that these factors "establish highly specific, and very close, links in nature" between the Charges and the DSB's recommendations and rulings, and the September 2012 BoA ruling.[1123]

7.523. The Philippines asserts that these measures all involve:

a. the same importer (PMTL),

b. the same exporter (PMPMI),

c. the same importing country (Thailand),

d. the same exporting country (the Philippines),

e. the same product, brands and producer (*Marlboro* and *L&M* cigarettes produced by PMPMI),

f. the same transaction values, imported under the same supply contract,

g. the same type of legal determination, i.e. a customs valuation determination, and

h. the same grounds for doubting the declared customs values (a comparison with the duty free prices of King Power).[1124]

7.524. With respect to the first six points set forth above, Thailand does not contest the Philippines' assertions and the resulting links they establish. Thus, in our view there is no dispute that there is a "nexus" between the measures insofar as they involve (i) the same importer (PMTL), (ii) the same exporter (PM Philippines Manufacturing Inc.), (iii) the same importing country (Thailand), (iv) the same exporting country (the Philippines), (v) the same product and brands (*Marlboro* and *L&M*

[1120] In the context of examining the *nature* of the Charges further below, we address Thailand's argument regarding the absence of overlap between the entries subject to the September 2012 BoA Ruling and the Charges.

[1121] Furthermore, while the entries subject to the Charges were imported into Thailand *before* the 118 entries subject to the September 2012 BoA Ruling, they were imported into Thailand *after* the 210 entries subject to the November 2012 BoA Ruling.

[1122] In respect of which the November 2012 BoA Ruling is the declared "measure taken to comply".

[1123] Philippines' second written submission, para. 484.

[1124] Philippines' first written submission, para. 554; and second written submission, para. 482.

cigarettes produced by PMPMI), and (vi) the same transaction values, imported under the same supply contract.

7.525. Thailand disputes the Philippines' contention that the Charges involve "the same type of legal determination" as the September 2012 BoA Ruling, because, in Thailand's view, they do not involve a "customs valuation" determination. In this connection, Thailand emphasizes that the Charges are "criminal in nature" and "do not have any customs valuation effects".[1125] In support of their opposing views on this issue in the context of the "close nexus" analysis, both parties rely on, and indeed expressly cross-reference and incorporate, their later arguments on whether the Charges can be characterized as a "customs valuation" determination.[1126]

7.526. In response to a question from the Panel, both parties agree that there are legal impediments to how far the Panel should go in assessing whether the Charges involve "the same type of determination" without deciding, in the jurisdictional scope of this proceeding, the merits of the substantive claims.[1127] However, the parties have expressed different views on the question of whether the Panel should, for the purposes of the jurisdictional analysis, go no further than making a finding on whether the measure *could* be found to constitute a "customs valuation" determination; or, alternatively, confine the scope of the jurisdictional examination to the fact that the complaining party alleges, and will seek to demonstrate, that the Charges involve a "customs valuation" determination.[1128] Thailand considers that the Panel "cannot rely on a mere allegation by the complainant in deciding the jurisdictional scope of this dispute", and states that "it should not rely merely on what the Philippines alleges and should not pre-judge the merits of the case".[1129] The Philippines also indicates that "a panel should proceed with a measure of caution in relying solely on an allegation made by one party".[1130]

7.527. There is no question that a panel may be required to resolve disputed questions of fact and law in the context of determining whether it has jurisdiction over a measure or claim. This is reflected in the sheer length and complexity of the analyses of jurisdictional issues that panels have undertaken on such issues ranging from the adequacy of a panel request in identifying the legal basis of the complaint pursuant to Article 6.2 of the DSU[1131], to the adequacy of a panel request in setting forth claims under Article I:1 of the GATT 1994 in cases where the complainant may have been on notice that the measures at issue were taken pursuant to the Enabling Clause[1132], to the existence of a sufficiently close nexus between a challenged measure in an Article 21.5 proceeding and the DSB's recommendations and rulings arising from the original proceeding.[1133] Furthermore, in each of these situations, a panel may be called upon to examine the legal provisions that serve as the basis for the complainant's claims.

7.528. However, we consider that a panel must take care to ensure that it does not make findings on disputed questions of fact or law encroaching on the *merits* of a claim for the purpose of

[1125] Thailand's response to Panel question Nos. 42(a) and 43, pp. 39-40.

[1126] See, e.g. Philippines' second written submission, paras. 486 and 493; Thailand's second written submission, paras. 3.50, 3.55 and 3.60.

[1127] Thailand states that it "would see considerable problems in the Panel taking an approach that would effectively collapse the procedural issue of the scope of the proceedings with the substantive issues to be addressed subsequently", and suggests that "there may well be approaches under which the Panel could find that the Charges were within the scope of these proceedings without deciding the merits of the substantive claims". (Thailand's response to Panel question No. 43, p. 40) For its part, the Philippines states that "[f]or purposes of the jurisdictional question of whether the Charges are an undeclared measure taken to comply, the Panel need not decide *definitively* the merits of the Philippines' substantive claims". According to the Philippines, the Panel could conduct an examination in the same manner as a recent compliance panel that conducted its examination of "whether the measure in question *could* undermine compliance with the DSB's recommendations and rulings, not whether the Charges are *actually* a determination subject to the obligations of the relevant covered agreement (here, the *CVA*) and are *actually* inconsistent with the obligations in that agreement". (Philippines' response to Panel question No. 43, paras. 350 and 353.)

[1128] Parties' responses/comments to Panel question No. 103.

[1129] Thailand's response to Panel question No. 103, p. 27.

[1130] Philippines' comments on Thailand's response to Panel question No. 103, para. 180.

[1131] See, e.g. Preliminary Ruling, *US – Countervailing and Anti-Dumping Measures (China)*, WT/DS449/4, paras. 3.17-3.60; Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.1-4.52.

[1132] See, e.g. Panel Report, *Brazil – Taxes*, paras. 7.1049-7.1131.

[1133] See, e.g. Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.80-6.155.

determining whether it has *jurisdiction* over that same claim.[1134] Otherwise, a panel runs the risk of turning a jurisdictional analysis on its head, insofar as it would result in a panel making findings on the merits of a claim to determine the threshold question of whether an assessment of that claim falls within the scope of its jurisdiction. For these and other reasons, the necessity of maintaining a "firewall" between questions of jurisdiction and questions of merits has been recognized.[1135]

7.529. In principle, disputed questions of fact or law raised at the jurisdictional phase will encroach upon the merits of a claim insofar as they would require a panel to make findings relating to one or more legal elements that must be established to uphold the claim at issue. What those issues are will therefore depend on the particular claims at issue. For example, in a case involving claims of either prohibited or actionable subsidies under the SCM Agreement, one of the legal elements that must be established is that the challenged measure involves a "subsidy" within the meaning of Article 1 of the SCM Agreement. Thus, a dispute as to whether a challenged measure constitutes a subsidy in a case involving prohibited or actionable subsidy claims under the SCM Agreement is an issue that goes to the merits of the claims, and therefore would not be resolved by a panel for the purpose of determining whether or not there is a sufficiently "close nexus" between the nature of the challenged measure and the DSB's recommendations and rulings arising from subsidies previously granted by the respondent. Likewise, in a case involving a claim under Article 10 of the CVA, one of the elements that must be established to uphold the claim is that the respondent disclosed information which is by nature confidential. Thus, where there is a dispute as to whether officials have disclosed information which is by nature confidential, that is an issue that goes to the merits of the claims and would not be resolved by a panel for the purpose of determining whether or not there is a sufficiently close nexus between the alleged disclosure and the DSB's recommendations and rulings arising from prior disclosures of confidential information by the respondent.

7.530. The question of whether a challenged measure involves a "customs valuation" determination within the meaning of Article 15.1(a) of the CVA is a legal element of the Philippines' claims under the CVA in this dispute. Accordingly, to rule on this issue in the context of our analysis of whether there is a sufficiently close nexus between the Charges and the DSB's recommendations and rulings arising from the customs valuation determination previously made by Thailand would require us to make findings that would encroach on the merits, as they relate to one or more legal elements that must be established to uphold the claims at issue. Based on the foregoing, we do not consider it necessary or appropriate to rule on whether the Charges involve a "customs valuation" determination within the meaning of the CVA to determine whether there is a close nexus between the Charges and the September 2012 BoA Ruling (and the DSB's recommendations and rulings that it implements). Leaving aside for purposes of the present jurisdictional enquiry whether the Charges involve a "customs valuation" determination to which the CVA is applicable, at this juncture of our analysis we note that the Charges were issued on the grounds that PMTL's declared transaction values for the 272 entries at issue should not be accepted, and that PMTL should have paid a greater amount in *ad valorem* duties in respect of those entries than it actually paid. It is clear that the Charges and the September 2012 BoA Ruling both relate to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes. We do not proceed further to assess, at this stage of our analysis, whether the Charges and the September 2012 BoA Ruling involve "the same type of legal determination (customs valuation)".

7.531. Thailand further argues that there is no nexus in terms of agencies responsible for the implementation of the DSB's recommendations and rulings (the Thai Excise Department, the Thai Revenue Department, the Thai Customs Department and the BoA) and the actors involved in issuing the Charges (the DSI and the Public Prosecutor).[1136] Thailand stresses that the Public Prosecutor has a different mandate from the Customs Department, and emphasises that "[t]he Public Prosecutor is not entitled under Thai law to engage in any form of customs valuation for the purposes of levying customs duties."[1137]

7.532. We agree with Thailand that the involvement of different agencies is a fact that is relevant to the close nexus analysis, and it attenuates the nexus between the Charges and the September 2012 BoA Ruling. However, our review of the jurisprudence suggests that this fact has

[1134] Appellate Body Report, *Australia − Apples*, paras. 423-425; Panel Reports, *EC − Fasteners (China)*, para. 7.45; *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, paras. 6.134-6.135.

[1135] Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume II*, (Oxford University Press, 2013), p. 1632.

[1136] Thailand's rebuttal submission on the preliminary ruling request, para. 3.41.

[1137] Thailand's second written submission, para. 3.87.

not been decisive in other cases, especially where different agencies had overlapping objectives or similar mandates.

7.533. In *US - Softwood Lumber IV (Article 21.5 – Canada),* the Appellate Body noted, as part of its analysis of the subject-matter for the purpose of finding a close relationship between measures, the fact that all three measures (the original measure found to be WTO-inconsistent, the measure taken to comply and the undeclared measure) were countervailing duty proceedings conducted by the same agency.[1138] We note that, as the Philippines points out, in *Australia – Salmon* the measure in the original proceeding was based on the Australian Quarantine Proclamation issued by the Governor-General of Australia, which banned the importation of salmon to Australia[1139], whereas in the compliance proceeding, the panel found a measure issued by the Government of Tasmania, also a ban on importation of salmon, to be "clearly connected to the panel and Appellate Body reports concerned".[1140] However, we also note that, as Thailand observes[1141], those different agencies had a similar mandate – to implement quarantine measures. In *US – Zeroing (Article 21.5 – EC)* and *US – Zeroing (Article 21.5 – Japan),* the same agency adopted the original and subsequent measures. However, neither the panels nor the Appellate Body specifically emphasized that point as important to the "close nexus" analysis. More recently, the compliance panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* considered the relevance of differences in the governmental agencies involved, and concluded that:

> In any case, the differences in the structure of the various measures do not detract from the closeness of the links that they share in other respects. Nor do we consider fatal to the existence of sufficiently close links between the measures the differences in the governmental agencies funding the respective measures. While FAA and NASA are different government agencies, they share overlapping objectives with respect to civil aviation. These commonalities are expressly recognized with respect to environmental and energy efficiency goals. In any case, we note that a close nexus has been found in instances where the respective measures have involved different levels of government, so we see no reason why the fact that FAA funds the Boeing CLEEN Agreement and NASA funds the NASA aeronautics R&D measures should be fatal to the existence of a sufficiently close link in terms of nature between those two sets of measures.[1142]

7.534. We consider that it suffices, for the limited purpose of the jurisdictional question with which we are confronted at this juncture of our analysis, to note that the BoA and the Public Prosecutor have potentially overlapping functions in the area of customs valuation. Leaving aside for purposes of the present jurisdictional enquiry whether the Charges involve a "customs valuation" determination to which the CVA is applicable, we note that the Public Prosecutor determined that PMTL's declared transaction values for the 272 entries at issue should be rejected, and determined PMTL should have paid a greater amount in *ad valorem* duties in respect of those entries. To that extent, the Charges and the September 2012 BoA Ruling both relate to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes. And to that extent at least, the Public Prosecutor and the BoA have potentially overlapping functions in the area of customs valuation.

7.535. Turning to Thailand's assertion that the Philippines is incorrect in stating that the Charges and the Thai customs valuation determination at issue in the original proceeding (which was subsequently reversed in the September 2012 BoA Ruling) had "[t]he *same grounds for doubting the declared customs values* (a comparison with King Power's duty-free prices)"[1143], Thailand asserts that "although the comparison with the prices of King Power may have played a role in the suspicion of customs fraud against PM Thailand, it is not the sole ground for doubting the accuracy of the customs value declared by PM Thailand".[1144] Indeed, Thailand states, the "DSI identified in the 2009 Memorandum of Allegation several other grounds for doubting the declared customs value", and "[t]herefore, the grounds for doubting the declared customs value are not the same".[1145]

[1138] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 83.
[1139] Panel Report, *Australia – Salmon,* para. 2.14.
[1140] Panel Report, *Australia – Salmon (Article 21.5 – Canada),* para. 7.10, subparas. 16 and 22.
[1141] Thailand's second written submission, paras. 3.53-3.54.
[1142] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.287.
[1143] Philippines' second written submission, para. 482. (emphasis original)
[1144] Thailand's second written submission, para. 3.51.
[1145] Thailand's second written submission, para. 3.51.

7.536. We note that Thailand does not contest that a comparison with King Power prices was one of the grounds for *doubting* PMTL's transaction values in the original Thai customs valuation determination that was subsequently reversed in the September 2012 BoA Ruling, or that it is one of the grounds for the Charges.[1146] Rather, Thailand stresses that a comparison between PMTL's import prices and those of King Power was not the *sole* ground underlying either determination. However, we note that the Philippines has not suggested otherwise, and we do not see the relevance of this fact to the assessment of whether or not there is a "sufficiently close nexus" between these various measures. Indeed, there does not need to be perfect and exact identity between all of the grounds underlying the two measures in order for there to be a "close nexus".

7.537. Thailand also argues, regarding the absence of any overlap between the entries subject to the Charges and the September 2012 BoA Ruling, that "[t]he Charges have no connection with the DSB recommendations and rulings given that their subject matter is different."[1147] In response to a question from the Panel, Thailand clarified that its position is that the lack of overlap is not "decisive" as to the existence of a close nexus, and is "only one of the several factors presented by Thailand demonstrating the lack of close nexus".[1148] Thailand emphasizes that the 272 customs entries covered by the Charges are entirely different from the 118 entries covered by the DSB's recommendations and rulings under the CVA.[1149] Thailand emphasizes that the two "sets of entries refer to different import transactions that were registered under different entry numbers."[1150] Thailand recalls the finding of the original panel that the Philippines has failed to demonstrate that Thailand maintains or applies a general rule requiring the rejection of the transaction value and the use of the deductive valuation method.[1151]

7.538. The Philippines disagrees with Thailand that "the lack of overlap in entries is *decisive* for purposes of determining whether there is a substantive connection"[1152], and argues that "[t]aken to its logical conclusion, Thailand could continue to engage in the same WTO-inconsistency with respect to every new entry" and "the Philippines would be required to bring new disputes regarding each new entry".[1153] The Philippines considers that findings of close nexus in *US - Zeroing (Article 21.5 – EC)* and *US – Zeroing (Article 21.5 – Japan)* show that it is not necessary that the measure taken to comply and the undeclared measure concern identical entries. In those disputes, administrative reviews were considered to be measures taken to comply, even though they concerned different

[1146] Based on the explanations reflected in the original panel report, we understand that a comparison with King Power's duty free prices did not provide the *final* basis for Thai Customs' decision to reject the transaction values in respect of the 118 entries in the original proceeding. The original panel report notes the following explanation from Thailand at the time: "Thai Customs did not rely on a comparison between PM Thailand's c.i.f. prices and the c.i.f. prices for duty-free imports as a ground for rejecting the transaction value. The c.i.f. prices for duty-free imports constituted the reason why Thai Customs had *doubts* about the acceptability of the price, but were not the ultimate grounds for not using the transaction value as the customs value." (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 4.50) In the original proceeding, Thailand explained that "the *grounds* for Thai Customs not using the transaction value as the customs value were that PM Thailand *failed to establish* that the relationship did not influence the transfer price." (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.177 (emphasis original)) Thus, it appears that in connection with the original customs valuation measure found to be inconsistent, Thai Customs did undertake a comparison of PMTL's price with the price of the duty-free operator King Power, and it was the result of that comparison that was "the reason" why Thai Customs "had doubts" about the acceptability of the price; but it was then PMTL's *failure to establish* that the relationship did not influence the price that was the ultimate "*ground*" for rejecting the declared transaction value. Thai Customs thus shifted the burden onto PMTL to establish that the relationship did not influence the price. The Panel found that Thai Customs failed to examine the circumstances of the sale with respect to the entries at issue, within the meaning of Article 1.2(a), in large part because it failed to explain why the information provided by PMTL was insufficient. Consequently, Thailand acted inconsistently with Articles 1.1 and 1.2(a) in rejecting the transaction value of the concerned entries. In sum, strictly speaking this comparison with King Power was used by Thai Customs only as the basis for *doubting* the declared transaction, and Thai Customs ultimately rejected PMTL's transaction values based on PMTL's failure to overcome those doubts. In the light of the foregoing, there may not be perfect identity in this regard, but there is evidently a "connection" between the Charges and the previous measure insofar as the comparison between PMTL and King Power is concerned.

[1147] Thailand's rebuttal submission on the preliminary ruling request, para. 3.33.

[1148] Thailand's response to Panel question No. 42(a), p. 39.

[1149] Thailand's rebuttal submission on the preliminary ruling request, para. 3.33.

[1150] Thailand's rebuttal submission on the preliminary ruling request, para. 3.33.

[1151] Thailand's rebuttal submission on the preliminary ruling request, para. 3.35 (referring to Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.133).

[1152] Philippines' second written submission, para. 497. (emphasis original)

[1153] Philippines' rebuttal submission on the preliminary ruling request, para. 52.

entries than those covered by the original investigations or administrative reviews that were subject to the DSB's recommendations and rulings.

7.539. We observe that Thailand has not identified any case in which a measure was found not to have a "sufficiently close nexus" with a declared measure taken to comply on the grounds that the measures concerned different shipments. Instead, Thailand has sought to demonstrate that the trade remedy cases referred to by the Philippines, in which a "close nexus" *was* found between certain anti-dumping measures notwithstanding that they covered different entries, are distinguishable from the present case. Thailand argues that they are distinguishable because in the trade remedies context, the different measures covering different entries were part of the same investigation or based on the same anti-dumping order. That may be true, but in our view it does not logically follow that one can extrapolate from these other cases the principle that measures relating to different shipments cannot be found to have a "close nexus" unless they are taken pursuant to the same underlying legal basis (e.g. an anti-dumping order).

7.540. Thailand recalls that the original panel found that the Philippines failed to prove that Thailand maintained or applied a "general rule" requiring Thai Customs to reject the transaction value and use the deductive method for valuing cigarette imports. Although we agree with Thailand's characterization of the original panel's findings, we do not consider that this demonstrates that the scope of this Article 21.5 compliance proceeding can only cover the same set of entries that were at issue in the original proceeding. A similar issue was addressed by the panel in the compliance proceeding in *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, and we consider that panel's analysis to be instructive. In that dispute, the original panel found that the complainant failed to demonstrate the existence of an unwritten LCA assistance/financing program (and, on appeal, the Appellate Body further found that no such program was identified in the panel request, and that it therefore fell outside of the panel's terms of reference). In the course of the subsequent Article 21.5 compliance proceeding in that dispute, the panel considered whether the implication was that the scope of the "measures taken to comply" were confined to the same aircraft models at issue in the original proceeding − or instead, whether measures related to the A350XWB, an aircraft model that was not covered by the original panel's findings, could also fall within the scope of the compliance proceeding by virtue of the "close nexus" test.[1154] The panel concluded that the existence of an "overarching measure" (for instance, an unwritten assistance/financing program linking together different measures relating to different models of large civil aircraft) may be one fact that could be used, but was not a requirement, to support the existence of a "close nexus" in these circumstances.[1155] The panel ultimately found that the challenged A350XWB measures had the same nature as the measures found to cause adverse effects in the original proceeding because of four commonalities: (i) they were all loan agreements; (ii) they all contained the same four "core" repayment terms; (iii) they were all entered into by essentially the same parties; and (iv) they were all entered into for the purpose of financing the development costs of Airbus large civil aircraft.[1156] Based on the foregoing, we do not see that a "general rule" or other "overarching measure" by relevant Thai agencies is a necessary precondition for finding a close nexus between measures covering different entries of cigarettes imported by PMTL into Thailand.

7.541. Continuing with our consideration of the significance of the fact that there is no overlap between the entries covered by the Charges and those covered by the September 2012 BoA Ruling, we agree with the compliance panel in *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EU)* that "[i]t is difficult to say in the abstract which aspects of a measure may be relevant to demonstrating a sufficiently close link in terms of 'nature' to the measures subject to the DSB recommendations and rulings", because "[t]he relevance or otherwise of certain aspects of the measures depends very much on the circumstances of the case".[1157] In that dispute, the panel found

[1154] Panel Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, paras. 6.80 and 6.84.

[1155] Panel Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 6.108.

[1156] Panel Report, *EC and certain member States − Large Civil Aircraft (Article 21.5 − US)*, para. 6.130.

[1157] Panel Report, *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EU)*, paras. 7.322-7.323. The panel observed, by way of example, that in a dispute involving a quarantine measure found to be WTO-inconsistent, the fact that an "undeclared" measure "is also a quarantine measure covering the same products (or subset of products), or otherwise operating in the same manner as the quarantine measure the subject of the DSB recommendations and rulings, will clearly be an important and relevant element of a panel's assessment of the closeness of the links, in terms of nature, between the "undeclared" measure and the original measure". However, the panel observed that "[o]n the other hand, it is not obvious that, in a dispute involving subsidies to a particular recipient in respect of a number of that recipient's products, the "type" of subsidy should be determinative in demonstrating whether any "undeclared" measures are within the scope of

that there was a sufficiently "close nexus" between measures adopted in different US states, notwithstanding certain differences such as the absence of any geographical overlap. The panel considered that the "key commonality in terms of nature" between the different sets of measures was "that they are packages of incentives which, despite the differences in the individual measures comprising each package, have been granted by a state of the United States conditional upon the location in that state of manufacturing facilities related to the same Boeing product, namely the 787", and that "the relevance to the close nexus analysis of any overlapping geographical scope of the measures depends very much on the context."[1158]

7.542. We find that panel's analysis instructive insofar as it illustrates how the relevance of a given similarity or difference between two measures to the "close nexus" analysis may depend on the circumstances of the case. In this case, Thailand has not explained why it is significant, in the circumstances of the issues raised in this dispute, that the Charges relate to a different set of entries from those covered by the September 2012 BoA Ruling. From the point of view of WTO jurisprudence relating to "close nexus" issues, there is no inherent relevance or significance that necessarily attaches to the fact that the Charges and the September 2012 BoA Ruling concern different shipments. We can certainly appreciate that, in some cases, the fact that different customs valuation decisions relate to different entries might be highly significant. Indeed, we note that customs valuation decisions can be said to be "transaction-specific", in the sense that they determine the customs value for particular entries, at a particular point in time.[1159] In the circumstances of this case, however, the different entries all involved the same product, the same brands and producer (*Marlboro* and *L&M* cigarettes produced by PMPMI), and, critically, the same transaction values, imported under the same supply contract.

7.543. Finally, it appears to us that consideration of the entries covered by the Charges and those covered by the September 2012 BoA Ruling seems to reinforce, rather than sever, the "nexus" arising from the connections identified by the Philippines. This is because the 272 entries covered by the Charges cover a continuous sequence of entries over the three-year period (running from July 2003 to June 2006) immediately preceding the 118 entries (running from June 2006 through to September 2007) that were the subject of the DSB's recommendations and rulings in the original proceeding, and that were the subject of the September 2012 BoA Ruling that implements it. Taken together, the entries covered by the Charges and the September 2012 BoA Ruling therefore comprise a continuous sequence of all entries over the period July 2003 to September 2007. Thus, there is actually a perfect chronological "connection" and "link" between the "group or series" of entries covered by the Charges, and the "group or series" of entries covered by the September 2012 BoA Ruling. While there is no nexus in terms of any overlap between the entries at issue, we recall that a "nexus" means "a connection, bond or link", or "a connected group or series; a network".[1160] In our view, the fact that the entries covered by the Charges and the September 2012 BoA Ruling comprise a continuous sequence of all entries over the period July 2003 to September 2007 establishes a nexus in terms of the timing, the nature and the effects of the measures.

7.544. In conclusion, the foregoing considerations relating to the *nature* of the Charges establish a nexus between the Charges, the September 2012 BoA Ruling and the DSB's recommendations and rulings it implements.

7.3.3.3.2.4 Effects

7.545. Thailand argues that the Charges could not have had any impact on the customs valuation of the specific entries at issue in the initial proceeding, because the BoA Ruling implemented the original panel's findings with regard to those entries, and the Charges concern a different set of entries. Thailand argues that, similarly, the Charges produce no effects on the DSB's

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the compliance proceeding", because the panel considered "the fact that the 'undeclared' measure is a similar type of subsidy (e.g. a tax concession) may not be especially informative".

[1158] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, paras. 7.342 and fn 588. The panel stated, "f]or example, when the measures involve import bans, their respective geographical scope of application may be highly relevant to an assessment of whether they are sufficiently closely connected. However, where the measures under consideration are location incentive packages offered by different states in competition with one another, it is much less relevant to whether they are sufficiently closely connected that they apply in different geographical areas."

[1159] United States' third party statement, paras. 9, 10 and 15.

[1160] Shorter Oxford English Dictionary.

recommendations and rulings because any possible penalty would not consist of the levying of *ad valorem* customs duties, which was the subject of the DSB's recommendations and rulings.

7.546. We note that, in some cases, panels and the Appellate Body have examined *effects* relatively narrowly, focusing on the extent to which the measure in question legally replaced or superseded the declared measure taken to comply.[1161] For example, the Appellate Body in *US – Zeroing (Article 21.5 – EC)* found that, when a measure has legal effects that supersede those of the measure found to be WTO-inconsistent in the original proceeding, but those effects continue to reflect the same WTO-inconsistent conduct, this would provide a sufficient link in terms of effect.[1162]

7.547. However, some panels have taken a broader view of what may be considered in relation to the examination of *effects*, presumably relying on a broader notion of what is meant by "undermining compliance". For example, the compliance panel in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* found a sufficiently close connection in terms of effects of certain measures taken by the State of South Carolina, on the one hand, and, on the other hand, the effects of certain Washington State tax measures at issue in the original proceeding. The former had no legal effect (in terms of replacing, superseding or otherwise) on the latter, but the panel found a sufficiently close connection in terms of effects because both sets of measures "in very general terms induce Boeing to locate manufacturing operations in a particular place by offering tax and other concessions that represent the functional equivalent of additional cash to Boeing."[1163] In light of the foregoing, we do not agree with the view that the jurisprudence narrows or equates an examination of effects to "legal consequences" in relation to other measures[1164], nor do we agree with Thailand's arguments regarding effects insofar as its arguments proceed from that premise. While that is certainly one type of "effect" that would be relevant to the examination, it does not exhaust what may be captured by an examination of effects.

7.548. Indeed, this is already apparent from the Appellate Body's broader formulation, cast in general terms, that an examination into effects takes into account whether the measure in question could "undermine compliance"[1165], and that this examination is informed by concerns of possible "circumvention", such as a Member complying through a declared measure, "while, at the same time, negating compliance through another".[1166] Insofar as the examination of effects is concerned with "circumvention", it would be antithetical to then narrowly confine that examination to consideration of "legal effects" on other measures.

7.549. We recall that, in this case, the Thai Customs Department initially rejected PMTL's declared transaction values for 118 entries over the period 2006-2007, and instead determined alternative customs values that required PMTL to pay a greater amount in *ad valorem* duties. After this alternative customs valuation was found to be WTO-inconsistent in the original proceeding, the BoA, in its September 2012 Ruling, accepted PMTL's declared transaction values for those transactions. Following the September 2012 BoA Ruling, Thailand, through the Public Prosecutor, filed criminal charges against PMTL. Leaving aside for purposes of the present jurisdictional enquiry whether the Charges involve a "customs valuation" determination to which the CVA is applicable, as already noted, the Charges were issued on the grounds that PMTL's declared transaction values for the 272 entries over the three-year period immediately preceding those 118 entries should have been rejected, and that PMTL should have paid a greater amount in *ad valorem* duties. The resulting criminal fine that is being sought, which under Section 27 is four times the duty-paid value, is far greater than the amount of money at issue in respect of the initial customs valuation of the 118 entries. We note that the two measures in question, i.e. the Charges and the September 2012 BoA Ruling, are both PMTL-specific determinations. Furthermore, and again leaving aside whether the Charges involve a "customs valuation" determination, both relate to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes. From that perspective, it appears overly formalistic to us to confine the analysis of the *effects* of the Charges solely to the perspective of assessing their "legal effect" (or lack thereof) on the 118 entries at issue in the September 2012 BoA Ruling. For the reasons set forth above, we agree with the Philippines that the Charges appear to aggravate the WTO-inconsistencies that Thailand has been instructed by

[1161] Japan's third-party submission, paras. 8-10.
[1162] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 231-232.
[1163] Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para 7.343.
[1164] Japan's third-party written submission, paras. 8-10.
[1165] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 256.
[1166] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71. This statement has been repeated by panels and the Appellate Body in several subsequent cases. (See, e.g. Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC),* para. 250)

the DSB to resolve, and in this way potentially undermine compliance and circumvent the DSB's recommendations and rulings because they perpetuate the problem addressed in those recommendations and rulings.

7.550. Based on the foregoing, we consider that the Charges have the potential to circumvent the compliance with the CVA achieved through the September 2012 BoA Ruling, and the fact that they have no legal effect on the BoA Ruling or the entries subject to that ruling does not mean that the Charges have no effects on compliance for purposes of the close nexus analysis.

7.3.3.3.2.5 Overall assessment

7.551. We have concluded that several considerations relating to the *timing* of the Charges establish a nexus in terms of timing between the September 2012 BoA Ruling and the DSB's recommendations and rulings it implements, and the events culminating in the Charges.

7.552. We have further found that the *nature* of the Charges establishes a nexus between the Charges and the September 2012 BoA Ruling and the DSB's recommendations and rulings that it seeks to implement, in that the relevant measures involve the same importer (PMTL), the same exporter (PMPMI), the same importing country (Thailand), the same exporting country (the Philippines), the same product, brands and producer (*Marlboro* and *L&M* cigarettes produced by PMPMI), and the same transaction values, imported under the same supply contract.

7.553. Leaving aside for purposes of the present jurisdictional enquiry whether the Charges involve a "customs valuation" determination to which the CVA is applicable, at this juncture of our analysis we note that the Charges were issued on the grounds that PMTL's declared transaction values for the 272 entries at issue should be rejected, and that PMTL should have paid a greater amount in *ad valorem* duties in respect of those entries, and to that extent the Charges and the September 2012 BoA Ruling both relate to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes. We have found that the nexus that exists between the Charges and the September 2012 BoA Ruling is more attenuated than it would otherwise be if both measures were taken by the same Thai government agencies. We have also found that the Public Prosecutor and the BoA have potentially overlapping functions in the area of customs valuation, at least to the extent that, in discharging their respective mandates, both agencies have made assessments as to whether PMTL's declared transaction values should be accepted or not, with corresponding assessments as to the amount in *ad valorem* duties that PMTL should have paid to the Thai government. We have further found that the Charges, like the original recommendations and rulings of the DSB implemented by the BoA in its September 2012 Ruling, both entailed reference to, and comparison of some kind with, the duty free prices of King Power.

7.554. We have also concluded that, although there is no overlap between the entries covered by the Charges and the September BoA Ruling, this does not sever the nexus; and that because the two sets of entries comprise a continuous sequence of all entries over the period July 2003 to September 2007, this establishes an additional nexus in the sense of establishing "a connected group or series" − in chronological terms − that spans the period July 2003 to September 2007.

7.555. Finally, we consider that the Charges have the potential to circumvent compliance with the CVA achieved through the September 2012 BoA Ruling, and we consider the fact that they have no legal effect on the BoA Ruling or the entries subject to that ruling does not mean that the Charges have no effects on compliance for purposes of the close nexus analysis.

7.3.3.4 Conclusion

7.556. On the basis of the foregoing considerations, taken together, the Panel concludes that the Charges fall within the scope of this compliance proceeding as a measure "taken to comply" because they have a sufficiently close nexus with the matters covered by the DSB's recommendations and rulings and the BoA's Ruling of 12 September 2012, which is a declared measure taken to comply.

7.3.4 Ripeness

7.3.4.1 Introduction

7.557. On 18 January 2016, an investigation by the DSI, a unit within the Ministry of Justice, culminated in the Thai Public Prosecutor filing criminal charges against PMTL and seven of its current and former employees.[1167] The competent Thai Criminal Court accepted and issued the Charges on the same day.[1168] The proceedings before the Criminal Court were ongoing at the time the Philippines made its request for the establishment of a panel, and are still ongoing as of the time of the issuance of the Report to the parties.[1169]

7.558. Thailand submits that a "doctrine of ripeness" applies in WTO dispute settlement, and that the Charges are not a matter "ripe" for adjudication in WTO dispute settlement proceedings.[1170] Thailand considers that the Panel is not competent to address claims relating to the Charges because they constitute "merely an allegation of criminal conduct, not a judgment by the Criminal Court".[1171] Given the nature of the Charges as constituting a mere "allegation" or "accusation", Thailand suggests that they are inseparable from the criminal proceedings that they triggered[1172], and submits that they do not represent a customs valuation "determination" for the purposes of the CVA[1173], and that the Philippines' claims directed at the Charges are effectively seeking "an abstract ruling on hypothetical future measures"[1174], namely on the outcome of the ongoing criminal court proceedings.

7.559. The Philippines requests that the Panel dismiss Thailand's "ripeness" arguments, arguing that the Charges are a "measure" subject to WTO dispute settlement.[1175] In its view, "the alleged 'ripeness' doctrine is an invention of Thailand that has no foundation in the covered agreements", and the only relevant legal issue is whether the Charges are a "measure" that can be challenged in WTO dispute settlement.[1176] The Philippines emphasizes the finality of the Public Prosecutor's decision, asserting that the Charges are "a defined and formal act, taken by an organ of the Thai state, on a date certain in the past, and that they have very real legal consequences for the accused".[1177] Based on the nature of the Public Prosecutor's decision, the Philippines also considers that the Charges constitute a "determination" covered by the CVA.[1178] The Philippines emphasizes that the "measure" challenged by the Philippines is the Charges, whereas "throughout its arguments on this issue, Thailand argues as if the Philippines were challenging 'the outcome of' the criminal court proceedings".[1179]

7.3.4.2 Main arguments of the parties

7.560. Thailand submits that "the doctrine of ripeness" is reflected in US law, Swiss law, and in the context of the International Court of Justice, and has been recognized in various contexts of WTO law and used by the Appellate Body and previous panels to resolve questions about the justiciability of matters before them.[1180] Thailand provides various examples to show that the doctrine of ripeness

[1167] Philippines' first written submission, paras. 465-466; the Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation), (Exhibit PHL-1-B).
[1168] The Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation), (Exhibit PHL-1-B).
[1169] According to Thailand, the decision of the Criminal Court is not expected before June 2018. (See Philippines' first written submission, para. 524; Thailand's first written submission, paras. 6.8-6.10)
[1170] Thailand's first written submission, paras. 6.48-6.82; second written submission, paras. 3.128-3.173; response to Panel question Nos. 38-39; opening statement at the meeting of the Panel, paras. 26-30; responses/comments to Panel question Nos. 100-102.
[1171] Thailand's second written submission, para. 5.2(c); first written submission, para. 6.7.
[1172] Thailand's second written submission, paras. 3.167-3.169; response to Panel question No. 39.
[1173] Thailand's response to Panel question No. 38; opening statement at the meeting of the Panel, para. 29.
[1174] Thailand's first written submission, para. 6.81.
[1175] Philippines' second written submission, paras. 448-449; response to Panel question No. 39; opening statement at the meeting of the Panel, paras. 64-72; responses/comments to Panel question Nos. 100-102.
[1176] Philippines' second written submission, para. 424.
[1177] Philippines' second written submission, para. 447.
[1178] Philippines' response to Panel question No. 38; comments on Thailand's response to Panel question Nos. 100(b) and 101.
[1179] Philippines' second written submission, para. 449.
[1180] Thailand's first written submission, paras. 6.50-6.71.

is reflected in various forms and contexts in WTO law, including: the general distinction between mandatory/discretionary measures[1181]; the approach taken by panels and the Appellate Body in several other cases that involved domestic court proceedings[1182]; implications drawn from various provisions of the DSU, including Articles 3.4, 3.7, 11, and 19.1[1183]; and Article 17.4 of the Anti-Dumping Agreement, which establishes that decisions to initiate anti-dumping investigations may not be challenged as such in WTO dispute settlement proceedings.[1184] Thailand submits that whether a challenged action is a "measure"[1185] that forms part of a panel's terms of reference is a separate issue from whether that measure is "ripe" for adjudication.[1186]

7.561. Thailand stresses that the Charges constitute merely an "allegation" of criminal conduct, not a finding of guilt or a judgment by the Criminal Court. Thailand submits that because the Charges are still pending before the Thai Criminal Court, which 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".[1187] Thailand reiterates that the Charges "marked only the beginning of the Criminal Court proceedings"[1188], whereby the Public Prosecutor "requests the competent Criminal Court to conduct a trial and determine the guilt or innocence of the defendants".[1189] In Thailand's view, "[o]n its face, the allegation or accusation that someone is acting inconsistently with domestic customs laws cannot be considered a violation of WTO law".[1190] Thailand adds that, "while the Charges contain a description of the facts surrounding the alleged offences, the Charges do not contain or refer to all of the evidence supporting the Public Prosecutor's allegations".[1191] Thailand explains that the court proceedings are "far from being completed", and that the court will conduct hearings "until at least April 2018".[1192]

7.562. Although Thailand states that it accepts that the Charges may be a "measure"[1193] that forms part of the Panel's terms of reference[1194], Thailand submits that the Charges are inseparable from the rest of the proceedings, including the outcome of the criminal proceedings[1195], in the sense that they "cannot be examined in isolation"[1196], and "cannot be segregated from the rest of the criminal proceedings".[1197] Thailand submits that, because the Charges are a mere accusation, they do not represent a customs valuation "determination" for the purposes of the CVA.[1198] Finally, building again on the premise that the Charges constitute merely an "allegation" and that the Court has yet to hear and evaluate the arguments and evidence, Thailand argues that the Philippines' claims directed at the Charges are effectively seeking "an abstract ruling on hypothetical future measures"[1199], namely on the outcome of the ongoing criminal court proceedings. In Thailand's view, this would "represent an unprecedented attempt to get a WTO panel to interfere in pending domestic criminal proceedings".[1200] In its view, "[t]here is no precedent whatsoever in WTO jurisprudence for such an *ex ante* ruling", and "no precedent for a WTO panel to put itself in the place of a domestic

[1181] Thailand's first written submission, paras. 6.55-6.66 (referring to William J. Davey, "Has the WTO Dispute Settlement System Exceeded Its Authority? : A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques", in *Journal of International Economic Law* No. 4 Vol. 1 (2001), (Exhibit THA-24), pp. 101-103).
[1182] Thailand's first written submission, paras. 6.57-6.60 and 6.68 (referring to Appellate Body Report, *US − Shrimp (Article 21.5 − Malaysia)*, para. 95).
[1183] Thailand's first written submission, paras. 6.61-6.67.
[1184] Thailand's first written submission, para. 6.69.
[1185] Thailand's second written submission, para. 3.131.
[1186] Thailand's first written submission, para. 6.1.
[1187] Thailand's first written submission, para. 6.48.
[1188] Thailand's first written submission, para. 6.73.
[1189] Thailand's first written submission, para. 6.74.
[1190] Thailand's first written submission, para. 6.74.
[1191] Thailand's first written submission, para. 6.75.
[1192] Thailand's first written submission, para. 6.76.
[1193] Thailand's second written submission, para. 3.131.
[1194] Thailand's first written submission, para. 6.1.
[1195] Thailand's second written submission, paras. 3.167-3.169; Thailand's response to Panel question No. 39.
[1196] Thailand's second written submission, para. 3.168.
[1197] Thailand's second written submission, para. 3.168.
[1198] Thailand's response to Panel question No. 38; Thailand's opening statement at the meeting of the Panel, para. 29.
[1199] Thailand's first written submission, para. 6.81.
[1200] Thailand's first written submission, para. 6.48.

tribunal and make a determination that is within the jurisdiction of that tribunal before the tribunal itself has a chance to make its ruling".[1201]

7.563. The Philippines submits that the "the alleged 'ripeness' doctrine is an invention of Thailand that has no foundation in the covered agreements"[1202], and the relevant legal standard is whether the Charges are a "measure". The Philippines recalls the Appellate Body's finding that a panel is "not in a position to choose freely whether or not to exercise its jurisdiction".[1203] The Philippines recalls that the Appellate Body has taken a broad view of the term "measure", stating that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[1204] The Philippines submits that an "act" is simply "[s]omething done"[1205], and that the Appellate Body has further explained that "[t]he acts or omissions that are so attributable are ... the acts or omissions of the organs of the state".[1206] The Philippines submits that, under this definition, a "measure" may be any administrative, legislative, and judicial act taken by any state organs, including an act taken by a Member's law enforcement authorities or courts.[1207]

7.564. The Philippines submits that Thailand's characterization of the Charges as merely an "accusation" or "allegation" seems designed to convey that they are "casual, informal, and of no consequence".[1208] The Philippines emphasizes the finality of the Public Prosecutor's decision, asserting that the Charges are "a defined and formal act, taken by an organ of the Thai state, on a date certain in the past, and they have very real legal consequences for the accused".[1209] The Philippines also notes that Thailand itself acknowledges that the Charges are the "culmination" of a decade-long investigation conducted by the DSI and the Public Prosecutor into PMTL's transaction values", and that by Thailand's own admission, therefore, the Charges constitute "the final act ending that investigation".[1210] In the Philippines' view, the "finality" of the decision is confirmed by the fact that the Charges have real legal consequences for the accused.[1211] The Philippines submits that, "under the *CVA*, the fact that the Customs Department previously made customs valuation decisions, and that the criminal court will also do so, in respect of the entries at issue does not detract from the finality of the Thai Public Prosecutor's customs valuation decision as set out in the Charges".[1212]

7.565. The Philippines emphasizes that the "measure" challenged by the Philippines is the Charges, whereas "throughout its arguments on this issue, Thailand argues as if the Philippines were challenging 'the outcome of' the criminal court proceedings".[1213] The Philippines agrees that "panels cannot speculate about future events", but that there is no need to do so in order to rule upon the WTO-consistency of the Charges.[1214] Accordingly, the Philippines considers that Thailand's arguments as to the impermissibility of ruling on the outcome of ongoing court proceedings is "beside the point".[1215] The Philippines reiterates that it "has not challenged any ruling of a Thai court".[1216] Given the nature of the Charges, including their finality and legal consequences, the Philippines considers that the Charges are a "determination" for purposes of the CVA.[1217]

[1201] Thailand's opening statement at the meeting of the Panel, paras. 27-28.
[1202] Philippines' second written submission, para. 424.
[1203] Philippines' second written submission, para. 410 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53).
[1204] Philippines' second written submission, para. 413 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).
[1205] Philippines' second written submission, para. 413 (referring to *Oxford English Dictionary*, OED Online).
[1206] Philippines' second written submission, para. 413 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review* para. 81).
[1207] Philippines' second written submission, para. 413.
[1208] Philippines' opening statement at the meeting of the Panel, para. 66.
[1209] Philippines' second written submission, para. 447.
[1210] Philippines' second written submission, para. 438.
[1211] Philippines' response to Panel question No. 38(b), para. 330.
[1212] Philippines' response to Panel question No. 38(b), para. 332.
[1213] Philippines' second written submission, para. 449.
[1214] Philippines' second written submission, para. 423.
[1215] Philippines' second written submission, para. 451.
[1216] Philippines' second written submission, para. 451.
[1217] Philippines' response to Panel question No. 38(b). In response to a question from the Panel, the Philippines states that the events between the DSI's initiation of its investigation in August 2006 and the Public Prosecutor's filing of the Charges on 18 January 2016 involved a series of information-gathering steps, a memorandum of allegation, and recommendations, and submits that the point in time at which there was a

7.3.4.3 Analysis by the Panel

7.3.4.3.1 General considerations

7.566. Thailand essentially argues that it would be premature for this Panel to make a finding on the WTO-consistency of the Charges, because they constitute "merely an allegation of criminal conduct, not a judgment by the Criminal Court".[1218] Thailand premises its arguments on the basis of what it terms "the doctrine of ripeness"[1219], and proceeds to define the issue before the Panel in terms of whether or not the Charges are "ripe" for adjudication.

7.567. Before turning to these issues, we note that none of the questions as formulated above presuppose that the doctrine of the "exhaustion of local remedies" is applicable in WTO dispute settlement proceedings. To the contrary, it is well established that the doctrine of the exhaustion of local remedies and the rationale behind it are not applicable in the context of WTO dispute settlement proceedings. This is evidenced by the fact that, in hundreds of GATT/WTO dispute settlement proceedings spanning many decades, there appears to be no instance in which a disputing party, a panel, or the Appellate Body has attached any significance to whether the complainants had initiated, pursued or exhausted domestic appeal mechanisms.[1220] In this dispute, both parties agree that exhaustion of local remedies is not applicable in the context of WTO dispute settlement proceedings[1221], and none of the third parties has expressed a different view on this issue.[1222]

7.568. We also note that Thailand has not sought to argue that the mandatory/discretionary distinction is relevant to the analysis of whether the Charges are "ripe" such that they may be subject to WTO dispute settlement proceedings. In the context of providing various examples of WTO law recognizing a "doctrine of ripeness", Thailand explains that the mandatory/discretionary distinction is one such instance.[1223] However, Thailand makes clear that the "present situation does not raise the issue of the distinction between a mandatory and discretionary measure".[1224]

7.569. We note at the outset that the concept of "ripeness" does not appear explicitly in the covered agreements. Furthermore, the "doctrine of ripeness" is not an expression that has any defined meaning in the context of general international law or international dispute settlement.[1225] We are unaware of any panel or Appellate Body report that has conducted an analysis of the admissibility or merits of a claim in terms of a "ripeness" doctrine.

7.570. However, we do consider that the findings of the Appellate Body in the original proceeding are instructive. In the original proceeding, the panel found that "guarantee decisions", which are taken prior to final duty assessment, fall within the scope of "administrative action relating to customs matters" within the meaning of Article X:3(b) of the GATT 1994, and are therefore subject to the right of appeal contained therein. Thailand appealed this finding, arguing that the scope of Article X:3(b) does not extend to "provisional" measures such as customs guarantee decisions, which

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customs valuation "determination" was when the Public Prosecutor issued the Charges on 18 January 2016. (Philippines' response to Panel question No. 38(c))

[1218] Thailand's second written submission, para. 5.2(c); Thailand's first written submission, para. 6.7.

[1219] Thailand's first written submission, paras. 6.50, 6.55, 6.57, 6.61, 6.62, 6.65, 6.69, 6.70, and 6.71.

[1220] See Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International, 1997), pp. 241–244. See also Appellate Body Report, *Thailand – H-Beams*, para. 94; Panel Report, *Argentina – Textiles and Apparel*, para. 6.68.

[1221] Philippines' second submission, para. 453; Thailand's second written submission, para. 3.169.

[1222] Canada, the European Union, Japan, and the United States' third-party responses to Panel question No. 3.

[1223] At paragraph 6.55 of its first written submission, Thailand states that "under this doctrine, a complaining Member may challenge as such a measure that is mandatory in the sense that its application will necessarily result in certain clearly definable consequences. Members may not, however, challenge as such a measure that is discretionary in the sense that its application in different cases might have different consequences. In the latter case, a reviewing panel could not adjudicate the WTO consistency of the measure because it does not know whether it would be applied in a WTO-consistent or WTO-inconsistent manner. It would be premature for the reviewing panel [to] attempt to categorize the consequences of the measure."

[1224] Thailand's first written submission, para. 6.56.

[1225] In support of its contention that there is a "doctrine of ripeness", Thailand refers to the International Court of Justice's case law relating to the requirement for an "actual controversy" in connection with "concrete cases". Thailand suggests that this means, "in effect", that the ICJ will only entertain cases that are "ripe". (Thailand's first written submission, paras. 6.53-6.54)

in its view were merely a "component" of the final determination of customs duties, and should not be regarded as "distinct decisions" for the purpose of Article X:3(b).[1226] Thailand argued that acceptance of the panel's view would "result in unduly interfering with" the customs administration's domestic decision-making process.[1227] In addition, Thailand argued that the Appellate Body should take into account "the doctrine of ripeness", as reflected in US Supreme Court jurisprudence.[1228] The Appellate Body proceeded to conduct its analysis of the issue raised by Thailand in the usual manner, on the basis of a careful analysis of the ordinary meaning of the terms of Article X:3(b) (i.e. "administrative action relating to customs matters"), in their context, and in the light of the object and purpose of the GATT 1994. The Appellate Body did not refer to the concept of "ripeness" in its analysis, let alone frame its analysis of the issues raised by Thailand in terms of a "doctrine of ripeness".

7.571. We highlight that the Appellate Body's analysis in the original proceeding concerned a different issue in the context of a different provision, and we are not suggesting that it is dispositive of the substantive issue raised by Thailand in this proceeding in relation to "ripeness". However, we consider that it is instructive as to how we should analyse the substance of the issue raised by Thailand. As the European Union has observed, "the doctrine of ripeness" is "a rather abstract concept … which is difficult to clearly circumscribe and delineate"[1229], and therefore "the question should be framed in a more classical manner".[1230] We agree. Rather than framing the analysis in terms of an abstract, undefined, and novel "ripeness doctrine", we will analyse Thailand's "ripeness" arguments on the basis of the more precise standards reflected in the covered agreements and WTO jurisprudence.

7.572. We consider that chief among the various considerations that weigh against proceeding with an analysis framed in terms of "ripeness" is the fact that the WTO agreements establish no one-size-fits-all legal standard with respect to what may be called "ripeness". Therefore, conducting an analysis in terms of so-called "ripeness" has the potential to obscure the more precise and individualized legal standards established in the text of the covered agreements. By way of illustration, Article 17.4 of the Anti-Dumping Agreement establishes a rule, unique to dispute settlement proceedings concerning that agreement, that decisions to initiate anti-dumping investigations may not be challenged in WTO dispute settlement until such time as a provisional or definitive measure has been imposed.[1231] In cases where particular WTO provisions establish effects-based legal standards, such as those found in Articles 5(c) and 6 of the SCM Agreement concerning subsidies that cause "serious prejudice", it is evident that, from a practical perspective, a Member may be unable to discharge its burden of proof if it brings its case immediately upon the granting of the specific subsidy in question[1232]; in contrast, it would generally be the case that no such limitations present themselves in the context of a claim brought under, for example, Article III:2 of the GATT 1994. Certain provisions in the covered agreements provide for rights of domestic appeal only in respect of "final" determinations or actions, whereas others are not so qualified.[1233] Certain

[1226] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 32-34.

[1227] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 35.

[1228] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 39 and 214. At fn 51, the Appellate Body notes that, with reference to the "doctrine of ripeness", Thailand referred to United States Supreme Court, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

[1229] European Union's third-party statement, para. 53.

[1230] European Union's third-party response to Panel question No. 3.

[1231] Article 17.4 provides that "[i]f the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ('DSB'). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB." The Appellate Body has observed that "the language of Article 17.4 of the *Anti-Dumping Agreement* is unique to that Agreement". (Appellate Body Report, *Guatemala – Cement I*, para. 79)

[1232] As Thailand points out, to prevail in a claim of serious prejudice under Article 6.3(d), it must be demonstrated that "the effect of the subsidy is an increase in the world market share of the subsidizing Member … and this increase follows a consistent trend over a period when subsidies have been granted".

[1233] The original panel stated that "the absence of the word 'final' preceding 'administrative action' in Article X:3(b) would also tend to manifest the drafters' intention to have the obligations under Article X:3(b) applied to a broad range of 'administrative action pertaining to customs matters' and that this administrative action is not necessarily confined to final administrative actions". (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1034) In contrast, we note that Article 13 of the CVA limits independent review to a "final determination of customs value", and that Article 13 of the Anti-Dumping Agreement limits independent review to "final" anti-dumping determinations.

notification and publication obligations in the covered agreements are applicable to draft laws and regulations, whereas other publication obligations apply only to measures once they have been "made effective".[1234]

7.573. In this dispute, we note that all third parties disagree with Thailand's position that the Charges are not ripe for adjudication.[1235] In fact, the Philippines and several third parties have suggested that the only relevant question is whether the Charges constitute a "measure" as defined in WTO dispute settlement proceedings.[1236]

7.574. In our view, Thailand's argumentation in connection with the "ripeness doctrine" is more complex than, and may raise issues that go beyond the question of, whether there is a "measure" within the meaning of Article 6.2 of the DSU. In addition, we consider that our resolution of this issue must take due account of the precise legal standards arising from the text of the CVA provisions at issue, which may not be possible insofar as the analysis is framed more broadly and generically in terms of what constitutes a "measure".[1237]

7.575. We understand Thailand's arguments related to "ripeness" to raise three distinct issues. First, Thailand's arguments raise the question of whether the Charges are a *distinct* measure for purposes of WTO dispute settlement. Second, Thailand's arguments raise the separate question of whether the Charges constitute a "determination" for the purposes of the CVA. Third, Thailand's arguments raise the question of whether the Panel can make findings on the WTO-consistency of the Charges without engaging in speculation as to when or how the ongoing criminal proceedings before the Criminal Court may be concluded, and without issuing abstract rulings on hypothetical future measures. In making our findings on these issues, we proceed on the understanding that the legal standard for what constitutes a "measure", or for what constitutes a "determination", or for what constitutes speculative findings on "future" measures, does not vary according to whether or not the subject matter of the case involves criminal law enforcement measures.[1238]

7.3.4.3.2 Existence of a distinct "measure"

7.576. It is well established that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[1239] As to the first

[1234] For example, Article 2.9 of the TBT Agreement establishes procedural and consultative obligations in respect of certain categories of "proposed technical regulation[s]" that "may have an effect on international trade". Similar obligations are contained in Annex B:5 of the SPS Agreement. Article 2.1 of the TFA establishes a similar obligation requiring that, to the extent practicable and subject to its domestic law, a Member must provide opportunities to comment on "the proposed introduction or amendment" of laws and regulations. On the other hand, the publication obligation in Article X:1 of the GATT 1994 is only triggered once a law, regulation, judicial decision, or administrative ruling of general application has been "made effective". This could occur either before or after it is formally adopted under a Member's domestic legal system. (See, e.g. Panel Report, *EC – IT Products*, para. 7.1048)

[1235] See the European Union's third-party submission, para. 54; the European Union's third-party statement, paras. 7-8; the European Union's response to panel question No. 3; Japan's third-party statement, paras. 13-14; Japan's response to panel question No. 3; the United States' third-party submission, paras. 17-19; the United States' response to panel question No. 3; Australia's third-party statement, para. 9. Canada is the only third party that submits that the doctrine of ripeness does apply in WTO dispute settlement, but disagrees with Thailand that the Charges are not ripe for adjudication. (See Canada's third-party submission, paras. 22-30; Canada's third-party response to Panel question No. 3)

[1236] Philippines' second written submission, para. 455; European Union's third-party statement, para. 54; Japan's third-party statement, para. 14.

[1237] In this regard, while the Philippines' arguments imply that the only relevant issue is whether the Charges are "measure", it also appears to argue that any such measure must also qualify as "actions of another Member" and that it may be relevant to assess whether or not that measure constitutes a "determination" for the purposes of the CVA. In its response to Panel question number 3 to the third parties, the European Union submits that only relevant question is whether there is a "measure", but then submits that "the exact contours" of what can constitute a "measure at issue" will be "delineated by the substantive WTO law provisions at stake", and that "in the present case the notion of customs valuation 'determination' contributes to this delineation". The United States appears to hold a similar view, suggesting that "the 'unripe' nature of a measure might inform the examination of the consistency of the measure at issue with the obligations asserted – for example, by indicating that the precise content of the measure at the time of the panel request does not (yet) reflect conduct inconsistent with the covered agreement". (United States third-party submission, para. 17)

[1238] We discuss the treatment of criminal law measures in greater detail in the context of Section 7.3.5 of our Report.

[1239] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Revie*w, para. 81.

element of this legal standard, in WTO law there are no *a priori* limitations on the kinds of "acts" or "omissions" that may qualify as a measure, and Thailand does not contest the Philippines' characterization of the Charges as a "formal legal act" by the Public Prosecutor. As the Philippines observes, the ordinary meaning of the word "act" is simply "[s]omething done".[1240] We note that in the context of interpreting the word "act" in Article 70.1 of the TRIPS Agreement, the Appellate Body viewed it "in its normal or ordinary sense of 'things done', 'deeds', 'actions' or 'operations'".[1241] As to the second element of the legal standard, it is common ground between the parties that the Public Prosecutor is an organ of the state, and that acts taken by the Public Prosecutor are attributable to Thailand.[1242]

7.577. Based on the foregoing, we consider that the Charges are a "measure" within the meaning of Article 6.2 of the DSU. We note that Thailand has not disputed that the Charges are a "measure", defined broadly under WTO law as "any act or omission attributable to a WTO Member" taken by different organs of the state.[1243] However, Thailand's arguments do raise the question of whether the Charges are a distinct measure that can be analysed separately from the subsequent criminal proceedings.

7.578. In this respect, Thailand submits that the Charges are inseparable from the rest of the proceedings, including the outcome of the criminal proceedings[1244], in the sense that they "cannot be examined in isolation"[1245], and "cannot be segregated from the rest of the criminal proceedings".[1246] In response to a question from the Panel asking Thailand to elaborate on why it would be artificial to focus on the Charges as a measure that is distinct from the outcome of the criminal court proceedings, Thailand states that it "understands that the Philippines challenged the Charges", but emphasizes that the Charges "are the mere starting point of the ongoing court proceedings that are not, at present, ripe for adjudication".[1247] In Thailand's view, "since there is still no outcome in the court proceedings, the Charges are not ripe for examination by this Panel".[1248]

7.579. We recall that in *US – Export Restraints*, the panel articulated an approach for the purpose of determining when a measure can individually give rise to a violation of WTO obligations:

> In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i.e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations.[1249]

7.580. In our view, upon being filed by the Public Prosecutor and issued by the competent Thai Criminal Court on the same day, the Charges "do" something concrete, independently of any other instruments or subsequent actions taken by the executive, administrative or judicial organs of Thailand. Specifically, the Charges have the direct legal consequences of: (i) the accused becoming subject to the mandatory jurisdiction of the criminal court; (ii) the accused being required to appear before the court to answer the Charges and attend the hearings relating to the Charges; (iii) the accused having to apply for and pay bail to secure temporary release during the proceedings; (iv) the accused having an officially recorded indictment and accusations; and (v) the accused having to pay the costs of a defence for criminal proceedings. Finally, the Charges deploy negative reputational effects to which the accused is being exposed. Accordingly, the Charges "operate" in "some concrete

[1240] Philippines' second written submission, para. 413 (referring to *Oxford English Dictionary*, OED Online).
[1241] Appellate Body Report, *Canada – Patent Term*, para. 54.
[1242] Thailand's second written submission, para. 3.131.
[1243] Thailand's second written submission, para. 3.131.
[1244] Thailand's second written submission, paras. 3.167-3.169; Thailand's response to Panel question No. 39.
[1245] Thailand's second written submission, para. 3.168.
[1246] Thailand's second written submission, para. 3.168.
[1247] Thailand's response to Panel question No. 39, p. 36.
[1248] Thailand's response to Panel question No. 39, p. 36.
[1249] Panel Report, *US – Export Restraints*, para. 8.85.

way in its own right" as "an instrument with a functional life of its own".[1250] In other words, it is an instrument that has "autonomous status".[1251]

7.581. Clearly, it could be said that the DSI investigation, the Charges, the subsequent criminal proceedings, and the eventual outcome of those proceedings all "form part of a continuum of events and measures that are all inextricably linked".[1252] However, to the extent that Thailand is arguing on this basis that the Charges are not a distinct measure for the purposes of WTO dispute settlement, we disagree for essentially the same reasons for which we earlier disagreed with Thailand's argument that the Charges are the same measure as the DSI investigation initiated in 2006.[1253] Just as the Charges had legal consequences that the earlier DSI investigation did not, those legal consequences are independent from the subsequent criminal proceedings that they triggered. As we indicated in the context of addressing Thailand's argument relating to the preclusion doctrine, the fact that certain events form part of a continuum of events and are all inextricably linked does not mean that they constitute a single "measure" for purposes of WTO dispute settlement.

7.582. The legal effect of the Charges includes the initiation of the criminal proceedings. The existence of Article 17.4 of the Anti-Dumping Agreement, and specifically the *absence* of any similar rule in the SCM Agreement or other covered agreements, reinforces our conclusion that the instrument initiating an investigation can, in principle, be analysed as a measure distinct from the subsequent investigation and the outcome thereof, and that, in principle, such a measure can be challenged prior to any subsequent investigation or resulting determination even taking place. Were it otherwise, the procedural restriction in Article 17.4 of the Anti-Dumping Agreement would be superfluous. We note that, in the absence of any comparable special rule and additional rule of procedure in the SCM Agreement, there is nothing in the text of the SCM Agreement that would pose any legal impediment to a Member initiating a WTO dispute settlement proceeding in respect of the initiation of a countervailing duty investigation prior to the imposition of any provisional or final countervailing duties.[1254]

7.583. We note that the issuance of criminal charges and arrest warrants have been treated as challengeable measures before other international courts and tribunals. For instance, the International Court of Justice has observed (in a case that involved, inter alia, the arrest of a ship and its master) that "in its ordinary sense the word ["measure"] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby".[1255] In *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the Court found that the mere issuance of an arrest warrant against the Minister for Foreign Affairs for the Democratic Republic of the Congo was, although never enforced, an act giving rise to a violation of the customary international law of immunities.[1256] It is also well established that unlawful arrests can be challenged under Article 5 of the European Convention on Human Rights, which, by its terms, provides that no one shall be "deprived of his liberty" save in the cases specified therein and in accordance with a procedure prescribed by law.[1257] The context is admittedly different, but it supports the conclusion that the issuance of criminal charges can be a "measure" that is distinct from any subsequent proceedings, including the outcome of any subsequent criminal proceedings.

[1250] Panel Report, *US − Export Restraints*, para. 8.85.

[1251] Panel Reports, *US − COOL*, para. 7.50 (referring to Appellate Body Report, *EC − Asbestos*, para. 64; *US − Export Restraints*, para. 8.85).

[1252] Panel Report, *US − Zeroing (Article 21.5 − EC),* para. 8.103.

[1253] See paragraphs 7.479. to 7.485. above.

[1254] There are several examples of Members requesting consultations regarding the initiation of a countervailing duty investigation. See WT/DS97/1 (*United States − Countervailing Duty Investigation of Imports of Salmon from Chile*); WT/DS112/1 (*Peru − Countervailing Duty Investigation against Imports of Buses from Brazil*); WT/DS167/1 (*United States − Countervailing Duty Investigation with respect to Live Cattle from Canada*), WT/DS470/1 (*Pakistan − Anti-Dumping and Countervailing Duty Investigations on Certain Paper Products from Indonesia*).

[1255] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 432, para. 66.

[1256] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, p. 3, paras. 52-54, 71 and 78.

[1257] See, e.g. European Court of Human Rights, Guide on Article 5 of the Convention − Right to Liberty and Security, 2014, available at http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf), para. 3 (explaining that "a deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms").

7.584. Based on the foregoing, we conclude that the Charges constitute a distinct "measure" for purposes of WTO dispute settlement. We next turn to the question of whether the Charges constitute a "determination" under the CVA.

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

7.585. The CVA does not contain any general "scope and coverage" provision that expressly defines the kinds of customs valuation actions to which it applies. However, the text of the CVA contains 43 references to how customs value is to be "determined", and Article 11 of the CVA provides for a right of appeal with regard to a "determination" of customs value. The *General Introductory Commentary* to the CVA provides that Articles 1 through 7 provide the methods of "determining" the customs value.

7.586. In response to a question from the Panel, Thailand confirms that its argument is tantamount to saying that an "allegation" or "accusation" does not meet the threshold of constituting a "determination" covered by the CVA.[1258] Thailand submits that, because the Charges are a mere accusation of wrong-doing, they do not represent a customs valuation "determination" for the purposes of the CVA.[1259] Thailand submits that 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", and that in the present case, the Charges are a mere accusation of wrong-doing and do not represent an "authoritative decision of a judge", nor do they represent a "settlement".[1260] Thailand is of the view that the distinction developed in the context of Article 23 of the DSU, between "a more or less final decision" that meets the threshold of a "determination", and a "preliminary opinion or view" that does not meet that threshold, "also applies in the context of the CVA".[1261] According to Thailand, the Charges do not meet the threshold of a "determination" covered by the CVA and are not ripe for examination by the Panel.[1262]

7.587. The Philippines takes a somewhat broader view of the types of measures that may be subject to the obligations in Article 1 through 7 of the CVA, based on its view that the scope of the CVA extends to any "actions of another Member" pursuant to Article 19.2 of the CVA, regardless of whether those actions can be characterized as a "determination".[1263] However, the Philippines accepts that, insofar as the applicable standard is that of a "determination", it may follow that a preliminary opinion or view, as distinguished from a more or less final decision, would not meet the threshold of a "determination" for purposes of the CVA.[1264] The Philippines notes that a "determination" is defined as "[t]he decision arrived at or promulgated; a determinate sentence, conclusion, or opinion".[1265] In the Philippines' view, the Charges "entail a final decision by the Public Prosecutor to establish the tax base used to determine the correct amount of *ad valorem* customs duties to be imposed on PM Thailand, for the purposes of levying *ad valorem* customs duties".[1266]

7.588. Beginning with the ordinary meaning of what constitutes a "determination", we note that Thailand refers the Panel to dictionary definitions of "determination" that include "[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", and highlights the fact that in the present case, the Charges are a mere accusation of wrongdoing and do not represent an "authoritative decision of a judge", nor do they represent a "settlement".[1267] The Philippines notes that other definitions of the word

[1258] Thailand's first written submission, para. 6.74; response to Panel question No. 38(c).
[1259] Thailand's response to Panel question No. 38; opening statement at the meeting of the Panel, para. 29.
[1260] Thailand's response to Panel question No. 38(a), p. 34 (quoting *Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 663).
[1261] Thailand's response to Panel question No. 38(b), p. 35.
[1262] Thailand's response to Panel question No. 38(b), p. 35.
[1263] Philippines' response to Panel question No. 38(a).
[1264] Philippines' response to Panel question No. 38(b).
[1265] Philippines' response to Panel question No. 38(b), para. 328 (referring to *Oxford English Dictionary*, OED Online).
[1266] Philippines' response to Panel question No. 38(b), para. 330.
[1267] Thailand's response to Panel question No. 38(a), p. 34 (*Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 663).

"determination" include "[t]he decision arrived at or promulgated; a determinate sentence, conclusion, or opinion".[1268]

7.589. We recall that the Appellate Body has previously interpreted the word "determine" in the context of Article 11.3 of the Anti-Dumping Agreement. It observed that dictionary definitions of the verb "determine" include "[c]onclude from reasoning or investigation, deduce" as well as "[s]ettle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter".[1269] We further note that in the context of Article 2.2.1 of the Anti-Dumping Agreement, the panel in *EC – Salmon (Norway)* recalled the above dictionary definitions relied upon by the Appellate Body, and further stated that:

> Turning again to the dictionary definitions of the verb "determine", we note that in addition to those identified by the Appellate Body, other definitions include "[c]ome to a judicial decision; make or give a decision about something", "[l]ay down authoritatively; pronounce, declare" as well as "[s]ettle or fix beforehand (now esp. a date); ordain, decree". This range of slightly varying definitions indicates that the verb "determine" may have a slightly different meaning depending on the context in which it is found.[1270]

7.590. The above dictionary definitions suggest that the ordinary meaning of the word "determination" is quite broad. We agree with Thailand that the Charges themselves do not qualify as "[t]he settlement of a suit or controversy by the authoritative decision of a judge or arbiter", at least insofar as the "judge or arbiter" is to be equated with the Criminal Court. However, we recall that the Public Prosecutor is a state organ whose actions are attributable to Thailand, and from that perspective the Charges can naturally be described as "the decision arrived at" by the Public Prosecutor, "the determinate conclusion" of the Public Prosecutor, and "the determinate opinion" of the Public Prosecutor. Furthermore, the Charges can naturally be described as an act that, insofar as the Public Prosecutor is concerned, "conclude[s] from reasoning or investigation" that PMTL has acted in violation of Section 27 of the Customs Act. The Charges can also be said to "*give a decision*" by the Public Prosecutor that criminal charges should be issued against PMTL and a criminal proceeding conducted.

7.591. We find additional guidance on the ordinary meaning of the term "determination" in the context of Article 23.2(a) of the DSU.[1271] In *US/Canada – Continued Suspension*, the Appellate Body reversed the panel's finding that statements made by Canada and the United States at two DSB meetings constituted a "determination" under Article 23.2(a) of the DSU. The Appellate Body stated that it "share[d] the view of the panel in *US – Section 301 Trade Act* that a 'determination' within the meaning of Article 23.2(a) 'implies a high degree of firmness or immutability, i.e. a more or less final decision by a Member in respect of the WTO consistency of a measure taken by another Member'", and that "preliminary opinions or views expressed without a clear intention to seek redress" are not covered by Article 23.2(a).[1272] It then found that the statements in question "seem no more than initial reactions" to the European Communities' self-proclaimed compliance, and stated that, given the complexity of the issues that arise with respect to an assessment of the WTO-consistency of that measure, "it is reasonable to assume" that Canada and the United States "needed some time before formulating a definitive view" on whether the European Communities had brought itself into compliance.[1273] The Appellate Body noted that in their statements to the DSB, the United States and Canada indicated that they "would be willing to engage in further bilateral discussions regarding the alleged scientific justification" for Directive 2003/74/EC, and the Appellate Body found that "[t]his readiness to discuss Directive 2003/74/EC is difficult to reconcile with a finding that the DSB statements constituted a 'determination' with the type of firmness and immutability required

[1268] Philippines' response to Panel question No. 38(b), para. 328 (referring to Oxford English Dictionary, OED Online).

[1269] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 110.

[1270] Panel Report, *EC – Salmon (Norway)*, para. 7.237.

[1271] Article 23.1 of the DSU provides that, when Members seek the redress of a violation of WTO obligations, they shall have recourse to, and abide by, the rules and procedures of the DSU. Article 23.2 then elaborates on this principle, with paragraph (a) stating that, in such cases, Members shall "not make a *determination* to the effect that a violation has occurred", except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, "and shall make any such *determination* consistent with the findings contained in" panel or Appellate Body reports. (emphasis added)

[1272] Appellate Body Reports*, US/Canada – Continued Suspension*, para. 396.

[1273] Appellate Body Reports*, US/Canada – Continued Suspension*, para. 396.

by its ordinary meaning".[1274] Furthermore, the Appellate Body stated that such statements "are not intended to have legal effects and do not have the legal status" of a definitive determination in themselves; rather than being "intended to have legal effects" or "legal status", the Appellate Body considered that "they are views expressed by Members and should not be considered to prejudice Members' position in the context of a dispute".[1275] In the context of elaborating on the point that DSB statements "are not intended to have legal effects", the Appellate Body stated that they are "generally diplomatic or political in nature" and "generally have no legal effect or status in and of themselves".[1276]

7.592. In response to a question from the Panel, the parties agree that Appellate Body jurisprudence analysing what constitutes a "determination" in the context of Article 23 of the DSU provides relevant guidance for determining what constitutes a "determination" under the CVA.[1277] Following this guidance, we find it difficult to escape the conclusion that the Charges fall within the meaning of what constitutes a "determination". In our view, the Charges constitute "a more or less final decision" by the Public Prosecutor that PMTL acted in violation of Section 27, in the sense that the issuance of the Charges triggered criminal court proceedings against PMTL. The Charges cannot naturally be characterized as a kind of "initial reaction" or "preliminary opinion" of the Public Prosecutor, in the sense that the Public Prosecutor might subsequently reassess its own conclusion. Similarly, it could not be said that the Charges "should not be considered to prejudice" the position of the Public Prosecutor in the conduct of the criminal court proceedings.[1278] We acknowledge that the Charges are not required to, and do not, lay out the evidence that the Public Prosecutor will provide to substantiate the Charges.[1279] However, it is not in dispute that under Section 158 of the Criminal Procedure, a charge must contain "all the acts alleged to have been committed by the accused, all the facts and particulars regarding the time and place of such acts, and the persons or articles concerned which are reasonably sufficient to give the accused a clear understanding of the charge".[1280] Most importantly, the Charges are "intended to have legal effects" and "legal status in and of themselves", and we have identified above some of those consequences.

7.593. We consider that the Appellate Body's findings in the original proceeding are also instructive, and provide valuable contextual guidance on what it means for an action to be "final" as opposed to a merely "provisional" or "intermediate" step. As explained above, in the original proceeding the panel found that "guarantee decisions", which are taken prior to final duty assessments, fall within the scope of "administrative action relating to customs matters" within the meaning of Article X:3(b), and are therefore subject to the right of appeal contained therein. Thailand appealed this finding, arguing that the scope of Article X:3(b) does not extend to "provisional" measures such as customs guarantee decisions. Thailand advanced a line of reasoning that appears to have some similarities to its argument in the present proceeding, submitting that "guarantee decisions are not *final* administrative acts but constitute merely intermediate steps on the way towards a final customs valuation decision".[1281]

7.594. In the context of its analysis of that issue, the Appellate Body found that "[w]ith respect to the purpose of securing payment of customs duties, the guarantee is the final measure, not merely an intermediate step."[1282] The Appellate Body elaborated on this point as follows:

> As already noted above, we do not consider that a guarantee is merely an intermediate step within the administrative procedure leading up to the final assessment of customs duty. Rather, a requirement to provide a guarantee in exchange for release of the goods has an administrative content of its own. As the Panel correctly found, the guarantee is a device allowing, on the one hand, the importer to withdraw their goods from customs, and, on the other hand, securing the payment of the ultimate customs duty. It is a final, and not an intermediate, administrative act with respect to these particular objectives. The fact that a guarantee provides security for a claim stemming from another

[1274] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 397.
[1275] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 398.
[1276] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 398.
[1277] Thailand's response to Panel question No. 38(b).
[1278] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 398.
[1279] Thailand's response to Panel question No. 32(d).
[1280] Thailand's first written submission, para. 6.87 (referring to Criminal Procedure Code, (Exhibit THA-16), Section 158).
[1281] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 213. (emphasis original)
[1282] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 212.

> administrative action does not change the fact that the imposition of a guarantee is an administrative action in its own right.[1283]

7.595. In the same way, we consider that the Charges involve a "final" decision, and not a "provisional" or "intermediate" step, for the purpose of initiating criminal proceedings. An offence under Section 27 of the Customs Act can be prosecuted only after the Public Prosecutor has issued charges[1284], and the issuance of the Charges therefore constitutes a "determination" for that purpose.

7.596. We consider that the definition of an "administrative decision" contained in footnote 4 to Article 4.1 of the TFA is also relevant context. It provides that an administrative decision, within the meaning of Article 4.1, is a decision "with a legal effect that affects the rights and obligations of a specific person in an individual case". We consider that this squares with the Appellate Body's view that a relevant consideration in assessing the finality of a measure is the question of whether an action is an administrative action in its own right, and that an action would be an administrative action in its own right if distinct legal effects flow from the action in question.

7.597. Based on the foregoing, we consider that the Charges constitute a "determination" for purposes of the CVA. Having found that the Charges constitute a "determination" for purposes of the CVA, then in the circumstances of this case we find it unnecessary to resolve the disputed questions of whether the notion of a "determination" is narrower than the notion of "actions taken by a Member" within the meaning of Article 19.2 of the CVA, and the related question of whether a measure relating to customs valuation that is *not* a "determination" for purposes of the CVA may nonetheless be subject to the obligations in Articles 1 to 7 of the CVA insofar as it qualifies as an "action" taken by a Member. We next address the question of whether the Panel can make findings on the WTO-consistency of the Charges without engaging in speculation on future measures or events.

7.3.4.3.4 Speculation on future measures or events

7.598. We understand Thailand to equate "the doctrine of ripeness" with the view that panels should not make speculative findings on "hypothetical future measures", such as the outcome of the pending criminal proceedings. In its first written submission, Thailand states that, "[p]ut simply, the doctrine [of ripeness] means that panels should not engage in exercises in speculation to predict either when or how a matter before it may be concluded and should not issue abstract rulings on hypothetical future measures."[1285] Thailand also refers to the statement by the panel in *EC – Commercial Vessels* that "an abstract ruling on hypothetical future measures is [not] necessary nor helpful to the resolution of this dispute"[1286], and states that this is "the essence of the doctrine of ripeness".[1287]

7.599. We agree that, as a general rule, a measure must be in existence at the time of a panel's establishment in order to be within that panel's terms of reference.[1288] This general rule has been applied in various contexts in a number of disputes, including *US – Upland Cotton*, in which the panel found that a particular legislative measure "did not exist, had never existed and might not subsequently have ever come into existence".[1289] The panel considered that Brazil's claim in relation to the legislation was therefore "entirely speculative".[1290] To the same effect, the panel in *India – Autos* agreed with the respondent that "hypothetical future measures which it could, but might not take … would not fall within the scope of this Panel's terms of reference".[1291]

7.600. The Appellate Body's analysis in *US – Shrimp (Article 21.5 – Malaysia)* confirms that panels should refrain not only from making speculative findings on future measures, but also from making speculative findings on future events that may have a bearing on the specific measure being challenged. In that dispute, the original panel found that an import ban imposed by the United States

[1283] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 214.
[1284] Thailand's response to the Philippines' question No. 3.
[1285] Thailand's first written submission, para. 6.70.
[1286] Panel Report, *EC – Commercial Vessels*, para. 7.30; Thailand's first written submission, para. 6.64.
[1287] Thailand's second written submission, para. 3.142.
[1288] Appellate Body Report, *EC – Chicken Cuts,* para. 156.
[1289] Panel Report, *US – Upland Cotton,* para. 7.158.
[1290] Panel Report, *US – Upland Cotton,* para. 7.158.
[1291] Panel Report, *India – Autos*, para. 7.34.

on certain shrimp products was inconsistent with its WTO obligations. As part of its implementation efforts, the United States issued *Revised Guidelines* that permitted the importation of shrimp under certain conditions. The *Revised Guidelines* constituted the "measure taken to comply". However, following adoption of the *Revised Guidelines* the US Court of International Trade (CIT) ruled that these *Revised Guidelines* were incompatible with the original US law that imposed the import ban. The CIT ruling was then appealed to the Court of Appeals. That appeal was still pending at the time of the WTO compliance proceeding. The panel noted that "until a decision is reached by the Court of Appeals, the Revised Guidelines remain applicable" and "the United States does not, for now, have to modify its Revised Guidelines".[1292] Thus, the compliance panel confined the scope of its findings to the relevant measure, i.e. the Revised Guidelines.

7.601. The Appellate Body affirmed the panel's approach, stating that the panel was correct not to indulge in speculation regarding the outcome of the US court proceedings. The Appellate Body stated that:

> There is no way of knowing or predicting when or how that particular legal proceeding will conclude in the United States. The *Turtle Island* case has been appealed and could conceivably go as far as the Supreme Court of the United States. It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make "an objective assessment of the matter … including an objective assessment of the facts of the case".[1293]

7.602. In light of the foregoing, we fully agree with Thailand that, in the words of the Appellate Body in *US − Shrimp (Article 21.5 − Malaysia),* it would be "an exercise in speculation on the part of the Panel to predict either when or how" the ongoing criminal proceedings against PMTL "may be concluded", and that the Panel should "not to indulge in such speculation". The Philippines agrees with Thailand that "panels cannot speculate about future events".[1294]

7.603. However, in the specific circumstances of this dispute, we do not consider that we would need to engage in speculation on future measures or events in order to make findings on the WTO-consistency of the Charges. As the Philippines has observed, the Charges are "a defined and formal act, taken by an organ of the Thai state, on a date certain in the past".[1295] Specifically, the issuance of the Charges constitutes an act completed on 18 January 2016. We consider that an assessment of the content and meaning of the Charges does not necessitate that we make predictions about events or measures taken subsequent to the issuance of the Charges on 18 January 2016.

7.604. We note that the Philippines has not relied on any events or measures subsequent to the Charges for the purpose of determining the meaning of the Charges. In response to a question from the Panel, the Philippines confirms that because the measure being challenged by the Philippines is the Charges, as distinct from the subsequent criminal court proceedings or their outcome, the court order preventing information regarding the criminal proceedings from being shared with third parties in question should not hinder either the Philippines' ability to challenge the Charges in this compliance proceeding, or the Panel's ability to conduct an "objective assessment of the facts of the case".[1296] Furthermore, we note that in a response to a question from the Panel, Thailand submits that it is not arguing that the Charges "contain insufficient information to discern the grounds for the accusation of customs fraud".[1297]

7.605. On the basis of the foregoing, we consider that the Panel can make findings on the WTO-consistency of the Charges without engaging in speculation on future measures or events.

[1292] Panel Report, *US − Shrimp (Article 21.5 − Malaysia)*, para. 5.109.
[1293] Appellate Body Report, *US − Shrimp (Article 21.5 − Malaysia)*, para. 95.
[1294] Philippines' second written submission, para. 423.
[1295] Philippines' second written submission, para. 447.
[1296] Philippines' response to Panel question No. 34(a).
[1297] Thailand's response to Panel question No. 100(a), p. 26.

7.3.4.4 Conclusion

7.606. For the reasons set forth above, the Panel concludes that it is not precluded from considering the WTO-consistency of the Charges on the basis of a "ripeness doctrine", because the Charges constitute a distinct "measure" for purposes of WTO dispute settlement, the Charges constitute a "determination" for purposes of the CVA, and an assessment of the WTO-consistency of the Charges does not require the Panel to engage in speculation on future measures or events, notwithstanding that no judgment has been rendered by the Criminal Court.

7.3.5 Applicability of the CVA to the Charges

7.3.5.1 Introduction

7.607. Articles 1 through 7 of the CVA provide methods of determining the customs value of imported goods. Article 15.1(a) of the CVA defines the "customs value of imported goods" as "the value of goods for the purposes of levying *ad valorem* customs duties on imported goods".

7.608. The Charges filed by the Public Prosecutor set forth the allegation that PMTL violated Section 27 of the Customs Act by declaring a "false price" for *Marlboro* and *L&M* cigarettes contrary to the "actual price", with the intention to defraud the government of taxes and customs duties. Pursuant to Section 27 of the Customs Act, the penalties upon conviction may include the imprisonment of seven of PMTL's current and former employees, and the payment of fines by PMTL in an amount that shall equal four times the duty-paid value, which is approximately THB 80,800,000,000 (approximately USD 2.3 billion).

7.609. Thailand submits that the CVA does not apply to Charges.[1298] Thailand submits that the Charges do not seek to determine "the value of goods" imported by PMTL, because the references to King Power's prices in the accompanying Annex only serve to establish a possible benchmark for a fine in the event of a conviction for customs fraud. Thailand further argues that, given the possibility of criminal penalties upon conviction, the Charges do not have the consequence of "levying *ad valorem* customs duties". Thailand argues that because the Public Prosecutor is not a part of Thailand's "customs administration" the substantive obligations of the CVA do not apply to the Charges. In addition, Thailand maintains that allegations under Section 27 have at their core the element of an "intention to defraud" the government that is neither found nor regulated in Articles 1 through 7 of the CVA.

7.610. The Philippines submits that the CVA applies to the Charges.[1299] The Philippines agrees with Thailand that the substantive obligations of the CVA apply to a measure insofar as it determines "the value of goods for the purpose of levying *ad valorem* customs duties" within the meaning of Article 15.1(a), and argues that the aspect of the Charges being challenged in this proceeding meets both elements of this definition. The Philippines considers that there may well be a question as to whether the Public Prosecutor is subject to certain procedural obligations in the CVA that apply to the "customs administration" in a narrow sense, but that the substantive obligations in the CVA apply to any organ of the State that makes a customs valuation determination, regardless of whether that entity is designated under domestic law as part of the country's customs administration. The Philippines submits that the "intention to defraud" element of Section 27 and the Charges does not prevent the application of the CVA, and that the Appellate Body rejected such an argument in *US – 1916 Act*.

7.3.5.2 Main arguments of the parties

7.611. Thailand submits that the CVA lays down rules and procedures to be followed by "the customs administration" in determining customs value for that purpose.[1300] Thailand notes that the CVA "refers repeatedly and exclusively to the work of the 'customs administration' of a Member", and "contains no references whatsoever to the work of government agencies exercising police

[1298] Thailand's first written submission, paras. 6.19-6.47; second written submission, paras. 3.64-3.127; opening statement at the meeting of the Panel, paras. 13-25; responses/comments to Panel question Nos. 32, 47, 48, 98-99 and 105-106.

[1299] Philippines' second written submission, paras. 523-618; opening statement at the meeting of the Panel, paras. 77-115; responses/comments to Panel question Nos. 33, 48, 98-99 and 105-106.

[1300] Thailand's first written submission, para. 6.19.

powers".[1301] Thailand reasons that, had the drafters intended the CVA to circumscribe the exercise of police powers and not merely the work of "customs administrations" in determining the customs value of imported goods, they would have said so.[1302] Thailand states that the Customs Department is the only Thai agency authorized under Thai law "to determine the value of goods for customs purposes".[1303] Thailand initially agreed in principle that the term "customs administration" may generally apply "to any entity conducting customs valuation, regardless of whether that entity is designated under domestic law as part of the country's customs administration"[1304], but nonetheless emphasized that "which agency is responsible for the administration of certain laws or takes a measure may be very relevant to the determination of the nature, in WTO terms, of the measure and whether that measure falls within the scope of a particular provision of the covered agreements".[1305] However, Thailand subsequently argued that the substantive obligations in the CVA at issue in this dispute only apply to government agencies that are responsible for the administration of the customs formalities and procedures that arise from the flow of goods into and out of a Member's territory, and those do not include the Public Prosecutor.[1306]

7.612. Thailand recalls that on the basis of the definition in Article 15.1(a) of the CVA, the panel in *Colombia – Ports of Entry* found that "customs valuation" has two elements: (i) the valuation of the goods (ii) for the purposes of levying *ad valorem* customs duties.[1307] Regarding the first element, Thailand submits that the Charges do not actually seek to "fix or determine the monetary value of PMTL's imported cigarettes".[1308] In this regard, Thailand asserts that the reference to the King Power prices "is not contained in the Charges themselves, but in an Annex for the purpose of providing a possible benchmark to the Criminal Court to impose fines in the event of a conviction".[1309] Thailand asserts that "the Charges do not determine or even attempt to determine what should be the 'true' or 'correct' or 'actual' customs value" for PMTL's goods.[1310] Thailand submits that the Philippines' entire argumentation concerning the Charges rests on the "defective foundation" that "the Charges represent a determination that the customs value of the goods at issue is the price charged by Philip Morris to King Power, a duty-free operator in Thailand".[1311]

7.613. Regarding the second element of the definition above, Thailand refers to the ordinary meaning of the term "levy", and submits that "the second element is satisfied only if the valuation of the goods has the purpose of collecting charges imposed at the border on goods entering the country".[1312] Thailand states that "[n]owhere 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".[1313] Thailand further submits that the customs duties on the 272 entries have already been levied and paid; hence, all matters relating to the customs valuation and levying of *ad valorem* customs duties for these 272 entries have concluded.[1314] Furthermore, Thailand points out that, as a matter of Thai law, neither the Public Prosecutor nor the Criminal Court has the legal power to value imported goods for the purposes of levying *ad valorem* customs duties.[1315] According to Thailand, if a fine were imposed, it would "have no effect on the customs duties that [were] already paid by PM Thailand with respect to these 272 entries".[1316] Thailand explains that the potential criminal fine at issue "would not be a charge levied at the border on goods entering Thailand".[1317]

7.614. Finally, Thailand maintains that allegations under Section 27 "have at their core the element of an intention to defraud the government that is not found nor regulated in Articles 1 through 7" of

[1301] Thailand's first written submission, para. 6.29.
[1302] Thailand's first written submission, paras. 6.29-6.30.
[1303] Thailand's response to Panel question No. 48(b), p. 46.
[1304] Thailand's response to Panel question No. 48, p. 45.
[1305] Thailand's response to Panel question No. 48, p. 45.
[1306] Thailand's comments on the Philippines' response to Panel question No. 92.
[1307] Thailand's first written submission, para. 6.25.
[1308] Thailand's response to Panel question No. 47(a), p. 44.
[1309] Thailand's first written submission, para. 6.40.
[1310] Thailand's response to Panel question No. 32(b), p. 28.
[1311] Thailand's opening statement at the meeting of the Panel, para. 21.
[1312] Thailand's first written submission, para. 6.26.
[1313] Thailand's first written submission, para. 6.34.
[1314] Thailand's first written submission, para. 6.35.
[1315] Thailand's first written submission, para. 6.36.
[1316] Thailand's first written submission, para. 6.41.
[1317] Thailand's first written submission, para. 6.41.

the CVA.[1318] According to Thailand, "even if the Charges were to qualify as 'customs valuation', the Charges would still fall outside the scope of the CVA because, as Thailand has argued, the Charges relate to a criminal accusation that focuses on whether PM Thailand had the intention to defraud the government".[1319] Thailand emphasizes specifically this additional element of the offence with which PMTL is charged, namely the "intention to defraud" (i.e. *mens rea*).[1320] Thailand disagrees with the Philippines that, "for purposes of its claims against the Charges, the Panel need only consider the aspect of the Charges dealing with goods valuation and can disregard the element of intent".[1321] In Thailand's view, to accept that the *actus reus* can be separated from the *mens rea* "would mean that a criminal judge would see no difference between acts of murder (intentional homicide) and manslaughter (unintentional homicide)", and it further points out that for "some crimes, such as theft, the element of intent determines whether the act is unlawful in the first place".[1322] Thailand distinguishes the Appellate Body's findings in *US − 1916 Act,* regarding the irrelevance of an additional "intent" requirement in the context of Article 18.1 of the Anti-Dumping Agreement, on the grounds that CVA contains no provision similar to Article 18.1 and because, unlike the US measure at issue in that case, the element of "intent" is inseparable from the *actus reus* in the context of Section 27 of the Customs Act.[1323]

7.615. The Philippines considers that there may well be a question as to whether the Public Prosecutor is subject to the procedural obligations in the CVA that apply to the "customs administration"[1324], in respect of which it makes no claims of violation in this proceeding[1325]; however, the Philippines considers that the substantive obligations apply to any organs of the Thai state that conduct a customs valuation exercise, regardless of whether that entity is designated under domestic law as part of the country's customs administration.[1326] The Philippines submits that "[i]t is well-established that a Member's WTO rights and obligations apply to all government agencies, including the courts and law enforcement authorities", and "[i]t is also well established that WTO law applies to measures characterized in municipal law as criminal".[1327] The Philippines recalls that municipal law classifications are not determinative of issues raised in WTO dispute settlement proceedings, and argues that if a Member could limit "customs administration" only to those entities designated under domestic law, this would permit Members to evade their CVA obligations.[1328]

7.616. The Philippines agrees with Thailand that, on the basis of Article 15.1(a) of the CVA as interpreted by the panel in *Colombia − Ports of Entry*, the substantive obligations in the CVA only apply to measures that determine (i) the valuation of the goods (ii) for the purposes of levying *ad valorem* customs duties. However, the Philippines argues that the aspect of the Charges being challenged in this proceeding meets both elements of this definition. Regarding the first element, the Philippines argues, based on its reading of Section 27 together with Section 2 of the Customs Act, that "[o]ne of the constituent elements of the offence under Section 27 is the determination, by the administering authority, of the 'price of the goods' (*i.e.*, customs value), both to calculate the amount of *ad valorem* customs duties allegedly due and to determine any fine payable".[1329] Among other things, the Philippines emphasizes that the Charges by their own terms entail a rejection by the Public Prosecutor of the "falsely declared *price",* and a determination of the "actual *price*" which, when read together with the definition of "*price*" in Section 2 of the Customs Act, "by definition … entails a customs valuation decision".[1330]

7.617. Regarding the second element of Article 15.1(a), the Philippines agrees with Thailand that the CVA only applies to valuation undertaken for the specified purpose in Article 15.1(a) of the CVA,

[1318] Thailand's response to Panel question No. 38(a), p. 34. More generally, see Thailand's response to Panel question number 32.
[1319] Thailand's response to Panel question No. 47(b), p. 45.
[1320] Thailand's response to Panel question No. 32(a), p. 27; Thailand's comments on the Philippines' response to Panel question No. 97(c), p. 30.
[1321] Thailand's comments on the Philippines' response to Panel question No. 97(c), p. 30.
[1322] Thailand's comments on the Philippines' response to Panel question No. 97(c), p. 30.
[1323] Thailand's comments on the Philippines' response to Panel question No. 97(c), pp. 29-30.
[1324] Philippines' response to Panel question No. 92.
[1325] See paragraph 7.463. above.
[1326] Philippines' second written submission, para. 553.
[1327] Philippines' second written submission, paras. 553-554.
[1328] See the Philippines' second written submission, paras. 562-570.
[1329] Philippines' second written submission, paras. 578-589.
[1330] Philippines' second written submission, para. 593.

namely "for the purposes of levying *ad valorem* customs duties on imported goods".[1331] However, the Philippines considers that the second element of Article 15.1(a) is satisfied whenever a valuation of goods is undertaken for the purposes of establishing the base used by an importing Member to levy the correct amount of *ad valorem* customs duties due.[1332] The Philippines observes that the verb "levy" means "to raise (a sum of money) by legal execution or process".[1333] Contrary to Thailand's view, the Philippines submits "customs duties are not necessarily 'levied on the border', either in physical or temporal terms"[1334], and that "[l]iability for the payment of customs duties arises *by reason of importation*, although the duties are often not 'levied on the border'."[1335] In the Philippines' view, the "levying of *ad valorem* customs duties necessarily includes action taken to enforce the payment of the correct amount [of] those duties, based on the customs value, whether that action is taken at the time of initial payment or subsequently".[1336] In other words, the Philippines submits that "enforcing the full payment of customs duties is part and parcel of levying those duties, within the meaning of Article 15.1(a) of the *CVA*".[1337]

7.618. Finally, the Philippines submits that the "intention to defraud" element of Section 27 and the Charges does not prevent the application of the *CVA,* and that the Appellate Body squarely rejected the same argument in *US − 1916 Act*.[1338] The Philippines does not dispute that the "intention to defraud" is an additional element of the offence with which PMTL is charged. However, the Philippines recalls that in *US − 1916 Act*, the Appellate Body held that a separate and additional "intent" requirement did not remove the 1916 Act from the scope of application of the Anti-Dumping Agreement, and was not even relevant to this question.[1339]

7.3.5.3 Analysis by the Panel

7.3.5.3.1 General considerations

7.619. We observe that certain treaty provisions may contain language expressly indicating that the obligations therein apply exclusively to measures taken in the context of criminal law procedures[1340], others may contain language expressly indicating that the obligations therein apply exclusively to measures taken in the context of civil procedures[1341], and others may contain language expressly indicating that the obligations therein apply in the context of both criminal and civil procedures.[1342] However, the vast majority of treaty obligations, including most of those found in the WTO covered agreements, contain no language expressly delineating their applicability to criminal or civil procedures. As a matter of treaty interpretation, the absence of treaty language qualifying the scope of application of an obligation to a particular sphere of municipal law suggests that the obligation may, in principle, apply to any measure taken in the context of any sphere of municipal law.

7.620. Thailand does not argue that the CVA is inapplicable to the Charges on the grounds that criminal law issues fall outside of the scope and coverage of WTO law and dispute settlement. The parties agree that criminal law matters are not *a priori* carved out from the scope of the WTO law, and that such matters are not *a priori* excluded from the scope of WTO dispute settlement proceedings. We note that we are not the first WTO dispute settlement panel to be called upon to

[1331] Philippines' second written submission, paras. 535-537 and 546.
[1332] Philippines' second written submission, para. 530.
[1333] Philippines' second written submission, para. 539 (referring to the Oxford English Dictionary, OED Online).
[1334] Philippines' second written submission, para. 604.
[1335] Philippines' second written submission, para. 605. (emphasis original)
[1336] Philippines' second written submission, para. 609.
[1337] Philippines' response to Panel question No. 38(b), para. 330.
[1338] Philippines' opening statement at the meeting of the Panel, para. 81.
[1339] Philippines' opening statement at the meeting of the Panel, para. 81.
[1340] See, e.g. Section 5 of Part III of the TRIPS Agreement, entitled "Criminal Procedures".
[1341] See, e.g. Article 34.1 of the TRIPS Agreement (providing that "[f]or the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process").
[1342] See, e.g. Article 6.1 of the European Convention on Human Rights (providing that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law").

review domestic measures in the sphere of a Member's criminal law, and we consider it useful to recall several general considerations that emerge from WTO jurisprudence.

7.621. In *US − 1916 Act*, the panel made findings on the WTO-consistency of a provision of a US law by the same name which criminalized dumping insofar as it was done with the requisite intent of destroying or injuring a domestic industry.[1343] In *US − Gambling*, the panel made findings on the WTO-consistency of domestic laws relating to money laundering, organized crime, fraud, and underage gambling.[1344] In *China − Intellectual Property Rights*, the panel made findings on the WTO-consistency of provisions in China's Criminal Law which established thresholds for criminal procedures and penalties for infringements of intellectual property rights.[1345] In *Argentina − Financial Services* and *Colombia − Textiles*, the panels made findings on the WTO-consistency of measures that were, according to the responding Member, justified on the grounds that they were aimed at addressing criminal money laundering and terrorist financing.[1346]

7.622. These cases established that the legal framework to be applied by a panel does not change when the measure at issue is adopted in the sphere of a Member's criminal law. As the Appellate Body has repeatedly observed, "municipal law classifications are not determinative of issues raised in WTO dispute settlement proceedings".[1347] In *US − 1916 Act*, the Appellate Body found that both Article VI of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement applied to a US measure that criminalized certain conduct, based on a straightforward application of the terms of those provisions. In *US − Gambling*, the panel noted that it was "well aware of the sensitivities associated with the subject-matter of this dispute", and emphasized that, although Members have a right to regulate, including a right to prohibit gambling and betting activities, if they do so they must do so in a manner consistent with their WTO obligations.[1348] In *China — Intellectual Property Rights*, the Panel stated that it "acknowledge[d] the sensitive nature of criminal matters and attendant concerns regarding sovereignty", but considered that "[t]hese 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".[1349] The panel stated that it would apply the usual rules of treaty interpretation to resolve the issues before it, taking into account such "limitations and flexibilities" that were reflected in the text.[1350]

7.623. We note at the outset that it is common ground between the parties that there is nothing in the text of the CVA that prevents Members − developing or developed − from taking tough enforcement measures against customs fraud.[1351] We also agree that developing country Members "need to be able to adopt tough enforcement measures, such as criminal prosecution, in order to fight customs fraud efficiently".[1352] However, we consider it important to clarify at the outset what is meant by "customs fraud", since the term "customs fraud" does not itself appear in the CVA.

7.624. The starting point of our analysis is Article 17 of the CVA, which provides that "[n]othing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the *truth or accuracy* of *any statement, document or declaration* presented for customs valuation purposes". The text of Article 17 does not elaborate on what is meant by the "truth or accuracy" of any statement, document or declaration presented for customs purposes. Paragraph 6 of Annex III to the CVA states that Article 17 acknowledges that enquiries may be made "which are, for example, 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". When read alone, these provisions leave open the precise benchmark for determining "the truth or accuracy" of the value "declared or presented" to customs.

[1343] See Panel Report, *US − 1916 Act,* paras. 6.178-6.181.

[1344] See Panel Report, *US − Gambling*, paras. 6.499-6.509 and 6.515-6.533.

[1345] See Panel Report, *China − Intellectual Property Rights*, paras. 2.2 and 7.669.

[1346] See Panel Reports, *Argentina − Financial Services,* para. 7.923; and *Colombia − Textiles,* para. 7.199.

[1347] Appellate Body Reports, *China − Measures Affecting Automobile Parts,* fn 244; *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 82; *US − Softwood Lumber IV*, para. 56.

[1348] Panel Report, *US − Gambling*, paras. 7.3-7.4.

[1349] Panel Report, *China −Intellectual Property Rights*, para. 7.501.

[1350] Panel Report, *China −Intellectual Property Rights*, paras. 7.500-7.501.

[1351] We note the Philippines' agreement on this point. (See Philippines' comments on Thailand's response to Panel question No. 75).

[1352] Thailand's response to Panel question No. 75, p. 10.

7.625. The "Decision of the Committee on Customs Valuation adopted pursuant to the Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value"[1353] elaborates on certain procedures that apply when an authority doubts the "truth or accuracy" of a declared transaction value, and sheds light on what is meant by the "truth or accuracy" of statements, documents or declarations. The Decision refers to cases where the customs administration has reason "to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a *declared* value", and it states that when 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 customs administration may ask the importer to provide further explanation, including documents or other evidence demonstrating "that the *declared* value represents the total *amount actually paid or payable* for the imported goods".[1354] Along the same lines, it continues by explaining what the customs administration may do if it still has reasonable doubts about "the truth or accuracy of the *declared value"*.

7.626. Thus, the Decision reflects an understanding that when reference is made to the "truth or accuracy" of documents and particulars provided in the context of customs valuation, the concern is whether the transaction value declared to customs is the "*amount actually paid or payable* for the imported goods". The nature of this enquiry is clearly distinct from, and in our view must be sharply contrasted with, the enquiry into whether the price "actually paid or payable for the imported goods" by the importer (i.e. "the transaction value") is an acceptable price for purposes of customs valuation in accordance with Article 1 of the CVA.

7.627. This understanding finds further reflection in the Doha Ministerial Decision on Implementation-Related Issues and Concerns of 14 November 2001. In paragraph 8.3 of that Decision, the Ministerial Conference "[u]nderlines the importance of strengthening cooperation between the customs administrations of Members in the prevention of customs fraud".[1355] It further states that, pursuant to the Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, when the customs administration of an importing Member has reasonable grounds to doubt "the *truth or accuracy of the declared value*", it may seek assistance from the customs administration of an exporting Member, which may include "furnishing information on the export value" of the good concerned.[1356] Recognizing the legitimate concerns expressed by the customs administrations of several importing Members "on *the accuracy of the declared value*", the Committee on Customs Valuation is directed to identify and assess practical means to address such concerns, "including the exchange of information on export values" and to report to the General Council by the end of 2002 at the latest.[1357]

7.628. Thus, the wording of paragraph 8.3, including its reference to the "accuracy" of the "declared" value and emphasis on the exchange of information on "the export value", is in line with the understanding that when reference is made to the "truth or accuracy" of documents and particulars provided in the context of customs valuation, the concern is whether the transaction value *declared* to customs is the "*amount actually paid or payable* for the imported goods". This understanding is also consistent with the statement of the Technical Committee on Customs Valuation that "[n]othing in the Valuation Agreement prevents an administration from enacting tough enforcement provisions in cases of valuation fraud".[1358]

7.629. Article 1(c) of the WCO's International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (the Nairobi Convention) defines "customs fraud" as "a Customs offence by which a person deceives the Customs [Department] and thus evades, wholly or partly, the payment of import or export duties and taxes or the application

[1353] Committee on Customs Valuation, Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, G/VAL/1, 27 April 1995, and Minutes of the Meeting of 12 May 1995, G/VAL/M/1, 11 August 1995, adopted pursuant to the invitation in the Ministerial *Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value*.

[1354] Emphasis added.

[1355] WT/MIN(01)/17, para. 8.3.

[1356] WT/MIN(01)/17, para. 8.3. (emphasis added)

[1357] WT/MIN(01)/17, para. 8.3. (emphasis added)

[1358] See 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/54, 16 May 2003, para. 33. We note that this understanding is further reflected in the title of the document itself.

of prohibitions or restrictions laid down by Customs law or obtains any advantage contrary to Customs law".[1359] The general definition of "customs fraud" contained in Article 1(c) does not elaborate on the kinds of "deception" that are embraced by this concept, but the examples of "customs fraud" reiterated in the Nairobi Convention are "forgery, falsification or counterfeiting".[1360] This too is consistent with the understanding that, in the particular context of customs valuation, customs fraud concerns whether the transaction value *declared* to customs is the "*amount actually paid or payable* for the imported goods".

7.630. Finally, we note that in *Argentina – Textiles and Apparel*, the panel confirmed that Members may of course take actions, including through criminal law, to counteract a "false declaration". Consistent with our understanding above, the panel understood a "false declaration" to refer to a situation in which "the customs value declared by the importer does not represent the price actually paid". The panel stated:

> [C]ustoms duties are normally to be imposed on the transaction value of imported goods as defined in the [CVA]. The transaction value is defined as "the price actually paid or payable for the goods when sold for export to the country of importation". Obviously, if the customs value declared by the importer does not represent the price actually paid, the Argentine authorities may take action to counteract a false declaration through, for example, revisions of the customs value declared in specific cases and even criminal prosecutions.[1361]

7.631. We understand both parties to agree that, in the context of customs valuation, the concept of customs fraud concerns the situation in which "the customs value declared by the importer does not represent the price actually paid". The Philippines submits that the conduct of an importer is not "fraudulent or otherwise criminal" simply by declaring a transaction value that a customs authority subsequently decides was influenced by the importer's relationship with the supplier, as this situation merely reflects the anticipated operation of Articles 1 to 7 of the CVA. In its view, "where the declared transaction value is <u>not</u>, in fact, the price paid or payable by the importer in the transaction in question", then "the importer may be liable under domestic law for criminal fraud for declaring a transaction value that was not truthful or accurate".[1362] Thailand does not specifically contest the Philippines' understanding on this point, and has asserted that the Charges should be understood as alleging customs fraud in precisely this sense. In its second written submission, Thailand makes reference to the grounds "for doubting the *accuracy* of the customs value *declared* by PM Thailand".[1363] In response to a question from the Panel, Thailand states that the Charges are to be understood as alleging that the transaction value *declared* by PMTL was not the *actual* price that PMTL paid to PMPMI.[1364] In response to the same question, Thailand states that "the Charges do not determine or even attempt to determine what *should* be the 'true' or 'correct' or 'actual' customs value".[1365] According to Thailand, "PMTL employees are accused of declaring a customs value that they knew was not the actual transaction price paid by the buyer."[1366]

7.632. We understand Thailand to argue that the CVA is inapplicable to the Charges on four different grounds, which relate to: (i) the agency that filed the Charges; (ii) the meaning of the Charges; (iii) the consequences of the Charges; and (iv) the "intention to defraud" aspect of the Charges.

[1359] International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Repression of Customs Offences (Nairobi Convention), concluded in Nairobi on 9 June 1977, entered into force on 21 May 1980. As one panel has observed, other treaties "may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character." (Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.92) Notwithstanding that the term "customs fraud" does not appear in the CVA, we refer to the Nairobi Convention because it has an informative character with respect to the general concept of "customs fraud".

[1360] Nairobi Convention, Annex IX, part II.

[1361] Panel Report, *Argentina – Textiles and Apparel,* para. 6.44.

[1362] Philippines' first written submission, paras. 511 and 513. (emphasis original)

[1363] Thailand's second written submission, para. 3.51. (emphasis added)

[1364] Thailand's response to Panel question No. 32(b).

[1365] Thailand's response to Panel question No. 32(b), p. 28. (emphasis added)

[1366] Thailand's response to Panel question No. 32(d), p. 29.

7.3.5.3.2 The agency that filed the Charges

7.633. We begin by considering whether the Charges fall outside of the scope of the CVA by virtue of the agency that issued them. More specifically, the question we are called upon to resolve is whether the CVA is inapplicable to the Charges because they were issued by an organ of the State that is not part of the "customs administration".

7.634. Thailand argues that even if the Charges contain a "customs valuation" determination, the CVA still does not apply to the Public Prosecutor because it is not a part of the "customs administration" for purposes of the CVA. Thailand initially agreed in principle that the term "customs administration" may generally apply "to any entity conducting customs valuation, regardless of whether that entity is designated under domestic law as part of the country's customs administration"[1367], but nonetheless emphasized that "which agency is responsible for the administration of certain laws or takes a measure may be very relevant to the determination of the nature, in WTO terms, of the measure and whether that measure falls within the scope of a particular provision of the covered agreements".[1368] Thailand subsequently argued that the substantive obligations in the CVA at issue in this dispute only apply to government agencies that are responsible for the administration of the customs formalities and procedures that arise from the flow of goods into and out of a Member's territory, thereby excluding the Public Prosecutor.[1369]

7.635. It is common ground between the parties that the Public Prosecutor is an organ of the state, and that acts taken by the Public Prosecutor are attributable to Thailand.[1370] Article 3.3 of the DSU refers to "measures taken by another Member", without limitation as to the government agencies involved, and it is well established that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[1371]

7.636. We note that the original panel stated, with reference to Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts[1372], that "WTO Members are responsible for the actions of their government officials".[1373] We consider that Article 4(1) of these Articles is an expression of customary international law. Article 4(1) provides that:

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

7.637. We further note that, while certain covered agreements may include one or more provisions that specifically apply to certain types of entities, such as state trading enterprises, none of the covered agreements in Annex 1A, nor the GATS, nor the TRIPS Agreement, contains any general scope and coverage provision limiting its applicability to particular government agencies within a Member. The Agreement on Government Procurement is unique in containing a scope and coverage provision stating that it applies to the "entities covered by this Agreement, as specified in Appendix I"[1374], and this reflects the subject matter and content and structure of the agreement as a whole.

7.638. Against this background, we consider that there would have to be a clear and explicit indication in the text of the CVA limiting its applicability to a narrow subset of government officials to sustain Thailand's interpretation. However, the CVA has no scope and coverage provision at all. The absence of any scope and coverage provision in the CVA weighs heavily against an interpretation that would restrict the scope and coverage of the provisions therein to a narrow subset of government officials. So does Article 19 of the CVA, which deals with dispute settlement, and which refers without limitation to "the actions of another Member" that may be challenged in WTO dispute settlement proceedings.

[1367] Thailand's response to Panel question No. 48, p. 45.
[1368] Thailand's response to Panel question No. 48, p. 45.
[1369] Thailand's comments on the Philippines' response to Panel question No. 92.
[1370] Thailand's second written submission, para. 3.131.
[1371] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Revie*w, para. 81.
[1372] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session, in 2001, published in Yearbook of the International Law Commission, 2001, Vol. II, Part Two (the ILC Articles on State Responsibility).
[1373] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.120.
[1374] Article I:1 of the Agreement on Government Procurement.

7.639. Turning to the CVA provisions at issue, Article 1.1 uses the passive voice in stating that "[t]he customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation", 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". Likewise, the first and second sentences of Article 1.2(a) are also formulated in the passive voice, and state that:

> In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In 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.

7.640. We note that the text of Articles 2.1 and 3.1, quoted in full and discussed below, also set forth obligations that are silent on who is applying the methodology.

7.641. We recognize that the CVA contains a number of references to the "customs administration" of a Member. These provisions include, *inter alia*, Article 1.2(a) third sentence. They also include references to the "customs administration" in the Interpretative Notes to paragraph 2 of Article 1, and Articles 2 and 3. However, these references in the text of the CVA to the "customs administration" do not amount to a clear and explicit indication in the text of the CVA limiting its applicability to a narrow subset of government officials. These are relatively generic terms, and are not defined in the CVA. Furthermore, many of the references to "the customs administration" in the CVA serve essentially the same function as the repeated references to "the authorities" in the context of the Anti-Dumping Agreement and SCM Agreement. Indeed, the Interpretative Note to Article 6 of the CVA refers to "the authorities" in the importing country.

7.642. If Thailand were correct that the CVA only applies to customs valuation determinations made by the "customs administration", Members could easily evade their CVA obligations. A Member's customs administration and law enforcement agency could each undertake a valuation decision for exactly the same purposes, namely, to establish the value of goods that should have been used for the purposes of levying customs duties due on goods at or following the time of their importation. However, while the CVA would apply to the Member's customs administration's actions in initially valuing the goods, it would not apply when the value is re-assessed by a law enforcement agency. We agree with the Philippines that such an interpretation would render the CVA meaningless because Members could evade their CVA obligations simply by having a different agency re-assess the values initially determined by the customs administration.[1375] We consider that the object and purpose of the covered agreements should guide us to avoid interpretations that would enable Members to "circumvent" or "evade" their obligations.[1376]

7.643. All of the third parties that expressed a view on this point disagree with Thailand's interpretation of the CVA. Canada considers that "the text appears to provide flexibility as to the government actors captured by its obligations"[1377], and submits that "[t]he question is whether the entity conducts customs valuation functions or not. Otherwise, the obligations borne by a WTO Member under the CVA could be dictated by the organization of its domestic government."[1378] The European Union states that "a line must be drawn between (i) applying the *substantive* obligations on customs valuation in the context of criminal proceedings and (ii) applying the *procedural* obligations of the CVA to criminal proceedings involving customs valuation determinations", and that "[o]n the former, the European Union has made it very clear that a functional approach is warranted, whereby the substantive rules of the CVA apply regardless of the nature of the procedures in which the determination is made."[1379] The United States notes that "certain interim procedural

[1375] Philippines' response to Panel question No. 48(a), para. 359.

[1376] Appellate Body Report, *US – Shrimp*, para. 114; Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 8-75-8.76; Appellate Body Report, *US –Softwood Lumber IV*, para. 64; Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.39 ("it is evident that the interpretation [of 'revenue foregone'] advanced by the United States would be irreconcilable with th[e] object and purpose …given that it would offer governments 'carte-blanche' to evade any effective disciplines, thereby creating fundamental uncertainty and unpredictability").

[1377] Canada's third-party submission, para. 35.

[1378] Canada's third-party submission, para. 40.

[1379] European Union's third-party response to Thailand's question No. 4, paras. 6-7.

requirements might not apply to the prosecutor directly"[1380], but that the obligations in Article 1 "are not limited to particular entities within a Member's government".[1381] Australia states that it does "not consider the fact that the actions relate to different arms of the Thai State as of relevance in this case".[1382]

7.644. Based on the foregoing, we find that the obligations in Articles 1, 2 and 3 of the CVA invoked by the Philippines in this case apply to any organ of the state that makes a "customs valuation" determination. Accordingly, we are unable to agree with Thailand that the CVA is inapplicable to the Charges on the grounds that they were issued by the Public Prosecutor, which is not a part of the "customs administration". Having reached that conclusion, we consider it unnecessary to reach any definitive conclusion on the scope of the term "customs administration".

7.3.5.3.3 The meaning of the Charges

7.645. We now consider whether the Charges seek to determine the monetary value of PMTL's imported cigarettes. This point of disagreement between the parties requires us to resolve certain issues relating to the meaning of the Charges filed by the Public Prosecutor.

7.646. Article 15.1(a) of the CVA defines the "customs value of imported goods" as "the value of goods for the purposes of levying *ad valorem* customs duties on imported goods". The panel in *Colombia – Ports of Entry* relied on Article 15.1(a) to define the constituent elements that must be presented for an action to constitute a "customs valuation" determination subject to the obligations in the CVA.[1383] The panel stated that:

> In light of the dictionary definitions of valuation and value, as well as the definition of customs value provided in Article 15 of the *Customs Valuation Agreement*, the Panel considers that the ordinary meaning of the concept of customs valuation is straightforward. Essentially, customs valuation involves the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties. With this understanding of the meaning of customs valuation, the Panel will consider whether Colombia determines the customs value of imports through the use of its indicative prices regime.[1384]

7.647. Thus, the panel found, based on the definition of "customs value of imported goods" in Article 15.1(a), that "customs valuation" involves "the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties".[1385] In this case, the parties both agree that this is the applicable legal standard, and that for the Charges to be subject to the CVA, both of the following elements of the definition of "customs valuation" reflected in Article 15.1(a) must be present: (i) determining the monetary worth or price of imported goods (ii) for the purposes of levying *ad valorem* customs duties.

7.648. Thailand submits that in this case there is no "valuation of goods", because the Charges do not actually seek to "fix or determine the monetary value of PMTL's imported cigarettes".[1386] Thailand essentially argues that the Charges are to be understood as alleging that the transaction value *declared* by PMTL was not the *actual* price that PMTL paid to PMPMI[1387], and that the reference to the King Power prices, which is not contained in the Charges themselves but in an Annex, merely serves the purpose of providing a possible benchmark to the Criminal Court to impose fines in the event of a conviction.

7.649. We would be inclined to agree with Thailand that the Charges fall outside of the scope of application of the CVA if Thailand were to substantiate its interrelated assertions that the Charges allege customs fraud based on a determination that the price that PMTL *declared* to have paid to PMPMI was not the *actual* price that was paid to PMPMI, and that the references to King Power's prices in the Annex merely serve as a possible benchmark for the purposes of a fine and not as a

[1380] United States' response to Panel question No. 4(b), para. 29.
[1381] United States' response to Panel question No. 4(a), para. 25.
[1382] Australia's third-party statement, para. 11.
[1383] Panel Report, *Colombia – Ports of Entry*, para. 7.81.
[1384] Panel Report, *Colombia – Ports of Entry*, para. 7.83.
[1385] Panel Report, *Colombia – Ports of Entry*, paras. 7.83-7.84.
[1386] Thailand's response to Panel question No. 47(a), p. 44.
[1387] Thailand's response to Panel question No. 32(b).

basis for determining the actual customs value of PMTL's imported goods.[1388] However, as elaborated further below, we consider that Thailand's reading of the Charges is not supported by the actual text of the instrument, when it is read in conjunction with its accompanying Annex, the domestic legal framework in which the Charges are situated, and the events culminating in the Charges.

7.650. The Appellate Body has explained that, "[a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law".[1389] A panel's obligation to conduct an "objective assessment of the facts" under Article 11 of the DSU "means that panels must conduct their own objective and independent assessment of the meaning of municipal law, instead of deferring to a party's characterization of such law".[1390] As the original panel observed, "to the extent that the parties disagree on the interpretation of relevant provisions, we are required to objectively examine the question at issue based on the text of the concerned provision[s] as well as on the evidence before us".[1391]

7.651. It is well established that questions relating to the meaning of domestic law arising before WTO panels and the Appellate Body are to be approached as questions of fact. In respect of the types of factual evidence that may be relied upon to resolve the meaning and content of municipal law, the Appellate Body has explained that "[i]f the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning … is not evident on its face, further examination is required."[1392] The nature and the extent of the evidence required to satisfy the burden of proof varies from case to case.[1393] In some cases, the text of the relevant legislation may be sufficient to clarify the content and the meaning of the relevant legal instruments. In other cases, the parties will also need to support their understanding of the content and meaning of such legal instruments with evidence beyond the text of the instrument, such as evidence of consistent application of such laws, pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts, and the writings of recognized scholars.[1394] The Appellate Body has added that, "in ascertaining the meaning of municipal law, a panel should undertake a holistic assessment of all relevant elements, starting with the text of the law".[1395]

7.652. In respect of the burden of proof, the party asserting that another party's municipal law is inconsistent with relevant treaty obligations "bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion".[1396] This general principle regarding the allocation of the burden of proof applies not only to assertions relating to the WTO-consistency of a municipal law in the form of a statute or a regulation, but also to municipal legal instruments such as the Charges. However, in applying general principles of law to the WTO dispute settlement system, we recall that the burden of proof lies with the party asserting a fact, whether that party is the complainant or the respondent.[1397] Thus, while the Philippines bears the burden of introducing evidence as to the scope and meaning of the legal instrument that it challenges, Thailand must also substantiate assertions that it makes with respect to the meaning and content of its domestic laws and legal instruments.

7.653. With these principles in mind, we observe that the text of the Charges alleges that PMTL violated Section 27 of the Customs Act by declaring a "false price" for *Marlboro* and *L&M* cigarettes

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[1388] The Panel need not decide, and therefore does not decide, whether in such circumstances the domestic authorities may still be subject to the procedures elaborated in the Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value.

[1389] Appellate Body Report, *US – Hot-Rolled Steel,* para. 200. See also Appellate Body Report, *US – Carbon Steel (India),* para. 4.445.

[1390] Appellate Body Report, *US – Carbon Steel (India),* para. 4.445 (referring to Appellate Body Report, *India – Patents (US)*, para. 66).

[1391] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 6.157 and 7.684.

[1392] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 168.

[1393] Appellate Body Report, *US – Carbon Steel*, para. 157. See also Appellate Body Report, *US – Carbon Steel (India),* para. 4.446.

[1394] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China),* para. 4.100; *US – Carbon Steel,* para. 157; *US – Carbon Steel (India),* para. 4.446.

[1395] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China),* para. 4.101. See also Appellate Body Report, *US – Carbon Steel (India),* para. 4.446.

[1396] Appellate Body Report, *US – Carbon Steel*, para. 157 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335).

[1397] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 12-16, DSR 1997:I, 323, at pp. 333-338.

contrary to the "actual price". The Charges do not elaborate on whether PMTL declared a "false" price in the sense that it was contrary to the "actual price" that PMTL paid to PMPMI, or rather a "false" price that was contrary to the "actual price" using another benchmark to determine the price to be used for customs valuation. However, the terms of the Charges make clear that PMTL's declaring of a "false price" contrary to the "actual price" is the act giving rise to the offense. There is no specific reference to any "fine" in the Charges. On the other hand, for each of the 272 entries at issue, there is a clause which: (i) states that for the particular entry at issue, the defendants declared a "false price of such [cigarettes] contrary to the actual price and against the law of customs"; (ii) refers to "the Exhibit attached to the Complaint" for, inter alia, the "price per pack of cigarette falsely and jointly declared by the Defendants", and the "actual price of cigarettes of each brand"; (iii) then concludes that "[t]he Defendant and others committed such for the importation of the goods into the Kingdom in order to avoid the full payment of tax and duty, which constituted the acts of being involved in any manner to avoid or attempt to avoid the payment of customs tax or duties … with the intention to defraud the government tax of His Majesty the King, which was the violation of law".[1398] Thus, the Charges refer to these elements as the "acts" that "constituted" the crime.

7.654. For each of the 272 entries, the Charges repeat that "the Exhibit attached to the Complaint" shows the details with respect to price per pack of cigarettes "falsely" declared, and the "actual price" of cigarettes of each brand. The attachment to the Charges, referred to by the parties as the "Annex"[1399] to the Charges, provides information on the 272 entries at issue in the form of a table. For each of the 272 entries, Columns 2 through 6 of the table provide information on the date and time of importation; the import entry number; the imported goods (*Marlboro* or *L&M*); and the number of boxes/packs of cigarettes included in that entry. Columns 7 and 8 provide information and exact figures on the "false" and the "actual" prices, as follows:

a. Column 7 specifies the alleged "false" price declared by PMTL. The figures contained in Column 7 correspond to the transaction value *declared* by PMTL, and range from THB 7.60 to THB 8.14 per pack for *Marlboro* and THB 5.75 to THB 6.16 per pack for *L&M.* This column is entitled the "Price of Goods (cigarettes) with *false* declaration / pack (Baht)".

b. Column 8 of the Annex specifies the alleged "actual price". The "actual price" indicated in Column 8 is the transaction value paid by King Power for *Marlboro* and *L&M* cigarettes. This Column is entitled, "Price of Goods (cigarettes) or *Actual* Customs Price price/pack (THB) (*** price of goods imported by King Power)".

c. Column 9 then calculates the "Price of Goods (cigarettes) *underdeclared* / pack (THB)". Based on the difference between the prices in Columns 7 and 8, i.e. between the prices paid by PMTL and those paid by King Power, it provides this information on an entry-by-entry basis. Thus, the Annex provides a comparison between PMTL's transaction values and King Power's prices, with the stated amount of the "underdeclared" amount of duties based on the precise difference between the two.

d. Column 10 calculates the resulting "Price of Goods (cigarettes) / import entry (THB)" by taking the number of packs imported by PMTL in the entry at issue, and multiplying by the price paid by King Power. On the basis of that price, Column 11 calculates the resulting "Duty / Import Entry (THB)", by applying the *ad valorem* rate of 5% to the price of the goods arrived at based on King Power's prices.

e. Column 12 sets forth the total of the "Price of Goods (cigarettes) plus declared duty / import entry". It arrives at a total of THB 20.2 billion (approximately USD 580 million).

7.655. We agree with the Philippines more generally that "[b]efore the Public Prosecutor can establish any penalty (such as a fine), the Public Prosecutor must first establish that the elements of the alleged crime are present, because these provide the necessary justification for establishing the penalty"[1400] and that "[l]ogically, a penalty for the commission of a crime can be considered only

[1398] The Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation), (Exhibit PHL-1-B). (emphasis added)

[1399] Annex to the Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation), (Exhibit PHL-96-B).

[1400] Philippines' response to Panel question No. 33, para. 263.

after the substantive elements of the crime itself have been established".[1401] The domestic legal framework in which the Charges and the Annex are situated, and in the context of which they must be read, also includes Section 158(5) of the Criminal Procedure Code. Section 158(5), to which both parties have made reference[1402], provides that "a charge must contain 'all the acts alleged to have been committed by the accused, all the facts and particulars regarding the time and place of such acts, and the persons or articles concerned which are reasonably sufficient to give the accused a clear understanding of the charge'."[1403]

7.656. We acknowledge Thailand's assertion that the information mentioned in the Annex does not serve "to explain the specific acts that constitute the fraud of which PMTL is accused", however we do not consider that Thailand has adequately explained how this can be reconciled with what the Annex to the Charges actually says.[1404] By their own terms, the Charges and the Annex "show[] the details" with respect to the "false" and "actual" price, "fix or determine the monetary value of PMTL's imported cigarettes" for the purpose of customs valuation, and do so on the basis of King Power's prices.

7.657. We note that the English translation of Section 27 of the Customs Act, as submitted by the Philippines[1405], reads as follows:

> Any person who … shall be in any way concerned in any evasion or attempted evasion of any duties of Customs … with intent to defraud His Majesty's Government of any duties due on such goods or to evade any prohibition or restriction of or applicable to such goods; shall for each offence be liable to a fine equal to quadruple the duty-paid value of the goods, or imprisonment for a period not exceeding ten years, or both fine and imprisonment.

7.658. Thus, Section 27 of the Customs Act makes it a criminal offense to evade the payment of customs duties, with the "intent[ion]" to "defraud the government" of the "duties" that are "due on such goods".

7.659. We agree with Thailand that in cases of customs fraud, the authorities may not know the price actually paid.[1406] We further agree with Thailand that an allegation of customs fraud could be made without ever seeking to determine the customs value of the importer's goods, and the making of such an accusation does not necessarily presuppose that the authorities would have engaged in a customs valuation determination in order to reach the conclusion that the declared transaction value was not "truthful or accurate". Using Thailand's example[1407], if an importer presents an invoice indicating a purchase price of 100 for the imported merchandise, but the customs authorities find in the importer's luggage a second invoice of 50 for that same merchandise, the necessary conclusion is that the declared value of 100 is not the price actually paid by the importer, but the authority may never discover the totality of the invoices related to this purchase and, hence, may never have conclusive evidence of the price actually paid by the importer.

7.660. It appears to us that these general considerations apply equally in the context of Section 27 of the Customs Act. In circumstances where the authorities find evidence of false invoicing, for

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[1401] Philippines' response to Panel question No. 33, para. 264.
[1402] Thailand's first written submission, para. 6.87; Philippines' second written submission, fn. 406.
[1403] Criminal Procedure Code, (Exhibit THA-16), Section 158.
[1404] Thailand's response to Panel question No. 99(a).
[1405] Customs Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (English translation), (Exhibit PHL-34-B). After the Philippines submitted an English translation of Section 27 of the Customs Act as Exhibit PHL 34-B, Thailand subsequently submitted its own English translation of Section 27, as Exhibit THA 3-B. In response to a question from the Panel, Thailand subsequently confirmed that the Panel was correct in its understanding that, in the absence of any objection in accordance with paragraph 11 of the Working Procedures, Thailand did not object to the English translation of Section 27 submitted by the Philippines as Exhibit PHL 34-B. (Thailand's response to Panel question No. 96). We note that paragraph 11 of the Working Procedures provides that:

> 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.

[1406] Thailand's response to Panel question Nos. 99(b) and 106.
[1407] Thailand's response to Panel question No. 99(b).

example, it would be possible to reach a conclusion that the importer evaded the "duties due on such goods" without ever establishing, as a constituent element of the offense, what was the price actually paid or payable, and/or an alternative customs value determined according to Articles 1 to 7 of the CVA. We see nothing in the terms of Section 27 that compels the conclusion that the authorities must, in every case of customs fraud, have determined the actual customs value. To that extent, we disagree with the Philippines insofar as it is arguing that, for any offense alleged under Section 27, the Public Prosecutor must always determine "the customs value that it considered to be correct".[1408] We therefore do not consider that, in order to establish the constituent elements of an offence, the terms of Section 27 always require that the authorities engage in customs valuation determinations, such that any and all Charges brought pursuant to Section 27 necessarily fall within the purview of the CVA.[1409] In light of the foregoing, we also accept Thailand's explanation that Section 158(5) of the Criminal Procedure does not have the effect of requiring that, for any charges alleging an offense under Section 27, they must "lay out what the correct value would have been had the alleged offence not occurred".[1410]

7.661. Having said that, in the circumstances of this case, the Charges brought against PMTL allege that PMTL failed to comply with Section 27 by declaring a "false price" for *Marlboro* and *L&M* cigarettes contrary to the "actual price". The Charges also specify in exact detail both the "actual price", and the basis for determining that "actual price". As already detailed above, the Charges do so in a manner that clearly seeks to "fix or determine the monetary value of PMTL's imported cigarettes" for purposes of customs valuation, and they do so on the basis of King Power's prices.

7.662. Furthermore, a reading of the terms of the Charges and their accompanying Annex in the context of Section 2 of the Act reinforces the conclusion that the "actual price" referred to in the Charges involves a customs valuation determination. Section 2 of the Customs Act sets out definitions of terms that appear throughout the Act, and confirms that the terms "*customs price*" and "*price*" carry the same meaning as one another, which "in the case of importation, means *price of goods for the purpose to collect duty*".[1411] It further provides that the "*price of goods for the purpose to collect duty*" should be in accordance with one of six different benchmarks corresponding to Articles 1-7 of the CVA.[1412] We recall that Section 27 provides a benchmark for the purpose of calculating a fine, which is that, in the event of a conviction, PMTL shall for each offence be liable for a fine equal to quadruple "the duty-paid value of the goods".[1413] In response to a question from the Panel, Thailand confirms that, under its position that the Annex merely sets forth a benchmark for a fine, the Annex still reflects "the Public Prosecutor's view that King Power's purchase prices are equivalent to the duty-paid value of the goods within the meaning of Section 27".[1414]

7.663. Furthermore, we do not see how Thailand's assertions regarding the meaning of the Charges can be reconciled with the content of the April 2009 Memorandum of Allegation. This document states that "the declared values of cigarettes imported into Thailand from the Philippines by Philip Morris pursuant to such import entries were *undervalued* and did not reflect the *actual* value of the cigarettes". The Memorandum of Allegation then calculates that THB 68.8 billion in taxes and duties were lost, based on a comparison of PMTL's prices with King Power's declared import prices.[1415] The Memorandum of Allegation cannot be understood as referring to King Power's declared import prices for the purposes of calculating a fine. Furthermore, if the actual allegation had been that PMTL's

[1408] Philippines' second written submission, para. 600.

[1409] Having said this, we note that even in the situation where the constituent elements of the offense in a particular case under Section 27 do not involve customs valuation, if Thailand were to establish a fine that is calculated on the basis of the value of the goods, the CVA applies to that valuation exercise. See paragraph 7.662. below.

[1410] Thailand's response to Panel question No. 32(d).

[1411] Emphasis added. Thailand argues that Section 103 of the Customs Act is the relevant provision for the calculation of a criminal fine, and that therefore Section 103, and not Section 2, is the correct context for understanding the term "price" as used in the Charges. (Thailand's second written submission, para. 3.118-3.120) We agree with the Philippines that it is clear from the terms of the Charges that they refer to the "price" for the purpose of establishing the constituent elements of the crime under Section 27 of the Customs Act, not "for the purpose of fixing the amount of any fine or penalty". (Philippines' response to Panel question No. 33, paras. 261-274) Accordingly, we agree with the Philippines that Section 2, and not Section 103, is the relevant provision of the Customs Act for the purpose of understanding the term "price" as used in the Charges.

[1412] Emphasis added.

[1413] Customs Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (English translation), (Exhibit PHL-34-B), Section 27.

[1414] Thailand's response to Panel question No. 99(c), p. 25.

[1415] See paragraph 7.441. above.

declared transaction values were not truthful or accurate by reference to the actual price paid to PMPMI, then one would expect to see the "lost" duties/taxes derived from a comparison of PMTL's declared transaction values with the prices PMTL *actually paid to PMPMI*. While we agree with Thailand that in cases of false invoicing the authorities may not know the price actually paid, Thailand has not explained why the April 2009 Memorandum of Allegation relies on King Power's prices.[1416] The inescapable conclusion is that the Memorandum of Allegation sought to "fix or determine the monetary value of PMTL's imported cigarettes" for the purpose of customs valuation, and did do so on the basis of King Power's prices.[1417]

7.664. Based on the foregoing, and in particular the plain meaning of the Charges and their Annex, we find that the Charges "fix or determine the monetary value of PMTL's imported cigarettes" for the purpose of customs valuation, and that they do so on the basis of King Power's prices. Accordingly, we are unable to agree with Thailand that the CVA is inapplicable to the Charges on the grounds that they do not actually seek to fix or determine the monetary value of PMTL's imported cigarettes.

7.3.5.3.4 The consequences of the Charges

7.665. We now turn to Thailand's argument that the CVA is inapplicable to the Charges because they will not result in the levying of *ad valorem* customs duties on imported goods. Thailand's argument essentially relates to the consequences that may follow from the Charges.

7.666. The parties agree that for the Charges to be subject to the CVA, both of the following elements of the definition of "customs valuation" reflected in Article 15.1(a) must be present: (i) determining the monetary worth or price of imported goods (ii) for the purposes of levying *ad valorem* customs duties on imported goods. Having already considered the first element above, we now turn to the second element.

7.667. Section 27 of the Customs Act makes it a criminal offense to evade the payment of "duties on Customs", with the "intention to "defraud the government" of the "duties" that are "due on such goods". By their plain terms, the Charges read in conjunction with their Annex determine the monetary worth or price of imported goods of PMTL for the purpose of determining the amount of the *ad valorem* customs duties that should have been paid by PMTL. This reading is based on the explicit terms of the Annex to the Charges, and confirmed by the domestic legal framework in which they are situated. We refer generally to our detailed review in the previous section of our findings.

7.668. However, we understand Thailand to argue that, even if this is so, the Charges still fall outside of the scope and coverage of the CVA because they could only result in criminal fines and penalties, and will not result in border measures levying *ad valorem* customs duties on imported goods. In this regard, Thailand advances arguments relating to the ordinary meaning of the term "levy", and submits that "the second element is satisfied only if the valuation of the goods has the purpose of collecting charges imposed at the border on goods entering the country".[1418]

7.669. In the circumstances of this case, we do not consider that the applicability of the CVA to the Charges turns on the meaning of the term "levying".[1419] In our view, even if Article 15.1(a) provided that a "customs valuation" determination falling within the scope of the CVA must determine "the value of goods for the purposes of collecting *ad valorem* customs duties on imported goods", the Charges would meet that definition. The Public Prosecutor's determination that the amount of the *ad valorem* customs duties that PMTL paid was less than the amount of *ad valorem* customs duties that should have been *collected* from PMTL, in the context of an allegation that PMTL declared a

[1416] Thailand's response to Panel question No. 99(b).

[1417] We further note that in 2013, it was reported in the Thai press that the then-Attorney-General had decided to follow the DSI's recommendation, and had issued a Prosecution Order against PMTL for declaring the import prices of *Marlboro* and *L&M* from the Philippines below the normal price, causing the State to suffer damages of THB 68 billion. (See paragraph 7.447. above) Here again, there is an unexplained contradiction between what Thailand submits the Charges mean, and the basis for the recurring THB 68.8 billion figure.

[1418] Thailand's first written submission, para. 6.26.

[1419] Thailand argues that the verb "levy" refers to "the collection"of customs duties, and equates the "levying" of *ad valorem* customs duties with the "collection" of duties. (Thailand's first written submission, para. 6.26) The Philippines counters that the drafters did not use the words "collection" or "collecting", as they did elsewhere in the covered agreements, and that the verb "levy" has a broader meaning of "to raise (a sum of money) by legal execution or process". (Philippines' second written submission, para. 539)

false price in order to evade the customs duties owed, suffices to establish that the Charges value goods for the purposes of collecting *ad valorem* customs duties on imported goods. We read the terms "for the purposes of levying *ad valorem* duties" in the context of Article 15.1(a) as embracing any determination of the value of imported goods for the purpose of determining the amount of *ad valorem* duties due on those imported goods.[1420]

7.670. We consider that Thailand's interpretation of Article 15.1(a) is contradicted by various provisions of the CVA which establish that customs duties are not necessarily "levied on the border", either in physical or temporal terms. As the Philippines observes[1421], Article 13 of the CVA expressly foresees that the determination of customs value may be delayed, and permits the goods to be withdrawn from customs upon provision of a security. The charges subsequently levied remain *ad valorem* customs duties, even though they are not "levied on the border".

7.671. If Thailand were correct in its argument that the CVA only applies to customs valuation determinations that result in the *actual* levying of *ad valorem* customs duties, Members could very easily evade their CVA obligations. A Member's customs administration and law enforcement agency could each undertake a valuation decision for exactly the same purposes, namely, to establish the value of goods that should have been used for the purposes of levying customs duties due on goods at or following the time of their importation. However, while the CVA would apply to the Member's valuation actions in initially valuing the goods, it would not apply when the value is re-assessed a second time, after the goods have passed the border. We agree with the Philippines that such an interpretation would render the CVA worthless, because Members could evade their CVA obligations simply by having a law enforcement agency re-assess the values initially determined by the customs administration.[1422] We consider that the object and purpose of the covered agreements should guide us to avoid interpretations that would enable Members to "circumvent" or "evade" their obligations.[1423] It appears to us that Thailand distances itself from the restrictive interpretation of Article 15.1(a) that would lead to this consequence. In response to a question from the Panel, Thailand accepted the proposition that if an agency values imported goods for the purpose of determining the amount of the *ad valorem* customs duties (and excise tax) that should have been paid at the time of importation, this would not cease to constitute the valuation of goods "for the purposes of levying *ad valorem* customs duties" if it results in a fine.[1424]

7.672. Based on the foregoing, we conclude that the Public Prosecutor's determination of the monetary worth or price of imported goods of PMTL for the purpose of determining the amount of the *ad valorem* customs duties that should have been levied on goods imported by PMTL, in the context of an allegation that PMTL declared false prices in order to evade customs duties, suffices to establish that this valuation was made "for the purposes of levying *ad valorem* customs duties on imported goods". Accordingly, we do not agree with Thailand that the Charges fall outside of the scope and coverage of the CVA because they could only result in criminal fines and penalties and do not result in the levying of *ad valorem* customs duties on imported goods.

7.3.5.3.5 The "intention to defraud" aspect of the Charges

7.673. We now turn to Thailand's argument that the CVA is inapplicable to the "customs valuation" aspect of the Charges as a consequence of the non-applicability of the CVA to the "intention to defraud" aspect of the Charges.

7.674. Section 27 of the Customs Act makes it a criminal offense to evade the payment of "duties on Customs", with the intention to "defraud the government" of the "duties" that are "due on such goods". Thus, there are two constituent elements to the offence under Section 27 of the Customs Act, and to the allegations made against PMTL in the Charges: (i) the first element of the allegation is that PMTL did not pay the customs duties due on the imported goods (*actus reus*); and (ii) the

[1420] The same would be true if Article 15.1(a) included language similar to that found in the Ad Note to Article III of the GATT 1994, and referred to ad valorem customs duties imposed on imported goods "at the time or point of importation". In our view, the Public Prosecutor's determination that the amount of the ad valorem customs duties that were collected from PMTL at the point or time of importation was less than the amount of ad valorem customs duties that should have been collected from PMTL at the point of importation would suffice to establish that the Charges value goods for the purposes of levying/collecting ad valorem customs duties on imported goods.

[1421] Philippines' second written submission, para. 605.

[1422] Philippines' second written submission, para. 565.

[1423] See footnote 1376 above.

[1424] Thailand's response to Panel question No. 105.

second element of the allegation is that PMTL did so with the intention to defraud (*mens rea*). We understand Thailand to argue that even if the Charges contain a "customs valuation" determination, and even if the CVA applies to the Public Prosecutor notwithstanding that it is not a part of the "customs administration", the CVA should be found to be inapplicable to the customs valuation aspect of the Charges as a consequence of the non-applicability of the CVA to the "intention to defraud" aspect of the Charges.

7.675. In this proceeding, the Philippines does not dispute that the offence under Section 27, and the allegations contained in the Charges, contain these two constituent elements. However, the Philippines' claims focus only on the first constituent element of the allegation, and in particular the basis upon which the Public Prosecutor determined that PMTL did not pay the customs duties due on the imported goods. The Philippines has made no claim or argumentation with regard to the second element of the offense, i.e. the "intention to defraud".

7.676. Thailand asserts that "the key element" of a violation under Section 27 of the Customs Act is the second constituent element of the offence, i.e. the "intention to defraud" (*mens rea*).[1425] Thailand disagrees with the Philippines that, "for purposes of its claims against the Charges, the Panel need only consider the aspect of the Charges dealing with goods valuation and can disregard the element of intent".[1426] In this regard, Thailand explains that allegations under Section 27 "have at their core the element of an intention to defraud the government that is not found nor regulated in Articles 1 through 7".[1427] According to Thailand, "even if the Charges were to qualify as 'customs valuation', the Charges would still fall outside the scope of the CVA because, as Thailand has argued, the Charges relate to a criminal accusation that focuses on whether PM Thailand had the intention to defraud the government".[1428] In Thailand's view, to accept that the *actus reus* can be separated from the *mens rea* "would mean that a criminal judge would see no difference between acts of murder (intentional homicide) and manslaughter (unintentional homicide)", and it further points out that for "some crimes, such as theft, the element of intent determines whether the act is unlawful in the first place".[1429]

7.677. In our view, it is a general principle that, insofar as a WTO obligation is by its terms applicable to the particular aspect of a domestic measure being challenged, it does not become inapplicable to that aspect as a consequence of the same measure containing other aspects that are not regulated by that WTO obligation. The Appellate Body has confirmed this general principle in the context of clarifying the applicability of different covered agreements to different aspects of a single measure, in which it has explained that "the specific aspects" of the measure examined under each agreement could be different.[1430] In that context, the Appellate Body has stated that, in such situations, "the focus of the inquiry, and the specific aspects of the measure to be scrutinized, under each agreement, will be different because the subjects of the two agreements are different".[1431] In our view, the Appellate Body's findings in *US − 1916 Act* further confirm that the same principle applies in respect of the issue that Thailand raises in this case regarding the element of criminal "intent". In *US − 1916 Act*, the measure at issue made it a criminal offense to engage in "dumping" with "the intent of destroying or injuring" a US industry.[1432] The complainants claimed that the 1916 Act was inconsistent with a series of obligations, including Article VI of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement. The United States argued that Article VI of the GATT 1994 does not "state that its disciplines govern any law based upon the concept of international price discrimination regardless of any other elements required to be proven under the law".[1433] Likewise, the United States argued that, because Article 18.1 concerned actions against "dumping" while the 1916 Act imposed criminal penalties against "dumping with the intent of destroying or injuring" a US industry, Article 18.1 did not apply to the US 1916 Act.

[1425] Thailand's response to Panel question No. 32(c), p. 28.
[1426] Thailand's comments on the Philippines' response to Panel question No. 97(c), p. 30.
[1427] Thailand's response to Panel question No. 38(a), p. 34. More generally, see Thailand's response to Panel question No. 32.
[1428] Thailand's response to Panel question No. 47(b), p. 45.
[1429] Thailand's comments on the Philippines' response to Panel question No. 97(c), p. 30.
[1430] Appellate Body Report, *EC − Bananas III*, para. 221 (referring to Appellate Body Report, *Canada − Periodicals*, p. 19, DSR 1997:I, 449, at p. 465).
[1431] Appellate Body Report, *Canada − Autos*, para. 160.
[1432] Panel Report, *US − 1916 Act (Japan)*, paras. 2.1-2.3.
[1433] Panel Report, *US − 1916 Act (Japan)*, para. 6.110.

7.678. The panel in *US – 1916 Act* found that "the existence in the 1916 Act of the additional requirements referred to by the United States, which are not found in Article VI, does not *per se* suffice to make the 1916 Act fall outside the scope of Article VI".[1434] The panel found that since Article 18.1 of the Anti-Dumping Agreement specifies that actions must be taken "in accordance with the provisions of GATT 1994 as interpreted by this Agreement", such a violation automatically entailed a violation of Article 18.1.[1435] The Appellate Body upheld the panel's finding, concluding that Article 18.1 applied to the 1916 Act because, regardless of the "additional requirement" of intent of destroying or injuring a US industry, the 1916 Act imposed penalties against conduct that satisfied the constituent elements of "dumping", as defined by Article VI of the GATT 1994 and the Anti-Dumping Agreement.[1436]

7.679. The Appellate Body recalled that "dumping" is defined in Article VI:1 of the GATT 1994 as conduct "by which products of one country are introduced into the commerce of another country at less than the normal value of the products", and that the elements of this definition are further elaborated in Articles VI:2 and VI:3 of the GATT 1994, and in Article 2 of the Anti-Dumping Agreement.[1437] The Appellate Body referred to the elements of the definition of "dumping" contained in the relevant WTO provisions as the "constituent elements" of "dumping".[1438] In the course of its analysis, the Appellate Body stated:

> We note that the United States places much emphasis on the "intent" requirement of the 1916 Act, i.e., the stipulation that dumping is "unlawful" when it is:
>
> > ... done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such Articles in the United States.
>
> This requirement of intent to destroy, injure, or prevent the establishment of an American industry, or to restrain or monopolize any part of trade, does not affect the applicability of Article VI of the GATT 1994 to the 1916 Act. As already noted, action may be taken under the 1916 Act only when the constituent elements of dumping are present. The fact that an importer can only be found to have violated the 1916 Act when the sales of dumped products in the United States were carried out with a certain intent does not mean that the actions under the 1916 Act are not "specific action against dumping". Proof of a requisite intent under the 1916 Act only constitutes an additional requirement for the imposition of the civil and criminal penalties set out in that Act. Even if the 1916 Act allowed the imposition of penalties only if the intent proven were an intent to monopolize or an intent to restrain trade (i.e., an "antitrust"-type intent), this would not transform the 1916 Act into a statute which does not provide for "specific action against dumping", and, thus, would not remove the 1916 Act from the scope of application of Article VI.[1439]

7.680. Thailand seeks to distinguish the Appellate Body's findings in *US – 1916 Act*, regarding the irrelevance of an additional "intent" requirement in the context of Article 18.1 of the Anti-Dumping Agreement from the situation in this dispute. First, Thailand submits that the CVA contains no provision similar to Article 18.1 of the Anti-Dumping Agreement and therefore the Appellate Body's analysis sheds no light on the scope of application of the CVA.[1440] Second, Thailand submits that, unlike the US measure at issue in that case, the element of "intent" is inseparable from the *actus reus* in the context of Section 27 of the Customs Act.[1441]

7.681. We agree with Thailand that no provision exists in the CVA that is analogous to Article 18.1 of the Anti-Dumping Agreement, and it may well be that the "silence of the CVA in this regard confirms Thailand's position that WTO Members are free to impose criminal penalties on customs fraud".[1442] However, that does not mean that the Appellate Body's interpretation of Article 18.1 in

[1434] Panel Report, *US – 1916 Act (Japan)*, para. 6.130.
[1435] Panel Report, *US – 1916 Act (Japan)*, fn 573.
[1436] Appellate Body Report, *US – 1916 Act*, para. 132.
[1437] Appellate Body Report, *US – 1916 Act*, para. 106.
[1438] Appellate Body Report, *US – 1916 Act*, para. 122.
[1439] Appellate Body Report, *US – 1916 Act*, paras. 131-132. (footnote omitted)
[1440] Thailand's comments on the Philippines' response to Panel question No. 97(c), p. 29.
[1441] Thailand's comments on the Philippines' response to Panel question No. 97(c), pp. 29-30.
[1442] Thailand's comments on the Philippines' response to Panel question No. 97(c), p. 29.

US − 1916 Act does not shed any light on the question of the scope of the CVA, as put before this Panel.

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

7.683. For these reasons, we find that the obligations in Articles 1 to 7 of the CVA apply to the customs valuation aspect of the Charges, despite the fact that the measure at issue includes an additional aspect, i.e. the "intention to defraud". Accordingly, we do not agree with Thailand that the CVA is inapplicable to the customs valuation aspect of the Charges as a consequence of the non-applicability of the CVA to the "intention to defraud" aspect of the Charges.

7.3.5.4 Conclusion

7.684. Based upon the findings above, the Panel concludes that the obligations in Articles 1 to 7 of the CVA apply to the Charges.

7.3.6 Consistency of the Charges with CVA disciplines

7.3.6.1 Introduction

7.685. In its first written submission, the Philippines claims that the Charges do not provide a valid basis for the rejection of PMTL's transaction values and therefore violate Articles 1.1 and 1.2(a), second sentence, of the CVA. In support of this claim, the Philippines advances three arguments. First, the Philippines argues that the sole ground specified in the Charges − a comparison of PMTL's transaction values with King Power's duty-free purchase prices − is not a valid basis to reject transaction values.[1443] Second, the Philippines argues that the arbitrary exclusion of 18 entries from the Charges with circumstances of sale that were identical or very similar to the circumstances of sale of the 272 entries included in the Charges shows that the Public Prosecutor failed to undertake a rigorous and critical examination of the circumstances of sale.[1444] In addition, the Philippines argues that three additional grounds mentioned in the April 2009 Memorandum of Allegation provide no basis under WTO law to reject PMTL's transaction values.[1445] The Philippines submits that, for these reasons, the Public Prosecutor's rejection of PMTL's transaction values in the Charges is inconsistent with Article 1.2(a) and, consequently, Article 1.1 of the CVA. Additionally, the Philippines claims that the Public Prosecutor's determination of a revised customs value, by concluding that the customs values of PMTL's imported cigarettes are equal to King Power's prices, was inconsistent with Articles 2.1 and/or 3.1 of the CVA.[1446]

7.686. In its written submissions, Thailand has advanced extensive arguments that the Charges are outside the scope of this proceeding by virtue of the preclusion doctrine and the absence of a close nexus with the declared measures taken to comply, that they are not "ripe" for adjudication, and that Articles 1 to 3 of the CVA are not applicable to the Charges. Furthermore, in the context of arguing that Articles 1 to 3 of the CVA are not applicable to the Charges, Thailand has vigorously argued that "the Charges do not determine or even attempt to determine what should be the 'true' or 'correct' or 'actual' customs value" for PMTL's goods",[1447] and that the Philippines' entire argumentation concerning the Charges rests on the "defective foundation" that "the Charges

[1443] Philippines' first written submission, paras. 580-628.
[1444] Philippines' first written submission, paras. 629-640.
[1445] Philippines' first written submission, paras. 641-667.
[1446] Philippines' first written submission, paras. 670-681.
[1447] Thailand's response to Panel question No. 32(b), p. 28.

represent a determination that the customs value of the goods at issue is the price charged by Philip Morris to King Power, a duty-free operator in Thailand".[1448] Thailand also argues that, if the Charges are inconsistent with the CVA, any such inconsistency is justified under Article XX of the GATT 1994.

7.687. In the light of the foregoing, and in particular Thailand's arguments regarding the applicability of the CVA to the Charges, it would be incorrect to state that Thailand concedes that the Charges are inconsistent with Articles 1 to 3 of the CVA.[1449] However, Thailand's arguments in this proceeding move from the applicability of Articles 1 to 3 of the CVA directly to its defence under Article XX of the GATT 1994. While Thailand does deny that the Charges determine the customs value of PMTL's imported goods on the basis of King Power's prices, Thailand does not advance any argument to the effect that the rejection of PMTL's transaction values on that basis, and/or the determination of an alternative customs value on the basis of King Power's prices, are consistent with Articles 1 to 3 of the CVA. Additionally, Thailand's first and second written submissions contain no response to either the Philippines' argument concerning the arbitrary exclusion of 18 entries from the Charges with circumstances of sale that were identical or very similar to the circumstances of sale of the 272 entries included in the Charges, or to the Philippines' arguments regarding the grounds contained in the April 2009 Memorandum of Allegation.

7.688. In accordance with Article 11 of the DSU, it is well established that panels presented with so-called "uncontested claims" must undertake their own "objective assessment" of the matter. In *US – Shrimp (Ecuador)*, the panel stated that "the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case."[1450] In *US – Shrimp (Thailand) / US – Customs Bond Directive*, the panel stated that "notwithstanding the fact that the United States is not seeking to refute Thailand's claims, we must satisfy ourselves that Thailand has established a prima facie case of violation".[1451] To ensure that we are in a position to make an objective assessment of the aspects that are not contested by Thailand, we have put several questions to both the Philippines and Thailand in relation to several different issues.[1452] We proceed to consider whether the Philippines has made a *prima facie* case that the Charges are inconsistent with Articles 1.1, 1.2(a), 2.1 or 3.1 of the CVA.

7.3.6.2 Analysis by the Panel

7.3.6.2.1 General considerations

7.689. We recall that the nature of the obligations under Articles 1.1 and 1.2(a), second sentence, regarding the obligation to undertake a proper examination of the circumstances of sale, is discussed in detail in the context of our analysis of the Philippines' claims in respect of the November 2012 BoA Ruling. We do not repeat that analysis here.[1453]

7.690. In cases where the authority concludes that the importer's transaction values are not acceptable, it must then proceed to the second step of determining an alternative customs value in accordance with the detailed disciplines in Articles 2 to 7 of the CVA. Articles 2 and 3 of the CVA provide as follows:

> Article 2
>
> 1. (a) If the *customs value of the imported goods cannot be determined under the provisions of Article 1*, the customs value shall be the transaction value of *identical goods sold for export to the same country of importation* and exported at or about the same time as the goods being valued.
>
> (b) In applying this Article, the transaction value of *identical goods in a sale at the same commercial level and in substantially the same quantity* as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial

[1448] Thailand's opening statement at the meeting of the Panel, para. 21.
[1449] Thailand's second written submission, paras. 319-323.
[1450] Panel Report, *US – Shrimp (Ecuador)*, para. 7.9.
[1451] Panel Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 7.21.
[1452] See Panel question Nos. 49-53, 70(a) and 107-108.
[1453] See Section 7.2.2.3.1 above.

level and/or in different quantities, *adjusted to take account of differences attributable to commercial level and/or to quantity*, shall be used, *provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment*, whether the adjustment leads to an increase or a decrease in the value.

...

Article 3

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of *similar goods sold for export to the same country of importation* and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of *similar goods in a sale at the same commercial level and in substantially the same quantity* as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, *adjusted to take account of differences attributable to commercial level and/or to quantity*, shall be used, provided that *such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment*, whether the adjustment leads to an increase or a decrease in the value.[1454]

7.691. By its terms, Article 2.1(a) of the CVA provides an alternative basis for customs valuation in the event that the transaction value is rejected in accordance with Articles 1.1 and 1.2(a). Under Article 2.1(a), the alternative value to be used is "the transaction value of *identical* goods sold for export to the same country of importation and exported at or about the same time as the goods being valued". Article 3.1(a) provides that if the alternative value cannot be determined based on a comparison under Article 2 (i.e. if there are no "identical goods"), then the alternative value to be used is "the transaction value of *similar* goods".[1455] These two provisions are very similar, except that Article 2 applies to valuation using the transaction value of *identical* goods, and Article 3 applies to valuation using the transaction value of *similar* goods.

7.692. Article 15.2 of the CVA defines "identical goods" and "similar goods" for customs valuation purposes, and these definitions apply to Articles 2 and 3 of the CVA. Article 15.2 reads in relevant part:

(a) "identical goods" means goods which are the same in all respects, including physical characteristics, quality and reputation. …

(b) "similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable.

...

(d) goods shall not be regarded as "identical goods" or "similar goods" unless they were produced in the same country as the goods being valued.

7.693. Paragraph 4 of the respective Interpretative Notes to Articles 2 and 3 further provides that "the transaction value of identical [or similar] imported goods means a customs value … which has already been accepted under Article 1". Additionally, 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. When there is no such sale, the transaction value of the identical or similar goods must be adjusted "on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment". Paragraph 5 of the Interpretative Notes to each of these provisions explains that, if

[1454] Emphasis added.
[1455] Emphasis added.

there is no "objective" basis to make an adjustment, the proposed comparison cannot be undertaken, and the goods must be valued in a different way.

7.3.6.2.2 Claim under Articles 1.1 and 1.2(a), second sentence, of the CVA

7.3.6.2.2.1 Introduction

7.694. We proceed to consider whether the Philippines has made a *prima facie* case in support of its claim that the Charges violate Articles 1.1 and 1.2(a) by rejecting PMTL's transaction values without any valid basis. The Philippines argues that the rejection of PMTL's transaction values is invalid and inconsistent with Article 1 because it is based on: (i) an invalid comparison with King Power's prices; (ii) the arbitrary inclusion/exclusion of entries with identical circumstances of sale; and (iii) the other invalid grounds referred to in the April 2009 Memorandum of Allegation, and reiterated in DSI press releases and in Senate testimony.[1456] The Philippines also argues that Thailand "repeatedly concedes that the Charges reject the declared transaction[] values", and that Thailand admits that the Public Prosecutor's determination "necessarily implies that the declared value is incorrect and not the correct value".[1457]

7.3.6.2.2.2 The comparison with King Power's prices

7.695. The Philippines considers that the sole basis in the Charges for the rejection of the transaction values is a comparison of King Power's prices with PMTL's transaction values.[1458] The Philippines explains that the Charges allege that PMTL's transaction values are a "false price … contrary to the actual price", and that the Annex to the Charges indicates that the "actual customs price" consists of King Power's prices.[1459] The Philippines further points out that the "Annex provides a precise numerical comparison between PM Thailand's transaction values and King Power's duty-free prices, with the stated amount of the underpayment of duties and taxes based on the precise difference between the two."[1460] The Philippines also points to statements of Thai customs officials alleging that PMTL had made false declarations because its transaction values were different to the prices of King Power.[1461]

7.696. The Philippines recalls its characterization of the legal standard under Article 1.2(a) of the CVA, as described in respect of its claims regarding the BoA Ruling.[1462] The Philippines adds to that characterization its understanding that Article 1.2(a) imposes specific requirements on the use of a benchmark price to be used for purposes of a comparison.[1463] Specifically, the Philippines contends that, under Article 1.2(a), second sentence, when conducting an examination of the circumstances of sale through a comparison of the declared transaction value with a benchmark price, the benchmark price must be a customs value that the customs authority has previously approved, either in the form of a transaction value that has been accepted by the customs authority, or in the form of a customs value determined by the customs authority in accordance with Articles 2 to 7 of the CVA.[1464]

7.697. The Philippines alleges that a comparison between King Power's prices and PMTL's declared transaction values is not a valid basis to reject transaction values, under the requirements of Article 1.2(a) of the CVA.[1465] The Philippines argues that the King Power comparison is invalid because: (i) King Power's prices do not comprise customs values accepted by the Customs Department; and (ii) the comparison fails to respect the "principles of comparability", because King Power's cigarettes are not sufficiently comparable to PMTL's cigarettes, and the comparison fails to account for important differences between PMTL and King Power. The Philippines also highlights that a comparison of King

[1456] Philippines' first written submission, paras. 576-669.
[1457] Philippines' opening statement at the meeting of the Panel, para. 114.
[1458] Philippines' first written submission, para. 582.
[1459] Philippines' first written submission, para. 583.
[1460] Philippines' first written submission, para. 583.
[1461] Philippines' first written submission, para. 584 (referring to The Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English translation), (Exhibit PHL-1-B); and Senate Committee on Justice and Police Affairs, Report on Review and Study of Investigation into and Consideration of Case Concerning Actual or Attempted Tax Evasion by PMTL et al., 10 October 2013 (English translation), (Exhibit PHL-87-B)).
[1462] Philippines' first written submission, paras. 556-575.
[1463] Philippines' first written submission, paras. 561-565.
[1464] Philippines' first written submission, paras. 561-565.
[1465] Philippines' first written submission, paras. 585-627.

Power's prices to PMTL's prices, for the purpose of rejecting the declared transaction value, had previously been considered and rejected by the WCO, the Thai Customs Department, and the Public Prosecutor itself.[1466]

7.698. On its first point, the Philippines notes that no customs value has been determined for King Power's cigarettes, because King Power sells its cigarettes in duty-free shops in which the goods have not "formally cleared Thai customs or entered Thailand".[1467] The Philippines explains that these cigarettes would only have been valued by the Thai Customs Department upon entry into Thailand, and that since King Power's cigarettes were sold to "duty-free consumers", they may never have entered Thailand. Furthermore, any cigarettes that did enter Thailand would have been valued on the basis of the price paid by the end consumer to King Power, and not the price paid by King Power for the cigarettes.[1468] Since King Power's purchase prices were not accepted by Thailand for customs valuation purposes, the Philippines argues that Article 1.2(a) precludes their use as a benchmark price.[1469]

7.699. On its second point, the Philippines highlights that King Power's cigarettes are produced in Malaysia, whereas PMTL's cigarettes are produced in the Philippines, and thus the cigarettes of the two companies are not identical or similar goods, within the meaning of the CVA.[1470] Based on its characterization of the legal standard under Article 1.2(a) of the CVA, the Philippines asserts that such goods are not sufficiently comparable for the purposes of establishing a benchmark to compare declared transaction values under Article 1.2(a), because they were not produced in the same country.[1471]

7.700. The Philippines further elaborates that Thailand also failed to account for significant differences between King Power and PMTL, including the incidence of fiscal charges on PMTL's cigarettes.[1472] The Philippines notes that PMTL's cigarettes are subject to fiscal charges at "each step in the supply chain", whereas King Power's cigarettes, being in the "duty-free distribution chain", are not subject to customs duties or internal taxes at any point in the supply chain.[1473] In the Philippines' view, "[m]oving backwards through the supply chain, the net sales revenue at each step in the duty-free chain is higher, because there is more revenue to allocate among the different actors"[1474], with the consequence that net revenue at each step of the duty-free supply chain is higher than in the duty-paid supply chain.[1475] The Philippines explains that if the customs value of PMTL's cigarettes was equivalent to King Power's prices, the final retail price would be prohibitively expensive, and retailers would have been legally prohibited from selling at that price, resulting in retailers failing to recover the excise tax on the cigarettes.[1476] Additionally, the Philippines asserts that, had the customs value been King Power's purchase price, as alleged in the Charges, the retail price would have been "more than 2.5 times the retail selling price at the time", to recoup the cost of goods sold plus applicable duties and taxes on the uplifted customs value.[1477] The Philippines indicates that the retail price would also have been 40% higher than the "the highest maximum retail selling price for any brand in the Thai market."[1478]

7.701. Additionally, the Philippines asserts that Thailand failed to account for differences in commercial levels and sales volumes between King Power and PMTL.[1479] Regarding different commercial levels, the Philippines asserts that the King Power comparison erroneously compares the sales price in a manufacturer-distributor transaction (in the case of PMTL) with the sales price in a distributor-retailer transaction (in the case of King Power).[1480] The Philippines notes that "[a]t each

[1466] Philippines' first written submission, paras. 587 and 621-627 (referring to Exhibits PHL110; and PHL 87-B).
[1467] Philippines' first written submission, para. 590.
[1468] Philippines' first written submission, para. 591.
[1469] Philippines' first written submission, paras. 592-593.
[1470] Philippines' first written submission, paras. 596-603.
[1471] Philippines' first written submission, paras. 597-603.
[1472] Philippines' first written submission, paras. 604-616.
[1473] Philippines' first written submission, para. 606.
[1474] Philippines' response to Panel question No. 49, para. 362.
[1475] Philippines' first written submission, paras. 609-610. The Philippines' elaborates in its response to Panel question number 49.
[1476] Philippines' first written submission, paras. 612-614.
[1477] Philippines' first written submission, para. 615.
[1478] Philippines' first written submission, para. 615.
[1479] Philippines' first written submission, paras. 617-620.
[1480] Philippines' first written submission, para. 618 .

stage of the supply chain, the selling price increases to account for the costs and profits of the party at that stage of the supply chain".[1481] Regarding different sales volumes, the Philippines asserts that in the relevant time-period, PMTL purchased approximately 8 billion cigarettes annually, whereas King Power purchased 170 million cigarettes (or roughly 2% of PMTL's volume).[1482]

7.702. As reviewed in detail in the previous section of our Report regarding the applicability of the CVA to the Charges, Thailand denies that the Charges determine the customs value of PMTL's imported goods on the basis of King Power's prices. However, as indicated above, Thailand does not advance any argument to the effect that the rejection of PMTL's transaction values on that basis would be consistent with Articles 1 to 3 of the CVA.

7.703. Turning to assess whether the Philippines has made a *prima facie* case, we consider that there is ample context in the CVA indicating that comparisons should, in principle, be conducted with comparable goods that have been sold for export to the same country of importation[1483] and which have been previously valued by the customs administration.[1484] As a first point, we note that, under Article 15.2(a) of the CVA, identical or similar goods are physically similar to the goods being valued. However, the mere fact that goods have a close physical similarity is not sufficient to establish that they are identical or similar under the CVA. Rather, other considerations are relevant in finding that goods are identical or similar, such as whether the goods were sold at the same level of trade. We also note that under Article 15.2(d) of the CVA, "goods shall not be regarded as 'identical goods' or 'similar goods' unless they were produced in the same country as the goods being valued". To the extent, therefore, that the Memorandum of Allegation suggests that King Power's cigarettes are identical or similar goods solely on the basis that they have "the same overall quality, proportions and ingredients" and the same import certification (Form YorSor. 3), this conclusion is not sufficient to establish that they are identical or similar under the CVA. Finally, we recall our findings above that, when conducting an examination of the circumstances of sale, differences between things being compared should be taken into account.[1485] We also highlighted above that such differences include differences in commercial levels and sales volumes.[1486] We further consider that a relevant difference to be taken into account would be the impact of fiscal duties or charges imposed on the production of a particular good, particularly where the production of the comparator good is not subject to any such duties or charges.[1487]

7.704. In our view, the Philippines has demonstrated that the cigarettes sold by King Power were not sold for export to Thailand, and were not previously valued by the customs administration, since:

> King Power's duty-free shops are a form of 'bonded warehouse' − a storage area for goods that have not formally cleared Thai customs or entered Thailand. Goods inside a bonded warehouse remain in the custody of the Customs Department … With respect to the transactions used for benchmark purposes, King Power never withdrew the cigarettes in question from the bonded warehouse for entry into free circulation in Thailand. Instead, it sold the goods to duty-free consumers, many of whom were leaving Thailand for a third country.[1488]

[1481] Philippines' first written submission, para. 619.
[1482] Philippines' first written submission, para. 620.
[1483] We refer to the text of, and interpretative notes to, Articles 1.1, 1.2(b), 2.1(a), 3.1(a), 5.1(a), 5.2, 6.1(b) and 7.2(a) of the CVA.
[1484] We refer to the text of, and interpretative notes to, Articles 1.2(b), 2.1 and 3.1 of the CVA.
[1485] See paragraph 7.136. above.
[1486] See footnotes 388 and 389 above.
[1487] We consider that the differential impact of fiscal charges or duties, in particular in a situation where the production of a comparator good is not subject to *any* such charges or duties, is directly relevant to a comparison of prices for the purpose of determining whether the prices paid by an importer are consistent with the prices of comparable goods. We note in this regard that a number of provisions of the CVA itself, including Articles 1.2(b), 2 and 3 of the CVA, suggest a requirement to adjust for factors that affect price-comparability. See footnote 388 above. In addition, to the extent that the Anti-Dumping Agreement may provide relevant context for interpreting the CVA, we note that Article 2.4 of the Anti-Dumping Agreement requires that allowances must be made for differences affecting comparability, including differences in "taxation".
[1488] Philippines' first written submission, paras. 590-591 (referring to Customs Notification No. 20-2549, 27 March 2006 (English translation), (Exhibit PHL-106-B), Sections 6 and 8a, regarding Process and Practice in relation to Duty-Free Shop; Customs Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (English translation), (Exhibit PHL-34-B), Section 40.

7.705. The Philippines has also explained that the cigarettes sold by King Power were not produced in the Philippines, but rather Malaysia,[1489] and that King Power's cigarettes are produced in a "duty-free supply chain", in which the normal fiscal duties applicable in a normal production chain of cigarettes (for instance, the fiscal charges applicable in the production of PMTL's cigarettes) are not applicable.[1490] We further consider that the Philippines has demonstrated that King Power's prices are for transactions taking place between a distributor and a retailer, whereas, by contrast, PMTL's transaction values are for transactions between a manufacturer and distributor.[1491] Additionally, the Philippines has demonstrated that the volume of imports by PMTL was substantially larger than King Power's cigarette purchases.[1492] It is uncontested that in conducting its comparison of PMTL's prices with those of King Power, the Public Prosecutor failed to account for any such differences.

7.706. We therefore consider that the Philippines has adequately demonstrated that the prices paid by King Power for its cigarettes purchases were not *per se* comparable to the prices paid by PMTL, and that the Public Prosecutor failed to account for important and relevant differences between PMTL and King Power. On this basis, we consider that the Philippines has made a *prima facie* case that the King Power comparison is not apt to reveal whether the relationship between PMTL and PMPMI influenced the price paid by PMTL. Furthermore, we note that, as Thailand also observes, in the context of the BoA Ruling of 16 November 2012, the BoA specifically excluded King Power from the industry comparator group on the grounds that it was a duty-free operator.[1493]

7.3.6.2.2.3 The arbitrary inclusion/exclusion of entries

7.707. The Charges cover 272 entries of *Marlboro* and *L&M* cigarettes imported from the Philippines between July 2003 and June 2006. While the DSI had recommended that PMTL be prosecuted with respect to 292 entries[1494], the Public Prosecutor decided to exclude 20 of the 292 entries from the Charges, to arrive at a total of 272 entries subject to the Charges. As a result, the Charges cover a continuous sequence of 272 entries, running from July 2003 to June 2006. The 20 entries excluded from the Charges included 18 entries that were among the 118 entries covered by the DSB's recommendations and rulings in the original proceeding.[1495] The Philippines argues that the exclusion of the 18 "WTO" entries from the Charges was arbitrary, and therefore inconsistent with the obligation under Article 1.2(a) of the CVA to conduct a rigorous and critical examination of the circumstances of sale.[1496]

7.708. The Philippines insists that the Public Prosecutor is required, under Article 1.2(a), to "reach the same decision with respect to exactly the same transaction values, for the same brands of cigarettes, imported by the same importer, from the same supplier, under the same supply contract."[1497] The Philippines notes that the Charges "cover a continuous sequence of 272 entries [of cigarettes], running from July 2003 to June 2006."[1498] The Philippines points out that the Public Prosecutor removed from the Charges 18 entries that continue the "same temporal sequence without

[1489] See Philippines' first written submission, para. 601 (referring to Manager Online, "'Public Prosecutor' indicated not to prosecute Philip [Morris], reiterated 2 government agencies confirmed no offence found", 22 March 2011 (English translation), available at: http://manager.co.th/Crime/ViewNews.aspx?NewsID=9540000036517 (last accessed 19 January 2017), (Exhibit PHL-91-B)).

[1490] Philippines' first written submission, paras. 606-616 (referring to PMTL, Comparison calculation: King Power's duty free prices vs. PMTL's duty-paid prices, (Exhibit PHL-7); PMTL's PowerPoint presentation at meeting with the Customs Department of 7 August 2006 (English translation), (Exhibit PHL-107-B); Statement by Georges Farah, PM World Trade, 9 November 2010, (Exhibit PHL-108). See also Philippines' response to Panel question No. 49.

[1491] Philippines' first written submission, paras. 617-619.

[1492] Philippines' first written submission, para. 620 (referring to PMTL Products arrival 2003-2006, (Exhibit PHL-109); PMTL's PowerPoint presentation at meeting with the Customs Department of 7 August 2006 (English translation), (Exhibit PHL-107-B)).

[1493] Thailand's second written submission, para. 2.45. Thailand explains that the duty-free operators that were excluded from the industry comparator group included King Power, King Power Duty Free, and Bangkok Airways.

[1494] See DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), p. 1.

[1495] Philippines' first written submission, paras. 496-497. The Public Prosecutor identified one entry that had been double-counted by the DSI, and one entry that did not pertain to *Marlboro* or *L&M* cigarettes. (Philippines' first written submission, para. 500)

[1496] Philippines' first written submission, paras. 629-642.

[1497] Philippines' first written submission, para. 637.

[1498] Philippines' first written submission, para. 629.

interruption", starting in September 2006 and ending in February 2007.[1499] Specifically, the Philippines notes that the circumstances of sale for the last 161 of the 272 entries in the Charges are identical to the circumstances of sale for the 18 excluded entries, and the circumstances of sale for the other 111 entries in the Charges were "very similar" to the 18 entries.[1500] The Philippines contends that, by including the 272 entries and rejecting the 18 entries, the Public Prosecutor has essentially considered that PMTL acted criminally in some transactions, and did not act criminally in other transactions that involved the same circumstances of sale.[1501]

7.709. The Philippines explains that the Public Prosecutor justified its decision on the grounds that the BoA had accepted the transaction values for the 18 entries.[1502] However, given that these transactions had the same circumstances of sale as the other transactions, the Philippines notes that the Public Prosecutor has not explained why it deferred to the BoA on the 18, but not also the 272.[1503] Furthermore, the Philippines emphasizes that there is arbitrariness in the Public Prosecutor's alleged deference to the BoA but not to the Customs Department, which had itself accepted the declared transaction values for the 272 entries in the Charges.[1504]

7.710. In the context of its arguments that the Charges are outside the scope of a compliance proceeding pursuant to Article 21.5, Thailand stated that "it is within the prerogative of the Public Prosecutor to rectify the number of entries it presents to the Court".[1505] In response to a question from the Panel inviting Thailand to respond to the Philippines' argument, Thailand recalls that "[a]s the declared value for these entries had been accepted by the BoA" in its September 2012 Ruling, "Thailand was seeking to achieve closure with respect to the entries subject to the original panel's ruling".[1506] In addition, Thailand recalls its position that "the requirements under Article 1.2(a) of the CVA – as well as the other provisions of the CVA invoked by the Philippines - do not govern the conduct of the domestic court proceedings at issue, including the Public Prosecutor's alleged arbitrary distinction between the 18 'WTO' and the 272 entries in the Charges", and its position that "the Public Prosecutor's actions at issue in the present dispute do not constitute a customs valuation decision subject to the provisions of the CVA invoked by the Philippines".[1507]

7.711. It is essentially uncontested that the Public Prosecutor accepted the declared transaction value for one set of imports, and rejected the declared transaction for another set of goods, when the actual circumstances of sale were identical for both sets of goods. The preamble to the CVA recognizes the "need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values".[1508] In our view, the stated objective of the CVA to achieve a fair, uniform and neutral system that precludes the use of arbitrary customs values informs the substantive requirements of the CVA. Indeed, the explicit objectives of the CVA would be frustrated if a customs authority's margin of discretion entitled it to simultaneously both accept and reject the declared transaction value, when examining imports that have the same transaction values, for the same brands of cigarettes, imported by the same importer, from the same supplier, under the same supply contract.[1509] We do not consider that the imposition of such a consistency requirement precludes a customs authority from altering its methodologies for either examining the circumstances of sale or determining a revised customs value, over time, as a consequence of changed circumstances or for any other justifiable reason.

7.712. Applying this to the present dispute, we note that Thailand has offered no principled basis for the Public Prosecutor's differential treatment of entries in identical circumstances (i.e. its decision

[1499] Philippines' first written submission, para. 630.
[1500] Philippines' first written submission, para. 634. For the 161 entries, the Philippines notes that the "same importer imported the same brands of cigarettes, from the same supplier, under the same supply contract, with exactly the same values." For the 111 entries, the Philippines explains that the only difference is that the transaction values were "agreed in US dollars and converted to Thai baht on importation" resulting in the prices being different to the other entries. (See Philippines' first written submission, fn 397 (referring to Letter from PMTL to the Director of Customs Bonded Warehouse, 30 August 2004, with attachments dated 23 and 27 August 2004 (English translation), (Exhibit PHL-112-B)))
[1501] Philippines' first written submission, para. 635.
[1502] Philippines' first written submission, para. 636.
[1503] Philippines' first written submission, paras. 636-637.
[1504] Philippines' first written submission, para. 638.
[1505] Thailand's first written submission, para. 3.16.
[1506] Thailand's response to Panel question No. 52, p. 47.
[1507] Thailand's response to Panel question No. 52, p. 47.
[1508] Fourth recital of the preamble to the CVA.
[1509] Philippines' first written submission, para. 637. (emphasis omitted)

to reject the transaction values in respect of the 272 entries subject to the Charges, and its decision to defer to the BoA's acceptance of the declared transaction values in respect of the 18 entries subject to the BoA's decision) from the point of view of customs valuation, and the obligation to conduct a proper examination of the circumstances of sale. We therefore consider that this reflects a degree of arbitrariness that casts further doubt on the extent to which the Public Prosecutor engaged in a proper examination of the circumstances of sale.

7.3.6.2.2.4 The additional grounds for rejecting PMTL's transaction values

7.713. The Philippines notes that there are three grounds for rejecting PMTL's declared transaction value that do not appear in the Charges, but that did appear in the Memorandum of Allegation of 9 April 2009.[1510] The additional grounds are: (i) a comparison with cigarette prices in third country markets; (ii) the assertion that PMTL's cigarette prices in Thailand have remained constant for several years, despite rising costs; and (iii) an allegation that PMTL made unspecified payments of "inaccurate expenses" to unspecified related parties.[1511]

7.714. The Philippines submits that the three additional grounds contained in the Memorandum of Allegation of 9 April 2009 are invalid for the following reasons. First, the Philippines argues that a comparison with third country prices is not a valid basis to reject the declared transaction values.[1512] The Philippines recalls that a rejection of transaction value must be supported by "substantive reasons that are linked to the evidence submitted".[1513] In the Philippines' view, no details have been provided on any third country price comparisons and the "piecemeal and inconsistent descriptions given of pricing comparisons, given in different documents (some official and others not), do not provide valid 'grounds' for rejecting the transaction values under Article 1.2(a)".[1514] Additionally, the Philippines recalls that, in a comparison with benchmark prices, Article 1.2(a) requires that the benchmark prices must be for goods sold for export to Thailand, and that Article 7.2(c) of the CVA expressly prohibits the use of domestic prices in the country of exportation, which implies that other third country prices also may not be used.[1515] The Philippines notes that issues such as different commercial levels of the transactions, and the constituent elements of the prices, are not accounted for in a third-country price comparison.[1516]

7.715. Second, the Philippines argues that the assertion that PMTL's cigarette prices in Thailand remained constant despite rising costs is not a valid basis to reject the declared transaction values.[1517] The Philippines notes that no details have been provided.[1518] The Philippines further considers that the assertion that costs of production have increased is "particularly flimsy", since it is based on an inspection that took place in 1999, when PMTL imported its cigarettes from Indonesia and not the Philippines, and thus is not a valid basis for making conclusions on sales made between 2003 and 2006.[1519] Additionally, the Philippines points out that PMTL has testified that cost increases resulting from increased wages have been "compensated by other factors that have reduced costs, such as improvements in productivity and economies of scale" as well as falling "transport costs".[1520] The Philippines also declares that PMTL uses a "resale minus" pricing method that is consistent with traditional pricing practices in the industry, and that the prices of TTM, PMTL's main competitor in the Thai market, were also stable for a long period of time.[1521] Finally, with respect to the allegation that PMTL's transaction values should have fluctuated in accordance with changes in the USD-THB exchange rate, the Philippines notes that until 1 September 2004 the transaction values did fluctuate, since PMTL purchased cigarettes in USD.[1522] Furthermore, the Philippines explains that,

[1510] Philippines' first written submission, para. 641.
[1511] Philippines' first written submission, para. 641.
[1512] Philippines' first written submission, paras. 643-651.
[1513] Philippines' first written submission, para. 646 (quoting Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.200).
[1514] Philippines' first written submission, para. 646 (referring to DSI, Press Release, 17 August 2011 (English translation), (Exhibit PHL-93-B); and Senate Committee on Justice and Police Affairs, Report on Review and Study of Investigation into and Consideration of Case Concerning Actual or Attempted Tax Evasion by PMTL et al., 10 October 2013 (English translation), (Exhibit PHL-87-B)).
[1515] Philippines' first written submission, paras. 647-649.
[1516] Philippines' first written submission, paras. 650-651.
[1517] Philippines' first written submission, paras. 652-664.
[1518] Philippines' first written submission, para. 654.
[1519] Philippines' first written submission, paras. 655-656.
[1520] Philippines' first written submission, para. 657.
[1521] Philippines' first written submission, paras. 658-659.
[1522] Philippines' first written submission, para. 662.

after 1 September 2004, PMTL purchased cigarettes in THB, and the price in THB therefore no longer fluctuated, and from that point on the supplier (PMPMI) bore any risk of fluctuations in the USD-THB exchange rate.[1523]

7.716. Third, the Philippines argues that the allegation that PMTL made inaccurate financial transfers to related parties is not supported by any explanation or evidence, amounts to nothing more than speculation, and is therefore an invalid basis for rejecting the declared transaction value, under the requirements of Article 1.2(a) of the CVA.[1524] The Philippines notes that the MoA devotes a single sentence to this point, asserting that there is "evidence of transfer of inaccurate expenses to related persons". It further notes that no details are given of these transfers and, again, the Public Prosecutor did not include this allegation in the Charges; thus, the Philippines submits that it is again unclear if the Public Prosecutor will use these unstated grounds in support of the Charges.[1525] The Philippines submits that, in the absence of any further details, the single sentence included in the MoA does not provide valid "grounds" for rejecting the transaction values under Article 1.2(a). The Philippines recalls the original panel's view that a rejection of the transaction value "needs to be supported with substantive reasons that are linked to the evidence submitted".[1526] The Philippines observes that, although the DSI's single sentence refers vaguely to "evidence", it fails to identify any relevant evidence before the authority, and argues that a vague reference to unspecified and unsubstantiated "evidence" is *substantively* no different than no reference at all to evidence. The Philippines submits that the existence of such alleged "evidence" cannot be confirmed objectively, let alone contested, and it amounts to nothing more than a speculative assertion that does not warrant the rejection of the transaction values in the Charges.[1527]

7.717. In the context of its arguments that the Charges are outside the scope of a compliance proceeding pursuant to Article 21.5, Thailand stated that "[a]lthough the comparison with the prices of King Power may have played a role in the suspicion of customs fraud against PM Thailand, it is not the sole ground for doubting the accuracy of the customs value declared by PM Thailand", and that the "DSI identified in the 2009 Memorandum of Allegation several other grounds for doubting the declared customs value."[1528] Otherwise, Thailand's first and second written submissions contain no response to the Philippines' arguments regarding the grounds contained in the April 2009 Memorandum of Allegation. In response to a question from the Panel, Thailand states that it "can confirm that the grounds mentioned in the 2009 Memorandum of Allegations are among the grounds that the Public Prosecutor considered in order to substantiate the element of 'intention to defraud' for purposes of demonstrating to the Criminal Court an offence under Section 27 of the Customs Act".[1529] In response to a follow-up question, Thailand clarifies that although "the Memorandum of Allegation contains several grounds for doubting the declared customs value", this "should not be interpreted as Thailand accepting that the Memorandum of Allegation contains grounds for rejecting the transaction value in the context of a customs value determination".[1530]

7.718. We recall that the Philippines' essential claim is that the Public Prosecutor's rejection of the declared transaction value in the Charges was inconsistent with Article 1.1 of the CVA, because the Public Prosecutor lacked a valid basis to reject the declared transaction value. The Philippines points out that the "sole ground specified in the Charges" − a comparison of PMTL's transaction values with King Power's duty-free purchase prices − is not a valid basis to reject transaction values.[1531]

7.719. It appears to us that the Philippines' argument relating to the Memorandum of Allegation is a conditional argument, made in anticipation that Thailand might seek to defend the Public Prosecutor's rejection of PMTL's declared transaction values on the grounds set forth therein. The Philippines notes that it is unclear "whether the Public Prosecutor is entitled under Thai law to rely on these alleged grounds of rejection even though they are not specified in the Charges and, if so, whether the Public Prosecutor will do so".[1532] The Philippines states that it addresses these

[1523] Philippines' first written submission, paras. 662-663.
[1524] Philippines' first written submission, paras. 665-667.
[1525] Philippines' first written submission, para. 665.
[1526] Philippines' first written submission, para. 666 (referring to Panel Report, *Thailand − Cigarettes (Philippines)*, para. 7.200).
[1527] Philippines' first written submission, para. 667.
[1528] Thailand's second written submission, para. 3.51.
[1529] Thailand's response to Panel question No. 50, pp. 46-47.
[1530] Thailand's response to Panel question No. 108, p. 33.
[1531] Philippines' first written submission, paras. 580-628.
[1532] Philippines' first written submission, para. 642.

allegations for "the sake of completeness", and argues that they do not meet the requirements under Article 1.2(a) to reject PMTL's declared transaction values. Additionally, the Philippines has clarified that it is asking the Panel to make a finding in respect of the grounds contained in the Memorandum of Allegation "insofar as [the Charges] reject PM Thailand's declared transaction values on the basis of these … grounds".[1533]

7.720. However, Thailand has not sought to defend the Public Prosecutor's rejection of PMTL's declared transaction values on the grounds set forth in the Memorandum of Allegation. Thailand states that it "can confirm that the grounds mentioned in the 2009 Memorandum of Allegations are among the grounds that the Public Prosecutor considered in order to substantiate the element of 'intention to defraud' for purposes of demonstrating to the Criminal Court an offence under Section 27 of the Customs Act"[1534], but it also states that this "should not be interpreted as Thailand accepting that the Memorandum of Allegation contains grounds for rejecting the transaction value in the context of a customs value determination".[1535] Furthermore, Thailand has not directly responded to the substance of the Philippines' arguments relating to these grounds, and has not advanced any arguments aimed at demonstrating that the Memorandum of Allegation establishes any valid grounds for rejecting PMTL's declared transaction values.

7.721. We note that the grounds contained in the Memorandum of Allegation were not explicitly indicated in the Charges as being bases for the rejection of the declared transaction value. Given the absence of these grounds in the Charges themselves, and the fact that Thailand has not sought to defend the Public Prosecutor's rejection of PMTL's declared transaction values on the grounds set forth in the Memorandum of Allegation, we consider that the rejection of the declared transaction value cannot be justified on the basis of the grounds contained in the Memorandum of Allegation. In other words, neither the text of the Charges, nor the arguments of the parties, demonstrate that the Public Prosecutor's rejection of the declared transaction value was on the basis of the reasons contained in the Memorandum of Allegation. Thus, such reasons cannot be considered to be part of the "examination of the circumstances of sale" within the meaning of Article 1.2(a), second sentence, which was conducted by the Public Prosecutor. As a consequence, we find that the grounds contained therein cannot be used to defend the decision to reject the declared transaction value, nor is it necessary for us to assess whether, if the Public Prosecutor *had* based its decision to reject the declared transaction value on those grounds, such a rejection would satisfy the requirement of Article 1.2(a), second sentence, to "examine the circumstances of sale".[1536]

7.3.6.2.2.5 Conclusion

7.722. The Panel concludes that the Philippines has made a *prima facie* case that the Charges are inconsistent with Articles 1.1 and 1.2(a) of the CVA because they reject PMTL's declared transaction values without a valid basis, and in particular that the Public Prosecutor acted inconsistently with Article 1.2(a), second sentence, by failing to properly examine the circumstances surrounding the sale of the cigarettes to PMTL.

7.3.6.2.3 Claims under Articles 2.1 and/or 3.1 of the CVA

7.723. The Philippines further claims that, in its determination of a revised customs value, Thailand acted inconsistently with Articles 2.1 and/or 3.1 of the CVA by concluding that the customs values of PMTL's imported cigarettes are equal to King Power's prices.[1537] The Philippines contends that, based on various statements by Thai criminal enforcement officials, the Charges use King Power's prices as the customs value for PMTL's cigarettes on the basis that they are "identical". Specifically,

[1533] Philippines' response to Panel question No. 51.
[1534] Thailand's response to Panel question No. 50, pp. 46-47.
[1535] Thailand's response to Panel question No. 108, p. 33.
[1536] We are mindful of the Philippines' concern that "the grounds mentioned in the Memorandum of Allegation continue to be an issue in the ongoing criminal proceedings in Thailand". (Philippines' request to review the Interim Report, para. 71) However, we recall that it is the Charges issued on 18 January 2016 which are the relevant measure at issue in this proceeding, and that we must refrain from making speculative findings on future measures, or from making speculative findings on future events (see generally Section 7.3.3, regarding the "ripeness" issue). Of course, if any future measure is taken on the basis of one or more or the grounds mentioned in the Memorandum of Allegation, the manner in which we have analysed the Philippines' claims and arguments in this proceeding mean that the Philippines would not be precluded from seeking review of any such future measure in the context of WTO dispute settlement proceedings.
[1537] Philippines' first written submission, paras. 670-681.

the Philippines notes that Thailand's criminal enforcement officials also seem to believe that "PM Thailand's and King Power's cigarettes are identical because of their close physical similarity".[1538] In this regard, Mr. Somchai Aphiwatthanaphon, the then-Deputy Director General of the Excise Department, referred to the respective cigarettes as "identical", and the DSI's MoA also states that the respective cigarettes "have the same overall quality, proportions and ingredients".[1539]

7.724. The Philippines asserts that, by using King Power's prices for determining the proper customs value of PMTL's cigarettes, the Public Prosecutor acted inconsistently with Articles 2.1 and/or 3.1 of the CVA, for three reasons. First, the Philippines submits that King Power's purchase prices were not previously accepted by the customs authority under Article 1 of the CVA.[1540] The Philippines submits that Thailand neither accepts a transaction value for these cigarettes, nor assesses an alternative customs value for them. The Philippines submits that King Power's prices are not, therefore, transaction values for imported goods that could be used under Article 2 or 3 of the CVA for assessing the customs value of PMTL's imported cigarettes.[1541]

7.725. Second, the Philippines submits that King Power's cigarettes were produced in Malaysia, whereas PMTL's cigarettes were produced in the Philippines.[1542] The Philippines recalls that, under the applicable legal standard, to be "identical" or "similar", Articles 2 and 3 require that goods be produced in the same country.[1543] Specifically, Article 15.2 of the CVA indicates that goods can only be regarded as identical or similar goods within the meaning of the CVA if they were "produced in the same country as the goods being valued".[1544]

7.726. Third, recalling its arguments that King Power's sales differ from PMTL's own sales in respect of the fiscal charges paid by PMTL, the different commercial levels of PMTL and King Power's transactions, and the quantities sold by King Power and PMTL respectively, the Philippines asserts that the Public Prosecutor failed to make necessary adjustments for these "considerable differences" in using King Power's transaction values for determining PMTL's customs values.[1545] The Philippines points out that Articles 2.1(b) and 3.1(b) require that, for the transaction value of an identical or similar good to be used as the customs value, the transaction value must be from sales "at the same commercial level and in substantially the same quantities" as the goods being valued, or alternatively adjustments must be made for any such differences.[1546] The Philippines also points out that, pursuant to paragraph 5 in each of the Interpretative Notes to Articles 2 and 3, in the absence of an "objective" basis to make adjustments, the goods must be valued in a different way.[1547] In its first written submission, the Philippines identified at least three such adjustments that must be made to King Power's purchase prices. These adjustments account for: (i) the impact of the incidence of fiscal charges on the prices paid by PMTL, a duty-paid operator, and the absence of fiscal charges on the prices paid by King Power, a duty-free operator; (ii) the different commercial levels of PMTL's and King Power's transactions; and, (iii) the quantities sold in the respective transactions.[1548]

7.727. As indicated above, Thailand denies that the Charges determine the customs value of PMTL's imported goods on the basis of King Power's prices. However, it does not advance any argument to the effect that the rejection of PMTL's transaction values on that basis, and/or the determination of an alternative customs value on the basis of King Power's prices would be consistent with Articles 1 to 3 of the CVA. We recall that in the original proceeding, Thailand provided a copy of a letter from the WCO Secretariat.[1549] In that letter, dated 28 June 2006, the WCO explicitly informed Thailand that it was inappropriate for the Customs Department to compare the respective prices of PMTL and duty-free operator, King Power, for the purpose of assessing the acceptability of PMTL's transaction values. Specifically, the WCO explained that such a comparison was inappropriate without accounting for differences between the transactions (fiscal charges, commercial levels, and

[1538] Philippines' first written submission, para. 671.
[1539] DSI, Memorandum of Allegation, 9 April 2009 (English translation), (Exhibit PHL-17-B), p. 1.
[1540] Philippines' first written submission, para. 678.
[1541] Philippines' first written submission, para. 678.
[1542] Philippines' first written submission, para. 679.
[1543] Philippines' first written submission, para. 679.
[1544] Philippines' first written submission, para. 674.
[1545] Philippines' first written submission, para. 680.
[1546] Philippines' first written submission, para. 676.
[1547] Philippines' first written submission, para. 676.
[1548] Philippines' first written submission, para. 680. See also the Philippines' response to Panel question No. 53.
[1549] Letter from the World Customs Organization to the Government of Thailand, 27 July 2006 (Exhibit PHL-110).

quantities). Consistent with the advice of the WCO, Thailand advised the original panel that the Customs Department did *not* rely on a comparison with King Power's duty-free prices as the final grounds for considering that PMTL's transaction values were influenced by its relationship with its supplier.[1550]

7.728. We note that, having found that the Charges are inconsistent with Article 1 of the CVA by rejecting the declared transaction value without a proper basis, it is a moot point whether the determination of a revised customs value is inconsistent with Articles 2 or 3 of the CVA. However, in accordance with our approach in respect of the BoA Ruling, we consider it appropriate to proceed to make findings in respect of the Philippines' claims in this respect, in the alternative.[1551]

7.729. Having reviewed the Philippines' arguments, and bearing in mind our findings in respect of the Philippines' claim under Article 1.2(a), second sentence, above, we consider that the Philippines has satisfactorily demonstrated that King Power's purchase prices do not constitute transaction values for either "identical" goods (within the meaning of Article 2 of the CVA) or "similar" goods (within the meaning of Article 3 of the CVA). Recalling the applicable legal standard under Article 2.1, Article 3.1, and Article 15.2(a), (b) and (d), which we have set forth above, we consider that the Philippines has made a *prima facie* case that the Charges are indeed inconsistent with Article 2.1(a) and (b), or in the event that the goods could be considered "similar goods" within the meaning of Article 3, Article 3.1(a) and (b) of the CVA.

7.730. For these reasons, the Panel concludes that the Philippines has made a *prima facie* case that the Charges are inconsistent with Article 2.1(a) and (b), or in the alternative, Article 3.1(a) and (b) of the CVA, because they improperly treat King Power's purchase prices as transaction values for identical or similar goods.

7.3.6.3 Conclusion

7.731. In sum, we have found above that the Charges are a measure with a close nexus to Thailand's declared "measures taken to comply" with the DSB's recommendations and rulings in the original proceeding. With respect to the first distinct claim made by the Philippines, we have concluded that the Philippines has made a *prima facie* case that the Charges are inconsistent with Articles 1.1 and 1.2(a) of the CVA because they reject PMTL's declared transaction values without a valid basis, and in particular that the Public Prosecutor acted inconsistently with Article 1.2(a), second sentence, by failing to properly examine the circumstances surrounding the sale of the cigarettes to PMTL. With respect to the second distinct claim made by the Philippines, we have concluded that the Philippines has made a *prima facie* case that the Charges are inconsistent with Article 2.1(a) and (b), or in the alternative, Article 3.1(a) and (b) of the CVA, because they improperly treat King Power's purchase prices as transaction values for identical or similar goods.

7.3.7 Article XX of the GATT 1994

7.3.7.1 Introduction

7.732. Thailand argues that, insofar as the Charges are inconsistent with the provisions of the CVA, such inconsistency is justified under Article XX(d) because the Charges are measures "necessary to secure compliance with laws or regulations" and that such inconsistency is also justified under Article XX(a) because the Charges are measures "necessary to protect public morals".[1552] As a threshold issue, Thailand submits that Article XX is available to justify inconsistencies with the CVA.[1553] Thailand argues that the Charges are provisionally justified under Article XX(d), because the Charges are "necessary to secure compliance" with Section 27 of the Customs Act.[1554] Thailand argues that the Charges are also justified under Article XX(a) because they are necessary to protect "public

[1550] See Thailand's first written submission in the original proceeding, para. 57. See also fn 1146 above.
[1551] See paragraph 7.76. above.
[1552] Thailand's first written submission, paras. 6.89-6.131; second written submission, paras. 3.186-3.263; opening statement at the meeting of the Panel, paras. 51-69; responses/comments to Panel question Nos. 55-56 and 109-110.
[1553] Thailand's first written submission, paras. 6.91-6.93.
[1554] Thailand's first written submission, paras. 6.95-6.112.

morals".[1555] Finally, Thailand argues that the Charges satisfy the requirements of the chapeau of Article XX of the GATT 1994.[1556]

7.733. The Philippines submits that the Charges are not justified under Article XX of the GATT 1994.[1557] As an initial matter, it submits that Article XX of the GATT 1994 is not applicable to the CVA.[1558] Regarding Article XX(d), the Philippines submits that the Charges are not "designed" or "necessary" to secure compliance with Section 27, as "there can […] be no relationship between … a WTO-inconsistent customs valuation and … the objective of securing compliance with laws designed to enforce payment of the correct amount of customs duties owed."[1559] The Philippines submits that the Charges are not justified under Article XX(a) for essentially the same reason.[1560] Finally, the Philippines additionally submits that the Charges constitute a "disguised restriction" on trade, and therefore fail to meet the requirements of the chapeau of Article XX.[1561]

7.734. In its second written submission, the Philippines sets forth its understanding that Thailand "does not assert justification under Article XX with respect to the Philippines' Article 10 claims, where the relevant conduct is not the Charges themselves, but the disclosure of PM Thailand's business confidential information".[1562] Thailand subsequently confirmed that this understanding is correct.[1563]

7.3.7.2 Main arguments of the parties

7.735. Thailand understands that the Appellate Body has indicated that Article XX is available to justify findings of inconsistency in respect of agreements other than the GATT 1994 where there is "a clear textual link between the provisions under which claims are made and the text of the GATT 1994, in particular Article XX".[1564] Thailand argues that there is a sufficient textual basis in the title of the CVA[1565], the language in the preamble of the CVA[1566], and also the language in Article XX(d) of the GATT 1994. In Thailand's view, it would be absurd if Article XX was available to justify an inconsistency with Article VII, but not the CVA, which explicitly "implements and elaborates on the rules contained in Article VII."[1567]

7.736. Thailand considers that the Charges are designed to secure compliance with Section 27 of the Customs Act, since the Charges "lead to the examination of the matter by the Criminal Court" and thus "are the only way of enforcing Section 27".[1568] Thailand considers that "Thailand could not properly enforce section 27, and the other requirements of the Customs Act, were it not able to pursue criminal cases."[1569] Thailand further asserts that the Charges make an "essential" contribution to the enforcement of Section 27, and that, in the absence of the Charges, "Section 27 would not have been enforced properly".[1570] In response to the Philippines' argument that a WTO-inconsistent customs valuation determination can, by definition, not be capable of securing compliance with laws designed to enforce payment of the correct amount of customs duties owed, Thailand submits that this "makes no sense" because the "need to justify a measure, or aspects of a measure, arises solely because those aspects have been found to be WTO-inconsistent", and, under the Philippines' approach, it would be "impossible" to ever justify a measure under Article

[1555] Thailand's first written submission, paras. 6.113-6.6.124.
[1556] Thailand's first written submission, paras. 6.125-6.131.
[1557] Philippines' second written submission, paras. 636-715; opening statement at the meeting of the Panel, paras. 116-120; responses/comments to Panel question Nos. 54, 56, 57 and 110.
[1558] Philippines' second written submission, paras. 652-660.
[1559] Philippines' second written submission, paras. 677-692.
[1560] Philippines' second written submission, paras. 697-705.
[1561] Philippines' second written submission, paras. 706-714.
[1562] Philippines' second written submission, fn 423.
[1563] Thailand's response to Panel question No. 55.
[1564] Thailand's first written submission, para. 6.92 (referring to Appellate Body Reports, *China – Publications and Audiovisual Products*, paras. 229-233; *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 310-319).
[1565] Thailand's second written submission, para. 3.207.
[1566] Thailand's first written submission, para. 6.91; second written submission, para. 3.207.
[1567] Thailand's second written submission, para. 3.208.
[1568] Thailand's first written submission, para. 6.106. See also Thailand's second written submission, para. 3.224.
[1569] Thailand's first written submission, para. 6.106.
[1570] Thailand's first written submission, para. 6.109. See also Thailand's second written submission, para. 3.232.

XX(d).[1571] Thailand further submits that the Philippines mischaracterizes the purpose of Section 27 of the Customs Act as being the re-evaluation of imported goods for collection of "correct" customs duties[1572], when the "purpose of Section 27 is, in a case of customs fraud, to impose a punishment, in the form of a fine on and/or imprisonment of the offender."[1573] Thailand submits that the Charges are necessary to protect "public morals" within the meaning of Article XX(a) because they are "closely related to the fight against fraudulent duty and tax evasion, and contribute to the fight against smuggling and contraband of cigarettes in Thailand", the criminalization of which under Section 27 "is a necessary component of the fight against smuggling and contraband".[1574]

7.737. Thailand argues that the Charges satisfy the requirements of the chapeau of Article XX of the GATT 1994.[1575] Thailand submits that "there is no indication that the Charges are applied arbitrarily or in a discriminatory manner against cigarette imports from the Philippines, or that they are a disguised restriction on international trade."[1576] Thailand notes that a criminal allegation "necessarily applies to an individual importer and cannot, as such, be considered to be discriminatory".[1577] In response to the Philippines' argument that the Charges are a "disguised restriction" on international trade because the fines could lead to the demise of PMTL and thereby leave TTM without import competition, Thailand submits that no fine has been imposed as yet, there is no certainty that a fine will be imposed, and the amount of any potential fine has yet to be determined.[1578] Additionally, Thailand notes that in 2015 the gross profit for Philip Morris International was USD 17.429 billion, and ranged between USD 17.429 billion and USD 21.004 billion between 2011 and 2015.[1579] Consequently, in Thailand's view, "it is not clear" that a fine of USD 2.35 billion would threaten the very survival of PMTL.[1580] Thailand also submits that the purpose of a fine is to punish offenders, and "the fact that there may be a fine at the end of the ongoing court proceedings cannot suffice to show that Thailand abuses or makes an illegitimate use of the exceptions under Article XX of the GATT 1994".[1581]

7.738. The Philippines reviews panel and Appellate Body reports that have addressed the availability of Article XX of the GATT 1994 to justify inconsistencies in respect of agreements other than the GATT 1994[1582], and submits that "[p]anels and the Appellate Body have not … readily applied Article XX to other covered agreements and have required sufficiently clear affirmative language to justify its application outside of the GATT 1994."[1583] The Philippines submits that "the mere fact that one particular provision of the GATT 1994 (other than Article XX) is mentioned in a different covered agreement − either in the title or the preamble − does not reveal any intention to apply all of the other provisions of the GATT 1994, such as Article XX, to that other agreement."[1584]

7.739. Regarding Article XX(d), the Philippines submits that the Charges are not "designed" or "necessary" to secure compliance with Section 27.[1585] The Philippines emphasizes that, in seeking justification under Article XX, Thailand must demonstrate that the WTO-inconsistent aspect of the Charges is necessary to secure compliance, and not that the Charges "as a whole" are necessary.[1586] The Philippines notes that Section 27 seeks to enforce Section 10bis of the Customs Act, which requires, according to the Philippines, that "the correct amount of the duties owed is calculated on

[1571] Thailand's second written submission, para. 3.218.
[1572] Thailand's second written submission, para. 3.218.
[1573] Thailand's second written submission, para. 3.223.
[1574] Thailand's response to Panel question No. 56, p. 49.
[1575] Thailand's first written submission, paras. 6.125-6.131; second written submission, paras. 3.254-3.261.
[1576] Thailand's first written submission, para. 6.129.
[1577] Thailand's first written submission, para. 6.129.
[1578] Thailand's second written submission, para. 3.258.
[1579] Thailand's second written submission, para. 3.259.
[1580] Thailand's second written submission, para. 3.259.
[1581] Thailand's second written submission, para. 3.260 (referring to Appellate Body Report, *US − Gasoline*, p. 25, DSR 1996:I, 3, at p. 23).
[1582] Philippines' second written submission, paras. 642-651 (referring to Appellate Body Reports, *Turkey − Textiles*, para. 58; *Argentina − Footwear (EC)*, para. 110; *US − Shrimp (Thailand) / US − Customs Bond Directive*, para. 319; *China − Publications and Audiovisual Products*, para. 233; *China − Raw Materials*, paras. 303 and 307; *China − Rare Earths*, paras. 5.55-5.56; and *US − Clove Cigarettes*, para. 101).
[1583] Philippines' second written submission, para. 651.
[1584] Philippines' second written submission, para. 656 (referring to Appellate Body Reports, *China − Raw Materials*, para. 303).
[1585] Philippines' second written submission, paras. 677-692.
[1586] Philippines' second written submission, para. 687.

the basis of an assessment of the 'price' or customs value of the goods".[1587] The Philippines insists that "[e]nforcement of the 'correct' amount of custom duties owed depends on establishing the correct … customs value" and that "[l]ogically, there can never be a circumstance where an incorrect customs valuation decision is 'necessary' to ensure the collection of the correct amount of customs duties."[1588] In the view of the Philippines, "there can therefore be no relationship between … a WTO-inconsistent customs valuation and … the objective of securing compliance with laws designed to enforce payment of the correct amount of customs duties owed."[1589] The Philippines thus asserts that the WTO-inconsistent aspect of the Charges, the customs valuation, is "incapable of securing compliance with Section 27", and consequently the Charges are not designed to secure compliance with Section 27.[1590] The Philippines emphasizes that, in the event that a justification under Article XX is relevant to the Panel's analysis, the Panel would already have concluded that the Charges determined the customs value of the goods in a WTO-inconsistent manner.[1591] The Philippines submits that the Charges are not "designed" or "necessary" to protect public morals under Article XX(a), for the same reasons that they are not justified under Article XX(d).[1592]

7.740. Finally, the Philippines submits that the Charges constitute a "disguised restriction" on trade, and therefore fail to meet the requirements of the chapeau of Article XX.[1593] The Philippines argues that PMTL is the largest importer of cigarettes into Thailand, and that the potential fines of USD 2.35 billion threaten "the very survival of PM Thailand", and could potentially result in the removal of "the largest source of import competition from the Thai market".[1594] The Philippines notes that Thailand's Ministry of Finance owns TTM, which "enjoys a monopoly over the production of cigarettes in Thailand, and is the dominant force in the Thai cigarette market, controlling more than three-quarters of the market".[1595] The Philippines suggests that "[t]he demise of PM Thailand would leave TTM, the sole domestic producer, without import competition in the market".[1596]

7.3.7.3 Analysis by the Panel

7.741. Thailand's defence under Article XX of the GATT 1994 raises two main issues. First, whether Article XX is available to justify a violation of the CVA. If so, the second issue is whether Thailand has demonstrated that the aspects of the Charges giving rise to the inconsistency with the CVA are justified under either Article XX(d) or Article XX(a). We address these issues in turn.[1597]

7.3.7.3.1 Applicability of Article XX of the GATT 1994 to the CVA

7.742. Article XX of the GATT 1994 reads in relevant part:

General Exceptions

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

[1587] Philippines' second written submission, para. 679.
[1588] Philippines' second written submission, paras. 688-689.
[1589] Philippines' second written submission, para. 681.
[1590] Philippines' second written submission, para. 682.
[1591] Philippines' second written submission, para. 680.
[1592] Philippines' second written submission, paras. 697-705.
[1593] Philippines' second written submission, paras. 706-714.
[1594] Philippines' second written submission, para. 712.
[1595] Philippines' second written submission, para. 713.
[1596] Philippines' second written submission, para. 714.
[1597] We are also mindful of the fact that, where the responding party claims that the obligations in another covered agreement are subject to the general exceptions in Article XX of the GATT 1994, a panel should, in principle, rule on that issue regardless of whether the panel considers that the respondent has demonstrated that the challenged aspects of the measure at issue are justified under Article XX in the particular circumstances of the case. Specifically, the Appellate Body has explained that in circumstances where a panel concludes that the respondent has failed to demonstrate that the WTO-inconsistent aspects of the measure at issue are "necessary" under Article XX, the absence of a ruling may leave the parties uncertain as to the regulatory scope that the respondent enjoys in implementing the recommendations and rulings of the DSB. (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 214)

> (*a*) necessary to protect public morals;
>
> ...
>
> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices

7.743. The text of Article XX establishes that the provision applies to "this Agreement", i.e. to the GATT 1994. Insofar as another covered agreement specifically cross-references Article XX and incorporates these general exceptions by reference, the Article XX exceptions will apply to that other agreement. For example, Article 3 of the TRIMs Agreement explicitly provides that "[a]ll exceptions under GATT 1994 shall apply", which plainly includes Article XX of the GATT 1994. Similarly, Article 24.7 of the TFA, which entered into force on 22 February 2017, states that "[a]ll exceptions and exemptions under the GATT 1994 shall apply to the provisions of this Agreement". These are clear examples of incorporation by reference.

7.744. The provisions of the CVA, however, do not make any reference to Article XX of the GATT 1994. The question before us, therefore, is whether the Article XX exceptions are available to Members to justify measures found to be inconsistent with the provisions of the CVA. There have been several disputes in which panels and the Appellate Body have considered the extent to which Article XX of the GATT 1994 is incorporated into other covered agreements, including accession protocols which are an integral part of the WTO Agreement, in the absence of such a clear reference to exceptions under the GATT.[1598] This dispute is the first to raise the interpretive question of whether Article XX of the GATT 1994 is available to justify violations of the CVA, which is a different covered agreement from the GATT 1994. The Appellate Body has articulated and applied a standard "analytical approach" that entails an agreement-by-agreement analysis that starts with the text of the covered agreement in question, and which entails a "thorough analysis of the relevant provisions", on the understanding that the lack of an express textual reference is not dispositive in and of itself.[1599] This standard analytical approach is captured in the Appellate Body's statement that the specific relationship between provisions of different covered agreements must be "ascertained through scrutiny of the provisions concerned, read in the light of their context and object and

[1598] In *US – Shrimp (Thailand) / US – Customs Bond Directive*, both the panel and the Appellate Body considered it unnecessary to rule on whether Article XX(d) was available to justify a violation of the Anti-Dumping Agreement, because they considered that the respondent had in any event not demonstrated that the measure could be justified as "necessary". (See Panel Reports, paras. 6.11-6.13; Appellate Body Reports, paras. 306-310) In *EC – Salmon (Norway)*, the EU argued on similar grounds that one of the challenged measures was justified under Article XX(d), but the panel in that dispute did not rule on the issue after finding that the measure was not inconsistent with the Anti-Dumping Agreement in the first place. (See Panel Report, paras. 7.755-7.761) In *China – Publications and Audiovisual Products*, the Appellate Body found that the "Trading Rights" obligation under Paragraph 5.1 of China's Accession Protocol, and the corresponding "Trading Rights" paragraphs of the Working Party Report, which expressly provided that the provision was "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement", is subject to Article XX of the GATT 1994. (See Panel Report, paras. 7.742-7.745; Appellate Body Report, paras. 205-233) In *China – Raw Materials*, both the panel and the Appellate Body found that the general exceptions in Article XX are not available in respect of Paragraph 11.3 of the China's Accession Protocol, which establishes a general prohibition of export duties. (See Panel Reports, paras. 7.116-7.159; Appellate Body Reports, paras. 270-307) In *China – Rare Earths*, the parties re-argued the question of whether Article XX is applicable to Paragraph 11.3 on the basis of new arguments raised by China, and the panel found, again, that Article XX is not available in respect of Paragraph 11.3 of the China's Accession Protocol. China appealed the Panel's assessment of the systemic relationship between, on the one hand, the specific provisions of its Accession Protocol and, on the other hand, the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. In doing so, however, China did not specifically appeal the Panel's ultimate conclusion that Article XX of the GATT 1994 is not available as a defence to justify its export duties. Furthermore, in a finding that was also not appealed, the panel found that China's commitments in Paragraphs 83 and 84 of its Working Party Report are subject to the general exceptions in Article XX. (See Panel Reports, paras. 7.53-7.115 and 7.1016-7.1033; Appellate Body Reports, paras. 5.1-5.74) In *US – Clove Cigarettes* the Appellate Body found that Article XX is not available to justify a breach of the TBT Agreement. (See Appellate Body Report, paras. 96 and 101; see also Appellate Body Report, *China – Rare Earths*, para. 5.56, fn 479) In *US – Poultry (China)*, the panel found that an SPS measure which has been found to be inconsistent with Articles 2 and 5 of the SPS Agreement cannot be justified under Article XX(b) of the GATT 1994. (See Panel Report, paras. 7.465-7.482)

[1599] Appellate Body Reports, *China – Rare Earths*, paras. 5.61-5.63.

purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments".[1600]

7.745. We understand the parties to agree that the applicability of Article XX of the GATT 1994 to the CVA must be determined on the basis of a textual analysis of the CVA and the GATT 1994. Specifically, we understand Thailand to accept that Article XX does not automatically apply to obligations in the covered agreements other than the GATT 1994, as reflected in its view that Article XX applies to other covered agreements where there is "a clear textual link between the provisions under which claims are made and the text of the GATT 1994, in particular Article XX."[1601] We understand the Philippines to accept that the absence of a specific textual reference to Article XX is not in and of itself dispositive, as reflected in its view that panels and the Appellate Body "have required sufficiently clear affirmative language to justify its application outside of the GATT 1994".[1602]

7.746. Therefore, we start our analysis with an examination of the textual bases identified by Thailand. Following that, we address Thailand's argument that the inapplicability of Article XX to the CVA would lead to an absurd result since Article XX would be available to justify a violation of Article VII of the GATT 1994, but not the Agreement that implements that provision. We then address Thailand's argument that Article XX applies to the CVA since this is the only way to establish a balance between Members' obligations and Members' right to regulate. In our assessment of that issue, we consider the consequences of the inapplicability of Article XX to the CVA on Members' right to enact measures to combat customs fraud.

7.747. Thailand identifies three textual bases to support its assertion that Article XX of the GATT 1994 is available to justify violations of the CVA. First, Thailand refers to the full title of the CVA, namely the "Agreement on Implementation of Article VII of the GATT 1994", which refers to Article VII of the GATT 1994.[1603] Second, Thailand refers to the language in the preamble to the CVA indicating the desire to "further the objectives of the GATT 1994", and recognizing "the importance of the provisions of Article VII of GATT 1994 and desir[e] to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation".[1604] Third, Thailand notes that Article XX(d) of the GATT 1994 explicitly indicates that Members may adopt measures necessary to secure compliance with their laws "relating to customs enforcement", which indicates that Article XX(d) "can be used to justify measures … that are necessary to enforce a Member's customs laws".[1605] While we recognize that treaty interpretation calls for a holistic analysis, for analytical clarity we will assess these three textual bases in turn.

7.748. Regarding the reference to Article VII in the title of the CVA, we observe that each of the covered agreements in Annex 1A ("Multilateral Agreements on Trade in Goods") to the WTO Agreement is in some way an elaboration, or otherwise linked to, one or more specific provisions in the GATT 1994. We agree with Thailand that the reference to the GATT 1994 in the title of the CVA is a textual reference to the GATT 1994. However, we do not consider that this alone is sufficient to indicate that Article XX is applicable to the CVA. Indeed, we consider that it would be overly formalistic to give undue weight to an explicit reference to a GATT Article in the title of an agreement for the purpose of ascertaining whether Article XX applies to the obligations contained therein. We note, for example, that the full title of the Tokyo Round Subsidies Code was the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*. The preamble to the Code clarified that the parties to the Code had agreed to its terms desiring, *inter alia*, "to apply fully and to interpret the provisions of Articles VI, XVI and XXIII" of the GATT, and to "elaborate rules for their application in order to provide greater uniformity and certainty in their implementation". In the context of the Uruguay Round, the title of the successor agreement was shortened to the *Agreement on Subsidies and Countervailing Measures*. We do not see how this mere shortening of the title could have legal implications in respect of the applicability of Article XX to countervailing duty investigations conducted under the Tokyo Round Subsidies Code, as opposed to those conducted under the SCM Agreement. In sum, we consider that, although the title to the

[1600] Appellate Body Reports, *China – Rare Earths*, para. 5.55.
[1601] Thailand's first written submission, para. 6.92.
[1602] Philippines' second written submission, para. 651.
[1603] Thailand's second written submission, para. 3.207.
[1604] Thailand's first written submission, para. 6.91; second written submission, para. 3.207.
[1605] Thailand's second written submission, para. 3.212.

CVA reflects a general link between the CVA and the GATT 1994, it does not establish any textual link to Article XX of the GATT 1994.

7.749. As regards Thailand's second identified textual link, we note that a preamble to an agreement is useful for providing interpretative context for the operative provisions being interpreted.[1606] However, we consider that in the absence of clear and specific language to the contrary, a treaty interpreter may presume that the language of a preamble is not a source of legally operative rights or obligations.[1607] Regarding the language in the preamble to the CVA indicating the Members' desire to "further the objectives of the GATT 1994", and recognizing "the importance of the provisions of Article VII of GATT 1994 and desir[e] to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation", this language does not establish a textual basis for concluding that Article XX is applicable to the CVA. We note that the ordinary meaning of these terms reflects a general link between the CVA and the GATT 1994, but as with the title to the CVA, does not establish any textual link to Article XX of the GATT 1994. We note that the preambles to both the TBT Agreement and the SPS Agreement include language indicating, respectively, that such agreements "further the objectives of GATT 1994" (TBT Agreement) and "elaborate rules for the application of the provisions of the GATT 1994" (SPS Agreement). However, the TBT Agreement and SPS Agreement are two covered agreements in respect of which Article XX of the GATT 1994 has been found to *not* be available.[1608] In our view, the language in the preamble to the CVA does not establish any affirmative textual basis for concluding that Article XX applies to the CVA.

7.750. Regarding the text of Article XX(d) it does not follow from the fact that Article XX(d) of the GATT 1994 explicitly indicates that Members may adopt measures necessary to secure compliance with their laws "relating to customs enforcement" that Article XX must apply in respect of the obligations contained in the CVA. We consider that the question relating to the applicability of Article XX cannot be decided on the premise that the measure sought to be justified is characterized as one which aims to fulfil one of the policy goals that are protected in Article XX. Such an approach would conflate two distinct steps of the analysis: the question regarding the applicability of Article XX to an agreement in the first place, and the question regarding the fulfilment of the substantive requirements of Article XX, in case Article XX is found to be applicable. Specifically in relation to Thailand's identified link, we do not consider that a reference to "customs enforcement" in Article XX would be sufficient to demonstrate the applicability of Article XX to an agreement relating to customs valuation simply because the measure sought to be justified in violating that agreement is one that relates to customs enforcement. In other words, the applicability of Article XX of the GATT 1994 must be decided on the basis of a clear and sufficient textual link between provisions of the GATT 1994, especially Article XX, and the agreement to which Article XX allegedly applies. This demonstration cannot be short-circuited by proceeding on the basis of how to characterize the *measure* that the Member seeks to justify under Article XX. Thus, Article XX cannot be found applicable to obligations in other covered agreements based on the fact that those obligations may regulate measures with objectives similar to those reflected in Article XX of the GATT 1994. Indeed, to find that Article XX is applicable to the CVA on that basis would be contrary to the approach taken in previous cases. In *China – Raw Materials*, for example, the respondent claimed that the export duties in question were necessary to protect public health and conserve natural resources, and were thus justifiable under Articles XX(b) and (g); however, both the panel and the Appellate Body found that Article XX of the GATT 1994 was not applicable to paragraph 11.3 of China's Accession Protocol.[1609]

[1606] Article 31(2) of the Vienna Convention.

[1607] We note that in *US – Norwegian Salmon AD*, the GATT panel referred with approval to the proposition that "[p]reambular provisions, cast in general wording are generally not intended to constitute substantive stipulations", and to the proposition that "[s]ince they are mere statements, preambles do not create any legal commitment above and beyond the actual text of the treaty". (GATT Panel Report, *US – Norwegian Salmon AD*, para. 369 and fn 463 (referring to Treviranus, *Encyclopaedia of Public International Law*, Vol. 7, p. 394 (1984))).

[1608] In *China – Rare Earths*, the Appellate Body stated that "Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement)". (Appellate Body Reports, *China – Rare Earths*, para. 5.56) (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 96 and 101) In *US – Poultry (China)*, the panel found that an SPS measure which has been found to be inconsistent with Articles 2 and 5 of the SPS Agreement cannot be justified under Article XX(b) of the GATT 1994. (Panel Report, *US - Poultry (China)*, para. 7.481)

[1609] Panel Reports, *China – Raw Materials*, paras. 7.116-7.7.159; Appellate Body Reports, *China – Raw Materials*, paras. 270-307.

7.751. Thailand submits that, if Article XX is not available to justify violations of the CVA, this would "result in an absurd situation, contrary to the principle that 'a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously'".[1610] This result would be absurd, according to Thailand, as this would allow a violation of Article VII of the GATT 1994 to be justified, in principle, under the general exceptions in Article XX of the GATT 1994, but would not allow for the justification of a violation of the CVA, notwithstanding that the CVA is an agreement that expressly implements Article VII of the GATT 1994.[1611]

7.752. We observe that the core concept of the "transaction value" established in the CVA is not necessarily identical to the concept of "actual value" as articulated in Article VII:2(b) of the GATT 1994, and that the CVA elaborates on the rudimentary provisions of Article VII by establishing a comprehensive system for customs valuation, comprising a series of multiple different steps and methods subject to detailed rules governing their sequential application. We do not consider that it follows from the fact that Article XX is applicable to the obligations contained in Article VII of the GATT 1994 that there would be a legal conflict or absurd result if Article XX were not applicable to the obligations in the CVA. In our view, it does not follow that the applicability of Article XX exceptions to the general obligations regarding customs valuation contained in Article VII of the GATT 1994 mandates that those same exceptions must also be applicable to the system of customs valuation comprising detailed methodologies found in the CVA. Indeed, the CVA contains specific and technical rules that elaborate how the customs value of imports may be determined, which are additional to, and different from, those found in Article VII of the GATT 1994.

7.753. We also note that, with the exception of China[1612], all of the other third parties in this dispute that expressed a view on the matter, including Canada, the European Union, Japan, and the United States, agree with the Philippines that Article XX is not available to justify inconsistencies with the CVA and that the applicability of Article XX to violations of Article VII, but not to violations of the CVA, would not lead to an absurdity.[1613] We note Japan's view that "the CVA is a special agreement on the implementation for a specific article, namely, Article VII of the GATT 1994. Therefore, by its nature, the CVA constitutes special law vis-à-vis GATT 1994, and provides special rules focusing on how Member states should determine the customs value."[1614] We also note the European Union's view that "the rationale and nature of obligations set out in the CVA are not such as to justify the conclusion that Article XX should justify breaches in this context".[1615]

7.754. Thailand submits that in the context of the TBT Agreement, the Appellate Body found that there exists a "balance" between a Member's obligations and a Member's right to regulate that is "inherent" in the TBT Agreement[1616], and that it was for this reason that Article XX of the GATT 1994 was found to be inapplicable to the TBT Agreement.[1617] Thailand considers that "in the case of the CVA, there is no such balance that can be found between obligations it contains and the right of Members to regulate", that there is "no reason why the CVA should be deprived of such a balance", and that therefore "the only way to ensure this balance is respected is for Article XX of the GATT 1994 to be available to justify a measure that is found to be inconsistent with certain provisions of the CVA."[1618]

7.755. We observe that the Appellate Body has repeatedly characterized the object and purpose of various WTO agreements in terms of "balance". As Thailand notes, the Appellate Body has articulated the object and purpose of the TBT Agreement in terms of striking a "balance …. between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate", and has said that this "is not, in principle,

[1610] Thailand's second written submission, para. 3.208.
[1611] Thailand's second written submission, para. 3.209.
[1612] In the course of the third-party meeting with the Panel, China expressed the view that although there is no reproduction of Article XX in the CVA, there may be a bridge between the GATT 1994 and the CVA. In support of this position, China asserted that, on the basis of the text and title of the CVA, there appears to be a natural and close connection between the GATT 1994 and the CVA, and China further suggested that the general exceptions in Article XX reflect the "inherent power" of WTO Members to regulate international trade.
[1613] See Canada, the European Union, Japan and United States' third-party responses to Panel question No. 6.
[1614] Japan's third-party statement, para. 19.
[1615] European Union's third-party response to Panel question No. 6.
[1616] Thailand's second written submission, para. 3.204.
[1617] Thailand's second written submission, para. 3.205.
[1618] Thailand's second written submission, para. 3.205.

different from the balance set out in the GATT 1994".[1619] The Appellate Body has confirmed that the GATS likewise "seeks to strike a balance between a Member's obligations assumed under the Agreement and that Member's right to pursue national policy objectives".[1620] The Appellate Body has also defined the object and purpose of the SCM Agreement as reflecting a "delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures".[1621] The Appellate Body has also described accession protocols as containing a "delicate balance of rights and obligations".[1622]

7.756. We consider that there is also an inherent balance in the CVA. This inherent balance finds reflection primarily through the relatively limited scope of the substantive and procedural obligations contained in the CVA, including a degree of discretion accorded to the customs authority in implementing those obligations. These obligations elaborate a methodology and a set of procedural obligations that must be followed by domestic authorities when making customs valuation determinations, but these obligations apply only where the customs authority engages in a determination of the monetary worth or price of imported goods for the purposes of levying *ad valorem* customs duties. Thus, measures taken by a Member to combat customs fraud will not run afoul of the obligations contained in the CVA unless such measures are premised on a false customs value that was determined inconsistently with the provisions of the CVA. This is confirmed by Article 17 of the CVA, which establishes that nothing in the CVA restricts or calls into question the rights of customs authorities to satisfy themselves as to the truth or accuracy of statements made by importers. Given the limited scope and reach of the obligations in the CVA, we see no reason why authorities pursuing the legitimate regulatory purpose of identifying or combatting customs fraud would need to deviate from the system of customs valuation established in the CVA, so as to require recourse to Article XX of the GATT 1994. For these reasons, we do not agree with the premise that there is no "inherent balance" in the CVA, such that "the only way to ensure this balance is respected is for Article XX of the GATT 1994 to be available".[1623]

7.757. Based on the foregoing, the Panel finds that the general exceptions in Article XX of the GATT 1994 are not applicable to the obligations in the CVA.

7.3.7.3.2 Justification under Article XX(a) or XX(d)

7.758. Having found that the general exceptions in Article XX of the GATT 1994 are not applicable to the obligations in the CVA, it is unnecessary for us to examine whether the Charges are justified under Article XX(d) or (a) of the GATT 1994. We are aware that panels have the discretion to address arguments and make additional findings beyond those strictly necessary to resolve a particular claim or defence, and that, in several disputes in which panels found that Article XX of the GATT 1994 was not available to justify a violation of an obligation arising under another covered agreement, they nonetheless proceeded to address the merits of those defences on an *arguendo* basis. In other disputes, panels have rejected Article XX defences based on their findings on certain threshold issues, but nonetheless proceeded to make additional limited findings on one or more of the remaining elements. In all of these cases, however, it appears that the main reason for doing so was to make additional factual findings to assist the Appellate Body in the event that its interpretation of Article XX, or the applicability thereof, was reversed on appeal.[1624]

7.759. In this dispute, Thailand's defences under Article XX(a) and (d) of the GATT 1994 essentially reiterate its earlier argument that the Charges do not involve any customs valuation determination in the first place, and that the reference to the King Power prices merely serves the purpose of providing a possible benchmark to the Criminal Court to impose fines in the event of a conviction. Thus, in the context of its Article XX defence, Thailand states that the Charges are not meant to determine the "correct" amount of customs duties[1625], and that "[t]here is no requirement that a penalty must be limited to or depend on the 'correct' customs value".[1626] Thus, Thailand's argument under Article XX assumes that the references to "false price" and "actual price" in the Charges, and

[1619] Appellate Body Report, *US – Clove Cigarettes*, para. 96.
[1620] Appellate Body Report, *Argentina – Financial Services*, para. 6.114.
[1621] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.
[1622] Panel Reports, *China – Raw Materials*, para. 7.112.
[1623] Thailand's second written submission, para. 3.205.
[1624] See e.g. Panel Reports, *China – Raw Materials*, paras. 7.229-7.230; *China – Rare Earths*, para. 7.140; *India – Solar Cells*, paras. 7.335-7.336.
[1625] Thailand's second written submission, paras. 3.223 and 3.242.
[1626] Thailand's second written submission, para. 3.242.

the references to King Power's prices in the Annex to the Charges, merely serve the purpose of providing a possible benchmark to the Criminal Court to impose fines in the event of a conviction for customs fraud established on separate grounds, and that this is the aspect of the Charges that needs to be justified under Article XX. However, we have already addressed this argument in the context of addressing the applicability of the CVA to the Charges, where we found that Thailand's reading of the Charges is not supported by the actual text of the instrument, when it is read in conjunction with its accompanying Annex, the domestic legal framework in which the Charges are situated, and the events culminating in the Charges.

7.760. Accordingly, in the circumstances of this case, we do not see any reason to proceed with an assessment of Thailand's defence under Article XX of the GATT 1994.

7.3.7.4 Conclusion

7.761. The Panel finds that the general exceptions in Article XX of the GATT 1994 are not applicable to the obligations in the CVA, and therefore the aspects of the Charges giving rise to the inconsistency with Thailand's obligations under the CVA cannot be justified under Article XX(a) or (d) of the GATT 1994.

7.3.8 Article 10 of the CVA

7.3.8.1 Introduction

7.762. The Public Prosecutor filed the Charges with the Court on 18 January 2016. The Annex to the Charges provided figures on PMTL's import prices for *Marlboro* and *L&M* cigarettes, along with figures on King Power's import prices for those same brands. On 19 January 2016, newspaper articles published in the *Bangkok Post* and *The Phuket News* reported on the filing of the Charges. These articles also provided figures on PMTL's import prices for *Marlboro* and *L&M* cigarettes, and compared these with the import prices of "other cigarette importers". The figures contained in these articles correspond to the information contained in the Annex to the Charges.[1627]

7.763. Article 10 of the CVA provides that, subject to certain limited exceptions, information that is by nature confidential or which is provided by an importer on a confidential basis for the purpose of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it. The Philippines submits that the information regarding the price for *Marlboro* and *L&M* cigarettes imported over the period 2003-2006 is confidential, and claims that Thailand acted inconsistently with Article 10 of the CVA by disclosing PMTL's import prices to the press.[1628] According to the Philippines, while the press articles do not specifically identify the source for the information in question, the only reasonable inference to draw is that Thai officials were responsible.

7.764. Thailand accepts that PMTL's import prices qualify as confidential information within the meaning of Article 10.[1629] Thailand also accepts that any disclosure of PMTL's import prices to the press by Thai government officials would not fall within the scope of the limited exceptions to the non-disclosure obligation provided for in the text of Article 10. However, Thailand submits that the Philippines' claim must fail because it has not been proven that Thai officials disclosed the information on PMTL's import prices to the press.[1630]

[1627] Philippines' first written submission, paras. 686-687 (referring to King-Oua Laohong, "Philip Morris tax evasion case reaches court", Bangkok Post, 19 January 2016, available at http://www.bangkokpost.com/news/general/831708/philip-morris-tax-evasion-case-reaches-court (last accessed 6 December 2016), (Exhibit PHL-119); and The Phuket News, "Philip Morris tax evasion case reaches court", 19 January 2016, available at http://www.thephuketnews.com/philip-morris-tax-evasion-case-reaches-court-55840.php (last accessed 6 December 2016), (Exhibit PHL-120)).

[1628] See generally Philippines' first written submission, paras. 682-690; second written submission, paras. 625-635; responses/comments in relation to Panel question Nos. 111 and 112.

[1629] See paragraph 7.770. below.

[1630] See generally Thailand's first written submission, paras. 6.83-6.88; second written submission, paras. 3.174-3.185; opening statement at the meeting of the Panel, paras. 70-77; responses/comments in relation to Panel question Nos. 58, 111 and 112.

7.3.8.2 Main arguments of the parties

7.765. The Philippines argues that PMTL declared its transaction values to the Thai authorities for the purpose of customs valuation, and the "only way" that they "could have appeared in press articles is if Thai authorities disclosed those figures to the press".[1631] Additionally, the Philippines notes that both press articles, "immediately before reporting PM Thailand's declared CIF transaction values … address information obtained from the Office of the Attorney General", and both articles use the phrase "[t]he company reportedly declared".[1632] In the Philippines' view, "[t]he only reasonable inference to draw is that the entity that did the 'report[ing]' to the Thai media was the Office of the Attorney General".[1633] The Philippines argues that the information in the press articles at issue could not have been obtained from the press articles at issue in the original proceeding, because the original press articles and the current press articles address different entries.[1634] The Philippines considers that the evidence submitted by the Philippines is similar to that submitted by the Philippines in the original dispute, and on which basis the original panel found that Thailand had acted inconsistently with Article 10.[1635] The Philippines further argues that additional disclosures of PMTL's import prices by the DSI subsequent to the original proceeding evidence a consistent pattern by Thailand of disclosing PMTL's confidential information, contrary to Article 10 of the CVA.[1636]

7.766. Thailand argues that neither of the press articles referred to by the Philippines indicates the source of the relevant information, and the Philippines has provided no other evidence to prove that PMTL's transaction values were disclosed by Thai government officials.[1637] Thailand reiterates that a "mere 'inference'" does not constitute sufficient evidence to make a "*prima facie*" case.[1638] Furthermore, Thailand rejects the Philippines' assertion that the press articles imply that the information on PMTL's transaction values was obtained from the Office of the Attorney General.[1639] Thailand points out that the prices that were at issue in the original proceeding are identical to the prices at issue in this proceeding, and therefore it is possible that the authors of the relevant press articles of concern in this proceeding could have obtained the information from sources other than the Thai government, including from the press articles at issue in the original proceeding.[1640] Thailand submits that journalists may have spoken to some of the individuals outside the Thai government that were familiar either with the current or original proceeding, and could have discussed these prices with PMTL itself on the basis that they were discussing the previously-disclosed prices.[1641] Regarding the Philippines' contention that the evidence in this dispute is similar to that it provided in the original dispute, Thailand notes that, unlike this dispute, in the original dispute the Philippines provided multiple exhibits as evidence, some of which explicitly identified the source of the information as the Thai government.[1642] Additionally, unlike this dispute, in the original dispute the parties agreed that the information had been disclosed by Thai government officials.[1643] Thailand further argues that additional disclosures of PMTL's import prices by the DSI in 2009 and 2011 do not form part of the Philippines' *prima facie* case to support its claim under Article 10, and have no probative value as to the conduct of the Thai authorities in 2016.[1644]

7.3.8.3 Analysis by the Panel

7.3.8.3.1 General considerations

7.767. Article 10 of the CVA reads as follows:

> All information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it without the specific permission of the

[1631] Philippines' second written submission, para. 628.
[1632] Philippines' second written submission, para. 629.
[1633] Philippines' second written submission, para. 629.
[1634] Philippines' response to Panel question No. 111, para. 269.
[1635] Philippines' second written submission, para. 630.
[1636] Philippines' response to Panel question No. 112.
[1637] Thailand's first written submission, para. 6.85; second written submission, para. 3.177.
[1638] Thailand's second written submission, paras. 3.177 and 3.180.
[1639] Thailand's second written submission, paras. 3.178.
[1640] Thailand's second written submission, paras. 3.183.
[1641] Thailand's opening statement, para. 75.
[1642] Thailand's second written submission, paras. 3.182.
[1643] Thailand's second written submission, paras. 3.182.
[1644] Thailand's response to Panel question No. 112.

> person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

7.768. The text of Article 10 can be parsed into several elements. The first element is that the information in question qualifies as "information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation". The second element is that the authorities concerned failed to treat this information "as strictly confidential [and] not disclose it". If both of those elements are established, there would be a violation of Article 10 unless it was established that the entity providing such information gave "specific permission" to disclose it, or that such disclosure was "required to be disclosed" in the context of judicial proceedings.

7.769. It is not in dispute that information an importer provides to a customs authority on its transaction values would normally constitute "confidential" information within the meaning of Article 10. In the context of this compliance proceeding, the Philippines notes that "[f]ew matters are more commercially sensitive for an importer than pricing information relating to its imports"[1645], and Thailand does not contest this point. In the original proceeding, Thailand accepted that "PM Thailand's customs value is confidential information", and that "[w]ith respect to imported cigarettes, the customs value is confidential and cannot be published".[1646] Although the point was not in dispute, the original panel set forth its own analysis as to why PMTL's transaction values was confidential for purposes of Article 10 of the CVA:

> The Customs Valuation Agreement neither defines confidential information nor provides a specific list of information that qualifies as confidential information. We find useful guidance in the discussions of the Ad Hoc Group on Implementation in the Committee on Anti-Dumping Practices. The record of the discussions indicates that information can be considered as confidential if it is not in the public domain and if its disclosure would be likely *inter alia*: "to be of significant competitive advantage to a competitor ... , to have a significant adverse effect upon the party who submitted the information ... , to prejudice the commercial position of a person who supplied or who is the subject of the information, ...".[1647]

> ... we agree that the very disclosure of PM Thailand's c.i.f. price, transaction values and imports volume information could cause commercial damages to PM Thailand by giving its competitors access to its sensitive business information. For example, the nature of such information could give competitors useful indications on PM Thailand's business strategy, including profit margins. Thailand did not specifically respond to this argument. Rather, it acknowledged that "the disclosure of [the c.i.f. price] information would prejudice the legitimate commercial interests of importers of cigarettes".[1648]

7.770. As indicated above, the original panel considered that information can be regarded as confidential for the purposes of Article 10 if it is not "in the public domain". We recall that the original panel found that Thailand acted inconsistently with Article 10 of the CVA by disclosing PMTL's import prices to the Thai media in August and September 2006, and in June 2009.[1649] As discussed further below, the evidence before the Panel in this proceeding indicates that the DSI publicly disclosed PMTL's import prices subsequently on at least two occasions, in September 2009 and August 2011.[1650] Notwithstanding these prior disclosures, both parties agree that the information on PMTL's import prices that appeared in the press reports on 19 January 2016 still qualifies as "confidential" information for the purposes of Article 10.[1651] We see no reason to disagree. In our view, the prior unauthorized disclosure of PMTL's confidential business information by Thai officials does not change the status of that information to non-confidential, precisely because that prior

[1645] Philippines' first written submission, para. 685.
[1646] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.410, and fn 715.
[1647] (*footnote original*) G/ADP/AHG/W/65.
[1648] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.408 and 7.410.
[1649] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(g); Philippines' first written submission, para. 685.
[1650] See paragraph 7.786. below.
[1651] Philippines' response to Panel question No. 111, para. 271; Thailand's comments on the Philippines' response to Panel question No. 111, p. 38 (confirming that "Thailand is not seeking to rely on a prior WTO-inconsistent conduct to justify the alleged subsequent disclosure").

disclosure was made without PMTL's permission.[1652] To find otherwise would entail giving an unduly broad meaning to what is meant by information "in the public domain", and could lead to the consequence that a Member's prior WTO-inconsistent disclosure of business confidential information gives it licence to do so again. This would be antithetical to a Member's obligation under Article 19.1 of the DSU to "bring its measure into conformity" with its WTO obligations.

7.771. In this case, the parties do not disagree on the interpretation of the terms "shall be treated as strictly confidential by the authorities concerned who shall not disclose it"; rather, the issue in dispute is the factual issue of whether the confidential information on PMTL's import prices that appeared in the January 2016 newspaper articles was disclosed by Thai officials. As to the meaning of these terms in Article 10, we note that the term "shall" establishes a legal obligation, and the word "strictly" suggests that Members enjoy no latitude or flexibility beyond the limited exceptions set forth in the text of Article 10. This provision applies broadly and without any textual limitation to "the authorities concerned".[1653] As the original panel observed in a different context, "WTO Members are responsible for the actions of their government officials".[1654]

7.772. Turning to the limited exceptions provided for in the text of Article 10, Thailand explains that the Public Prosecutor was required to disclose PMTL's import prices in the Charges, and that such disclosure − i.e. the disclosure of this information *in the Charges* − falls squarely into the exception provided under Article 10 of the CVA that business confidential information may be disclosed "to the extent that it may be required to be disclosed in the context of judicial proceedings".[1655] However, we do not understand the Philippines to suggest otherwise, or to argue that the Public Prosecutor acted inconsistently with Article 10 by including information on PMTL's import prices in the Charges themselves. Rather, the Philippines' claim rests on the allegation that Thai officials violated Article 10 insofar as they separately disclosed the information contained in the confidential Charges to the press.[1656]

7.773. For its part, Thailand has not argued that PMTL gave specific permission to Thai authorities to disclose this information to the press, or that any such disclosure *to the press* by Thai officials was "required in the context of judicial proceedings". Thailand accepts that the limited exception in Article 10 for information "required to be disclosed in the context of judicial proceedings" would "not directly justify the conduct that the Philippines is alleging, as it would not make sense to argue that an alleged disclosure to the press is justified by the disclosure by the Public Prosecutor to the criminal

[1652] The panel in *EU − Fatty Alcohols* considered certain information relating to the investigated producers/exporters to be confidential, and such information was therefore bracketed in the panel report. Following the issuance of the interim report to the parties, the European Union requested the panel to treat this information as non-confidential as it was already in the public domain. The panel, in its final report, reduced the bracketing to a limited extent, deleted some of the information the European Union considered non-confidential, and maintained the bracketing in the other paragraphs. On appeal, the European Union argued that the information in question was erroneously redacted since it was already in the public domain. Indonesia, in response, stated that the European Union bore the burden of demonstrating that this information had been "properly released" into the public domain, questioning whether or not the matter had been discussed or agreed with the investigated producers/exporters. While the Appellate Body considered that it was not necessary to rule on this matter in order to arrive at a satisfactory settlement of the dispute, we note the panel's reluctance to disclose this information in the panel report despite its uncontested existence in the public domain. (Appellate Body Report, *EU − Fatty Alcohols*, paras. 5.242-5.252, discussing information redacted in Panel Report, *EU − Fatty Alcohols*, paras. 7.64, 7.74, 7.80, 7.82, 7.83)

[1653] In Thailand's view, the unqualified reference to "authorities" in Article 10, as distinguished from other CVA provisions that use the term "customs administration", suggests that its scope extends to any authority "that could come across this information". (Thailand's comments on the Philippines' response to Panel question No. 92, p. 24)

[1654] Panel Report, *Thailand − Cigarettes (Philippines)*, para. 7.120 (referring to Article 4(1) of the ILC Articles on State Responsibility; Appellate Body Report, *US − Gasoline*, p. 28, DSR 1996:I, 3, at pp. 26-27).

[1655] Thailand's first written submission, para. 6.87.

[1656] We note in this connection that the relevant item of the Philippines' panel request states that Thailand violated Article 10 of the *CVA* "because Thailand has disclosed *to the Thai media* the declared transaction values for entries covered by the Charges, which is business confidential information" (paragraph 14, final bullet point). (emphasis added) We note that in its first written submission, the Philippines formulated its request for findings in a manner that could lead to the understanding that the Charges themselves violate Article 10 (paragraph 856, second bullet point), and this may have led Thailand to argue, in response, that the inclusion of the information in the Charges themselves does not violate Article 10, on the grounds that this limited disclosure was "required in the context of judicial proceedings". We note that in its second written submission, the Philippines formulates its requests for findings in a way that is more consonant with its panel request, and with the substance of its argumentation in support of this claim (paragraph 800, third bullet point).

court".[1657] Accordingly, we consider that the limited exception in Article 10 regarding the "[requirement] to be disclosed in the context of judicial proceedings" is not relevant to the claims made in this case.

7.774. The disputed issue between the parties in relation to the Philippines' claim under Article 10 is whether the Philippines has provided sufficient evidence to demonstrate that PMTL's import prices were disclosed to the press by Thai officials.

7.3.8.3.2 The evidence before the Panel

7.775. In the light of the parties' arguments and the issue raised by the Philippines' claim under Article 10, we begin our analysis by clarifying the applicable evidentiary standard. We will then proceed to provide our assessment of the facts in the light of that standard.

7.776. Thailand submits that the Philippines has not presented evidence to show "with certainty" that the confidential information was disclosed to the press by Thai government officials, and that its claim under Article 10 is instead based on "inference[s]".[1658] Thailand submits that, for this reason, the Philippines "fails to meet the standard of making a *prima facie* case" that it was indeed Thai government officials that disclosed the information to the press.[1659] In Thailand's view, "a mere 'inference' is not sufficient to support the Philippines' assertion that the confidential information was disclosed by Thai government officials".[1660] In response to a question from the Panel[1661], Thailand argues that the Philippines cannot make its case on the basis of "inferences", and recalls the Appellate Body's statement that a "*prima facie*" case "is one which, in the absence of effective refutation by the defending party, *requires a panel, as a matter of law*, to rule in favour of the complaining party presenting the *prima facie* case".[1662]

7.777. We agree with Thailand that the evidence before the Panel does not show "with certainty" that PMTL's import prices were disclosed to the press by Thai government officials. However, Appellate Body and panel reports support the conclusion that while WTO-inconsistent conduct may not be lightly presumed, and must always be supported by sufficient evidence, the applicable evidentiary standard of proof in WTO dispute settlement proceedings is closer to that of the balance of probabilities, and is not a standard of certainty or proof beyond a reasonable doubt. It is well established that a complainant is only required to make a *prima facie* case, and that a *prima facie* case is made when a complainant provides evidence "sufficient to raise a *presumption* that what is claimed is true".[1663] Where the evidence submitted to a panel "support two plausible conclusions that one could draw", the relevant question is whether the evidence makes one of the two probable outcomes "more likely than not".[1664] Indeed, a panel would commit a legal error insofar as it required the complainant to provide evidence "*necessarily* showing"[1665] a particular fact, in the sense of requiring that the evidence "in no circumstance permit of a conclusion *other than* the existence of that fact".[1666]

[1657] Thailand's response to Panel question No. 58(a), p. 50.
[1658] Thailand's second written submission, paras. 3.177 and 3.181.
[1659] Thailand's second written submission, paras. 3.177.
[1660] Thailand's second written submission, paras. 3.180.
[1661] Thailand's response to Panel question No. 58(c).
[1662] Appellate Body Report, *EC – Hormones*, para. 104 (referring to Appellate Body Report, *US - Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at p. 335). (emphasis added)
[1663] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at p. 335. (emphasis added)
[1664] The Appellate Body found that "*it is more likely than not* that the revised GSM 102 programme operates at a loss", and found, on that basis, that "[t]herefore, we consider that Brazil has succeeded in establishing" its claim of violation under item (j) of the Illustrative List of Export Subsidies annexed to the SCM Agreement. (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 301 and 321) (emphasis added)
[1665] Emphasis added.
[1666] Appellate Body Report, *US – Continued Zeroing*, para. 335. (emphasis original) Several panels have made findings to the same effect. For example, in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the panel rejected a legal benchmark proposed by the respondent on the grounds that it would entail "a standard of proof akin to the 'beyond a reasonable doubt' standard under criminal law". (Panel Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 5.67) In *US – Countervailing and Anti-Dumping Measures (China)*, the panel found that a series of challenged determinations were inconsistent with applicable WTO obligations arising from an inference drawn from certain facts. That panel acknowledged that those facts "do

7.778. We also agree with Thailand that there is no direct evidence before the Panel establishing that PTML's import prices were disclosed to the press by Thai government officials, and that the Philippines' claim under Article 10 is indeed based on inference and circumstantial evidence. We do not consider this to be decisive. As a consequence of the applicable evidentiary standard being closer to that of a balance of probabilities, and not that of certainty or proof beyond a reasonable doubt, it is well established that panels may make findings of fact based on inferences and circumstantial evidence. The Appellate Body has stated that "a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence."[1667] The Appellate Body has elaborated as follows:

> [P]anels routinely draw inferences from the facts placed on the record. The inferences drawn may be inferences of fact: that is, from fact A and fact B, it is reasonable to infer the existence of fact C. … The facts must, of course, rationally support the inferences made, but inferences may be drawn whether or not the facts already on the record deserve the qualification of a *prima facie* case. The drawing of inferences is, in other words, an inherent and unavoidable aspect of a panel's basic task of finding and characterizing the facts making up a dispute.[1668]

7.779. The Appellate Body has explained that, as a general principle, "precisely how much and precisely what kind of evidence will be required to establish [a *prima facie* case] will necessarily vary from measure to measure, and provision to provision, and case to case".[1669] Based on the foregoing, we consider the relevant question to be whether the circumstantial evidence before the panel rationally supports the inference that, on or about 18 January 2016, Thai officials likely disclosed PMTL's confidential import prices to the media. We must make an objective assessment of that question based on a close scrutiny of the evidence provided to the Panel by the parties, and on the basis of the inferences rationally supported by that evidence.

7.780. On 19 January 2016, newspaper articles published in the *Bangkok Post* and *The Phuket News* reported on the filing of the Charges. Copies of these articles have been provided to the Panel. The article published in the *Bangkok Post*[1670] provided information related to the filing of the Charges, and then disclosed the following information on import prices of PMTL and other, unnamed cigarette importers:

> In 2013 the attorney-general indicted PMTL for allegedly under-reporting the value of cigarettes it imported from the Philippines between 2003 and 2006 to avoid paying the full amount of tax.

not *necessarily* lead to this (and only this) conclusion", and that while recognizing that an alternative explanation could be drawn from those facts, the panel stated that "to reject China's claim on the basis of a remote possibility … would not be in keeping with the standard of proof that applies in WTO panel proceedings". (Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.378 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 335)) In *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the compliance panel stated that it was "satisfied on the balance of probabilities" that an amendment to a South Carolina law was intended to provide a property tax exemption in respect of Boeing's aircraft. (Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 8.996)

[1667] Appellate Body Report, *US – Continued Zeroing*, para. 357.

[1668] Appellate Body Report, *Canada – Aircraft*, para. 198. Panels have made statements to the same effect. In *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, the compliance panel stated that it was a "reasonable inference" that an amendment to a South Carolina law was intended to provide a property tax exemption in respect of Boeing's aircraft. (Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 8.996) As one panel has observed, "[i]n situations where direct evidence is not available, relying on inferences drawn from relevant facts of each case facilitates the duty of international tribunals in determining whether or not the burden of proof has been met". (Panel Report, *Argentina – Textiles and Apparel*, para. 6.39 (referring to Keith Highet, "Evidence and Proof of Facts" in *The International Court of Justice at a Crossroads*, Transnational Publishers, Inc. (1987), p. 355 and Mojtaba Kazazi, *Burden of Proof and Related Issues*, Kluwer (1996)))

[1669] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323, at p. 335.

[1670] King-Oua Laohong, "Philip Morris tax evasion case reaches court", Bangkok Post, 19 January 2016, available at http://www.bangkokpost.com/news/general/831708/philip-morris-tax-evasion-case-reaches-court (last accessed 6 December 2016), (Exhibit PHL-119).

> The value of the imported products and avoided tax was estimated at 20 billion baht. The offence is liable to a fine worth four times the amount, or about 80 billion baht, and/or a jail term of up to 10 years.
>
> The company reportedly declared 5.88 baht as its CIF (cost, insurance and freight) rate for a packet of L&M cigarettes from the Philippines, while other cigarette importers declared it at 16.81 baht per packet.
>
> PMTL also declared the CIF rate on Marlboro cigarettes from the Philippines at 7.76 baht a packet, lower than the 27.46 baht reported by other importers.

7.781. The content of the article in *The Phuket News*[1671] is virtually identical to that which appeared in the *Bangkok Post*, and the above passage appears in identical terms in both articles. The article in *The Phuket News* states, in several places, that it is based on other "Thai media reports"; furthermore, it contains a hyperlink to what is identified as the "original story", which directs to the article from the *Bangkok Post*. Thus, it appears that the information in the article published in *The Phuket News* was directly based on the information already published in the *Bangkok Post* - as opposed to being based on any information disclosed by Thai officials.

7.782. This leads us to conclude that Thailand is partially correct when it suggests that information contained in the two media reports in question may have been based on other, earlier media reports: in this case, one is based on information contained in the other. This also leads us to reiterate that while a panel may find that a Member has acted in a WTO-inconsistent manner based on inferences drawn from circumstantial evidence, such inferences are not to be drawn lightly, or without close scrutiny of the available evidence before the Panel. In the light of the foregoing, the remainder of our analysis focuses on the source of the information in the "original story", i.e. the article in the *Bangkok Post*.

7.783. The article published in the *Bangkok Post* does not specifically or directly identify the source of the information on the import prices of PMTL or of other cigarette importers. Furthermore, we find nothing in the text of the article that sheds any light on the source of the information. It is true, as the Philippines notes, that the article refers to other information provided by the Attorney-General in connection with the filing of the Charges, "immediately before reporting PM Thailand's declared CIF transaction values".[1672] However, we do not consider that certain information in the article being specifically attributed to the Attorney-General rationally supports the inference that the unattributed information appearing in the same article, regarding the import prices of PMTL and other cigarette importers, should also be attributed to the same source.[1673] In this regard, we observe that the article also refers to statements made by representatives of PMTL in connection with the issuance of the Charges. Having found nothing intrinsic to the text of the article that sheds light on the source of the confidential information disclosed therein, we proceed with our assessment of the issue in light of the surrounding factual circumstances and the context of this article.

7.784. The *Bangkok Post* includes the import prices of both PMTL *and King Power,* without referencing the latter by name, in a way that corresponds to the information contained in the confidential Annex to the Charges. Since the Annex to the Charges remains confidential, and is therefore not available in the public domain in any prior news articles or otherwise, this information comparing PMTL's import prices with those of King Power that appeared in the *Bangkok Post* article necessarily demonstrates knowledge of some of the information contained in the Annex to the Charges issued on 18 January 2016. If the article referred solely to PMTL's import prices in the context of reporting on the Charges, then it is possible that the information on PMTL's import prices might have been obtained from prior press articles published in Thailand, insofar as one proceeded on the assumption that PMTL's import prices remain static over time.[1674] However, the fact that the

[1671] The Phuket News, "Philip Morris tax evasion case reaches court", 19 January 2016, available at http://www.thephuketnews.com/philip-morris-tax-evasion-case-reaches-court-55840.php (last accessed 6 December 2016), (Exhibit PHL-120).

[1672] Philippines' second written submission, para. 629.

[1673] In this regard, we have noted Thailand's arguments at paragraphs 3.178-3.179 of its second written submission.

[1674] Philippines' response to Panel question No. 111, para. 269. At paragraph 270 of its response to Panel question number 112, the Philippines states that "[n]o respectable journalist writing an article in January 2016 concerning entries from 2003 to 2006 would simply copy previously reported transaction values from earlier press articles pertaining to entries from 2006 to 2008." In response, Thailand maintains that "[t]he

news article mirrors the comparison between PMTL's import prices with those of King Power as contained in the *confidential* Annex to the Charges, makes it difficult to conceive of why or how the *Bangkok Post* article would contain this information unless the Annex to the Charges (or at least the confidential information on the import prices therein) was disclosed to the press on or about 18 January 2016.

7.785. There are several past examples of Thai government officials (including officials from the DSI) disclosing PMTL's import prices for *L&M* and *Marlboro* cigarettes to Thai newspapers. In the original proceeding, the panel found that Thai government officials did so on three separate occasions, in the months of August 2006, September 2006, and again in June 2009.[1675] In the original dispute the Philippines provided multiple exhibits as evidence, some of which explicitly identified the source of the information as the Thai government, and the parties agreed that the information had been disclosed to the media by Thai government officials.[1676] In this proceeding, Thailand seeks to contrast the *Bangkok Post* article with these other reports, in that it does not explicitly identify the source of the information as the Thai government.

7.786. Furthermore, based on our review of the exhibits provided by the parties in this proceeding, it appears that, on at least two more subsequent occasions, the DSI disclosed PMTL's import prices for *Marlboro* and *L&M* cigarettes to the public. The first occasion occurred in September 2009, when the DSI issued a press release recommending prosecution: without naming PMTL by name, this press release provides the transaction values for *Marlboro* and *L&M* of the "foreign entity" that is an "affiliate of the world's largest tobacco manufacturing group", and which imports *Marlboro* and *L&M* from the "affiliate" in the Philippines.[1677] The second occasion occurred in August 2011, when the DSI issued a press release reiterating its recommendation for prosecution: this time the DSI, identifying PMTL by name, included its import price for *Marlboro* cigarettes, as well as the customs values determined by Customs Department.[1678] It is notable that the second disclosure that took place in August 2011 occurred well after the original panel found a violation of Article 10 of the CVA by virtue of the disclosure of PMTL's transaction values by different Thai government officials, including officials from the DSI.

7.787. As Thailand correctly points out, however, these press releases were not identified as part of the Philippines' claims as presented in its panel request.[1679] Accordingly, we agree with Thailand that it would be outside of our terms of reference to make any findings of inconsistency under Article 10 with respect to the DSI press releases from September 2009 and August 2011, and we make no such findings. Thailand also stresses that the Philippines did not refer to the DSI press releases in the context of making a "*prima facie*" case under Article 10.[1680] It is well established that a panel must not make a *prima facie* case for a party that bears the burden of proof in relation to a claim or a defence. However, insofar as Thailand is suggesting that the Panel's assessment of the Philippines' claim under Article 10 must be confined to the evidence which the Philippines itself referred to in the course of trying to make its *prima facie* case, we disagree: there is no strict temporal sequence of proof in WTO dispute settlement proceedings requiring a panel to make a specific finding on whether the complainant has, at a particular point in time in the course of the proceeding, made a *prima facie* case.[1681] Nor would such an approach sit easily with the Appellate Body's repeated insistence that panels have a significant degree of discretion in weighing and analysing evidence, which includes the prerogative both to "decide which evidence it chooses to utilize in making its findings"[1682] and "how much weight to attach to the various items of evidence placed before it by the parties".[1683]

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journalist could have assumed that the values were the same because the entries at issue were consecutive. It could also have assumed that transaction values usually do not change over the years. These are perfectly plausible scenarios, taking into account that the journalist concerned might not have been a specialist in customs matters, might not have had other information available, might have had a deadline, or might have assumed that the previously-disclosed information was public knowledge." (Thailand's comments on the Philippines' response to Panel question No. 111, p. 38)

[1675] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.409.

[1676] Thailand's second written submission, para. 3.182.

[1677] DSI, Press release, 2 September 2009 (English translation), (Exhibit PHL 90-B), pp. 1-2.

[1678] DSI, Press release, 17 August 2011 (English translation), (Exhibit PHL 93-B), p. 3.

[1679] Thailand's response/comments in relation to Panel question No. 112.

[1680] Thailand's response/comments in relation to Panel question No. 112.

[1681] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras 6.50-6.51.

[1682] Appellate Body Report, *EC – Hormones*, para. 135.

[1683] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 229.

7.788. Having said this, the fact that certain Thai government officials disclosed PMTL's confidential import prices in the past is not a sufficient or decisive basis for concluding that Thai government officials acted inconsistently with the same WTO obligation several years later. In *Chile – Alcoholic Beverages*, the Appellate Body explained that:

> [T]he Panel has relied on the fact that previous Chilean measures, which are no longer applicable, involved some protection of domestic alcoholic beverages to show that the *new* tax system will also be applied "so as to afford protection". The Panel's reliance on this factor is wrong. Members of the WTO should not be assumed, in any way, to have *continued* previous protection or discrimination through the adoption of a new measure. This would come close to a presumption of bad faith. Accordingly, we hold that the Panel committed legal error in taking this factor into account in examining the issue of "so as to afford protection".[1684]

7.789. This does not mean that these facts are not relevant, and have no probative value, to the question before us. The information before the Panel establishes that Thai government officials disclosed PMTL's confidential import prices for *Marlboro* and/or *L&M* to the press on at least five separate occasions, over a period of several years, prior to the issuance of the Charges; that such disclosure occurred by different Thai government officials before, during, and after the original panel proceedings; and that these prior disclosures concerned exactly the same kind of information that was disclosed in the *Bangkok Post* article, namely PMTL's import prices for *Marlboro* and *L&M* cigarettes. We agree with the Philippines that this evidences a consistent pattern by Thailand of disclosing PMTL's confidential information.[1685] However, we consider that it would constitute legal error for us to presume that Thai officials disclosed the information to the media on the basis of these prior actions.

7.790. The evidence before the Panel establishes that the information comparing PMTL's import prices with those of King Power that appeared in the *Bangkok Post* article published on 19 January 2016 necessarily demonstrates knowledge of some of the information contained in the Annex to the Charges issued on 18 January 2016. Thai government officials have previously disclosed PMTL's confidential import prices for *Marlboro* and/or *L&M* to the press on at least five separate occasions, over a period of several years, prior to the issuance of the Charges. In the light of the foregoing, we certainly cannot exclude that PMTL's import prices for *L&M* and *Marlboro* that were referenced in the 19 January 2016 article in the *Bangkok Post* were disclosed by Thai government officials.

7.791. However, the press reports do not identify who disclosed this information. Even if it appears unlikely that PMTL would have disclosed information prejudicial to its own interests to the media, this does not sufficiently answer the question of which individual disclosed it. The universe of individuals who may have had access to the confidential information in the Charges is unknown. Following our close review of the articles submitted by the Philippines, it is clear that the information in one of the two articles came from the other article, and not from Thai officials. Furthermore, while Thai government officials disclosed PMTL's confidential import prices in the past, this is not a sufficient or decisive basis for concluding that Thai government officials acted inconsistently with the same WTO obligation several years later.

7.792. The Philippines was not required to provide evidence meeting a standard of proof beyond a reasonable doubt, and as a panel we are free to make factual findings based on inference and circumstantial evidence. However, we cannot engage in speculation, or make factual findings giving rise to a finding of violation based on an educated guess. Having carefully considered the evidence before us, we conclude that there is insufficient evidence to sustain the conclusion that Thai officials disclosed PMTL's transaction values to the media in connection with the Charges filed on 18 January 2016.

[1684] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74. We note that panels and the Appellate Body have consistently reiterated that there is no presumption of inconsistency in WTO dispute settlement, and that a Member is presumed to have fulfilled its WTO obligations unless proven otherwise. (See Appellate Body Report, *EC – Sardines*, para. 278; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Panel Report, *US – Certain EC Products,* para. 6.110; Panel Report, *US – Continued Suspension,* para. 7.338; Panel Report, *Canada – Continued Suspension,* para. 7.339; Panel Reports, *China – Rare Earths*, para. 7.390, 7.709; and Decision by the Arbitrator, *EC – Hormones (Article 22.6 – EC),* para. 9).

[1685] Philippines' response to Panel question No. 112.

7.3.8.4 Conclusion

7.793. For the reasons set forth above, the Panel finds that the evidence before it is insufficient to find that the Philippines has discharged its burden of demonstrating that Thai officials were responsible for disclosing PMTL's import prices to the media, contrary to Thailand's obligation under Article 10 of the CVA. The Panel wishes to emphasize, however, that it is highly regrettable that the purpose of Article 10 of the CVA has been frustrated. We recall the original panel's finding that Thailand acted inconsistently with Article 10 of the CVA by disclosing confidential customs valuation information, provided by PMTL to Thai Customs, to the Thai media.[1686] The relevant Thai agencies should take all necessary precautionary measures to ensure that PMTL's transaction values are kept strictly confidential in accordance with Article 10 of the CVA. In this regard, the Panel observes that the obligation in Article 10 of the CVA is of a continuing nature, as are the DSB's recommendations and rulings in connection with Article 10 arising from the original proceeding.

7.4 The VAT notification requirement

7.4.1 General

7.4.1.1 Factual background

7.794. This section briefly describes the uncontested facts relevant to the VAT notification requirement. We note that the parties disagree on several fundamental factual issues regarding the operation of the VAT notification requirement. We address these issues in Section 7.4.2 below, and in the course of our analysis of the Philippines' claims under Articles X:1, X:3(a) and III:4 of the GATT 1994.

7.795. Thailand charges VAT, at an *ad valorem* rate, on imported and domestic goods and services sold in Thailand.[1687] The tax liability under an *ad valorem* tax is a function of the tax rate and the tax base used.[1688] Under Thailand's VAT scheme, cigarette importers are responsible for paying the VAT on cigarettes they distribute for retail sale in Thailand.[1689] Previously, Thailand based its VAT on maximum retail selling prices (MRSPs) established by the Excise Department on a brand-specific basis.[1690] In response to the DSB's recommendations and rulings in the original proceeding, Thailand modified its VAT regime and abandoned the use of MRSPs as the VAT base.[1691] Under the modified regime, VAT for cigarettes is now based on a retail selling price (RSP) notified for each brand by importers, including but not limited to PMTL. The VAT is determined on the same basis for TTM (the sole domestic cigarette producer).[1692]

7.796. On 31 August 2012, the Revenue Department adopted Notification 187, which provides a replacement VAT base.[1693] Clauses 4(2) and 5(2) of Notification 187 read together with Clause 6(1) provide that, in June of each year, TTM and each importer (including PMTL) are required to notify to the Revenue Department the retail selling price, which is defined as the "average price of the market price" for each brand that they sell.[1694] The RSP is used for the calculation of the VAT base from

[1686] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.2(g).
[1687] Philippines' first written submission, para. 729.
[1688] Philippines' first written submission, para. 729.
[1689] Philippines' first written submission, para. 732; Thailand's response to Panel question No. 62(a).
[1690] For discussion, see Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.458-7.473.
[1691] On 24 May 2012, Thailand reported to the DSB that the Excise Department had issued two regulations, on 15 May 2012, that eliminated MRSPs entirely. (See WT/DSB/M/316, 20 July 2012, para. 58)
[1692] According to Thailand, the RSP is "notified by cigarette producers to the Revenue Department." (Thailand's first written submission, para. 7.3)
[1693] Notification No. 187 on VAT, "Determination of tax base, categories and types of tobacco for sale for which the value of the tax base is required to be calculated according to the rules under Section 79/5(2) of the Revenue Code", 31 August 2012 (English translation), (Notification 187), (Exhibit PHL-121-B).
[1694] Notification 187, (Exhibit PHL-121-B). The Philippines observes that the VAT base is based on the higher of a constructed retail price (option 1) and an average actual market price (option 2), and that, since the adoption of Notification 187 and Order Por. 145-2555, the VAT base for all domestic and imported cigarettes has been set pursuant to option 2. The Philippines' claims in this proceeding concern the requirement to notify "the average price of the market price actually purchased and sold in general on the date on which the value added tax liability occurs", pursuant to option 2. (Philippines' first written submission, paras. 736-737)

1 July to 30 June of the next year.[1695] If the price changes during the course of the year, a revised RSP must be notified.[1696]

7.797. Following the adoption of Notification 187 in August 2012, the Philippines raised concerns with Thailand that importers could not meet the notification requirement specified in Notification 187.[1697] On 21 September 2012, PMTL raised similar concerns in a letter sent to the Revenue Department, and indicated that it would notify the recommended retail selling price (RRSP), because it was unable to comply with the requirement to notify the average *actual* market price, and invited the Revenue Department to advise PMTL should it have concerns with PMTL's compliance.[1698] The company noted its understanding that "the use of RRSPs is consistent with the VAT tax base".[1699] On 28 September 2012, in its first notification after Notification 187 entered into force, PMTL informed the Revenue Department that it was notifying the RRSP.[1700] On 10 October 2012, in response to the Philippines' requests for memorialization of the importers' right to notify the recommended retail selling price, Thailand sent the Philippines a note, by email, stating that "where manufacturers set the market price by means of recommended retail selling prices, the recommended retail selling prices may be notified".[1701]

7.798. On 30 November 2012, the Revenue Department adopted Order Por. 145-2555.[1702] Clauses 4(1), 5(1) and 6(2) of Order Por. 145-2555 reiterate the requirement that in June of each year, TTM and each cigarette importer are to notify to the Revenue Department the retail selling price. Additionally, Clause 2(4) of Order Por. 145-2555 clarifies that the retail price to be notified under Notification 187 is the average of the actual purchase prices paid for cigarettes by the majority of consumers, to retailers, on the notification date in June of each year.[1703] After the adoption of Order Por. 145-2555, PMTL continued to notify the RRSP in every subsequent June notification.[1704] In the notifications of June 2013, June 2015, and June 2016, PMTL again expressed its understanding that it is acceptable to notify the RRSP as the VAT base.[1705] In those notifications, the company consistently referred to the letter of September 2012 inviting objections to this understanding from the Revenue Department, and noted that it had never received any letter of disagreement.[1706]

[1695] Notification 187, (Exhibit PHL-121-B), Clause 6(1).
[1696] Notification 187, (Exhibit PHL-121-B), Clause 6(2).
[1697] Philippines' first written submission, paras. 748-751. Thailand has not contested that the Philippines had concerns with regard to the operation of Notification 187. (See Thailand's first written submission, paras. 7.1-7.81; and second written submission, paras. 4.1-4.47)
[1698] Letter from PMTL to the Director of the Revenue Department, 21 September 2012 (English translation), (Exhibit PHL-123-B).
[1699] Letter from PMTL to the Director of the Revenue Department, 21 September 2012 (English translation), (Exhibit PHL-123-B), p. 2.
[1700] See, e.g. Letter from PMTL to the Director of the Revenue Department, 28 September 2012 (English translation), (Exhibit PHL-129-B).
[1701] Email communication between officials of the Permanent Mission of the Philippines to the WTO and the Permanent Mission of Thailand to the WTO, 10 October 2012, (Exhibit PHL-130).
[1702] Order Por. 145-2555, Calculation of Tax Base for Importation and Sale of Tobacco According to the Category and Type Prescribed by the Director-General and Approved by the Minister Under Section 79/5 of the Revenue Code, and Preparation of Tax Invoice In Case of Sale of Tobacco Under Section 86/5(2) of the Revenue Code (English translation), (Order Por. 145-2555), (Exhibit PHL-122-B).
[1703] Specifically, Clause 2(4) of Order Por. 145-2555 defines the term "the average price of the market price actually purchased and sold in general on the date on which the value added tax liability arises", which is set forth in Notification 187. Clause 2(4) of Order Por. 145-2555 defines this term with respect to both domestic and imported cigarettes. The clause states that the term "average price of the market price actually purchased and sold in general on the date on which the Value Added Tax liability occurs" means "the market price of tobacco for each type of cigarette category at which the consumers in general or the majority [of them] purchase" cigarettes "on the date on which the registered operator … notifies the retail selling price which is used for the calculation of the value of the tax base". (Order Por. 145-2555, (Exhibit PHL-122-B))
[1704] Philippines' first written submission, para. 750; Thailand's first written submission, paras. 7.12 and 7.21.
[1705] Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation), (Exhibit PHL-132-B); Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation), (Exhibit PHL-133-B); Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation), (Exhibit PHL-134-B). The Philippines has not submitted the notification for 2014. (See Philippines' first written submission, para. 753, fn 462)
[1706] Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation), (Exhibit PHL-132-B); Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation), (Exhibit PHL-133-B); Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation), (Exhibit PHL-134-B).

7.4.1.2 Claims and order of analysis

7.799. The parties' requests for findings in relation to the VAT notification requirement are set out in greater detail in Section 3 of our Report. As reflected there, the Philippines advances several claims under the GATT 1994 relating to the notification requirement arising under Notification 187 and Order Por. 145-2555.[1707] The Philippines claims that the requirement for cigarette importers to notify in June of each year the "average actual market price"[1708] for cigarettes on the date of notification is inconsistent with Articles III:4 and X:3(a) of the GATT 1994, and that Thailand's failure to publish a rule allowing cigarette importers to notify the RRSP in fulfilment of the VAT notification requirement is inconsistent with Article X:1 of the GATT 1994. Thailand argues that the Philippines has failed to demonstrate that Thailand acted inconsistently with Articles X:1, X:3(a) and III:4 of the GATT 1994.[1709]

7.800. The Philippines' claims under Articles X:1, X:3(a) and III:4 rest on a number of factual premises that reflect, in Thailand's view, an inaccurate description of the operation of Thailand's VAT notification requirement. We begin our analysis by addressing certain disputed factual issues that relate to several of the Philippines' claims regarding the operation of the VAT notification requirement under Articles X:1, X:3(a) and III:4. After addressing these factual aspects of the operation of the VAT notification requirement, we will proceed to examine the Philippines' claims under Articles X:1, X:3(a) and III:4. Since our findings under Article X:1 inform our analysis of the Philippines' claims under Articles X:3(a) and III:4, we address the claim under Article X:1 first.

7.4.2 The operation of the VAT notification requirement

7.4.2.1 Introduction

7.801. The Philippines' claims relating to the VAT notification requirement rely on the different legal situations of TTM and PMTL under Thai competition law as a relevant factual circumstance. In this respect, the parties disagree whether legislative changes that Thailand has introduced into its competition legislation in the course of this proceeding should be taken into account by the Panel. We address this question first in our analysis below.

7.802. Additionally, the Philippines' claims under Article X:1, X:3(a) and III:4 rest on a number of factual premises that reflect, in Thailand's view, an inaccurate description of the operation of Thailand's VAT notification requirement. Among other things, Thailand denies the Philippines' assertion that PMTL is not in a position to know the average actual market price on the date of notification and thus cannot notify it. It also denies the Philippines' assertion that, in the event the notified RRSP turns out to be less than the average actual market price, the importer will face legal consequences. These issues relate to several of the Philippines' claims in relation to the VAT notification requirement under Articles X:1, X:3(a) and III:4, and we therefore address them before turning to those specific claims.

7.803. With regard to the Philippines' assertion that PMTL is not in a position to know the average actual market price on the date of notification and thus cannot notify it[1710], Thailand submits that the Philippines' claims are based on "incorrect" and "unsupported" assumptions.[1711] Thailand considers that: (i) like TTM, PMTL "equally can, and does, set the downstream retail price", despite the operation of Thai competition law[1712]; (ii) importers can satisfy the VAT notification requirement through the use of RRSPs, which in effect amount to actual selling prices[1713]; (iii) the Philippines has not proved that it is impossible for the importers to know the average actual market price through

[1707] Philippines' first written submission, paras. 728-854; and second written submission, paras. 717-796.

[1708] In their submissions, the parties use the expression the "average actual market price" to refer to "average price of the market price", the term used in Notification 187. Accordingly, we use the same terminology as the parties.

[1709] Thailand's first written submission, paras. 7.1-7.81; and second written submission, paras. 4.1-4.47.

[1710] Philippines' first written submission, paras. 745-746, 804-807 and 827; and second written submission, paras. 758 and 790.

[1711] Thailand's first written submission, paras. 7.38-7.39.

[1712] Thailand's first written submission, paras. 7.39.

[1713] Thailand's first written submission, paras. 7.12, 7.21 and 7.38; second written submission, paras. 4.16-4.17.

collection of market research data[1714]; and (iv) the importers have not encountered problems in complying with the notification requirement in recent years.[1715]

7.804. Thailand also contests the Philippines' assertions that in the event the notified RRSP turns out to be less than the average actual market price the importer will face legal consequences.[1716] Thailand submits that even if a cigarette importer could not ensure that it complies with the requirement, and there is a discrepancy, it would not be in "legal jeopardy" because it can simply notify the correct price without legal consequences.[1717]

7.4.2.2 Temporal scope of the Panel's analysis

7.805. On the date of the establishment of the Panel, Section 4(2) of the Competition Act of Thailand (1999) contained an exemption from competition law for state enterprises.[1718] It is an uncontested fact that TTM, the domestic producer of cigarettes, enjoyed the exemption at the time and was thus free to enter into pricing arrangements with wholesalers and retailers.[1719] The parties also agree that, as of the date of the establishment of the Panel, cigarette importers enjoyed no such exemption and thus were subject to the general requirements of competition legislation, and in particular Section 27(1) of the Thai Competition Act, 1999.[1720]

7.806. In the course of this proceeding, Thailand modified its competition law. In its first written submission, Thailand explained that it was in the process of revising the relevant competition laws for other purposes, and that one of the proposed changes "would eliminate TTM's exemption from the competition laws".[1721] At that time, Thailand stated that due to unforeseen developments in Thailand, this legislative process had taken longer than expected to complete, and, while it remained on the legislative agenda, "it [was] difficult to predict with certainty when it [would] be completed".[1722] In its second written submission, Thailand informed the Panel that the proposed amendments, including the "elimination of TTM's exemption" from the competition laws, had received legislative approval and were awaiting Royal Assent, and that it was anticipated that the amendments would come into effect in the third quarter of 2017.[1723] In its responses to the Panel's questions, Thailand states that its "competition law was recently modified to introduce multiple changes, among which is the elimination of TTM's automatic exemption from competition legislation. The amended competition law was published on 7 July 2017 in Thailand's official gazette, and entered into force on 5 October 2017."[1724]

7.807. The parties disagree as to whether the Panel should take into account the amendment of Thailand's competition law in the course of this proceeding. In response to a question from the Panel, Thailand clarified that it was requesting that the Panel take the "amendment" into account and submitted that this would be consistent with the meaning of the Philippines' panel request, which indicates that "[t]his request for the establishment of a panel also concerns any amendments to the

[1714] Thailand's response to Panel question Nos. 65 and 115(b); comments on the Philippines' response to Panel question No. 115(a).

[1715] Thailand's first written submission, para. 7.21; response to Panel question No. 115(b), p. 43; and comments on the Philippines' response to Panel question No. 116.

[1716] Thailand's second written submission, para. 4.18; and response to Panel question No. 62(a).

[1717] Thailand's second written submission, para. 4.18.

[1718] Section 4 of the Competition Act, 1999 reads: "This Act shall not apply to the act of: … (2) State enterprises under the law on budgetary procedure". (Competition Act, B.E. 2542 (1999) (English translation), (Exhibit PHL-124-B))

[1719] Philippines' first written submission, para. 747 and fn 452; Thailand's first written submission, paras. 7.47-7.48; and second written submission, para. 4.7.

[1720] Section 27(1) of the Competition Act, 1999 reads: "[a]ny business operator shall not enter into an agreement with another business operator to do any act amounting to a monopoly, or reduction of competition or restriction of competition in the market of any particular goods or any particular service in any of the following manners:(1) fixing selling prices of goods or service as a single price or as agreed, or restricting the purchase volume of goods or services." (Competition Act, B.E. 2542 (1999) (English translation), (Exhibit PHL-124-B))

[1721] Thailand's first written submission, para. 7.48.

[1722] Thailand's first written submission, para. 7.48.

[1723] Thailand's second written submission, para. 4.47.

[1724] Thailand's response to Panel question No. 62(a), p. 56. Thailand submits as Exhibit THA-42 a copy of Thailand's official gazette of 7 July 2017 in which Thailand's amended competition law was published. Thailand stated that it did not yet have an English translation of the relevant provisions of the amended competition law, and for the moment therefore Thailand's exhibit contained only the cover page of the official gazette in Thai and a general English translation of this cover page.

measures identified above".[1725] Thailand further submits that the absence of a finding on the current regulatory framework "leaves the parties in a state of uncertainty regarding whether Thailand has come into compliance" and that "[t]he Panel's failure to address the amendments to the competition law could result in the parties being forced to initiate unnecessary additional compliance proceedings under Article 21.5 of the DSU."[1726] The Philippines, for its part, considers that its claim under Article III:4 is an "as such" claim, and that "[i]f the legal regime in Thailand were reformed in a manner that would, on its face, impose the same risk of legal jeopardy on the producer of domestic cigarettes as is currently faced by importers of foreign cigarettes, then this would remove the basis for an 'as such' challenge under Article III:4".[1727] However, the Philippines submits that it is well-established that a panel should rule on measures as they stand at the time of the panel's establishment.[1728] The Philippines argues that therefore it is "neither necessary as a matter of law, nor appropriate in the circumstances of this case, for the Panel to take account of changes to Thai competition law".[1729]

7.808. We address the question of whether or not we should take into account the amendment of Thailand's competition law bearing in mind that Thai competition law has not been challenged as a measure at issue in this proceeding. Rather, the Philippines has framed its claim under Article III:4 in a manner that focuses on the VAT notification requirement in Notification 187 and Order Por. 145-2555 as the specific measure at issue, and that presents TTM's exclusion from Thai competition law as a relevant factual circumstance that creates "different situations" for TTM and PMTL, as a consequence of which the VAT notification requirement gives rise to less favourable treatment.[1730] We recall that a panel may examine a legal instrument enacted after the date of the panel's establishment, which amends one of the challenged measures at issue, provided that the panel request is broad enough to encompass such an amendment and the amendment does not change the "essence" of the measure.[1731] However, in this proceeding, the provisions of Thai competition legislation are neither part of the challenged measure itself, nor a distinct measure being challenged. Since the specific measures challenged by the Philippines relating to the VAT notification requirement are not altered by the change in the competition legislation, this principle does not resolve the issue before us.

7.809. It is well established that a panel's terms of reference require it to assess the WTO-consistency of a challenged measure as it existed on the date of the Panel's establishment.[1732] Several panels have rejected requests from a respondent to make findings on the changed situation, on the basis that the complainant had not requested such findings.[1733] This approach has been

[1725] Thailand's response to Panel question No. 124(a).

[1726] Thailand's request to review the Interim Report, paras. 2.57 and 2.59.

[1727] Philippines' response to Panel question No. 64, para. 465.

[1728] Philippines' opening statement at the meeting of the Panel, para. 128; and response to Panel question No. 124(a).

[1729] Philippines' response to Panel question No. 124(a), para. 338.

[1730] We note that the requests for findings in the Philippines' first and second written submissions do not identify any provision of Thailand's competition law. (See Philippines' first written submission, para. 856, third bullet; Philippines' second written submission, para. 801) The Philippines has also not tried to argue that TTM's exclusion from Thailand's competition legislation is itself a "measure taken to comply". (See, e.g. Philippines' first written submission, para. 762) We further note that while the panel request may not be entirely free of ambiguity, the Philippines has clarified that it "did not identify TTM's exemption from Thai competition law as a measure taken to comply, subject to claims. Rather, the Philippines identified TTM's exemption from Thai competition law as a factual circumstance relevant to the Philippines' claims regarding discrimination under the VAT notification requirement." (Philippines' request to review the Interim Report, paras. 132-133)

[1731] Appellate Body Reports, *Chile – Price Band System*, paras. 136-144; and *EC – Selected Customs Matters*, para. 184.

[1732] Appellate Body Report, *US – Clove Cigarettes,* para. 205. See also Appellate Body Reports, *China – Raw Materials*, para. 260; and *EC - Selected Customs Matters*, para. 187.

[1733] In *Russia – Tariff Treatment*, the panel highlighted the findings of the Appellate Body in *Chile – Price Band System* to the effect that its decision to make findings on the amended measure in that dispute should not "condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny" and additionally "the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'". (Panel Report, *Russia – Tariff Treatment*, paras. 7.83 (referring to Appellate Body Report, *Chile – Price Band System*, para. 144)) The panel then stated that "for the reasons explained by the Appellate Body in *Chile – Price Band System* (relating to the possibility of shielding a measure from scrutiny and the demands of due process, and referred to above), it would not be appropriate to [make findings on the amended measure] in the absence of a specific request from the [complainant]". (Panel Report, *Russia – Tariff Treatment*, para. 7.84) The panel in *China – Raw Materials* noted that, by requesting the panel not to make findings on subsequent replacement measures, the complainants

followed in disputes where changes were introduced to the challenged measures, or where subsequent events in the course of this proceeding had an impact on the operation of the measures at issue. In our view, the same approach may apply equally in situations where the challenged measure remains unchanged, but the surrounding factual circumstances relevant to the assessment of the WTO-consistency of the measure evolve in the course of a proceeding. In the absence of a request from the Philippines to consider the VAT notification requirement in light of the changed circumstances, we do not consider that additional findings on the changed situation are strictly necessary to resolve the dispute between the parties.

7.810. Nonetheless, we note that Thailand has provided a detailed justification in support of its request that the Panel make additional findings on this issue.[1734] While we do not necessarily agree with every reason presented by Thailand, we appreciate Thailand's concern regarding possible uncertainty in the implementation of the Panel's findings under Article III:4 of the GATT 1994 in light of the amendment of the competition law.[1735] The Philippines has not clearly objected to that request.[1736] Furthermore, the issue presented by the parties' arguments raises a narrow and well-defined factual issue, such that there could be utility in the Panel presenting the parties' arguments and making factual findings that could assist the Appellate Body on appeal.

7.811. Accordingly, we proceed to make additional findings relating to the amendment in our analysis of the Philippines' claim under Article III:4 of the GATT 1994. With regard to the Philippines' claims under Articles X:1 and X:3(a), we will limit our examination of the VAT notification requirement to the facts as they existed at the date of the establishment of the Panel, prior to the changes to the competition legislation.

7.4.2.3 PMTL's ability to ensure that its notification is correct

7.4.2.3.1 Section 27 of the Competition Act

7.812. The parties disagree as to whether, under the Competition Act of Thailand, importers were, at the time of the panel's establishment, allowed to set the retail selling price in the same way as TTM. We recall the Philippines' argument that while TTM enjoyed an exemption from the Competition Act and could set retail prices, importers could not similarly set prices because the Competition Act prohibits price fixing agreements between different economic operators.[1737] According to the Philippines, this restriction "applies not only to horizontal arrangements between competitors, but also to vertical arrangements between suppliers and downstream resellers of products".[1738]

7.813. Thailand contests this point. According to Thailand, "[PMTL] equally can, and does, set the downstream retail price, by means of its RRSPs".[1739] In addition, Thailand submits that "the practice of imposing prices on wholesalers and retailers, also known as "vertical price fixing", is not "a *per se* violation of Thai competition law" and that "the legality of vertical price fixing depends on the specific circumstance of each case".[1740]

"are in fact narrowing the panel's terms of reference." The panel stated that "there is nothing unfair in a complainant reducing, as opposed to enlarging, the case the defendant has to meet." (See Panel Report, *China – Raw Materials*, paras. 7.22-7.24) In *India – Additional Import Duties,* the panel considered whether its terms of reference could include a subsequent amendment of the measure. In interpreting the scope of the terms of reference, the panel accepted the complainant's position that it never intended to bring within the scope of the dispute measures which were not in existence on the date of the establishment of the panel. (See Panel Report, *India – Additional Import Duties*, paras. 7.58-7.60) We also note that in *India – Autos*, the panel considered it relevant that "[t]he complainants, while they had not specifically requested the Panel to consider these issues at this stage of its analysis, did make requests for findings which called for these subsequent events to be taken into account, in requesting the Panel to find that the measures had 'remained' in violation subsequent to 1 April." (Panel Report, *India – Autos*, para. 8.27)

[1734] Thailand's request to review the Interim Report, paras. 2.39-2.72.

[1735] Thailand's request to review the Interim Report, para. 2.58.

[1736] Philippines' comments on Thailand's request to review the Interim Report, paras. 96-112.

[1737] Philippines' first written submission, paras. 744 and 747; Competition Act, B.E. 2542 (1999) (English translation), (Exhibit PHL-124-B), Sections 4(2) and 27(1).

[1738] Philippines' first written submission, fn 451.

[1739] Thailand's first written submission, para. 7.39.

[1740] Thailand's response to Panel question No. 62(a), p. 55.

7.814. Before proceeding to an examination of the provisions of the Competition Act, we recall the mandate of a panel when faced with parties' disagreement on the meaning of municipal law.[1741] The obligation to conduct an "objective assessment of the facts" under Article 11 of the DSU "means that panels must conduct their own objective and independent assessment of the meaning of municipal law, instead of deferring to a party's characterization of such law".[1742] As the original panel observed, "to the extent that the parties disagree on the interpretation of relevant provisions, we are required to objectively examine the question at issue based on the text of the concerned provision[s] as well as on the evidence before us".[1743] In respect of the types of evidence that may be relied upon to resolve the meaning and content of municipal law, the Appellate Body has explained that "[i]f the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning … is not evident on its face, further examination is required."[1744] In line with this approach, to the extent the parties disagree on the content of the provisions of Thai law, we will examine the question at issue based on the text of the concerned provisions and other evidence before the Panel.

7.815. Beginning with the text, Section 27(1) of the Competition Act, which applies to importers of cigarettes, contains a chapeau and a list of ten specific practices.[1745] The provision reads in relevant part:

> Any business operator shall not enter into an agreement with another business operator to do any act amounting to a monopoly, or reduction of competition or restriction of competition in the market of any particular goods or any particular service in any of the following manners:
>
> (1) fixing selling prices of goods or service as a single price or as agreed, or restricting the purchase volume of goods or services;[1746]

7.816. Thailand explains that "conduct would violate Section 27 only if it falls within one of the ten practices listed *and* if the practice also gives rise to a situation described in the chapeau, i.e. it amounts to a monopoly, reduction of competition or restriction of competition in the market of any particular goods or any particular service".[1747] Thailand further submits that while vertical price fixing could fall within sub-paragraph (1) of Section 27, "[t]here may be specific instances of vertical price fixing that do not reduce or restrict competition in the market and, hence, would not violate Section 27 of Thailand's Competition Act".[1748] The Philippines has a different reading of Section 27. In its view, the words "in any of the following manners" in the chapeau of Section 27 means that any of the ten listed practices constitutes an "act amounting to a monopoly, or reduction of competition or restriction of competition in the market of any particular goods or any particular service".[1749]

7.817. Recalling that the meaning of domestic law is a question of fact, subject to the normal rules governing the burden of proof, certainty is not required.[1750] In this case, neither party has pointed to any relevant "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, [or] the opinions of legal experts and the writings of recognized scholars"[1751] to support its reading of Section 27. Accordingly, we must base our understanding of the meaning of Section 27 on the text of the provision, and that is what we have done.

7.818. The ordinary meaning of the words "in any of the following manners" in the chapeau appears to deem the listed practices that follow in sub-paragraphs 1 to 10 to be an "act amounting to monopoly, reduction of competition or restriction of competition in the market" for relevant goods or services, and, therefore, prohibited. The chapeau of Section 27 is not drafted in terms that would

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[1741] See paragraphs 7.650. to 7.652. .

[1742] Appellate Body Report, *US – Carbon Steel (India),* p. 4.445 (referring to Appellate Body Report, *India – Patents (US)*, para. 66).

[1743] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 6.157 and 7.684.

[1744] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 168.

[1745] Competition Act, B.E. 2542 (1999) (English translation), (Exhibit PHL-124-B), Section 27.

[1746] Competition Act, B.E. 2542 (1999) (English translation), (Exhibit PHL-124-B), Section 27(1).

[1747] Thailand's response to Panel question No. 113, p. 41. (emphasis original)

[1748] Thailand's response to Panel question No. 113, p. 41.

[1749] Philippines' comments on Thailand's response to Panel question No. 113, paras. 233-236.

[1750] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

[1751] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.100 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157).

suggest that they contain an autonomous set of criteria.[1752] Moreover, some of the actions enumerated in sub-paragraphs 1 to 10 would amount at least to a "reduction of competition or restriction of competition" in the ordinary sense of those words. For example, sub-paragraph 4 refers to different business operators "fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or a tender for the goods or services or in order to prevent one party from participating in a bid or a tender for the goods or services". It stands to reason that if some of the conduct that is described in sub-paragraphs 1 to 10 would by definition amount at least to a "reduction of competition or restriction of competition" in the market with respect to the "particular goods" subject to the agreement, if not a "monopoly", then it is difficult to sustain the conclusion that the chapeau establishes an additional, autonomous legal standard that must be established for the specified conduct to be a violation of Section 27. In conclusion, the terms of Section 27 of the Competition Act therefore support the interpretation submitted by the Philippines.

7.819. We also find force in the Philippines' argument that even if Thailand were correct that vertical price fixing is not *per se* a violation of Section 27 of the Competition Act, Thailand concedes that vertical price fixing "could fall within sub-paragraph (1) of Section 27" and, in certain circumstances, meet the elements of the chapeau.[1753] Indeed, given that the nature of the conduct specified in sub-paragraph (1) is that of entering into an agreement "fixing selling prices of goods or service as a single price or as agreed, or restricting the purchase volume of goods or services", we consider that it is highly likely that such conduct would, in many cases, constitute an act amounting to a "reduction of competition or restriction of competition" in the market with respect to the "particular goods" subject to the agreement. Thus, even under Thailand's reading, an importer that fixes the retail sales prices certainly faces the *risk* that it violates Section 27 of the Competition Act. Therefore, even under Thailand's interpretation, cigarette importers continue to face "legal jeopardy" if they fix retail sales prices in order to comply with the VAT notification requirement.[1754]

7.820. We further recall that both parties accept that TTM enjoyed an exemption from the Competition Act, and was free to enter into pricing arrangements with wholesalers and retailers. Our analysis thus reveals that TTM and importers were situated differently vis-à-vis Thai competition law at the time of the Panel's establishment. For these reasons, we find that while TTM was exempted from the competition law and able to enter into pricing arrangements, importers were subject to Section 27 of the Competition Act and thus unable to lawfully set retail prices in the same way as TTM.

7.4.2.3.2 The RRSP and the actual average market price

7.821. The parties disagree on whether RRSPs always correspond to average actual market prices, such that an importer's notifications using RRSPs will necessarily fulfil the VAT notification requirement.

7.822. The Philippines acknowledges that "the average actual market price is usually close to the recommended price", but submits that "it often differs from the recommended price to some extent".[1755] Thailand maintains that "the RRSP is for all practical purposes the same as the actual average selling price".[1756] In support of its point, Thailand quotes the original panel's statement that:

> We understand that for imported cigarettes, the RRSP figures are virtually the same as the RSP figures as the retailers will normally accept the retail selling price proposed by PM Thailand (i.e. the RRSP (Recommended Retail Selling Price)) as their actual retail selling price (i.e. the RSP (Retail Selling Price)).[1757]

Thailand thus submits that, "as noted by the original panel, PM Thailand … can, and does, set the downstream retail price, by means of its RRSPs".[1758]

[1752] We note that Article XX of the GATT 1994 provides an example of the kind of language that establishes autonomous legal standards in a chapeau that must be examined separately from those contained in the sub-paragraphs that follow.

[1753] Thailand's response to Panel Question 113, p. 41.

[1754] Philippines' comments on Thailand's response to Panel question No. 113, para. 238.

[1755] Philippines' first written submission, para. 744.

[1756] Thailand's first written submission, para. 7.8.

[1757] Thailand's first written submission, para. 7.8 (quoting Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.491).

[1758] Thailand's first written submission, para. 7.39.

7.823. We note at the outset that the Philippines' claims rest on the premise that the RRSP and average actual retail price on the date of notification *may* not be the same, and not on a demonstration that they *are* not the same.[1759] In other words, the Philippines' claims rest on the *possibility* that the RRSP notified may not correspond to the actual average market price. Therefore, the relevant question that needs to be resolved is whether an importer's notifications using RRSPs will always correspond to the actual average market price, and thereby will necessarily fulfil the VAT notification requirement.

7.824. In addressing this question, we first note that the very concept of a "recommended" retail sales price implies that it *may* not be the same as the "actual" retail sales price. That is because a "recommended" retail selling price represents a mere benchmark for retailers of what an appropriate price of cigarettes may be and that *recommendation* does not in any way constrain retailers' freedom to deviate from the benchmark and set a specific retail price they prefer.

7.825. Furthermore, the Philippines has brought to our attention Thailand's New Excise Tax Act, which became effective on 16 September 2017.[1760] Sections 16 and 17 of the New Excise Tax Act set the tax base for goods by reference to the RRSP; the list of goods subject to the excise tax includes, but is not limited to, tobacco products. Section 17 states that "[i]n case that the Recommended Retail Selling Price *is not consistent with the reality*, or *is not in accordance with market mechanisms*, or the [Recommended Retail Selling] Price cannot be determined under paragraph two, the Director-General shall have the power to announce a Recommended Retail Selling Price as a base for Tax calculation".[1761] Thus, the possibility of a divergence between the RRSP and the actual price is sufficiently real as to be addressed by Thailand itself in its legislation. In response to a question from the Panel, Thailand recognized that this reflects at least the "theoretical possibility" of deviation.[1762] According to Thailand, however, "the scenario contemplated by Section 17 is a theoretical one" and this "does not amount to an admission by Thailand that this scenario will occur or is likely to occur".[1763] We agree with Thailand that the theoretical possibility of the RRSPs diverging from the actual retail selling price does not mean that such divergence is likely to occur, or has occurred. However, it does mean, or at least suggests, that the RRSP is not necessarily the actual price.

7.826. We acknowledge that Thailand has asserted in the course of this proceeding that "PMTL follows the standard business practice of many sectors whereby, as part of their marketing agreements with the suppliers, wholesalers and retailers are required to respect the recommended retail price in return for marketing assistance."[1764] We observe, however, that Thailand has not substantiated this assertion and we have no evidence supporting this proposition before us. The Philippines, to the contrary, argues that PMTL does not control the distribution chain for its imported cigarettes, but rather sells the cigarettes either to an independent wholesaler for onward sale to a retailer, or directly to large independent retailers.[1765] As discussed above, we understand that should an importer attempt to fix retail prices, it would face the risk that it violates Section 27 of the Competition Act. In the absence of any evidence that PMTL is acting in contravention of Thai competition law, we cannot assume that PMTL engages in unlawful behaviour. Therefore, Thailand's assertion does not call into question the fact that wholesalers and retailers have a *choice* whether to follow the importer's *recommended* price or not, meaning that the actual price may not be the same as the recommended price.

7.827. Indeed, the original panel observed that "the RRSP figures are *virtually* the same as the RSP figures as the retailers will *normally* accept the retail selling price proposed by PM Thailand".[1766] The original panel did not find that PMTL "can, and does, set the downstream retail price, by means of its RRSPs," as argued by Thailand.[1767] In fact, the panel's use of the words "virtually" and "normally"

[1759] Philippines' response to Panel question No. 66(a), para. 481.
[1760] Philippines' response to Panel question No. 59(a), para. 430 and fn 396.
[1761] New Excise Tax Act (English translation), (Exhibit PHL-203-B). (emphasis added)
[1762] Thailand's response to Panel question No. 114, p. 41; Philippines' comments on Thailand's response to Panel question No. 114, para. 243.
[1763] Thailand's response to Panel question No. 114, p. 41.
[1764] Thailand's response to Panel question No. 62(a), p. 56.
[1765] Philippines' first written submission, para. 744.
[1766] Emphasis added.
[1767] Thailand's first written submission, para. 7.39.

explicitly contemplates the possibility that the RRSPs and actual retail selling prices may not always be identical.

7.828. Additionally, we consider that the statement of the original panel above needs to be read in its context. The original panel was not presented with the issue that is now before this compliance Panel, i.e. whether the RRSPs and average actual market prices of PMTL's cigarettes are always the same. Rather, the original panel was called upon to determine whether imported cigarettes were subjected to taxes in excess of those applied to domestic cigarettes by virtue of a difference between maximum retail selling prices (MRSPs) of imported cigarettes and actual retail selling prices (and RRSPs) of imported cigarettes, on the one hand, and the lack of any such difference between the MRSPs and actual retail selling prices of domestic cigarettes, on the other.[1768] We understand the original panel to have referred to the RRSPs and actual retail selling prices of imported cigarettes interchangeably in the context of addressing that issue because the parties had done so, and since the figures for both would normally be the same.[1769] In sum, in dealing with the Philippines' claim in the original dispute, the original panel focused its analysis on the differences between MRSPs and RRSPs/RSPs, and *not* on the differences between RRSPs and RSPs. Read in this context, therefore, the statement quoted by Thailand does not amount to a finding by the original panel that the RRSP is the same as the actual average market price of cigarettes. In any event, we note that, insofar as the extent to which the RRSP determines the retail selling price is a factual issue that has the potential to evolve over time, a statement made by the original panel based on the evidence before it in 2009 would not necessarily hold true today.

7.829. We note that Thailand itself does not assert that RRSPs and average actual market prices are necessarily and always identical, but rather that they are "generally", "virtually", "normally", "for all practical purposes", and "in effect" the same.[1770] We recognize that the Philippines has not identified any instances in which PMTL's recommended price differed from the actual retail selling price.[1771] As we have already indicated, the Philippines' claims rest on the premise that the RRSP and average actual retail price on the date of notification *may* not be the same, and not on a demonstration that they *are* not the same. As we discussed in the previous section, the evidence before the Panel supports the Philippines' assertion that importers cannot impose recommended prices on retailers without violating, or at least running the risk of violating, Thai competition law. Thus, even if, in practice, the RRSPs for imported cigarettes have always been followed by retailers in Thailand, there remains the possibility that retailers will deviate from the RRSP.

7.830. For the reasons stated above, we conclude that the RRSP for imported cigarettes is not necessarily the same as the average actual market price and therefore the importer cannot *ensure* that it complies with the VAT notification requirement by notifying its RRSP on the date of notification.

7.4.2.3.3 Market research

7.831. The Philippines argues that it could be possible, by relying on market research data, for an importer to notify the average actual market price in Thailand, but since gathering and processing such data necessarily involves a delay it is impossible to notify the average actual market price on the date of notification itself.[1772] The Philippines argues that market research may take 4-6 weeks to be completed and that this assertion is based on PMTL's explanation and experience in obtaining such data.[1773]

7.832. With regard to the means of compliance with the notification requirement, Thailand submits that "if importers wish to obtain this price from 'a market research company, such as A.C. Nielsen', that is their choice".[1774] According to Thailand, "[i]mporters can obtain the average retail selling

[1768] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.489-7.490.
[1769] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.491.
[1770] See Thailand's first written submission, paras. 7.8-7.9, 7.36 and 7.38.
[1771] In response to a question from the Panel, the Philippines explains that it does not consider it appropriate for it to request the importer to provide evidence showing instances where the RRSP was below the retail selling price. The Philippines states that it "is concerned that such evidence, if it were to exist, could be used by Thai authorities as a basis for action (perhaps criminal) against the importer for failing to notify the correct retail selling price". (Philippines' response to Panel question No. 66(a), para. 482)
[1772] Philippines' response to Panel question No. 115 (a).
[1773] Philippines' first written submission, para. 806; and response to Panel question No. 115 (a).
[1774] Thailand's second written submission, para. 4.26.

price through any method they prefer".[1775] Additionally, Thailand considers that the Philippines' assertion that the collection of market research data takes 4-6 weeks has not been properly substantiated.[1776]

7.833. It is our understanding that the Philippines' claims under Articles X:3(a) and III:4 are based on the factual proposition that the importer is not in a position to know the average actual market price *on the date of notification*. Thus, regardless of the precise time period that market research takes, it is sufficient for the Philippines to establish that a necessary delay in gathering pricing data makes it impossible for the importer to obtain the average actual market price through market research *on the date of notification*. In our view, the Philippines has succeeded in establishing this presumption. As the Philippines explains in its first written submission, "[b]ecause such information must be collected and compiled by the research company, 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".[1777] We recall that, according to Clause 2(4) of Order Por. 145-2555, the average market price to be notified is "the market price of tobacco for each type of cigarette category" at which the consumers in general or the majority [of them] purchase cigarettes "on the date on which the registered operator … notifies the retail selling price".[1778] Thailand has not asserted that market research data on the average actual market price of imported cigarettes on the date of notification can be obtained *on that same date*.[1779]

7.834. We note that Thailand objected to the submission by the Philippines of Exhibit PHL-226, which contains a letter from A.C. Nielsen and a covering letter from PMTL.[1780] The Philippines uses this letter in support of its assertion that the collection of market research data takes 4-6 weeks.[1781] Since we have already established, without relying on or addressing this evidence, that it is not possible for the importer to obtain market research data, on the date of notification, regarding the average actual market price of imported cigarettes on that same date, we see no need to address this additional piece of evidence.

7.835. For the above reasons, we conclude that collecting market research data necessarily involves some delay and the purchasing of such market data does not enable the importer to comply with the requirement of Notification 187 and Order Por. 145-2555 to notify the average actual market price *on the same date* as when the notification is made. We further note that Thailand has not suggested any alternative means of compliance that would fulfil the requirement to notify the average actual market price on the date of notification.[1782] Accordingly, the Panel finds that an importer cannot rely on market research studies to know and notify the average actual market price on the date of notification.

7.4.2.3.4 Statements by importers

7.836. Thailand points to evidence which suggests that, to date, PMTL and other importers have consistently submitted notifications on the basis of RRSPs and have not been found in violation of the notification requirement. Thailand argues that "[i]n recent years … PM Thailand, and other importers have complied with Order Por. 145-2555 by notifying their RRSP as a proxy/best evidence for the actual average selling price (at their own request)."[1783] According to Thailand, "[t]here have been no problems on either side with the operation of Order Por. 145-2555 or the system of notifying and announcing the VAT base on June of each year, or with the notification of any changes thereto."[1784] Thailand has also provided the minutes of meetings that took place between the Revenue Department, the domestic cigarette manufacturer (TTM), and cigarette importers on 11 June 2013 and 20 June 2014, which report statements of the cigarette importers and

[1775] Thailand's second written submission, para. 4.26.
[1776] Thailand's response to Panel question No. 65; and comments on the Philippines' response to Panel question No. 115(a).
[1777] Philippines' first written submission, para. 806.
[1778] Order Por. 145-2555, (Exhibit PHL-122-B).
[1779] Thailand's response to Panel question Nos. 63(a) and 115(b).
[1780] Thailand's comments on the Philippines' response to Panel question No. 115(a).
[1781] Philippines' response to Panel question No. 115(a).
[1782] Thailand's response to Panel question No. 63(b).
[1783] Thailand's first written submission, para. 7.11.
[1784] Thailand's first written submission, para. 7.21.

manufacturer to the effect that they encountered no problems in complying with the notification requirement.[1785]

7.837. The Philippines argues that the statements of importers in the minutes submitted by Thailand do not contradict its claims.[1786] The Philippines further submits that the "acknowledgement by importers that the existing practice of notifying RRSPs in fulfilment of the VAT notification requirement is not in itself 'problematic' does not resolve the risk of legal jeopardy that importers face."[1787]

7.838. From the perspective of how the Philippines frames its claims, the relevant question is whether this evidence demonstrates that PMTL and other importers are able to know the average actual market price on the date of notification so as to be able to ensure that they are in compliance with the VAT notification requirement. In examining this issue, we consider that the evidence presented by the parties falls into two categories. First, the parties presented reported statements of importers on their ability to comply with the VAT notification requirement, and correspondence between PMTL and the Revenue Department relating to the same issue. Second, both parties agree that, since the adoption of Notification 187, the Revenue Department has accepted notifications from importers on the basis of RRSPs without any issue.

7.839. We start our analysis by looking at the statements of importers and the relevant correspondence. The minutes of the meetings between the Revenue Department and importers which took place on 11 June 2013 and 20 June 2014 demonstrate that the Revenue Department gave importers and manufacturers the opportunity to express their views on the operation of Notification 187 and Order Por. 145-2555. The minutes of the meeting of 11 June 2013 state in the section "Meeting resolution" that the "[c]igarette importers and manufacturer concluded that they had no problems in understanding and complying with" the requirements of Notification 187.[1788] The minutes of the meeting of 20 June 2014 contain a somewhat different wording in the same section: "[c]igarette importers and manufacturers acknowledge the practice of informing retail prices and report that there is no problematic issue".[1789] Read in isolation, these statements seem to confirm Thailand's view that the importers had not experienced problems "complying with" the VAT notification requirement.

7.840. However, as indicated above, we consider that the relevant question is whether this evidence demonstrates that PMTL and other importers are able to know the average actual market price on the date of notification so as to be able to ensure that they are in compliance with the VAT notification requirement. These statements do not necessarily answer that question, as they might be understood to mean that PMTL and other importers had not, to date, experienced any problems in complying with the VAT notification requirement insofar as the Revenue Department has been accepting notifications based on RRSPs. It is common ground between the parties that the RRSP is frequently the same as the actual average selling price, and we recall that the Revenue Department has consistently accepted notifications from PMTL on the basis of RRSPs without any issue. Specifically, the Philippines has submitted notifications sent by PMTL to the Revenue Department in 2012, 2013, 2015, and 2016.[1790] All such notifications refer to the letter of 21 September 2012[1791],

[1785] Thailand's first written submission, para. 7.11 (referring to the Minutes of the meeting of 11 June 2013 between the Revenue Department's representatives and representatives of cigarette importers and the domestic cigarette manufacturer (English translation), (Exhibit THA-30-B)); See also Minutes of the meeting of 20 June 2014 between the Revenue Department's representatives and representatives of cigarette importers and the domestic cigarette manufacturer (English translation), (Exhibit THA-31-B).

[1786] Philippines' response to Panel question No. 116, para. 284.

[1787] Philippines' response to Panel question No. 116, para. 286.

[1788] Minutes of the meeting of 11 June 2013 between the Revenue Department's representatives and representatives of cigarette importers and the domestic cigarette manufacturer (English translation), (Exhibit THA-30-B), p. 3.

[1789] Minutes of the meeting of 20 June 2014 between the Revenue Department's representatives and representatives of cigarette importers and the domestic cigarette manufacturer (English translation), (Exhibit THA-31-B), p. 3.

[1790] Letter from PMTL to the Director of the Revenue Department, 28 September 2012 (English translation), (Exhibit PHL-129-B); Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation), (Exhibit PHL-132-B); Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation), (Exhibit PHL-133-B); Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation), (Exhibit PHL-134-B).

[1791] Letter from PMTL to the Director of the Revenue Department, 21 September 2012 (English translation), (Exhibit PHL-123-B).

which states that PMTL invited the Revenue Department to object to the use of RRSPs for the purpose of notifications, and notes that the company received no such objection or notice of disagreement from the Revenue Department.[1792]

7.841. Insofar as it is appropriate to rely on contemporaneous statements by PMTL or other importers for the purpose of assessing whether they are able to ensure that they are in compliance with the VAT notification requirement, we consider that greater weight must be given to PMTL's statements contained in its letter of 21 September 2012 to the Revenue Department. This letter speaks to the difficulties PMTL had in finding a way to satisfy the notification requirement. This letter reads in relevant part:

> The Company is concerned that it is not possible to collect all data necessary to assess the "*average price of the market actually purchased and sold in general on the date on which the value added tax l[i]ability arises*". Any efforts made by the Company to meet this requirement could not, practically speaking, result in the capture of all data on all sales in all parts of Thailand on any given date. For the sake of certainty therefore, the Company will apply the recommended retail selling price (*RRSP*) which it recommends that its trade partners follow pursuant to a written notification. While we understand that our trade partners make every effort to sell our product in accordance with the RRSP, please note that the Company is subject to the Provisions of the Trade Competition Act B.E. 2542 (1999) and cannot therefore make any further efforts to control pricing in the market.[1793]

7.842. We note that Thailand objects to the relevance of this letter, given that it was sent after the introduction of Notification 187, but prior to the adoption of Order Por. 145-2555, and makes no reference to any "alleged difficulty related to the calculation of the price of PMTL's cigarettes prevailing on the date of the notification".[1794] We further note that, when Notification 187 was initially introduced, its wording suggested that "importers were expected to notify, in June, a retail price that will be charged in the future" and this letter was expressing the concern that it was impossible to comply with this requirement.[1795] We recall that, on 30 November 2012, the Revenue Department adopted Order Por. 145-2555 to clarify that, *inter alia*, the price to be notified is the price on the date of notification.[1796] In our view, PMTL's concerns expressed in the letter remain relevant regardless of whether the price to be notified is the price on a future date or on the date of notification. We observe that the letter expresses PMTL's concern with the impossibility of collecting market pricing data "*on any given date*", the plain meaning of which includes the date of notification.[1797] Additionally, we do not see how PMTL's concern that it cannot ensure that RRSPs are followed by its retailers, due to the constraints of competition law, would have changed by virtue of the adoption of Order Por. 145-2555.

7.843. Overall, we consider that the statements of the importers in the meetings with the Revenue Department and PMTL's letter of 21 September 2012 are to be taken into account and given some weight. However, we consider that this evidence is inconclusive with regard to whether the importers have experienced difficulties or not, because they do not specify in what sense there have been "no problems in … complying with the notification requirement."[1798] We consider that PMTL's statements contained in its letter of 21 September 2012 to the Revenue Department speak to this question with greater specificity, and therefore carry greater weight. We therefore conclude that statements of importers reported in the minutes of the meetings with the Revenue Department do not demonstrate

[1792] Letter from PMTL to the Director of the Revenue Department, 28 September 2012 (English translation), (Exhibit PHL-129-B); Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation), (Exhibit PHL-132-B); Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation), (Exhibit PHL-133-B); Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation), (Exhibit PHL-134-B).

[1793] Letter from PMTL to the Director of the Revenue Department, 21 September 2012 (English translation), (Exhibit PHL-123-B), p. 2. (emphasis original)

[1794] Thailand's comments on the Philippines' response to Panel question No. 115(a), p. 40.

[1795] Philippines' first written submission, para. 739.

[1796] Philippines' first written submission, para. 740; Thailand's comments on the Philippines' response to Panel question No. 115(a), p. 40.

[1797] Emphasis added.

[1798] Minutes of the meeting of 11 June 2013 between the Revenue Department's representatives and representatives of cigarette importers and the domestic cigarette manufacturer (English translation), (Exhibit THA-30-B), p. 3.

that importers have not experienced difficulties in complying with the VAT notification requirement as written.

7.4.2.3.5 Conclusion

7.844. For the reasons stated above, the Panel concludes that: (i) while TTM was exempted from Thai competition law and able to enter into price fixing arrangements, importers were subject to Section 27 of the Competition Act and thus unable to lawfully set retail prices in the same way as TTM; (ii) the RRSP for imported cigarettes is not necessarily the same as the average actual market price and therefore importers cannot ensure that they comply with the VAT notification requirement by notifying their RRSPs; (iii) since collecting market research data necessarily involves some delay, importers cannot rely on market research studies to know and notify the average actual market price on the date of notification; and (iv) the minutes of the meetings with the Revenue Department relied on by Thailand do not demonstrate that importers have not experienced difficulties in complying with the VAT notification requirement as written.

7.845. In sum, the Panel concludes that the importer is not in a position to know the average actual market price on the date of notification and thus is unable to ensure that it complies with the VAT notification requirement, as written, in Notification 187 and Order Por. 145-2555.

7.4.2.4 Consequences of an incorrect notification

7.846. We recall that the Philippines' claims under Articles X:3(a) and III:4 of the GATT 1994 are framed in terms of "legal jeopardy", in the sense of PMTL being exposed to the risk of legal consequences, in the form of penalties or otherwise, in the event that the notified RRSP turns out to be less than the average actual market price. Therefore, they necessarily rest on the premise that PMTL could actually face such consequences in the event that the notified RRSP turns out to be less than the average actual market price.[1799] However, Thailand submits that even if a cigarette importer could not ensure that it complies with the VAT notification requirement, and there turns out to be a discrepancy between the RRSP notified and the actual average market price, PMTL would not be in any "legal jeopardy" because it can simply submit a correction of an originally incorrect notification, without suffering any legal consequences.[1800] The Philippines contests this understanding, and argues that, in any event, there is still a significant administrative burden imposed on the importer in the event that it attempts to submit a correction.[1801]

7.847. Turning first to the existence of "legal jeopardy", we recall that, according to the Philippines, "under Sections 88 and 89 of the Revenue Code, the Revenue Department may impose 'penalties' and 'surcharges' on an importer for conduct leading to the underpayment of VAT."[1802] Section 89(3) of the Revenue Code states:

> A person liable to tax or a person under Section 86/13 shall pay penalties in the cases and at the rates as follows:
>
> ...
>
> (3) If he files a tax return or a tax remittance return incorrectly or contains errors affecting the amount of tax payable or remittable to be inaccurate, the penalty shall be equal to the amount of tax additionally payable or remittable.[1803]

7.848. We recall that the VAT on cigarettes that the importer is required to pay is a function of the tax rate and tax base. In our analysis above we have reached the conclusion that the importer is unable to ensure that it notifies correctly the "average actual market price" used for the purpose of establishing the VAT base. For this reason, the importer is exposed to the risk of understatement of the VAT base. In light of these findings and Section 89(3) of the Revenue Code, which by its terms

[1799] Philippines' first written submission, para. 810; second written submission, paras. 770-771; and response to Panel question Nos. 118 and 121.
[1800] Thailand's second written submission, para. 4.18.
[1801] Philippines' response to Panel question No. 118; comments on Thailand's response to Panel question No. 119(b).
[1802] Philippines' response to Panel question No. 121, para. 302.
[1803] Revenue Code (English translation), (Exhibit PHL-231-B), Section 89(3).

refers to the "penalties" that shall be paid, we agree with the Philippines that if an importer pays its VAT in accordance with a VAT base that is lower than the one that should have been notified, and thereby incurs a lower tax liability than is actually due, the Revenue Department may impose penalties on the importer.[1804] This, in our view, constitutes a tangible legal consequence of unintentional non-compliance.

7.849. Additionally, we recall the Philippines' argument that Sections 37 and 90/4 of the Revenue Code provide for criminal offences relating to the underpayment of the VAT.[1805] The Philippines submits that as a consequence of an incorrect notification and resulting VAT underpayment, the importer can be subject to action by the DSI and Public Prosecutor.[1806] We understand that the Philippines' claims are framed in terms of a risk of "legal jeopardy" in the event of the importer's *unintentional* failure to comply with the VAT notification requirement. Thus, to the extent that the penalties under Sections 37 and 90/4 depend on the existence of an importer's intent to furnish false information or evade VAT, we are not convinced that those provisions will necessarily lead to penalties in the event of an *unintentional* failure to comply. We are mindful, however, that the DSI is authorized to investigate these criminal offences.[1807] In our view, in the event that the DSI were to investigate the importer's failure to comply, regardless of the specific outcome of the investigation, this would represent a significant consequence of unintentional non-compliance for an importer.[1808]

7.850. We note that Thailand has not contested that, in case of a failure to comply with the VAT notification requirement, an importer may face the penalties described above, or the prospect of a criminal investigation.[1809] We take into account Thailand's clarification that any criminal investigation can be initiated by the DSI only at the request of the Revenue Department.[1810] However, this does not alter our analysis.

7.851. With regard to the existence of "legal jeopardy", Thailand submits that "[i]f a cigarette importer notifies in good faith the actual average market price on the basis of its RRSP, and subsequently notices a discrepancy between the notified price and the actual price that prevailed on the date of the notification, the importer could simply notify this correction as a change of the notified price."[1811] Furthermore, according to Thailand, "[t]he Revenue Department would not retroactively calculate VAT liability for the period between the original notification and the notification of the change."[1812] In response to a question from the Panel, Thailand describes two scenarios in which an

[1804] Philippines' response to Panel question No. 121, para. 306.

[1805] Section 37 of the Revenue Code provides for the punishment with imprisonment of three months to seven years and a fine of two thousand to two hundred thousand Baht for "knowingly or wilfully" furnishing false information "with a view to evading payment of the tax and duty" and for evading or attempting to evade payment of the tax "by falsehood, fraud, artifice." We further note that Section 90/4 of the Revenue Code imposes identical penalties for various action related to evasion of tax or duties committed with "intent to evade or attempt to evade value added tax." (Revenue Code (English translation), (Exhibit PHL-231-B), Sections 37 and 90/4)

[1806] Philippines' response to Panel question No. 121, paras. 302-303.

[1807] Philippines' response to Panel question No. 121, para. 302; Thailand's comments on the Philippines' response to Panel question Nos. 120 and 121. We observe that the Notification of the Board of Special Case (No. 4) B.E. 2554 identifies Sections 37, 90/4 of the Revenue Code as falling within the authority of the DSI. See Notification of the Board of Special Case (No. 4) B.E. 2554 (2011) (English translation), (Exhibit PHL-228-B), Clause 4.

[1808] In response to Panel question No. 121, the Philippines submits that, where the importer pays insufficient VAT, the importer may face "surcharges" under Section 89/1 of the Revenue Code. We note that Thailand explained in the course of the proceedings that this provision relates to the situation where "the importer submitted to the Revenue Department an amount of VAT that is not the actual amount of VAT collected from consumers". (See Thailand's response to Panel question No. 62(c)) As we understand Thailand's argument, Section 89/1 of the Revenue Code would then be not relevant to the situation where the notified VAT base is lower than it should have been because even using this lower VAT base the importer would submit all the amount of VAT collected from consumers. We do not find it necessary to decide on this issue, in light of our overall findings that the importer may indeed face consequences in the form of potential imposition of penalties and the possibility of DSI investigation.

[1809] Thailand's comments on the Philippines' response to Panel question Nos. 120 and 121.

[1810] Thailand's comments on the Philippines' response to Panel question Nos. 120 and 121.

[1811] Thailand's second written submission, para. 4.18.

[1812] Thailand's second written submission, para. 4.18.

importer may make a correction of the notified VAT base without incurring any penalty.[1813] Thailand provides the following table to explain Scenario 1 and Scenario 2:

<table>
<tr><td colspan="4">Scenario 1</td></tr>
<tr><td colspan="2">JUNE[1814]</td><td>JULY</td><td>AUGUST</td></tr>
<tr><td colspan="2">[----------20----28---]</td><td>[-1----------]</td><td>[----------15----------]</td></tr>
<tr><td>Notification by the importer of the new VAT base according to the information available (importer later realizes this is VAT base is incorrect)</td><td>Notification of the correct VAT base after noticing a mistake in the 20 June notification</td><td>Correct VAT base enters into effect.</td><td>Tax return is submitted reflecting the correct VAT base</td></tr>
<tr><td colspan="4">Scenario 2</td></tr>
<tr><td>[----------20-------]</td><td colspan="2">[-1----------29-]</td><td>[-1----------15----------]</td></tr>
<tr><td rowspan="2">Notification by the importer of the new VAT base according to the information available (importer later realizes this is VAT base is incorrect)</td><td>Incorrect VAT base enters into effect</td><td>Notification of the correct VAT base after noticing a mistake in the 20 June notification</td><td>Correct VAT base enters into effect</td><td>Deadline for filing tax return on VAT collected during July.</td></tr>
<tr><td colspan="3">Period of 1 July – 31 July</td></tr>
</table>

7.852. Under Notification 187, the VAT base notified by a cigarette importer enters into force on the first day of the following month.[1815] Under the first scenario as explained by Thailand, an importer notifies an incorrect VAT base during the month of June and then, after discovering a discrepancy between the notified RRSP and the average actual market price, notifies the correction of the VAT base during the same month, before the entry into force of the incorrect VAT base (which would be 1 July), and consequently the revised, correct VAT base enters into force on 1 July. In this situation, the importer then uses the correct VAT base to collect VAT during the next month, and incurs no penalty.[1816]

7.853. Under the second scenario, as explained by Thailand, the importer makes a notification using available information during the month of June and the incorrect tax base enters into force on 1 July. Shortly thereafter, the importer discovers a discrepancy between the notified RRSP and the average actual market price, and notifies a correction during the month of July. The revised, corrected tax base enters into force on 1 August. According to Section 83 of Thailand's Revenue Code, the VAT collected by the taxpayer during the month in which the VAT base was in effect must be reported and paid by submitting a tax return within the first 15 days of the following month. In this example, the VAT for the month of July would have to be paid on 15 August and the importer would have already collected the VAT using an incorrect VAT base. In this situation, the importer would have to

[1813] Thailand's response to Panel question No. 62(a).

[1814] We note that initially the explanation provided by Thailand referred to the months of February, March and April. However, Thailand later clarified that those months can be replaced with the months of June, July and August, thus the table reflects those changes. (See Thailand's response to Panel question No. 119)

[1815] Notification 187, (Exhibit PHL-121-B), Clauses 6(1), 6(2) and 7. See also Thailand's response to Panel question No. 62(a).

[1816] Thailand's response to Panel question No. 62(a).

re-issue new invoices of its sales to retailers to collect VAT using the correct VAT base. On the basis of these new invoices, the importer would then submit its tax return on 15 August.[1817]

7.854. First, we observe that both of the scenarios presented by Thailand envisage corrections being made either before the incorrect VAT base enters into effect or before the deadline for submitting the tax return, and do not account for the possibility that a discrepancy between the RRSP notified and the average actual market price may not be discovered before the return is filed. We agree with the Philippines that, in this third scenario, "importers face a risk of legal jeopardy that not even Thailand suggests can be mitigated through monitoring and corrected notifications".[1818]

7.855. Second, we have reviewed the terms of Notification 187 and Order Por. 145-2555 relating to changes in the average actual market price, and it is not clear to us that they establish any correction mechanism. We note that Thailand has not directed us to any specific provisions in the applicable instruments to substantiate its assurances that an importer can subsequently correct the original incorrect notification without facing any penalties or consequences. We recall that an importer is required to notify the "average actual market price" in June of each year, and that if the price changes during the course of the year, a revised price must be notified. Specifically, Clause 6(2) of Notification 187 and Clause 6(3) of Order Por. 145-2555 impose on an importer the obligation to notify "a change" in the "average actual market price". However, these terms address the situation in which there is "a change" in the "average actual market price", not the situation in which the RRSP notified on a particular date turns out to be different from the average actual market price on that date.

7.856. Furthermore, according to Clauses 5(1)(b) and 2(4) of Order Por. 145-2555, what must be notified is the average actual market price "on the date on which … the importer … notifies" the average actual market price. Thus, based on the wording of these provisions, insofar as the provisions dealing with the situation in which there was a "change" to the average actual market price may serve as a basis for submitting revised notifications, it appears that the new notification (i.e. the correction) would be expected to also reflect the average market price *on the date of the new notification*. This suggests that the importer will continue to be subject to the same problem as before, namely being unable to identify the correct price to notify on the date on which it is required to make a notification. Therefore, we do not consider that the correction mechanism presented by Thailand mitigates the "legal jeopardy" to which the importer is exposed.

7.857. In any event, even if Thailand's understanding were correct and the importer was allowed to make a correction to the original notification reflecting the price *on the date of the original notification,* we consider that the importer would still face significant administrative and financial burdens in the process of making those corrections. We consider that under any of Thailand's scenarios, in order to ensure its compliance with the notification requirement through any correction mechanism, an importer would have to commission market research studies to verify whether the RRSP which it notified continues to match the average actual market price.[1819] In this respect, we note the Philippines' position that gathering market research data would "impose a substantial cost on the importer, amounting to more than THB 4 million in 2016."[1820] While we do not consider it necessary to quantify the cost, we agree with the Philippines that undertaking market research would impose a financial burden on the importer. Additionally, we note that, as Thailand itself explains, under the second scenario described above, a correction may require the re-issuance of VAT invoices.[1821] We further note that "[a]s 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

[1817] Thailand's response to Panel question No. 62(a).

[1818] Philippines' response to Panel question No. 118, para. 296.

[1819] See Thailand's response to Panel question No. 62(a) and question No. 9 from the Philippines to Thailand.

[1820] Philippines' first written submission, para. 806.

[1821] Thailand's response to Panel question No. 62(a), p. 55. Thailand states that:

> As long as the importer notifies the correct VAT base before the submission of the tax return (in this example, 15 April), the importer has the opportunity to submit his tax return paying VAT on the basis of the correct VAT base. In this case, as the importer would have already collected VAT from retailers based on the incorrect VAT base, the importer would need to re-issue new invoices of his sales to retailers to collect VAT using the correct VAT base.

supply chain, for each pack of imported cigarettes."[1822] In our view, the issuing of such additional invoices would indeed impose a significant administrative burden on an importer.

7.858. Furthermore, we recall the Philippines' argument that even if the mechanism of correction exists, the importer still faces "an endless spiral of notifications, corrections and reissuance of invoices".[1823] Thailand, for its part, argues that the importer does not face an "endless spiral of notifications, corrections and reissuance of invoices", because an importer may subsequently submit a corrected notification that indicates the average actual market price on the date of the original notification.[1824] In our view, even assuming that the importer can submit a correction reflecting the average actual market price *on the date of the original notification*, we do not see how this would significantly reduce the administrative and financial burdens imposed on importers.

7.859. We recall that an importer is required to notify the average actual market price in June of each year, and that if the price changes during the course of the year, a revised price must be notified. Insofar as an importer were required to only make one notification per year based on the average actual market price in June, it would follow that the possibility of submitting a subsequent correction of the average actual market price prevailing on the date of the initial notification would obviate the need to make any further notifications, including any further notifications correcting the average actual market price prevailing on the date of the second notification. Furthermore, insofar as Thailand's assertion is correct, it means that there would never be a need to submit more than one subsequent correction in respect of the same earlier month, e.g. June. However, since an importer is required to notify changes to the actual average market price on an *ongoing* basis, there is inherently the prospect of submitting multiple notifications, corrections, and reissuing of invoices to reflect changes throughout the course of the year, with an attendant administrative burden.

7.860. For the reasons above, we conclude that, in the event the notified RRSP turns out to be less than the actual average market price prevailing on the initial date of notification, or prevailing at subsequent points in the year, the importer, in the absence of any appropriate administrative ruling or formal bilateral arrangement with the Revenue Department, may face significant consequences, including legal consequences such as penalties and possible criminal investigation. Furthermore, even if the importer were able to correct the original incorrect notification, it would still have to bear additional administrative and financial burdens.

7.4.3 Claim under Article X:1 of the GATT 1994

7.4.3.1 Introduction

7.861. Article X:1 of the GATT 1994 establishes an obligation on Members to publish promptly certain trade regulations of general application insofar as they have been made effective. As described above, Notification 187 and Order Por. 145-2555 require importers and the domestic producer of cigarettes to notify in June of each year the "average actual market price" on the date of notification. Since the introduction of Notification 187 in 2012, PMTL has consistently submitted yearly notifications on the basis of its RRSPs, and the Thai Revenue Department has accepted those notifications without objection.[1825] However, the possibility of submitting notifications on the basis of RRSPs has not been specified in written Thai regulations.[1826]

7.862. The Philippines argues that the Thai Revenue Department's consistent practice of permitting importers to notify the RRSP prevailing on the date of notification, instead of the average actual

[1822] Philippines' response to Panel question No. 118, para. 293. Thailand has not contested this assertion.

[1823] Philippines' opening statement at the meeting of the Panel, para. 149.

[1824] Thailand's response to the Philippines' question No. 9.

[1825] Philippines' first written submission, paras. 753 and 845 (referring to Letter from PMTL to the Director of the Revenue Department, 28 September 2012 (English translation), (Exhibit PHL-129-B); Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation), (Exhibit PHL-132-B); Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation), (Exhibit PHL-133-B); Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation), (Exhibit PHL-134-B); and Thailand's first written submission, paras. 7.12, 7.70 and 7.76.

[1826] Philippines' first written submission, paras. 753 and 851; and Thailand's second written submission, para. 4.23.

market price, amounts to a general rule for purposes of Article X:1, and that the failure to publish this rule therefore constitutes a violation of Article X:1.[1827]

7.863. Thailand disputes that the Revenue Department's confirmation that importers can notify RRSPs to fulfil the notification requirement amounts to a rule of general application within the meaning of Article X:1.[1828] In this regard, Thailand considers that the Philippines has not demonstrated the existence of any "practice" adopted by the Revenue Department; rather, it considers that PMTL's notification of the average actual market price on the basis of RRSPs constitutes merely a specific means of compliance chosen by PMTL.

7.4.3.2 Main arguments of the parties

7.864. The Philippines argues that the Revenue Department "has adopted a long-standing general rule, reflected in its consistent practice, of permitting importers to notify, on a brand-specific basis, the recommended retail selling price prevailing on the date of notification".[1829] As evidence of this, the Philippines points to the Revenue Department's lack of objection to PMTL's practice of notifying the RRSP, as well as representations made to the Philippines by Thailand, in writing, to the effect that "it is permissible for importers to notify the recommended retail selling price prevailing on the date of notification, in order to satisfy the notification requirements … with respect to the average actual market price".[1830] The Philippines considers that the Revenue Department's "conduct amounts to a consistent practice" that has the "required degree of authoritativeness to amount to 'laws, regulations, [or] administrative rulings' for purposes of Article X:1".[1831] The Philippines considers that Thailand's suggestion that notification of the RRSPs is simply an importer's "chosen means" of compliance demonstrates why Thailand's rule should be published, as required under Article X:1.[1832] The Philippines also considers that this "rule" applies to all importers of cigarettes in Thailand, and therefore the rule is "generally applicable" within the meaning of Article X:1.[1833] The Philippines considers that this "rule" is "connected or related to the imposition and collection of VAT, which … is a condition for lawful sale of cigarettes in Thailand".[1834] The Philippines argues that the "rule" was made effective by Thailand.[1835] Finally, the Philippines argues that Thailand has not published this "rule", in contravention of Article X:1.[1836]

7.865. Thailand submits that the Revenue Department's confirmation that "importers can use RRSPs as a proxy for the average actual selling price" is not included in the category of measures that are subject to Article X:1.[1837] Thailand considers that there is no "formal right" to notify the RRSPs under Notification 187 and Order Por. 145-2555, but rather the notification of the RRSPs constitutes the "method" chosen by PMTL to notify the average actual market price to the Revenue Department.[1838] In Thailand's view, the Philippines is advancing an interpretation of Article X:1 that, if accepted, would require that Members publish the specific methods by which private entities choose to comply with their obligations.[1839] According to Thailand, this interpretation would lead to absurd outcomes, such that Thailand would also be required to publish, for example, "the possibility of notifying the price obtained from 'a market research company, such as A.C. Nielsen'".[1840] Thailand explains that it has published "the relevant administrative rules establishing the VAT tax base for cigarettes", namely those contained in Notification 187 and Order Por. 145-2555.[1841]

[1827] Philippines' first written submission, paras. 832-854; second written submission, paras. 723-746; opening statement at the meeting of the Panel, paras. 123-126; and response to Panel question Nos. 69 and 117.

[1828] Thailand's first written submission, paras. 7.69-7.81; second written submission, paras. 4.22-4.36; opening statement at the meeting of the Panel, paras. 105-111; and response to Panel question No. 61.

[1829] Philippines' first written submission, para. 844.

[1830] Philippines' first written submission, para. 845.

[1831] Philippines' first written submission, para. 846. (emphasis omitted)

[1832] Philippines' second written submission, paras. 731-733.

[1833] Philippines' first written submission, para. 847; and second written submission, paras. 725-727.

[1834] Philippines' first written submission, para. 849. (emphasis omitted)

[1835] Philippines' second written submission, paras. 735-737.

[1836] Philippines' first written submission, paras. 851-853; and second written submission, paras. 740-743.

[1837] Thailand's second written submission, para. 4.23.

[1838] Thailand's second written submission, para. 4.29.

[1839] Thailand's second written submission, para. 4.27.

[1840] Thailand's second written submission, para. 4.28.

[1841] Thailand's first written submission, para. 7.77.

7.4.3.3 Analysis by the Panel

7.4.3.3.1 General considerations

7.866. Article X:1 of the GATT 1994 states in relevant part:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

7.867. The Appellate Body has explained that the rationale behind Article X:1 is "to ensure that traders are made aware of measures that may have an impact on them, so that they have time to become acquainted with, and to adapt to, the new measures".[1842] We recall that the original panel noted that:

> The obligations under Article X:1 to publish trade regulations largely consist of the following elements: (i) the existence of laws, regulations, judicial decisions and administrative rulings of general application made effective by a WTO Member that pertain to, *inter alia*, the classification or the valuation of products for customs purposes; and (ii) the obligation to publish such laws and regulations promptly in such a manner as to enable governments and traders to become acquainted with them.[1843]

7.868. It is not in dispute that Thailand has not published any rule or guidance indicating that notifications on the basis of RRSPs are acceptable for the purpose of fulfilling the VAT notification requirement. This means that if we were to find that the Revenue Department's conduct at issue falls within the scope of "laws, regulations, judicial decisions and administrative rulings of general application" within the meaning of Article X:1, there would be no need for us to inquire further into the second element identified above.

7.869. Thus, the single issue on which the parties disagree in relation to Article X:1 is whether the Revenue Department's acceptance of importers' notifications based on RRSPs in fulfilment of Notification 187 and Order Por. 145-2555 amounts to a "[l]aw", "regulation", "judicial decision" or "administrative ruling" within the meaning of Article X:1. In particular, the Philippines submits that the Revenue Department "has adopted a long-standing general rule, reflected in its consistent practice, of permitting importers to notify, on a brand-specific basis, the recommended retail selling price prevailing on the date of notification".[1844] More specifically, the Philippines argues that "the practice at issue is an exercise of non-binding administrative authority by the Thai Revenue Department in deciding what is [an] acceptable notification under Notification 187 and Order Por. 145-2555, as part of the Department's administration of VAT", which falls within the concept of an "administrative ruling" within the meaning of Article X:1.[1845] In Thailand's view, however, the option of submitting notifications on the basis of RRSPs "is not a measure of general and prospective application"[1846], rather it is "the specific means chosen by PM Thailand to comply with Thailand's VAT rules".[1847] Thailand further argues that "nothing in Article X:1 requires WTO Members to publish the specific means, process or methods chosen by private operators to comply with legal requirements".[1848]

7.870. Our analysis therefore will focus on whether the Revenue Department's conduct qualifies as an "administrative ruling" within the meaning of Article X:1. The meaning of "[l]aws, regulations, judicial decisions and administrative rulings" as used in Article X:1, has been considered by panels before. In this respect, the panel in *EC – IT Products* found that "the coverage of Article X:1 extends

[1842] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.65.
[1843] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.761.
[1844] Philippines' first written submission, para. 844.
[1845] Philippines' response to Panel question No. 68, para. 495.
[1846] Thailand's second written submission, para. 4.25.
[1847] Thailand's second written submission, para. 4.23.
[1848] Thailand's second written submission, para. 4.23.

to instruments with a degree of authoritativeness issued by certain legislative, administrative or judicial bodies".[1849] The panel also noted that whether a particular measure has a necessary "degree of authoritativeness" requires a "case-by-case assessment of the particular factual features of the measure".[1850] On the issue of what constitutes an "administrative ruling", the panel observed that "a 'ruling' is 'the action of governing or exercising authority, the exercise of government, authority, control, influence' or 'an authoritative pronouncement'".[1851] We observe that this is similar to the term "regulation", which is defined as "[a] rule or principle governing behaviour or practice; *esp.* such a directive established and maintained by an authority".[1852]

7.871. Regarding the Philippines' contention that the Revenue Department has adopted an *unwritten* administrative ruling, we further find relevant the original panel's discussion of whether, in the absence of written rules, the Thai Customs Department had established, through practice, a general rule regarding the release of guarantees for internal taxes.[1853] The original panel explained that, if the Philippines were to allege the existence of an unwritten rule, "it should have … drawn [the Panel's] attention to the 'practice' relied on by Thai Customs in previous instances".[1854] In explaining its finding that the Philippines had not established the existence of specific procedural rules regarding the release of guarantees, the panel noted "the absence of evidence showing a practice or repeated actions".[1855] We approach the issue of the alleged existence of an *unwritten* administrative ruling with these considerations in mind.

7.872. The parties' disagreement does not centre on the meaning of "[l]aws, regulations, judicial decisions and administrative rulings of general application" as used in Article X:1. Rather, it rests primarily on the application of the legal standard to the facts. Having said this, certain key facts are not in dispute. In the course of this proceeding, Thailand has not contested that, since 2012, the Revenue Department has accepted PMTL's notifications on the basis of RRSPs without objection.[1856] It is also an undisputed fact that Thailand has confirmed to the Philippines that PMTL can notify its RRSP.[1857] We note that both parties agree that the Revenue Department's acceptance of notifications on the basis of RRSPs is premised on its right to verify the information submitted by the taxpayer.[1858]

7.873. We therefore proceed to consider the key issue disputed by the parties, namely, whether the Revenue Department's conduct of accepting the importer's notifications on the basis of RRSPs in fulfilment of Notification 187 and Order Por. 145-2555 constitutes an "administrative ruling" within the meaning of Article X:1 of the GATT 1994. In our analysis, we will, following the approach of the panels in *EC - IT Products* and in the original proceeding, consider whether the Philippines has demonstrated that there was "an authoritative pronouncement"[1859] on behalf of Thailand confirming that notifications on the basis of RRSPs are acceptable and whether the evidence confirms the existence of the Revenue Department's "practice or repeated actions"[1860] of accepting such notifications.

7.4.3.3.2 Existence of an "administrative ruling" subject to Article X:1

7.874. We begin our analysis with an examination of whether Thailand or Thai agencies have made any "authoritative pronouncement" to the effect that cigarette importers can notify RRSPs in fulfilment of the VAT notification requirement. In this respect, we examine whether, as argued by the Philippines, Thailand has represented to the Philippines that it is permissible for importers to notify the recommended retail selling price prevailing on the date of notification, in order to satisfy

[1849] Panel Report, *EC – IT Products,* para. 7.1027.
[1850] Panel Report, *EC – IT Products,* para. 7.1027.
[1851] Panel Report, *EC – IT Products*, para. 7.1025.
[1852] Appellate Body Report, *India – Solar Cells*, para. 5.106 (referring to Oxford English Dictionary online).
[1853] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.845-7.849.
[1854] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.846.
[1855] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.847.
[1856] Thailand's first written submission, paras. 7.12, 7.70 and 7.76.
[1857] Philippines' first written submission, para. 751 (referring to Email communication between officials of the Permanent Mission of the Philippines to the WTO and the Permanent Mission of Thailand to the WTO, 10 October 2012, (Exhibit PHL-130)); Thailand's first written submission, paras. 7.10 and 7.78-7.79 (referring to the same Email communication); and second written submission, para. 4.36.
[1858] Thailand's response to Panel question No. 117; Philippines' response to Panel question No. 117 and comments on Thailand's response to Panel question No. 117.
[1859] Panel Report, *EC – IT Products,* para. 7.1025.
[1860] Panel Report, *Thailand – Cigarettes (Philippines),* para. 7.847.

the notification requirements of Notification 187 and Order Por. 145-2555 with respect to the average actual market price.[1861]

7.875. On the issue of evidence relating to discussions between the Philippines and Thailand regarding implementation of the DSB's recommendations and rulings in the original dispute, we take note of Thailand's concern that the documents submitted by the Philippines as Exhibits PHL-126, PHL-127 and PHL-160 constitute notes of bilateral meetings and that those notes were prepared by the Philippines without Thailand's approval or agreement on the content.[1862] Indeed, we are cautious in attaching weight to statements reportedly made by Thai officials, as contained in unilaterally prepared notes and, therefore, we refrain from relying on the content of those notes in our findings.

7.876. Despite this, Thailand has not denied that it explicitly confirmed to the Philippines that PMTL could use the RRSPs in its notifications.[1863] Thailand explains that "the Philippines and [PMTL] asked whether the companies could use their RRSPs as a proxy/best evidence for their notifications of the average actual selling price under Order Por. 145-2555."[1864] Thailand further clarifies that in an email sent from Thailand to the Philippines "on 10 October 2012, Thailand confirmed to the Philippines that this practice was acceptable."[1865]

7.877. We consider significant the context in which this confirmation was made. As Thailand itself explains, PMTL "expressed concerns to the Revenue Department that it was difficult to comply with Order Por. 145-2555 because while the companies announce RRSPs, they do not control the re-sale price and cannot be certain of the actual price on the date of the notification" and "[h]ence, [PMTL] and the Philippines requested the Revenue Department to allow the companies to use their RRSPs".[1866] This, for us, shows that Thailand and the Thai Revenue Department were aware that importers experience difficulties in finding a way to notify the average actual market price in the situation where they are not able to know it on the date of notification.[1867]

7.878. Giving guidance on how to comply with the notification requirement, particularly in those circumstances, in our view, appears to constitute an "authoritative pronouncement" on behalf of Thailand. However, we consider that it is necessary to review the existence of the practice and actions followed by the Revenue Department before reaching any conclusion on whether Thailand has adopted an "administrative ruling", within the meaning of Article X:1, that cigarette importers can submit notifications on the basis of RRSPs in fulfilment of their obligations under Notification 187 and Order Por. 145-2555.

7.879. As explained above, in establishing the existence of an *unwritten* rule the original panel attached importance to the evidence of a "practice or repeated actions". In the circumstances of this case, we consider that such evidence is highly relevant to the question of whether an unwritten "administrative ruling" exists. According to the Philippines, the existence of the Revenue Department's practice is established, in particular, by the fact that, since 2012, the Revenue Department has consistently and without objection accepted notifications on the basis of RRSPs from PMTL.[1868] As already discussed, the evidence adduced by the Philippines indeed demonstrates that the Revenue Department has consistently and without any objection accepted notifications from PMTL that used RRSPs for the calculation of the VAT base.[1869] We recall that the Philippines has submitted to the Panel such notifications made by PMTL in 2012, 2013, 2015, and 2016.[1870] All such

[1861] Philippines' first written submission, para. 845.
[1862] Thailand's first written submission, fn 23; and second written submission, paras. 4.34-4.36.
[1863] Thailand's first written submission, para. 7.10; and second written submission, para. 4.36.
[1864] Thailand's first written submission, para. 7.10.
[1865] Thailand's first written submission, para. 7.10 (referring to Email communication between officials of the Permanent Mission of the Philippines to the WTO and the Permanent Mission of Thailand to the WTO , 10 October 2012, (Exhibit PHL-130)).
[1866] Thailand's first written submission, para. 7.7.
[1867] We recall in this respect our finding above that importers are not in a position to know the average actual market price on the date of notification and thus are not able to ensure that they comply with the notification requirement as written. (See Section 7.4.2.3.5 above)
[1868] Philippines' first written submission, paras. 845-846.
[1869] See Section 7.4.2.3.4 above.
[1870] Letter from PMTL to the Director of the Revenue Department, 28 September 2012 (English translation), (Exhibit PHL-129-B); Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation), (Exhibit PHL-132-B); Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation), (Exhibit PHL-133-B); Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation), (Exhibit PHL-134-B).

notifications refer to PMTL's earlier letter of 21 September 2012[1871], which states that PMTL invited the Revenue Department to object to the use of RRSPs for the purpose of notifications, and notes that the company received no such objection or notice of disagreement from the Revenue Department.[1872]

7.880. We note that Thailand does not contest the Revenue Department's acceptance of notifications on the basis of RRSPs in recent years but offers a different interpretation of this fact. For Thailand, "[t]he fact that [PMTL] has been able to comply with Thai VAT law for several years demonstrates that importers *are* able to determine for themselves how to comply with the law in the preferred manner of *their own choosing*".[1873] In light of our finding that importers are not in a position to know the average actual market price on the date of notification and thus cannot ensure that they comply with the notification requirement as written[1874], we cannot agree with the proposition that PMTL has *chosen* this method to comply with the requirement. Rather, in our view, the evidence shows that PMTL has had recourse to the notification of RRSPs as the *only* method of compliance, which was explicitly authorized by Thailand and habitually accepted by the Revenue Department. Overall, the Revenue Department's consistent acceptance of notifications from PMTL, which used RRSPs, together with the absence of any objection to this method of calculation of the VAT base (although expressly invited), suggest to us the existence of a "practice or repeated actions" by the Revenue Department. We consider that this practice also appears to confirm the existence of an "administrative ruling" to the effect that cigarette importers can submit notifications on the basis of RRSPs in fulfilment of their obligations under Notification 187 and Order Por. 145-2555. However, we consider that it is necessary to review the precise content of the practice followed by the Revenue Department before reaching any conclusion on whether Thailand has adopted an "administrative ruling" within the meaning of Article X:1.

7.881. We note that there is a disagreement between the parties on the precise content of the practice that has been followed. The Philippines contends that the Revenue Department has "*unconditionally* accept[ed] the RRSPs as the VAT base as a proxy for the actual average market price"[1875], while preserving the right to verify the notified RRSP "to ensure its validity".[1876] Thailand, on the other hand, argues that RRSPs are acceptable *only* insofar as they reflect the average actual market price. In particular, Thailand states that "despite the self-assessment system which tax payers must carry out in good faith, the Revenue Department retains the right to audit these notifications to verify whether … *these prices reflect the average market price* of imported cigarettes at the time of the notification."[1877] In sum, according to the Philippines, in the course of audit, the Revenue Department would be comparing the notified RRSP against the RRSP in force on the date of notification; according to Thailand, the Revenue Department would be comparing the notified RRSP against the average actual market price on the date of notification.

7.882. The evidence before us is somewhat ambiguous, but we consider that it tends to support Thailand's view on the content of the Revenue Department's practice. Specifically, paragraph 4 of the email providing an explanation of the Revenue Department's practices, sent from Thailand to the Philippines on 10 October 2012, states that the Revenue Department "confirmed that *where manufacturers set the market price by means of* recommended retail selling prices, the recommended retail selling prices may be notified."[1878] Paragraph 5 further provides that the Revenue Department "is no longer setting the tax base. Revenue explained that in practice, the

[1871] Letter from PMTL to the Director of the Revenue Department, 21 September 2012 (English translation).

[1872] Letter from PMTL to the Director of the Revenue Department, 28 September 2012 (English translation), (Exhibit PHL-129-B); Letter from PMTL to the Director of the Revenue Department, 28 June 2013 (English translation), (Exhibit PHL-132-B); Letter from PMTL to the Director of the Revenue Department, 25 June 2015 (English translation), (Exhibit PHL-133-B); Letter from PMTL to the Director of the Revenue Department, 29 June 2016 (English translation), (Exhibit PHL-134-B).

[1873] Thailand's second written submission, para. 4.29. (emphasis original)

[1874] See Section 7.4.2.3.5 above.

[1875] Philippines' response to Panel question No. 117, para. 288.

[1876] Philippines' comments on Thailand's response to Panel question No. 117, para. 254.

[1877] Thailand's response to Panel question No. 61(a), p. 53.

[1878] Email communication between officials of the Permanent Mission of the Philippines to the WTO and the Permanent Mission of Thailand to the WTO, 10 October 2012, (Exhibit PHL-130). (emphasis added)

importers/manufacturers *set the price and the retail market follows*. It has never seen situations in which the retail price does not follow the price set by the importer/manufacturer."[1879]

7.883. We read the foregoing as suggesting that the RRSP is accepted by the Revenue Department "*where manufacturers set the market price*", from which it could be understood that the Revenue Department *only* accepts the RRSPs to the extent that they reflect the "actual average market price" of cigarettes. Additionally, insofar as the Philippines' arguments relating to the content of the practice rely mostly on the reported statements of Thai officials, we cannot ignore, and must accord at least some weight to, the clear statements made by Thailand to the Panel in the course of this proceeding on the exact same issue, to the effect that the RRSP is accepted *only to the extent* that it reflects the average actual market price and that the Revenue Department reserves the right to verify whether the notified RRSP corresponds to the average actual market price.[1880]

7.884. Notwithstanding that the evidence before us tends to support Thailand's view that the notifications on the basis of the RRSP are accepted *only to the extent* that it reflects the average actual market price, we consider that it still demonstrates the existence of an "administrative ruling" within the meaning of Article X:1. We consider this to be the case because even accepting Thailand's characterization of the content of the Revenue Department's practice, this practice appears to contradict, or at least stand in tension with, the terms of published VAT notification requirement set forth in Notification 187 and Order Por. 145-2555, as we explain further below.

7.885. In this regard, we consider that the notion of an "administrative ruling" in Article X:1 cannot be interpreted so broadly as to entail the consequence that any and all pronouncements made or practices followed by government agencies, regardless of their nature and normative status, must be published.[1881] We agree with Thailand that there must be, and indeed are, important limitations on the kinds of practices that become subject to the publication requirement in the context of Article X:1.[1882] One important limitation that we discuss further below is the express qualification, set forth in the text of Article X:1, that only judicial decisions and administrative rulings "of general application" fall within the scope of Article X:1. Another important limitation is that Article X:1 only covers specified matters listed in Article X:1, including measures of general application "pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges".

7.886. We consider that other important limitations are inherent in the concept of an "administrative ruling". Of particular relevance in this case, we consider that for a pronouncement or unwritten practice to meet the threshold of qualifying as an "administrative ruling" subject to the publication requirement in Article X:1, it must differ from, or add to, or significantly elaborate on published laws, regulations, and rulings. Were it otherwise, Members would have to publish, *inter alia*, every permissible form and modality for complying with laws and regulations falling within the scope of Article X:1. In our view, an unduly broad interpretation of the kinds of measures covered by Article

[1879] Email communication between officials of the Permanent Mission of the Philippines to the WTO and the Permanent Mission of Thailand to the WTO, 10 October 2012, (Exhibit PHL-130). (emphasis added)

[1880] For example, in paragraph 7.15 of its first written submission, Thailand states that "[i]f an importer considers that its RRSP corresponds to the average market price under Order Por. 145-2555, as indeed it does in practice, importers are free to notify this price to the Revenue Department". Furthermore, in paragraph 7.78, Thailand argues that "[a]t PM Thailand's request, Thailand clarified that PM Thailand could notify the RRSP as its VAT base if it considers that this reflects the actual retail price mentioned in Order Por. 145-2555". In paragraph 4.11 of its second written submission, Thailand clarifies that "importers may notify their RRSPs as their VAT base only to the extent that they consider their RRSPs as reliable indicators or proxy of the value to be notified, that is, the actual retail selling price prevailing in Thailand on the date of the notification". (emphasis original) Additionally, in response to Panel question No. 117, Thailand states that "the Revenue Department reserves the right to verify whether the notified price is, in fact, the average market price."

[1881] We observe that Article X:1 does not prescribe any specific means of publication. As the Panel in *EC – IT Products* explained, Article X:1 requires "publication that is prompt and that ensures those who need to be aware of certain laws, regulations, judicial decisions and administrative rulings of general application can become acquainted with them." (See Panel Report, *EC – IT Products*, para. 7.1015) Thus, as long as that requirement is complied with, a WTO Member enjoys flexibility in the choice of a particular means of publication.

[1882] Thailand submits that, "while Article X:1 requires WTO Members to publish the legal rules that private operators must be satisfy, nothing in Article X:1 requires WTO Members to publish the specific means, process or methods chosen by private operators to comply with legal requirements." (See Thailand's second written submission, para. 4.23) Thailand further states that "[t]here is no requirement under Article X:1 … that a regulator is *required* to publish rules laying down the universe of methods by which an entity may comply with regulatory requirements." (See Thailand's second written submission, para. 4.28)

X:1 would entail unduly burdensome and unrealistic consequences for Members, and would extend beyond the "wide range of measures that have the potential to affect trade and traders".[1883]

7.887. This distinction finds reflection in several cases in which panels have faced the question of whether certain practices, followed in the context of other published rules, fall within the scope of the publication requirement in Article X:1. In several disputes, panels have examined the relationship between the practice and the published rules, particularly in terms of tension or contradiction. For example, the panel in *Japan – Film* noted in its analysis of the claims under Article X:1, on the issue of whether there was any evidence of an "administrative ruling" within the meaning of Article X:1, that the "record is devoid of any specific allegation by the United States as to any action taken by any of the councils *that is at odds with the basic principles set forth in the codes*."[1884] Along the same lines, the panel considered that even "administrative rulings in individual cases [fall within the scope of Article X:1] where such rulings *establish or revise* principles or criteria applicable in future cases".[1885] A similar approach was also followed by the panel in *India – Patents* in its analysis of the claim under Article 63.1 of the TRIPS Agreement (a provision equivalent to Article X:1 of the GATT 1994). The panel stated:

> [W]e find unpersuasive the Indian claim that only the Patents Act 1970, on which the administrative practices are based, is subject to the publication requirement. In view of the fact that the Patents Act contains *mandatory provisions which are contrary to the administrative practice*, the text of the Patents Act alone would at best mislead the public regarding the existence of the mailbox system, and would not satisfy the requirement under Article 63.1.[1886] (emphasis added)

7.888. Applying this standard to the facts of this case, we examine the relationship between the Revenue Department's practice and written Thai rules establishing the VAT notification requirement. To begin with, we recall that the term "the average price of the market price actually purchased and sold in general on the date on which the value added tax liability arises", as set forth in Notification 187, is defined in Clause 2(4) of Order Por. 145-2555 as "the market price of tobacco for each type of cigarette category at which the consumers in general or the majority [of the consumers] purchase from the trader of tobacco actually distributed in general on the date on which the registered operator … notifies the retail selling price which is used for the calculation of the value of the tax base".[1887] This provision makes it clear that the data underlying "the average price of the market price" should be data on the actual sales and purchases of imported cigarettes by the majority of consumers. Notably, it makes no reference to the *recommended* price. We further note that the *recommended* price is plainly not based on the data of the *actual* sales and purchases of imported cigarettes on the date of notification.

7.889. Thus, by looking at the text of the requirement, we consider that an importer would not know that the RRSP can potentially fulfil the notification requirement to the extent it matches the average actual market price. Hypothetically speaking, we consider that, for a new importer of cigarettes who launches a new business in Thailand and is unaware of whether the RRSPs are followed by the Thai market, nothing in the wording of the notification requirement would indicate that an RRSP can be notified to the Revenue Department. In light of this, we consider that Thailand through its Revenue Department has authorized a method of fulfilling the notification requirement, which is not already set forth in the text of Notification 187 and Order Por. 145-2555, and is, inconsistent with the written provisions of those regulations.

7.890. On the basis of all of the foregoing, we conclude that the Revenue Department's practice of accepting notifications which use the RRSP to notify the average actual market price, together with Thailand's authoritative pronouncement that the use of RRSPs as a proxy/best evidence for the average actual selling price is acceptable, amount to an "administrative ruling" within the meaning of Article X:1.

[1883] Pane Report, *EC – IT Products*, para. 7.1026.

[1884] Panel Report, *Japan – Film*, para. 10.396. (emphasis added)

[1885] Panel Report, *Japan – Film*, para. 10.388. (emphasis added) We note that the panel made this statement in the context of interpreting and applying the terms "of general application".

[1886] Panel Report, *India – Patents*, para. 7.48. The panel's reasoning under Article 63.1 of the TRIPS Agreement was reversed on appeal on the grounds that the complainant's claim under that provision was outside of the panel's terms of reference. Nonetheless, we draw useful guidance from the panel's approach.

[1887] Order Por. 145-2555, (Exhibit PHL-122-B).

7.891. While our conclusion is based on the particular circumstances of this case, we note that it is broadly consistent with the finding reached by the panel in *Dominican Republic — Import and Sale of Cigarettes*. In that dispute, the panel found that the average-price surveys of cigarettes conducted by the Dominican Republic Central Bank "were part of the administrative determination of the tax base for cigarettes", and as such were covered by the scope of "administrative rulings … of general application" described in Article X:1 of the GATT.[1888] In that case, the panel concluded that while the surveys may have not been, in themselves, administrative rulings of general application, "they would constitute an essential element of an administrative ruling: the determination of the tax base for cigarettes".[1889] The panel found it significant that once authorities had determined the tax base for cigarettes at a specific amount, "that ruling would be applicable for the importation of all cigarettes within the description, until a new tax base had been set". The panel thus considered that because the average-price surveys were used to determine the applicable tax base for cigarettes, they were "part of the administrative determination of the tax base for cigarettes".[1890] Therefore, "governments and traders would be entitled to obtain information on the results of the survey, as well as on the methodology used in order to conduct the survey".[1891] As already indicated, the principal issue in dispute is whether the Philippines has established the existence of an "administrative ruling" within the meaning of Article X:1. Having found that Thailand has indeed adopted an "administrative ruling", we now consider whether this ruling pertains to one or more of the matters specified in Article X:1, whether it is of "general application", and whether it has been "made effective" by Thailand so that it is subject to the publication requirement under Article X:1 of the GATT 1994.

7.892. Article X:1 applies to measures "pertaining to … rates of duty, taxes or other charges". We have found that the Revenue Department has adopted a practice of permitting cigarette importers to notify RRSPs in fulfilment of the VAT notification requirement. We agree with the Philippines that this administrative ruling *pertains* to taxes or other charges (specifically, VAT), in the sense that it "defines in what way an importer can successfully comply with the obligation to notify the average actual market price for purposes of establishing the VAT base".[1892] We therefore consider that, because it forms part of the administrative determination of the tax base for cigarettes, this administrative ruling pertains to "rates of … taxes". We note that Thailand does not specifically contest this point.

7.893. Furthermore, we note that Thailand does not contest that the Revenue Department's conduct of accepting notifications on the basis of RRSPs is "of general application" in the sense that other cigarette importers and manufacturers may equally notify their RRSPs in the same manner as PMTL has done. As explained by the panel in *US - Underwear*, in a finding that was upheld by the Appellate Body, where a measure "affects an unidentified number of economic operators", it constitutes a measure of general application.[1893] Thailand has not argued that notification on the basis of RRSP is a method available *only* to PMTL but not to other importers of cigarettes. We note in particular Thailand's statement that "[i]n recent years … TTM, PM Thailand, and other importers have complied with Order Por. 145-2555 by notifying their RRSP as a proxy/best evidence for the actual average selling price".[1894] Additionally, we observe that the email sent from Thailand to the Philippines on 10 October 2012, which we have referred to in the previous paragraph, confirms that notification of the RRSP is acceptable "where *manufacturers* set the market price by means of recommended retail selling prices" and contains an additional explanation that, "in practice, the *importers/manufacturers* set the price and the retail market follows. It has never seen situations in which the retail price does not follow the price set by the *importer/manufacturer*".[1895] We agree with the Philippines that this confirmation was phrased in general terms and relates to all importers, not being in any way specific to PMTL.[1896] We therefore consider that the Revenue Department's practice constitutes an "administrative ruling" of "general application" within the meaning of Article X:1.

[1888] Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.408.
[1889] Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.405.
[1890] Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.406.
[1891] Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.407.
[1892] Philippines' first written submission, para. 842.
[1893] Panel Report, *US - Underwear,* para. 7.65. See also Appellate Body Report, *US - Underwear,* p. 21, DSR 1997:I, 11, p. 29.
[1894] Thailand's first written submission, para. 7.12.
[1895] Email communication between officials of the Permanent Mission of the Philippines to the WTO and the Permanent Mission of Thailand to the WTO, 10 October 2012, (Exhibit PHL-130). (emphasis added)
[1896] Philippines' second written submission, para. 727.

7.894. Finally, on the issue of whether the administrative ruling has been "made effective" for the purposes of Article X:1, we consider that the evidence before the Panel establishing the existence of the Revenue Department's "administrative ruling" permitting the notification of RRSPs in fulfilment of the VAT notification requirement equally establishes that this is a measure that Thailand has, through the Revenue Department, "made effective". The panel in *EC – IT Products* considered that "the term 'made effective' under Article X:1 of the GATT 1994 ... covers measures that were brought into effect, or made operative, in practice".[1897] We have already found above that the Revenue Department has, in practice, consistently accepted the notification of RRSPs in fulfilment of the VAT notification requirement, which means that the administrative ruling of general application has been made effective by Thailand.

7.895. On the basis of the foregoing, we consider that the Revenue Department's unpublished practice of accepting the importers' RRSPs in fulfilment of the VAT notification requirement constitutes an administrative ruling of general application, and is related to the imposition and collection of VAT, which is a condition for the lawful sale of cigarettes in Thailand.[1898] Therefore, the practice at issue falls within the meaning of Article X:1 of the GATT 1994 and is subject to the publication requirement.

7.4.3.4 Conclusion

7.896. The Panel recalls that in the original proceeding, the panel found that Thailand had acted inconsistently with Article III:2 of the GATT 1994 by subjecting imported cigarettes to a VAT liability in excess of that applied to like domestic cigarettes, by means of the calculation of the government-mandated MRSPs that were used as the VAT base.[1899] For the reasons set forth above, the Panel finds that, in implementing the DSB's recommendations and rulings in the original proceeding, Thailand failed to publish the administrative ruling of general application that cigarette importers can notify RRSPs to the extent they reflect the average actual market prices under Notification 187 and Order Por. 145-2555, inconsistently with Article X:1 of the GATT 1994.

7.4.4 Claim under Article X:3(a) of the GATT 1994

7.4.4.1 Introduction

7.897. Article X:3(a) of the GATT 1994 sets out the obligation to administer laws, regulations, decisions and rulings, within the meaning of Article X:1, in a uniform, impartial and reasonable manner. As indicated above, Notification 187 and Order Por. 145-2555 impose on importers the requirement to notify the average actual market price on the date of notification as the VAT base. Under Clauses 5 and 6 of Notification 187 and Clauses 2(4), 5 and 6 of Order Por. 145-2555, the importer is required to notify the average actual market price on the date of notification in June of each year. As we found in the previous section, the Revenue Department has adopted an administrative ruling of general application that cigarette importers can notify RRSPs to the extent that they reflect the average actual market prices in fulfilment of their obligations under Notification 187 and Order Por. 145-2555.

7.898. The Philippines claims that the VAT notification requirement under Notification 187 and Order Por. 145-2555 is not "reasonable", and therefore inconsistent with Article X:3(a) of the GATT 1994, because importers cannot ensure that they comply with this requirement without violating Thai competition law.[1900]

7.899. Thailand argues that the Philippines has failed to demonstrate any inconsistency with Article X:3(a) of the GATT 1994, because: (i) the Philippines' claims concern substantive rules and not "administration" of those rules; and (ii) the Philippines' claim that the VAT notification

[1897] Panel Report, *EC – IT Products*, para. 7.1048.
[1898] Philippines' first written submission, para. 849.
[1899] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.791 and 8.4(a). See also paragraphs 7.19. and 7.20. above.
[1900] Philippines' first written submission, paras. 816-831; second written submission, paras. 785-796; opening statement at the meeting of the Panel, paras. 155-162; and response to Panel question Nos. 60, 64, 67, 115, 116, 118, 120, 121 and 122.

requirement is not "reasonable" rests on an incorrect factual understanding of the operation of Thailand's VAT regime.[1901]

7.4.4.2 Main arguments of the parties

7.900. The Philippines argues that Notification 187 and Order Por. 145-2555 are within the scope of Article X:3(a) of the GATT 1994 because they "administer" Thailand's VAT regime as established under the Thai Revenue Code.[1902] The Philippines considers that "the measures govern the manner in which Thailand administers the tax with respect to individual entities subject to the tax, by requiring that certain information be obtained from those entities in order to establish the tax base for their cigarettes."[1903] In the Philippines' view, "[t]he notification requirement does not, in itself, prescribe any substantive aspect of the tax", but rather provides for a manner of applying the substantive rules on the VAT tax base, which are specified in the Revenue Code.[1904] The Philippines clarifies that although Notification 187 and Order Por. 145-2555 may also contain substantive rules relating to the VAT base, the Philippines is challenging only the notification requirement.[1905]

7.901. The Philippines considers that Notification 187 and Order Por. 145-2555 provide for "unreasonable" administration of Thailand's VAT regime, because importers are not in a position to know the average actual market prices on the date of notification, and therefore cannot ensure that they comply with the notification requirement without violating Thai competition law.[1906] The Philippines recalls that, under the notification requirement, an importer of cigarettes must notify "in June of each year … the average actual market price on the date of notification".[1907] The Philippines further argues that importers cannot be in possession of average actual market price information at the time of the notification obligation.[1908] The Philippines considers that it is unreasonable "in the sense of rational or appropriate − for a Member to impose binding administrative requirements on an importer in the knowledge that the importer cannot comply with those requirements".[1909] In the Philippines' view, this prospect of non-compliance places the importer "in one form or another of legal jeopardy".[1910] Regarding Thailand's contention that a faulty notification can be corrected, the Philippines submits that "[e]ven if the endless spiral of notifications, corrections and reissuance of invoices … could, in theory, mitigate the legal jeopardy faced by an importer, the imposition of a requirement constantly to monitor, re-notify, correct and re-document transactions is itself an inherently unreasonable requirement".[1911]

7.902. Thailand argues that the scope of Article X:3(a) is limited to administration of laws and regulations, and that "any claim under Article X:3(a) relating to an instrument's substantive content must be dismissed".[1912] In Thailand's view, Notification 187 and Order Por. 145-2555 "establish substantive rules relating to the tax base to be used for purposes of VAT on cigarettes".[1913] Thailand highlights that the text of Notification 187 explicitly indicates that it "prescribes the tax base" for VAT on cigarettes.[1914]

[1901] Thailand's first written submission, paras. 7.50-7.68; second written submission, paras. 4.37-4.46; opening statement at the meeting of the Panel, paras. 112-117; response to Panel question Nos. 67, 122 and 123.
[1902] Philippines' first written submission, paras. 824-825; and second written submission, paras. 786-789.
[1903] Philippines' first written submission, para. 825.
[1904] Philippines' first written submission, para. 825.
[1905] Philippines' second written submission, para. 786.
[1906] Philippines' first written submission, paras. 826-830; second written submission, paras. 790-796.
[1907] Philippines' first written submission, para. 827.
[1908] Philippines' first written submission, paras. 826-830; second written submission, para. 790.
[1909] Philippines' first written submission, para. 829.
[1910] Philippines' second written submission, para. 795.
[1911] Philippines' response to Panel question No. 118, para. 298.
[1912] Thailand's first written submission, para. 7.60.
[1913] Thailand's first written submission, para. 7.61.
[1914] Thailand's second written submission, para. 4.42.

7.903. Thailand also argues that, even if the challenged measures were within the scope of Article X:3(a), the Philippines' "entire argumentation … is premised on its understanding that compliance … can only be achieved by violating Thailand's competition law".[1915] Thailand argues that "cigarette importers can comply, and have complied, with Notification 187 and Order Por. 145-2555 without infringing Thailand's competition law".[1916] This, in Thailand's view, serves as evidence that there is no need to violate either the notification requirement or Thai competition law.[1917]

7.4.4.3 Analysis by the Panel

7.4.4.3.1 General considerations

7.904. Article X:3(a) of the GATT 1994 states:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.905. We recall that the original panel discussed the nature of Article X:3(a) and its requirements. The original panel observed that:

> To establish a violation of Article X:3(a), a complaining party must … show that the responding Member *administers* the legal instruments of the kind described in Article X:1 in a manner that is *non-uniform, partial* and/or *unreasonable*.
>
> The obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements. This means that … a violation of any of the three obligations will lead to a violation of the obligations under Article X:3(a).[1918]

7.906. In the present proceeding, the Philippines' claim concerns the requirement to administer the legal instruments of the kind described in Article X:1 in a "reasonable" manner. In the context of such a claim, it is incumbent on the complainant to demonstrate three elements: first, the existence of *a legal instrument of the kind described in Article X:1*; second, that this instrument is being *administered* by the respondent; third, the administration of the legal instrument in question is *unreasonable*. We note that the parties largely agree on the interpretation of the legal standard under Article X:3(a).[1919]

7.907. We recall that the "laws, regulations, decisions and rulings" described in Article X:1 are as follows:

> Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use.

7.908. The Philippines submits that Notification 187 and Order Por. 145-2555 provide for the "administration" of the VAT regime established under the Thai Revenue Code, which "pertain[s]" to the imposition of "taxes or other charges" and "requirements … affecting … sale".[1920] Thailand does not contest that the Thai Revenue Code qualifies as a "law[] … of general application" within the meaning of Article X:1. We agree with this characterization of the Thai Revenue Code.

7.909. From previous jurisprudence, it is established that one legal instrument can "administer" another legal instrument. In *EC – Selected Customs Matters*, the Appellate Body reversed the panel's

[1915] Thailand's first written submission, para. 7.67.
[1916] Thailand's second written submission, para. 4.45.
[1917] Thailand's second written submission, para. 4.45.
[1918] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.866-7.867. (emphasis original)
[1919] Thailand's first written submission, para. 7.57.
[1920] Philippines' first written submission, para. 824.

finding that Article X:3(a) does not apply to legal instruments which are themselves laws and regulations, insofar as they "administer" other laws or regulations.[1921] In the context of interpreting whether legal instruments can qualify as acts of administration under Article X:3(a), the Appellate Body stated:

> While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument.[1922]

7.910. Thailand does not contest that, in principle, one legal instrument may administer another legal instrument.[1923] Rather, Thailand disagrees with the proposition that the two challenged measures at issue in this dispute are of an administrative character.

7.911. We note that the parties disagree on the description of the VAT regime in several respects. We have considered the disputed factual aspects of Thailand's VAT regime in Section 7.4.2 above. As we have found, an importer is not in a position to know the average actual market price on the date of notification, which makes it impossible for an importer to ensure that it complies with the VAT notification requirement.[1924] In case of non-compliance with the VAT notification requirement and understatement of the VAT base, an importer faces consequences such as penalties, the prospect of a criminal investigation, and an additional administrative and financial burden in the event the importer tries to correct an original incorrect notification.[1925] In practice, the Thai Revenue Department permits the notification of RRSPs in fulfilment of the VAT notification requirement. However, it has not published this administrative ruling of general application.[1926]

7.912. On the basis of these findings we proceed to consider whether the VAT notification requirement in Notification 187 and Order Por. 145-2555 "administers" the Thai Revenue Code and, if so, whether it is "reasonable".

7.4.4.3.2 "administer"

7.913. The Philippines submits that "[t]he measures at issue lay down rules for applying or implementing – that is, administering – Thailand's VAT regime through, among others, requiring the notification of information that is used to establish the tax base."[1927] Although the Philippines accepts that these two instruments may contain substantive rules relating to the VAT base, the Philippines maintains that it does not challenge those substantive rules, and that its challenge is limited to "the requirement for importers to notify the average actual market prices prevailing on the date of notification".[1928]

7.914. Thailand emphasizes that Notification 187 and Order Por. 145-2555 "establish *substantive* rules relating to the tax base" for the VAT on cigarettes.[1929] In particular, Thailand points to the introductory paragraph of Notification 187, which states that the Director-General of the Revenue Department "hereby prescribes the tax base" for VAT on cigarettes.[1930] In addition, according to Thailand, "Clauses 4 and 5 of Notification 187 define the tax base for VAT on cigarettes, namely that

[1921] Appellate Body Report, *EC – Selected Customs Matters*, para. 309. Additionally, we recall the observation of the panel in *Argentina – Hides and Leather* that "[i]f the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X". The panel in that dispute found that Resolution 2235, which provided for a means to involve private persons in assisting Customs officials in the application and enforcement of the substantive rules, clearly was administrative in nature. (See Panel Report, *Argentina – Hides and Leather,* paras. 11.70-11.72)

[1922] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

[1923] Thailand's first written submission, para. 7.58.

[1924] See Section 7.4.2.3.5 above.

[1925] See Section 7.4.2.4 above.

[1926] See Section 7.4.3.4 above.

[1927] Philippines' first written submission, para. 825.

[1928] Philippines' second written submission, para. 786.

[1929] Thailand's first written submission, para. 7.61.

[1930] Thailand's first written submission, para. 7.61.

the tax base shall be the value of tobacco derived from deducting the VAT from the full retail price."[1931]

7.915. Previous panels have interpreted the term "administer" as "putting into practical effect or applying" another legal instrument of the kind described in Article X:1[1932], or "a certain manner of applying"[1933] substantive rules. In our view, a legal instrument can contain both administrative and substantive requirements, and this alone does not exclude an instrument from the scope of Article X:3(a). Indeed, an interpretation to the contrary would exclude from the scope of Article X:3(a) a wide range of legal instruments, including various kinds of instruments that have previously been found to fall within the scope of Article X:3(a).[1934] What matters, in our view, is whether the individual provisions or aspects of the instrument being challenged − i.e., the "specific measure at issue" − essentially are of an implementing, as opposed to substantive, character. Insofar as they are, then it is irrelevant whether those provisions or aspects are embodied in an instrument that contains other provisions of a substantive nature. Hence, the issue before us is whether the VAT notification requirement contained in the relevant provisions of Notification 187 and Order Por. 145-2555 essentially implements the provisions of the Thai Revenue Code.

7.916. While Notification 187 and Order Por. 145-2555 may establish rules relating to the VAT base, we understand the Philippines to be particularly concerned with both the type of information that must be submitted in order to calculate the VAT, as well as the timing element of the notification requirement. Specifically, the Philippines asserts that the required information on the average actual market price as of the date of notification cannot be submitted on the date of notification because it is not yet available to an importer. In our view, the requirement that a specific *type* of information has to be submitted on a particular *date*, is indeed a requirement that relates to "a certain manner of applying" the rules pertaining to the VAT tax base, or, in other words, their "administration".

7.917. By way of illustration, while the VAT base is the retail selling price, and more specifically, the average actual market price, one can contemplate various options or modalities of implementing this base that would not alter the nature of the base itself. For example, one option could be to require importers to notify the average actual market price prevailing on a date preceding the date of notification, rather than the average actual market price on the date of notification. Alternatively, since Thailand considers that recommended prices are virtually the same as average actual market prices[1935], another option could be to require importers to notify their RRSPs as a proxy of the average actual market price. These modalities would not change the essence of the substantive requirement of the regulations at issue. Rather, such changes would affect the "manner of applying" that VAT base. We therefore consider that requiring a cigarette importer to notify the average actual market price *based on actual purchases of cigarettes by the majority of consumers from retailers on the date of notification* represents "a certain manner of applying" or administering the prescribed VAT base.

7.918. Furthermore, by their terms, Notification 187 and Order Por. 145-2555 appear to administer another provision, i.e. Section 79/5 of the Revenue Code. While we do not suggest that the nomenclature is decisive, we do note that the full titles of the challenged measures are:

> Notification No. 187 on VAT, "Determination of tax base, categories and types of tobacco for sale for which the value of the tax base is required to be calculated according to the rules under Section 79/5(2) of the Revenue Code".
>
> Order Por. 145-2555, "Calculation of Tax Base for Importation and Sale of Tobacco According to the Category and Type Prescribed by the Director-General and Approved

[1931] Thailand's first written submission, para. 7.61.
[1932] Panel Reports, *US − COOL*, para. 7.821.
[1933] Panel Report, *Argentina − Hides and Leather*, para. 11.72.
[1934] In *EC − Selected Customs Matters*, the Appellate Body found that the EU's penalty laws and instruments of implementation of customs law could be examined under Article X:3(a). (Appellate Body Report, *EC − Selected Customs Matters,* para. 210) The panel in *Argentina − Leather and Hides* found Resolution 2235, which provided for a means to involve private persons in assisting Customs officials in the application and enforcement of the rules on classification and export duties, to be administrative in nature and thus fall within the scope of Article X:3(a). (See Panel Report, *Argentina − Leather and Hides*, para. 11.72)
[1935] Thailand's first written submission, paras. 7.8-7.9, 7.36 and 7.38.

by the Minister Under Section 79/5 of the Revenue Code, and Preparation of Tax Invoice In Case of Sale of Tobacco Under Section 86/5(2) of the Revenue Code".

The mention of Section 79/5 of the Revenue Code in the titles of both instruments supports our conclusion above.[1936]

7.919. For these reasons we agree with the Philippines that the VAT notification requirement embodied in Notification 187 and Order Por. 145-2555, and in particular the requirement that a specific *type* of information has to be submitted on a particular *date*, falls within the scope of Article X:3(a).

7.4.4.3.3 "in a reasonable manner"

7.920. Turning to the substantive issue, the Philippines submits 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."[1937] This, in the Philippines' view, "creates a permanent state of legal uncertainty for the importer."[1938]

7.921. The jurisprudence indicates that what is "unreasonable" has to be determined on a case-by-case basis.[1939] In our view, imposing a requirement with which compliance cannot be ensured unless a subject of the law elects to violate another legal requirement would fall within the scope of "unreasonable". We further consider that a requirement placing the burden of potential consequences of internally incoherent national legislation on a private party would not satisfy the standard of "reasonable" administration.

7.922. We proceed by applying this standard of "reasonableness" against the conclusions regarding the operation of the Thai VAT regime that we reached in Sections 7.4.2 and 7.4.3 above, which are the following: (i) the importers of cigarettes are not in a position to know the average actual market price on the date of notification for tax purposes and thus cannot ensure that they comply with the VAT notification requirement; (ii) importers of cigarettes may well face real consequences if the notified value turns out to be less than the average actual market price; and (iii) the Revenue Department permits, in practice, the notification of RRSPs to the extent that they reflect the average actual market prices on the day of notification, but it has not published this administrative ruling of general application.

7.923. We consider that the VAT notification requirement creates uncertainty for cigarette importers regarding how to comply. As we have established in Section 7.4.2.3 , importers are not in a position to know the average actual market price on the date of notification and thus cannot ensure that they comply with the VAT notification requirement. Through the notification of the RRSP, importers may, as a practical matter, consistently match the average actual market price when they notify their RRSPs. However, such importers simply have no way of knowing whether the RRSP does, in fact, correspond to the average actual market price on the date of notification, when they submit their notification. The importers in this situation are left to wonder whether the notification of the RRSP, accepted by the Revenue Department in practice, would fulfil the VAT notification requirement or not. This uncertainty, in our view, suffices to establish that the provisions of Notification 187 and Order Por. 145-2555, which contain the VAT notification requirement, lead to unreasonable administration of Section 79/5 of the Thai Revenue Code establishing the VAT tax base.

7.924. However, we also agree with the Philippines that the situation before us raises an even more serious concern because, aside from creating uncertainty and confusion, it is impossible to ensure compliance with the published VAT notification requirement, and thus exposes the importer to

[1936] We observe that in our reasoning we do not draw any inferences from Thailand's statement in paragraph 7.75 of its first written submission that "the relevant administrative rules establishing the VAT tax base for cigarettes are those contained in Notification 187 and Order Por. 145-2555". We took into account Thailand's explanation that it did not use "the term 'administrative' in the sense or context of Article X:3(a), which refers to the administration of substantive rules". (See Thailand's response to Panel question No. 67)

[1937] Philippines' first written submission, para. 828.

[1938] Philippines' first written submission, para. 830.

[1939] Panel Reports, *US – COOL*, para. 7.851. Furthermore, the original panel observed that the ordinary meaning of the term "reasonable" is "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate". See Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.919.

potential consequences of non-compliance.[1940] The imposition of a notification requirement with which it is impossible to ensure compliance at the time of notification, particularly where its violation may expose an importer to penalties, the prospect of a criminal investigation or, at a minimum, an additional administrative and financial burden, is not reasonable.

7.925. We recall that Thailand's principal argument in relation to the claim under Article X:3(a) is that cigarette importers can comply with Notification 187 and Order Por. 145-2555 without violating Thailand's competition law, and have done so through the use of RRSPs.[1941] We have already addressed this argument in our analysis above.[1942] We have found that RRSPs are not the same as average actual market prices, and the importer has no control over market players to ensure that RRSPs are, in fact, followed. Therefore, cigarette importers cannot ensure their compliance with the notification requirement, simply by notifying RRSPs.[1943] Additionally, we do not find it relevant that the use of RRSPs is not a violation of Thai competition law; rather, we recall our observations that importers would be acting in contravention of Thai competition law should they try to impose retail selling prices on wholesalers and retailers.[1944]

7.926. These considerations notwithstanding, we recall our finding under Article X:1 that the Revenue Department has adopted an unpublished administrative ruling that cigarette importers can notify RRSPs to the extent that they reflect the average actual market prices under Notification 187 and Order Por. 145-2555.[1945] This administrative ruling is part of Thailand's administration of the VAT rules, in our view, and has to be taken into account in our assessment of its reasonableness. We observe that, even though the Revenue Department has allowed importers to notify RRSPs for several years already, Thailand denies that there is any "formal right" of the importers to submit the RRSP in order to comply with Notification 187 and Order Por. 145-2555.[1946] The unpublished administrative ruling therefore creates no legal certainty for importers that they are complying with the VAT notification requirement correctly, or that the Revenue Department will continue to accept RRSPs. For these reasons, the Revenue Department's unpublished administrative ruling does not eliminate the uncertainty existing for the industry as to the means of compliance with the VAT notification requirement, and does not render the administration of the requirement reasonable.

7.927. We find support for our reasoning in two previous disputes involving claims under Article X:3(a) where panels made their findings of "unreasonable administration" on the basis of uncertainty generated by legal requirements. In *China − Raw Materials*, the panel was faced with the issue of whether the criterion of operation capacity of an applicant (used as one of the eligibility criteria for the export quota of raw materials) was reasonably administered by China.[1947] While the operation capacity criterion could trump all other criteria and result in an applicant's failure to obtain a quota, there was no official definition of this criterion and no standard against which the authorities could assess it.[1948] In the course of its analysis, the panel noted that "a system of quota allocation where an *undefined* and *vaguely worded criterion* can trump all other criteria, yet is to be applied by 32 different regional offices[,] constitutes the type of evidence" that establishes unreasonable administration.[1949] The reason for the panel to conclude that the administration of the operation capacity criterion was unreasonable included the "*lack of any definition, guidelines or standards* in how the 32 Local Departments in charge of Foreign Trade should apply the potentially critical operation capacity criterion".[1950] We thus understand the panel's finding to be based on the uncertainty surrounding the application of the operation capacity criterion.

7.928. Similarly, in *US − COOL*, the panel found that a letter sent by the Secretary of Agriculture to industry representatives ("the Vilsack letter") in connection with a new rule governing labelling requirements led to "unreasonable" administration because of an apparent tension between the letter and the rule.[1951] In the course of its analysis, the panel stated that the Vilsack letter "*created*

[1940] Philippines' response to Panel question No. 122(a), paras. 316 and 327; Philippines' comments on Thailand's response to Panel question No. 122(a), para. 269.
[1941] Thailand's first written submission, para. 7.67; and second written submission, para. 4.45.
[1942] See Section 7.4.2.3 above.
[1943] See Section 7.4.2.3 above.
[1944] See Section 7.4.2.3.1 above.
[1945] See Section 7.4.3.4 above.
[1946] Thailand's second written submission, para. 4.29; and response to Panel question No. 63(c).
[1947] Panel Reports, *China − Raw Materials*, paras. 7.737-7.738 and 7.741-7.746.
[1948] Panel Reports, *China − Raw Materials*, para. 7.738.
[1949] Panel Reports, *China − Raw Materials*, para. 7.744. (emphasis added)
[1950] Panel Reports, *China − Raw Materials*, para. 7.745. (emphasis added)
[1951] Panel Reports, *US − COOL*, paras. 7.850-7.870.

uncertainties for industry regarding how to comply with the specific labelling requirements contained in" the 2009 Final Rule, and on that basis found a violation of the "reasonable" administration requirement.[1952] We note that Thailand does not agree with the proposition that the panel in *US – COOL* based its finding of "unreasonable" administration on the fact that the Vilsack letter created uncertainty or confusion.[1953] However, we observe that paragraph 7.866 of the panel report indeed makes the connection between "uncertainties for industry regarding how to comply" and "unreasonableness" of administration:

> In our view, however, Mexico has adduced sufficient evidence to demonstrate that the Vilsack letter *created uncertainties for industry regarding how to comply* with the specific labelling requirements contained in the 2009 Final Rule (AMS). In particular, Mexico highlights that the Vilsack letter suggested practices additional to the ones foreseen under the 2009 Final Rule (AMS), and threatened to modify the 2009 Final Rule (AMS) if such practices were not followed. It is *essentially for these same reasons that we found that Canada has demonstrated that the Vilsack letter is inconsistent with the requirement of reasonable administration under Article X:3(a)* of the GATT 1994. Accordingly, we find that Mexico has demonstrated that the Vilsack letter does not meet the standard of reasonable administration of the COOL measure within the meaning of Article X:3(a).[1954]

7.929. We find further support for our position in the reasoning of the panel and the Appellate Body in *India – Patents*. The panel in *India – Patents* examined whether India had established a legal mechanism for the filing of mailbox applications that provided "a sound legal basis" for preserving both the novelty of the inventions and the priority of the applications, as required by Article 70.8 of the TRIPS Agreement. India was relying on the unpublished administrative practice of receiving mailbox applications as a means of establishing such a legal mechanism.[1955] The panel, however, found that the administrative practice "creat[ed] a certain degree of legal insecurity in that it requir[ed] Indian officials to ignore certain mandatory provisions of the Patents Act".[1956] The panel further observed that "economic operators - in this case potential patent applicants - are influenced by the legal insecurity created by the continued existence of mandatory legislation" that established conflicting rules.[1957] On the basis of the lack of legal security, the panel found that India's system of receiving mailbox applications did not satisfy the requirements of Article 70.8 of the TRIPS Agreement.[1958]

7.930. As Thailand rightly observes[1959], the panel in *India – Patents* was dealing with a different provision, and not Article X:3(a) of the GATT 1994. However, we consider that the panel's analysis is relevant to a more general question of whether an informal, unpublished administrative ruling can create legal uncertainty for private operators.[1960] We see a certain parallel between the circumstances of the present dispute and *India – Patents*. As we found above[1961], the Revenue Department's administrative ruling, through which it has been accepting RRSPs, is not set forth in the written provisions of Notification 187 and Order Por. 145-2555 and is not consistent with them. Thus, similarly to the situation in *India – Patents*, the Revenue Department's informal administrative ruling under which it allows importers to notify RRSPs, creates a degree of legal insecurity as to its status in light of the written provisions of the regulations. Further, despite the Revenue Department's informal administrative ruling, cigarette importers are influenced by the legal insecurity created by the continued existence of the text of the VAT notification requirement. These considerations further reinforce our view that, even in the presence of the unpublished Revenue Department's

[1952] Panel Reports, *US – COOL*, para. 7.866. (emphasis added)
[1953] Thailand's response to Panel question No. 122(a), p. 46.
[1954] Panel Reports, *US – COOL*, para. 7.866. (emphasis added)
[1955] Panel Report, *India – Patents,* paras. 7.31-7.33. See also Appellate Body Report, *India – Patents,* para. 61.
[1956] Panel Report, *India – Patents,* para. 7.35.
[1957] Panel Report, *India – Patents,* para. 7.35.
[1958] Panel Report, *India – Patents,* para. 7.35. The panel's finding was upheld on appeal. (See Appellate Body Report, *India – Patents,* para. 71)
[1959] Thailand's response to Panel question No. 122(b), p. 46.
[1960] In its analysis of how India's administrative practice relates to the mandatory provisions of the law, the panel in *India – Patents* relied on the findings of the GATT panel in *Malt Beverages,* which dealt with a completely different provision – Article III:4 of the GATT. Thus, we do not consider that the analysis of the panel was entirely provision-specific and we will rely on the more general observations of the panel. (See Panel Report, *India – Patents,* para. 7.35)
[1961] See paras. 7.888. and 7.889. above.

administrative ruling, the VAT notification requirement leads to unreasonable administration of the Thai Revenue Code.

7.931. Moreover, we recall that the Revenue Department only accepts RRSPs under Notification 187 and Order Por. 145-2555 to the extent that they reflect the average actual market prices. Thus, even if the administrative ruling were published, it would not give cigarette importers any guarantee that the Revenue Department will not impose penalties in the event of a divergence between the RRSP and the average actual market price. Therefore, even the publication of the administrative ruling would not render the administration of the VAT rules reasonable.

7.932. In examining the reasonableness of the requirement at issue, we are mindful of the need to consider any rationale that may explain the existence of such a rule. In the original proceeding, the panel noted that in applying the standard of reasonableness in Article X:3(a), it "also found guidance in WTO jurisprudence that the requirement of reasonableness should be examined based on the features of the administrative act at issue in the light of its objective, cause or the rationale behind it".[1962] In response to our request to explain the rationale behind the requirement to notify the average actual market price prevailing on the same day that the notification is due, Thailand submitted that "[t]he rationale for using the actual price … is that the taxpayers do not determine unilaterally their own tax base".[1963]

7.933. We certainly agree that WTO members have a legitimate right not to allow a taxpayer to determine the amount of tax unilaterally in order to ensure correct tax collection. However, we do not see the connection between this objective and the aspect of the VAT notification requirement that is at issue. As we understand it, both the Philippines and Thailand concur that tax authorities have the right to review a taxpayer's declaration.[1964]

7.934. We further observe that Thailand, in its response, has not addressed the *timing element* highlighted in the question from the Panel, i.e. that the importer is required to submit the data on the average actual market price *on the date of notification*. We fail to see how the requirement to notify the average actual market price prevailing on *the same day that the notification is due* helps to address the objective that the notification requirement seeks to achieve according to Thailand, i.e. ensuring there is no unilateral determination of the tax base by a taxpayer. As we have found above, importers do not and are not in a position to know the average actual market price on the date of notification. Thus, if anything, the notification requirement forces the taxpayer to *arbitrarily* determine the value to be notified, which, in our view, undermines the alleged objective of avoiding unilateral tax base determination. We can therefore identify no rational connection between the objectives pursed by the VAT notification requirement and the difficulties imposed on the importers in attempting to comply with it.

7.4.4.4 Conclusion

7.935. For the reasons set forth above, the Panel finds that, in implementing the DSB's recommendations and rulings in the original proceeding, Thailand has administered the provisions of its Revenue Code in an unreasonable manner, inconsistently with Article X:3(a) of the GATT 1994, by imposing on cigarette importers a VAT notification requirement with which it is impossible to

[1962] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.951 (referring to Panel Report, *Argentina – Hides and Leather*, para. 11.86; and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227). Examination of the measure's reasonableness in light of its objective echoes clear parallels between the nature of the obligation in Article X:3(a) and the requirement, under the chapeau of Article XX, to ensure that any measures covered by the general exceptions are "applied" in a manner that does not give rise to discrimination that is "arbitrary" or "unjustifiable". Panels applying Article X:3(a) have relied upon findings under the chapeau, and vice versa. The original panel in its analysis under Article X:3(a) cited the Appellate Body's finding in *Brazil – Retreaded Tyres* that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence". (See Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.921 and fn 180) In *US – Shrimp*, the Appellate Body found, in the context of addressing the consistency of the measure with the chapeau of Article XX, that the "due process requirements" found in Article X:3(a) and (b) "bear upon this matter". (Appellate Body Report, *US – Shrimp*, para. 182)

[1963] Thailand's response to Panel question No. 123.

[1964] Thailand's response to Panel question No. 117; Philippines' response to Panel question No. 117, para. 289; and Philippines' comments on Thailand's response to Panel question No. 117, para. 254.

ensure compliance, and which exposes cigarette importers to the potential consequences of non-compliance.

7.4.5 Claim under Article III:4 of the GATT 1994

7.4.5.1 Introduction

7.936. Article III:4 of the GATT 1994 sets out the obligation to accord to imported products treatment no less favourable than that accorded to like products of national origin.

7.937. We recall that Notification 187 and Order Por. 145-2555 impose an identical requirement on importers and TTM, the domestic producer of cigarettes, to notify, in June of each year the average actual market price on the date of notification as the VAT base. We have found above that under Thai competition law, as it stood on the date of the establishment of the Panel, cigarette importers attempting to set retail selling prices would have acted in violation of Thai competition law or, at a minimum, were exposed to the risk of such violation, whereas TTM benefited from an exemption from Thai competition law and could enter into vertical price fixing arrangements.[1965] We found that, because of the constraints of Thai competition law, cigarette importers could not know the average actual market price prevailing on the date of notification and thus could not ensure that they complied with the notification requirement.[1966]

7.938. The Philippines claims that the requirement to notify the average actual market price prevailing on the date of notification is "as such" inconsistent with Article III:4 of the GATT 1994 because of the different situations of importers and TTM vis-à-vis Thai competition law, by virtue of which it is possible for TTM, but not cigarette importers, to comply with the notification requirement.[1967]

7.939. Thailand does not contest that the cigarettes imported by PMTL and domestically produced cigarettes are "like products"[1968], or that the notification requirement falls within the meaning of "law, regulation, or requirement affecting their internal sale".[1969] However, Thailand argues that the VAT notification requirement does not accord "less favourable treatment" to imported cigarettes.[1970]

7.4.5.2 Main arguments of the parties

7.940. The Philippines claims that the notification requirement under Thailand's VAT regime, whereby importers and local producers are required to notify the "average actual market price" is, taken together with the other provisions of Thai law exempting TTM from competition law, "as such" inconsistent with Article III:4 of the GATT 1994.[1971] The Philippines argues that domestic and imported cigarettes are "like" products within the meaning of Article III:4 of the GATT 1994, because the notification requirement taken together with the exclusion of TTM from competition law discriminates on a *de jure* basis between domestic and imported cigarettes; therefore "likeness" may be presumed.[1972] The Philippines additionally argues that domestic and imported cigarettes are "like" based on an examination of the physical characteristics and end-uses of the domestic and imported cigarettes, as well as consumer preferences in Thailand, and the classification of domestic and imported cigarettes under Thai regulations (including customs, internal taxes, and other regulations).[1973] The Philippines argues that the notification requirement obliges importers and TTM to notify the average actual market price to the authorities to enable the VAT base to be determined,

[1965] See Section 7.4.2.3.1 above.
[1966] See Section 7.4.2.3 above.
[1967] Philippines' first written submission, paras. 759-815; second written submission, paras. 747-784; opening statement at the meeting of the Panel, paras. 129-154; and response to Panel question Nos. 60, 64-66, 115(a), 116, 118, 120, 121 and 124.
[1968] Thailand's response to Panel question No. 65.
[1969] Thailand's first written submission, paras. 7.1-7.49; and second written submission, paras. 4.1-4.21.
[1970] Thailand's first written submission, paras. 7.26-7.49; second written submission, paras. 4.7-4.21; opening statement at the meeting of the Panel, paras. 99-104; and response to Panel question Nos. 62, 65 and 124.
[1971] Philippines' first written submission, paras. 759-815; second written submission, paras. 747-784; and response to Panel question No. 64, para. 464.
[1972] Philippines' first written submission, paras. 731 and 778-779.
[1973] Philippines' first written submission, paras. 784-794.

and thus these measures impose "requirements" within the meaning of Article III:4.[1974] These requirements, according to the Philippines, "affect" the internal sale of cigarettes because they have the potential to "adversely modify the conditions of competition between domestic and imported products".[1975]

7.941. Regarding the issue of "less favourable treatment", the Philippines argues that Notification 187 and Order Por. 145-2555 accord to imported cigarettes treatment less favourable than that accorded to domestic cigarettes, because of the formally different legal situations of importers and TTM, which result in importers being subject to additional legal jeopardy to which TTM is not.[1976] Specifically, the Philippines notes that, under the relevant measures, "[i]n June of each year, both importers and TTM are obliged to notify the average actual market price prevailing on the date of the June notification".[1977] The Philippines notes, however, that Thai competition law "prohibits importers from imposing a retail selling price on the independent wholesalers and retailers to whom they sell imported cigarettes", and therefore importers are not in a position to know (or notify) the average actual market price on the date in question.[1978] The Philippines highlights that it could be possible, through relying on market research data, for an importer to notify the average actual market price in Thailand for a date 4-6 weeks prior to the notification date of 30 June, but it is impossible to notify the average actual market price as it stands on 30 June on that date itself, because that price could not be known.[1979] The Philippines submits that, in contrast to importers, TTM is exempted from Thai competition law, meaning that "TTM has a choice … whether or not to dictate its retailers' retail sales prices and, thereby, know the actual price on the date of notification".[1980] The Philippines maintains that, unlike TTM, importers have no such choice and cannot comply with the notification requirement unless they simultaneously violate Thai competition law, and therefore importers are exposed to legal jeopardy through the consequences of a failure to comply with the notification requirement.[1981] According to the Philippines, even if the possibility of correcting an original faulty notification could somehow mitigate the legal jeopardy, the importers face additional financial burdens of monitoring actual prices, filing corrections and reissuing VAT invoices to retailers – a burden that the domestic producer of cigarettes does not have to face.[1982]

7.942. The Philippines has not requested findings on the VAT notification requirement as affected by the amended competition law.[1983] Nonetheless, the Philippines contests Thailand's characterization of the amended competition law. In particular, the Philippines argues that the text of the provision does not support Thailand's assertion that the exemption for state enterprises has become non-automatic (i.e. has to be granted by the authorities).[1984] Furthermore, the Philippines submits that "even if TTM does not automatically enjoy an exemption under the new Section 4(2), an exemption may be reintroduced at any time upon a finding that TTM's activities fall within the scope of the new Section 4(2)."[1985] Finally, according to the Philippines, "Thailand has not demonstrated that TTM does not satisfy" the requirements of the exemption as amended.[1986] The Philippines considers that even taking into account the amended competition law, the Panel should conclude that Thailand's VAT notification requirement is inconsistent with its obligations under Article III:4 of the GATT 1994.[1987]

7.943. Thailand argues that because the text of the notification requirement does not distinguish between imported and domestic cigarettes, any less favourable treatment could only arise on a *de*

[1974] Philippines' first written submission, paras. 796-797.
[1975] Philippines' first written submission, para. 797.
[1976] Philippines' first written submission, paras. 801-814; and second written submission, paras. 753-759.
[1977] Philippines' first written submission, para. 802.
[1978] Philippines' first written submission, para. 804. See also Philippines' second written submission, para. 757 (referring to Competition Act, B.E. 2542 (1999) (English translation), (Exhibit PHL-124-B), Sections 4(2) and 27(1)).
[1979] Philippines' first written submission, paras. 806-807.
[1980] Philippines' comments on Thailand's response to Panel question No. 114, para. 246.
[1981] Philippines' comments on Thailand's response to Panel question No. 114, para. 247.
[1982] Philippines' opening statement at the meeting of the Panel, paras. 148-151 and 160; and response to Panel question No. 119, paras. 293-298.
[1983] Philippines' response to Panel question No. 124(a).
[1984] Philippines' comments on Thailand's response to Panel question No. 124(b), paras. 287-288.
[1985] Philippines' comments on Thailand's response to Panel question No. 124(b), para. 286.
[1986] Philippines' comments on Thailand's response to Panel question No. 124(b), para. 289.
[1987] Philippines' comments on Thailand's response to Panel question No. 124(b), para. 290.

facto basis.[1988] Thailand argues that, although it does not contest "likeness", the *de jure* / *de facto* distinction "is not a moot point"[1989] because "unlike *de jure* discrimination which can be demonstrated on the basis of the words of the legislation, *de facto* discrimination entails a heavier evidentiary burden as the complainant needs to explain and substantiate the reasons why, in practice, the formally identical treatment results nonetheless in less favourable treatment."[1990]

7.944. Regarding the allegation of "less favourable treatment", Thailand underlines that the practice of notifying RRSPs "applies equally to both TTM and the importers" and that "TTM and the importers both set and notify their RRSPs in precisely the same manner".[1991] Regarding the Philippines' assertion that TTM "can, and does, set the downstream retail price", Thailand argues, that the Philippines has provided no evidence that TTM sets the downstream retail price differently to the manner in which PMTL's own RRSPs set the downstream market price.[1992] Regarding the Philippines' argument that the importers are not permitted under Thai competition law to set retail prices, Thailand argues that "there may be specific instances of vertical price fixing that ... would not violate" Thai competition law.[1993] Thailand also considers that the Philippines' argument is premised on the idea that a cigarette importer is "more likely" to make an incorrect notification in comparison to TTM, yet, in Thailand's view, the Philippines has not provided any evidence in support of this contention.[1994] Thailand considers that the Philippines' Article III:4 claim is premised on certain factual assertions that it has failed to prove, "i.e. it cannot know the average market price on the day of the notification because: (i) although cigarette importers determine recommended retail selling prices, they do not know the actual market price on that date; (ii) that it takes 4-6 weeks for a market research company to obtain the average market price; and (iii) that a failure to comply with Thailand's VAT notification requirements results in a 'legal jeopardy' affecting cigarette importers".[1995] Thailand submits that if a cigarette importer notifies the actual average market price on the basis of its RRSP, and subsequently notices a discrepancy between the notified price and the actual price, that importer could simply notify this correction as a change of the notified price, which means that no legal jeopardy exists for the importer.[1996]

7.945. Thailand requests that the Panel take into account the amended competition law in its analysis of the VAT notification requirement under Article III:4 of the GATT 1994.[1997] Thailand explains that the amended Section 4(2), which provides that the Act shall not apply to the acts of certain State enterprises, public organizations, or other State agencies, "does not afford TTM, or any other Thai state enterprise, an automatic exemption from the Competition Act".[1998] In its responses to the Panel's questions following the meeting with the parties, Thailand indicated that to date there had been no finding or resolution indicating whether TTM's activities fall within the scope of the exemption in Section 4(2).[1999]

7.4.5.3 Analysis by the Panel

7.4.5.3.1 General considerations

7.946. Article III:4 of the GATT 1994 requires that:

> The products of the territory of any Member imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

[1988] Thailand's first written submission, paras. 7.28-7.32.
[1989] Thailand's response to Panel question No. 65, p. 59.
[1990] Thailand's response to Panel question No. 65, p. 59.
[1991] Thailand's first written submission, para. 7.32.
[1992] Thailand's first written submission, paras. 7.39-7.40.
[1993] Thailand's response to Panel question No. 113(b), p. 41.
[1994] Thailand's second written submission, para. 4.6.
[1995] Thailand's response to Panel question No. 65, p. 59.
[1996] Thailand's second written submission, para. 4.18; and response to Panel question No. 62(a).
[1997] Thailand's response to Panel question No. 124(a).
[1998] Thailand's response to Panel question No. 124(b), p. 49.
[1999] Thailand's response to Panel question No. 124(b), p. 49.

7.947. We recall that three requirements must be satisfied to establish a violation of Article III:4: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[2000]

7.948. With regard to the first requirement, it is not in dispute that the cigarettes imported by PMTL and domestically produced cigarettes are "like products".[2001] Furthermore, we note that the original panel already found that the *Marlboro* and *L&M* cigarettes imported by PMTL were "like" TTM's cigarettes in the same price range for the purposes of Article III:2 and III:4 of the GATT.[2002] We appreciate that the original panel's "likeness" findings rested on factual elements with the potential to evolve over time, but the Philippines observes that none of the facts supporting these findings have changed[2003], and Thailand does not contest this assertion. We recall that a determination of "likeness" must be carried out on a case-by-case basis taking into account the four traditional factors as well as any other criteria that may also be relevant.[2004] Apart from the fact that the original panel found that the products at issue are "like products" and recalling that this issue is not in dispute in this proceeding, we note that the Philippines has nonetheless elaborated how domestically produced cigarettes and PMTL's imported cigarettes: (i) share the same physical characteristics[2005]; (ii) have identical end-uses[2006]; (iii) are interchangeable from the consumers' point of view[2007]; and (iv) have the same tariff classification in Thailand.[2008] We consider that all of the foregoing constitutes a sufficient basis for us to find that PMTL's imported cigarettes and domestic cigarettes are "like products" within the meaning of Article III:4 of the GATT 1994.

7.949. We note that Thailand equally does not contest that the notification requirement falls within the meaning of a "law, regulation, or requirement affecting their internal sale".[2009] In our view, the VAT notification requirement is evidently a "requirement", and it is set forth in instruments adopted by the Revenue Department that constitute "regulations" within the meaning of Article III:4. We recall that the Appellate Body in *EC – Bananas III* confirmed that the term "affecting" is understood to mean "to have an effect on, which indicates a broad scope of application".[2010] Furthermore, in the original proceeding, the panel found that "the Thai regulations at issue, which concern the VAT-related administrative requirements, can be considered as affecting the internal sale of imported cigarettes within the meaning of Article III:4".[2011] In light of this jurisprudence and in the absence of any objection from Thailand, we consider that the VAT notification requirement, pursuant to which importers and TTM are required to notify the average actual market price to the authorities for the purpose of calculating the VAT base, is a "requirement" that "affects the internal sale" of imported cigarettes within the meaning of Article III:4.

7.950. Furthermore, the parties do not dispute that, as of the date of this Panel's establishment, TTM enjoyed an exemption from the Competition Act and was thus in the position to lawfully enter into price fixing arrangements with retailers.[2012] Our analysis of the Philippines' claim under Article III:4 is based on the relevant factual circumstances, including the state of Thai competition law, as they existed on the date of the establishment of the Panel. As explained in Section 7.4.2.2 above we will, following our analysis of the Philippines' claim under Article III:4, make additional findings relating to the amendment to Thai competition law that took place in the course of this proceeding.

7.951. We note that the parties also agree that the VAT notification requirement sets an identical requirement for both TTM and importers, i.e. to notify the average actual market price on the date

[2000] Appellate Body Reports, *Korea – Various Measures on Beef*, para. 133; and *EC – Seals*, para. 5.99.
[2001] Thailand's response to Panel question No. 65.
[2002] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.541 and 7.662.
[2003] Philippines' first written submission, para. 783.
[2004] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-21, DSR 1996:I, 3, at pp. 113-114.
[2005] Philippines' first written submission, paras. 784-788.
[2006] Philippines' first written submission, para. 789.
[2007] Philippines' first written submission, paras. 790-792.
[2008] Philippines' first written submission, para. 793.
[2009] Thailand's first written submission, paras. 7.1-7.49; Thailand's second written submission, paras. 4.1-4.21.
[2010] Appellate Body Report, *EC – Bananas III*, para. 220 (referring to GATT Panel Report, *Italian Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, para. 12).
[2011] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.665.
[2012] See para. 7.805. above.

of notification in June.[2013] We recall that "the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner".[2014] We further recall in this respect that a measure accords less favourable treatment to imported products over domestic products if it "modifies the conditions of competition in the relevant market to the detriment of imported products".[2015] The Appellate Body noted in the original proceeding that the element of less favourable treatment requires "a careful examination 'grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'' … [but t]his analysis need not be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned."[2016] Additionally, the Appellate Body stated that "[t]he implications of the contested measure for the equality of competitive conditions are, first and foremost, those that are discernible from the design, structure, and expected operation of the measure."[2017]

7.952. We have already made findings on a number of factual elements which are disputed by the parties in the context of the Philippines' claim under Article III:4. In particular, we found that: (i) an importer that fixes the retail sales price acts in violation of Thai competition law or, at a minimum, faces the risk of such violation; (ii) the Philippines has established that an importer cannot obtain the average actual market price on the date of notification through a market survey because collecting and processing such data necessarily involves a delay; and (iii) the importers' RRSPs are not necessarily identical to the average actual market prices, and that notifying its RRSP does not allow the importer to ensure that it complies with the VAT notification requirement.[2018] On the basis of those findings, we came to the conclusion that the importer is not in a position to know the average actual market price on the date of notification and thus cannot ensure that it complies with the VAT notification requirement as written.[2019] We also found that, in the event the notified importer's RRSP turns out to be less than the average actual market price, the importer may face consequences, such as penalties, the prospect of a criminal investigation, or, at a minimum, an additional financial and administrative burden in attempting to correct an incorrect notification.[2020] Finally, we recall that in our analysis of the Philippines' claim under Article X:1 we found that the Revenue Department adopted an administrative ruling that cigarette importers can notify RRSPs to the extent that they reflect the average actual market prices under Notification 187 and Order Por. 145-2555, however this ruling remains unpublished.

7.953. The only remaining disputed issue is thus whether, despite the absence of any formal difference in treatment arising from the terms of Notification 187 and Order Por. 145-2555, the VAT notification requirement accords "less favourable treatment" to imported cigarettes.[2021] In the course of our analysis of that issue, we also address the parties' disagreement on whether any alleged discrimination arises on a *de jure* or *de facto* basis.[2022]

7.4.5.3.2 "less favourable treatment"

7.954. According to the Philippines, the "[c]onditions of competition between imports and domestic cigarettes [in Thailand] are adversely modified by the risk that importers, but not TTM, may be held liable for non-compliance with Thai law".[2023] The Philippines argues that "TTM's exemption from Thai competition laws means that TTM can … set the downstream retail price" and "is able to comply with the requirement to notify the average actual market price" whereas "Thai competition law prohibits importers from imposing a retail selling price on the independent wholesalers and retailers to whom they sell imported cigarettes" and thus cigarette importers "on the date of notification… do not know

[2013] Philippines' first written submission, paras. 802-803; and Thailand's first written submission, para. 7.30.

[2014] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 136; and GATT Panel Report, *US – Section 337*).

[2015] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

[2016] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 129 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215).

[2017] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130.

[2018] See Section 7.4.2.3 above.

[2019] See Section 7.4.2.3.5 above.

[2020] See Section 7.4.2.4 above.

[2021] Thailand's first written submission, paras. 7.26-7.49; and second written submission, paras. 4.7-4.21.

[2022] Parties' responses to Panel question No. 65.

[2023] Philippines' first written submission, para. 813.

− and cannot notify − the average actual market price on that date".[2024] The Philippines explains that "cigarette importers face the legal risk of violating either the notification requirement … or the prohibition against dictating retail sales prices to retailers under Thai competition law, while the domestic cigarette manufacturer TTM faces no such legal risk".[2025]

7.955. The Appellate Body has previously found that an "additional obstacle" or "extra hurdle" can modify the conditions of competition for an imported product.[2026] In a number of previous disputes, measures leading to additional administrative burden and paperwork were found to negatively affect competitive opportunities of the imported products. We recall that in the original proceeding, the Appellate Body upheld the panel's finding that the imposition on resellers of imported cigarettes of additional VAT-related administrative requirements − which included filing forms, maintaining reports and potentially facing penalties and surcharges − resulted in less favourable treatment of imported cigarettes.[2027] Furthermore, in *Canada − Wheat Exports and Grain Imports,* elevator operators were subjected to a prior authorization scheme to process imported grain, while no such requirement existed for domestic grain. The panel found that this modified the conditions of competition to the detriment of imported grain, even though the authorization had never been refused by the competent Canadian agencies and advance authorization schemes were available.[2028] Similarly, in *US − COOL*, a measure challenged under Article 2.1 of the TBT Agreement was found to entail a detrimental impact on imported products by virtue of a higher burden in terms of recordkeeping and verification requirements, the consequent need for segregation, and higher associated compliance costs.[2029]

7.956. In light of this jurisprudence, we now examine whether our findings above, in the context of our assessment of the disputed issues relating to the operation of the Thai VAT regime and competition law, demonstrate that the notification requirement modifies the conditions of competition to the detriment of imported products, by exposing cigarette importers to legal risks, or at a minimum, an additional administrative burden and financial burden.

7.957. First, in the absence of an appropriate administrative ruling or formal bilateral arrangement with the Revenue Department, an importer that fixes the retail sales prices acts in violation of Thai competition law or, at a minimum, faces the risk of such violation, whereas TTM is exempted from competition legislation and can fix retail prices. TTM thus can ensure that the RRSPs are followed in retail transactions and that the RRSP matches the actual average market price. In light of these facts, we disagree with Thailand's contention that "TTM's exemption from Thai competition law is simply irrelevant to the structure and operation of Thailand's VAT regime" and that even if it were relevant "it would amount at most to a *difference* in treatment".[2030] The exemption from Thai competition law enables TTM, unlike importers, to know the average actual market prices on the date of notification. In our view, this goes well beyond a mere "formal" difference in treatment.

7.958. We note that Thailand contests that "TTM can, and does, set the price charged by retailers for TTM's cigarettes".[2031] However, the jurisprudence supports the conclusion that it is not legally relevant whether TTM actually takes advantage of its exemption from competition law and actually sets retail prices. For example, the panel in *US − FSC (Article 21.5 − EC)* confirmed that Article III:4 of the GATT 1994 is an obligation requiring that Members ensure equality of competitive *opportunities* to like domestic and imported products, and demonstrating a violation thereof did not require proof that the sourcing decisions of private firms had "actually been impacted by the requirement in question".[2032] The fact of the matter is that TTM has the *ability* under Thai competition

[2024] Philippines' first written submission, para. 805.
[2025] Philippines' second written submission, para. 759.
[2026] Appellate Body Report, *US − Section 211 Appropriations Act*, para. 268.
[2027] Panel Report, *Thailand − Cigarettes (Philippines)*, paras. 7.722, 7.734 and 7.738; Appellate Body Report, *Thailand − Cigarettes (Philippines)*, paras. 138 and 140.
[2028] Panel Report, *Canada − Wheat Exports and Grain Imports*, paras. 6.184-6.213.
[2029] See Panel Reports, *US − COOL,* paras. 7.346-7.347 and 7.372; Appellate Body Reports, *US − COOL,* para. 348. The Appellate Body has also found that in assessing whether a measure affects competitive conditions under Article III:4 of the GATT 1994, it may be reasonable for a panel to rely on any relevant findings it made in examining that measure's detrimental impact under Article 2.1 of the TBT Agreement. (Appellate Body Report, *US − Tuna II (Mexico)*, para. 7.278) We therefore consider that the jurisprudence developed under Article 2.1 of the TBT Agreement may inform our analysis of the meaning of "less favourable treatment" under Article III:4 of the GATT 1994.
[2030] Thailand's first written submission, para. 7.47.
[2031] Thailand's response to Panel question No. 114.
[2032] Panel Report, *US − FSC (Article 21.5 − EC),* para. 8.159.

law to lawfully set retail prices and ensure that its notified recommended price matches "the average price of the market price" on the date of notification, whereas importers do not have the same ability, which is not consistent with the standard of equality of competitive opportunities protected by Article III:4 of the GATT.

7.959. Second, importers currently have no alternative way of ensuring that they are complying with the VAT notification requirement. As we have established above, market research studies do not enable an importer to know the average actual market price *on the date of notification*.[2033] Equally, while the Revenue Department has adopted an administrative ruling that the notifications on the basis of RRSPs are acceptable, this ruling has not been published, and thus an importer cannot rely on it to ensure its formal compliance with the VAT notification requirement. Furthermore, since the Revenue Department only accepts RRSPs to the extent that they reflect the average actual market prices, even if the administrative ruling were published, it would not give cigarette importers any guarantee that the Revenue Department will not find the importer in breach of the notification requirement in the event of a divergence between the RRSP and the average actual market price. As indicated above, we consider that this is tantamount to imposing a formal VAT notification requirement with which an importer cannot ensure its compliance. The implication of these two factual considerations is that the "unreasonable" requirement that is imposed on importers, as described above in respect of Article X:3(a), is *not* also imposed on TTM (due to the exemption from competition law).

7.960. Third, as follows from our earlier analysis, the consequences of the failure to notify the correct average actual market price includes the risk of penalties and a criminal investigation.[2034] Thailand observes that "if TTM fails to comply with the VAT requirements, it will be subject to the same audit consequences as the importers would be".[2035] This argument, in our view, does not address the fact that the formally identical treatment accorded to TTM and PMTL in respect of their VAT notification obligations fails to account for their formally different legal situations under Thai competition law. While the same legal consequences may apply to both TTM and the importer in case of a failure to comply with the notification requirement, TTM, by virtue of its exemption from competition law, has the ability to avoid a situation of non-compliance whereas the importer does not. We recall the Appellate Body's view that "the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner".[2036] Thus, under the VAT notification requirement as written, the importer, unlike TTM, permanently faces the risk of legal consequences of non-compliance (i.e. so-called "legal jeopardy").

7.961. Finally, we recall Thailand's argument that, to make a correction to an originally incorrect notification, the importer could simply notify a correction as a change of the notified price, and thus the importer faces no legal jeopardy.[2037] As we have explained above, we do not consider that the correction mechanism presented by Thailand mitigates the "legal jeopardy" to which the importer is exposed.[2038] It appears that the new notification (i.e. the correction) would be expected to also reflect the average actual market price *on the date of the new notification* meaning that the importer will continue being unable to identify the average actual market price to notify on the date on which it is required to make a notification. Nonetheless, even if a correction could indeed be made and, as argued by Thailand, could reflect the average actual market price on the date of the original notification[2039], insofar as an importer is required to notify changes to the actual average market price on an *ongoing* basis, there exists inherently the prospect of submitting multiple notifications, corrections, and reissuing of invoices to reflect changes throughout the course of the year.[2040] Therefore, even under this scenario, the importer faces the additional administrative and financial burden of monitoring prices, submitting corrections, and possible reissuance of VAT invoices.[2041] Since TTM can ensure that its notification of the average actual market price is correct in the first

[2033] See Section 7.4.2.3.3 above.
[2034] See Section 7.4.2.4 above.
[2035] Thailand's first written submission, para. 7.46.
[2036] Appellate Body Report, *Canada − Wheat Exports and Grain Imports*, para. 87 (referring to Appellate Body Report, *Korea − Various Measures on Beef*, para. 136; and GATT Panel Report, *US − Section 337*).
[2037] Thailand's second written submission, para. 4.18; and response to Panel question No. 62(a).
[2038] See paragraph 7.856. above.
[2039] Thailand's response to the Philippines' question No. 9.
[2040] See paragraph 7.859. above.
[2041] See paragraphs 7.859. and 7.860. above.

place, unlike importers, it is not compelled to submit corrections and does not have to bear this additional administrative and financial burden.

7.962. In response to the Philippines' assertion of less favourable treatment, Thailand stresses that "the current practice of notifying RRSPs applies equally to both TTM and the importers" and that "TTM and the importers both set and notify their RRSPs in precisely the same manner".[2042] We have already established above that TTM and importers do not set RRSPs in the same manner. Thus, the same practice affects TTM and cigarette importers differently: TTM can ensure that it notifies the correct price on the date of notification through controlling retail prices, whereas importers cannot. Therefore, as stated above, such a practice does not eliminate less favourable treatment accorded to imported cigarettes by the VAT notification requirement.

7.963. Additionally, we do not consider that our finding under Article X:1 that the Revenue Department's unwritten practice of accepting RRSPs amounts to an administrative ruling of general application[2043] alters the analysis under Article III:4. As we have explained in the context of Article X:3(a), Thailand denies that there is any "formal right" to submit the RRSPs in fulfilment of the VAT notification requirement, and thus the unpublished administrative ruling does not eliminate the legal risks associated with potential non-compliance with the VAT notification requirement *as written* nor the administrative and financial burden that the importer has to bear in order to correct faulty notifications.[2044]

7.964. In conclusion, we consider that the inability of importers to ensure their compliance with the VAT notification requirement puts importers in a state of legal uncertainty regarding the correctness of the notified VAT base, and creates the possibility of punitive or burdensome legal consequences for any mistake. In other words, the VAT notification requirement creates a legal risk for the importer that the domestic manufacturer of cigarettes does not face. Furthermore, even if an importer tries to address the risk through the submission of corrections to the original notification, the importer bears an additional administrative burden. Put simply, under the Thai VAT regime, the sale of imported cigarettes is associated with legal risks and additional administrative burdens and costs whereas sale of domestic cigarettes is not. In light of these considerations, we find that the VAT notification requirement, as written, modifies the conditions of competition to the detriment of imported cigarettes.

7.965. The parties provided extensive arguments on whether the discrimination at issue arises on a *de facto* or *de jure* basis. The Philippines argues that, insofar as the discrimination necessarily arises from "the interaction of different elements of Thai law", i.e. from the "necessary implication" arising from the texts of Notification 187 and Order Por. 145-2555 and the "simultaneous operation of Thai competition law", the discrimination is *de jure* in nature.[2045] Thailand disagrees and denies that there is any *de jure* discrimination. It argues that whatever less favourable treatment is alleged by the Philippines could arise only on a *de facto* basis.[2046] Thailand notes that "the Philippines' Article III:4 claim is premised on certain *factual* assertions", and for that reason it "is necessarily a *de facto* claim".[2047]

7.966. We recall Thailand's argument that the Philippines' claim is based on certain factual premises, which in its view the Philippines has not proved, and that this establishes that its argumentation rests on a *de facto* basis.[2048] Thailand refers to the Philippines' assertions "that it cannot know the average market price on the day of the notification because: (i) although cigarette importers determine recommended retail selling prices, they do not know the actual market price on that date; (ii) that it takes 4-6 weeks for a market research company to obtain the average market price; and (iii) that a failure to comply with Thailand's VAT notification requirements results in a 'legal jeopardy' affecting cigarette importers".[2049] In Section 7.4.2 above, we have addressed these assertions by the Philippines and found that: (i) an importer that attempts to fix retail prices acts in violation of Thai competition law or, at a minimum, faces a risk of such violation; (ii) consequently the RRSP for imported cigarettes is not necessarily the same as the average actual

[2042] Thailand's first written submission, para. 7.33.
[2043] See Section 7.4.3.4 above.
[2044] See paragraph 7.926. above.
[2045] Philippines' first written submission, para. 779; second written submission, para 764; and response to Panel question No. 65, para. 479.
[2046] Thailand's first written submission, para. 7.32.
[2047] Thailand's response to Panel question No. 65, p. 59.
[2048] Thailand's response to Panel question No. 65, p. 59.
[2049] Thailand's response to Panel question No. 65, p. 59. (footnotes omitted)

market price, meaning that by notifying its RRSP the importer cannot ensure that it complies with the notification requirement; (iii) a market survey of cigarette prices necessarily involves a delay, which makes it impossible for the cigarette importer to obtain average actual market price on the date of notification through this method; and (iv) in the event the notified RRSP turns out to be less than the actual average market price, the importer may face significant consequences ("legal jeopardy") and, where the importer tries to correct an inaccurate notification it has to bear an additional administrative and financial burden. We find that, with regard to these factual elements, the Philippines has discharged its burden of proof.

7.967. It is well established that less favourable treatment can arise where a measure does not draw formal distinctions in the treatment of domestic and imported products but in practice modifies the conditions of competition to the detriment of the latter.[2050] Since the obligation provided by Article III:4 extends to situations of *de facto* discrimination, it operates as a safeguard against the circumvention of the non-discrimination disciplines through the provision of formally identical treatment in law. We recall in this respect the Appellate Body's statement, reflecting the fundamental nature of the principle of equal treatment, and equality, that "the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner".[2051] In the circumstances of the present case, we are faced with the issue of whether the discrimination established is in its nature *de jure* or *de facto*.

7.968. We note that the measure challenged is the VAT notification requirement, while its application is affected by the rules of the Competition Act. These rules are essentially the cause of the discriminatory treatment. We appreciate that less favourable treatment can arise on a *de jure* basis by virtue of the interaction of different laws and regulations of a Member. However, as we explained in paragraph 7.808. above, the Thai Competition Act is not a challenged measure in this dispute. We therefore consider and qualify the impact of the Competition Act under these circumstances as an indirect impact which causes discrimination in the application of VAT notification requirement which stands alone as the measure challenged before this panel. We thus consider Thai competition law as a relevant factual circumstance that creates different situations for TTM and PMTL, as a consequence of which the VAT notification requirement in practice gives rise to less favourable treatment.

7.4.5.4 Legislative changes in the course of the proceeding

7.969. Thailand requests the Panel to find that "Thailand's VAT measures and Thailand's amended competition law are not inconsistent with Article III:4 of the GATT 1994 because cigarette importers and the producer of domestic cigarettes face the same requirements for purposes of notifying the VAT base as neither of them benefits from an exemption from Thai competition law that would allow them to legally fix retail prices."[2052] The basis for that request is Thailand's assertion that following

[2050] See Appellate Body Reports, *Canada - Wheat Exports and Grain Imports*, para. 87; *Korea - Various Measures on Beef*, paras. 135-137. In *Dominican Republic - Import and Sale of Cigarettes*, the panel considered that the requirement that a tax stamp must be affixed on cigarette packets in the territory of the Dominican Republic and under the supervision of Dominican Republic tax authorities applied equally to both domestic and imported cigarettes. However, the panel found that this formal equality itself led to less favourable treatment of imported cigarettes, since tax stamps could be affixed on packs of domestic cigarettes as part of the production process, while in the case of imported cigarettes an additional process had to be undertaken, with resulting additional costs. (See Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, paras. 7.189-7.198) Additionally, we recall that the panel in *EC - Trademarks and Geographical Indications* examined the WTO-consistency of the Regulation which contained formally identical provisions vis-à-vis nationals of different Members, with respect to the protection of geographical indications. The panel found that the distinction made by the Regulation on the basis of the location of a geographical indication operated in practice to discriminate between the group of nationals of other WTO Members who wished to obtain protection of a geographical indication, and the group of the European Communities' nationals in the same situation, inconsistently with the national treatment obligation provided in the TRIPS Agreement, Article 3.1. (See Panel Reports, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.181-7.240*; EC – Trademarks and Geographical Indications (US)*, paras. 7.131-7.213)

[2051] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 136; and GATT Panel Report, *US – Section 337*).

[2052] Thailand's request to review the Interim Report, para. 2.71. See also Thailand's response to Panel question No. 124(a).

an amendment of the competition law in October 2017, "TTM does not at present enjoy any exemption from competition law".[2053] The Philippines' contests that assertion.[2054]

7.970. We recall that questions relating to the meaning of domestic law arising before WTO panels are to be approached as questions of fact. In respect of the types of factual evidence that may be relied upon to resolve the meaning and content of municipal law, the Appellate Body has explained that "[i]f the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning … is not evident on its face, further examination is required."[2055]

7.971. We recall that the Philippines has not requested any findings with regard to the VAT notification requirement as affected by the amended competition law. Rather, the Philippines requested that the Panel should rule on the consistency of the measure as it stood at the date of the panel's establishment.[2056] We have found that the Philippines fulfilled its burden of proof with regard to its challenge of the VAT notification requirement, based on the circumstances as they existed on the date of the panel's establishment. The Appellate Body has clarified that while the complaining party bears the burden of making its *prima facie* case, "the responding party must prove the case it seeks to make in response, and each party bears the burden of substantiating the assertions that it makes".[2057] We consider that it is Thailand, as the party asserting the WTO-consistency of the VAT notification requirement by virtue of the amendment of the competition law, that must demonstrate with evidence that circumstances have changed such that the VAT notification requirement is no longer inconsistent with Article III:4 of the GATT 1994.

7.972. Thailand refers us to the amended Section 4(2) of the Trade Competition Act (2017). It reads:

> This Act shall not apply to the acts of:
>
> […]
>
> (2) State enterprises, public organizations, or other State agencies, however, specifically in the part carried out under the laws or resolutions of the Council of Ministers with necessity for the purpose of maintaining State's stability, public interests, common interests, or arrangement of public utilities.[2058]

7.973. In other words, the text of Section 4(2) contains an exemption from the prohibitions in the Thai competition law that extends to those state enterprises having the purpose of "maintaining [the] State's stability, public interests, common interests, or arrangement of public utilities". Thus, it is not clear from the face of Section 4(2) whether TTM falls within the scope of the exemption.

7.974. Indeed, Thailand itself has not expressed any definite view on whether TTM is, or could be found to be, within the scope of the exemption in Section 4(2). Rather, Thailand confines its assertion to the point that "the amended language of Section 4(2) of the Competition Act indicates that state enterprises *may* be exempted from the application of this law, but only in specific circumstances."[2059] According to Thailand, in that sense, this provision "does not afford TTM, or any other Thai state enterprise, an *automatic* exemption from the Competition Act".[2060]

7.975. We note that Thailand has not submitted any evidence on the application of the law, pronouncements of domestic courts on the meaning of the law, opinions of legal experts, or writings of recognized scholars, to clarify whether TTM falls within the scope of the exemption in Section 4(2). In its responses to the Panel's questions following the meeting with the parties, Thailand indicated

[2053] Thailand's response to Panel question No. 124(b).
[2054] See paragraph 7.942. above.
[2055] Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review,* para. 168.
[2056] Philippines' opening statement at the meeting of the Panel, para. 128; and response to Panel question No. 124(a).
[2057] Appellate Body Report, *US − Tuna II (Mexico) (Article 21.5 − Mexico)*, para. 7.33 (referring to Appellate Body Reports, *Japan − Apples*, paras. 154, 157; *US − Tuna II (Mexico)*, para. 283; *US − Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335; *EC − Hormones*, para. 98)
[2058] Trade Competition Act B.E. 2560 (2017) (English translation), (Exhibit PHL-207-B).
[2059] Thailand's response to Panel question No. 124(b).
[2060] Thailand's response to Panel question No. 124(b). (emphasis added)

that to date there had been no finding or resolution indicating whether TTM's activities fall within the scope of the exemption in Section 4(2).[2061] Indeed, Thailand states that it is "pure speculation as to whether TTM would be granted, or even claim, an exemption".[2062]

7.976. We note that TTM's Annual Report for the year 2015 reads in relevant part that "TTM's core functions are to provide the state with remittance in a form of revenues and taxes and to support tobacco farmers in improving the tobacco leaf quality in compliance with Good Agricultural Practices (GAP)".[2063] The 2015 Annual Report adds that:

> Although TTM has adhered to the policy that does not support people's smoking, there are still consumers' demand and an increasing amount of imported cigarettes. Therefore, TTM, as a state enterprise having a function to redistribute the revenues to the Government, has to protect the nation's interests and develop business operation with more effectiveness.[2064]

In our view, this raises the question of whether TTM's self-description of its functions and objectives suggests that it may indeed satisfy the requirements of Section 4(2).

7.977. We make no finding on whether TTM does or does not fall within the exemption in Section 4(2). Rather, we find that Thailand bears the burden of substantiating its assertion that TTM does not enjoy any exemption from the relevant Thai competition law, and that Thailand has not provided sufficient evidence in the course of this proceeding to discharge its burden.

7.4.5.5 Conclusion

7.978. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, Thailand's VAT notification requirement accords less favourable treatment to imported cigarettes as compared to like domestic cigarettes by exposing cigarette importers to legal risks and additional administrative burdens and costs, which the domestic producer of cigarettes does not have to face. The VAT notification requirement is thus inconsistent with Article III:4 of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. Regarding the BoA Ruling of 16 November 2012, concerning 210 entries of *Marlboro* cigarettes imported into Thailand by PMTL between January 2002 and January 2003, we conclude that:

a. the BoA acted inconsistently with Articles 1.1 and 1.2(a) of the CVA by rejecting PMTL's declared transaction values without a valid basis, and in particular that:

   i. the BoA acted inconsistently with Article 1.2(a), second sentence, by failing to properly examine the circumstances surrounding the sale of the cigarettes to PMTL because its examination of the circumstances of sale was not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL for the relevant cigarettes; and

   ii. the BoA acted inconsistently with Article 1.2(a), third sentence, by failing to communicate to PMTL its grounds for considering that the relationship influenced the price and failing to give PMTL an opportunity to respond.

b. the BoA acted inconsistently with Article 5.1 of the CVA in applying the deductive method to determine an alternative customs value, and in particular that:

   i. the BoA acted inconsistently with Article 5.1(a)(i) by failing to deduct an appropriate amount in respect of P&GE;

[2061] Thailand's response to Panel question No. 124(b), p. 49.
[2062] Thailand's request to review the Interim Report, para. 2.61.
[2063] TTM, Annual Report, 2015 (English and Thai), (Exhibit PHL-3), p. 5.
[2064] TTM, Annual Report, 2015 (English and Thai), (Exhibit PHL-3), p. 5.

ii. the BoA acted inconsistently with Article 5.1(a)(ii) by failing to deduct an appropriate amount in respect of transport costs; and

iii. the BoA acted inconsistently with Article 5.1(a)(iv) by failing to deduct an appropriate amount in respect of provincial taxes payable.

c. the BoA acted inconsistently with Article 11.3 of the CVA by failing to provide sufficient reasons for its decision in the BoA Ruling itself; and

d. the BoA acted inconsistently with Article 16 of the CVA by failing to provide a timely explanation of how the customs value was determined, following PMTL's request for an explanation.

8.2. Regarding the Charges filed by the Public Prosecutor on 18 January 2016 concerning 272 entries of *Marlboro* and *L&M* cigarettes imported by PMTL between July 2003 and June 2006, we find that the Philippines' claims are admissible and fall within the scope of this compliance proceeding[2065], and we conclude that:

a. the Charges are inconsistent with Articles 1.1 and 1.2(a) of the CVA because they reject PMTL's declared transaction values without a valid basis, and in particular that the Public Prosecutor acted inconsistently with Article 1.2(a), second sentence, by not engaging in an examination of the circumstances of sale that was apt to reveal whether the relationship between PMTL and PMPMI influenced the price paid by PMTL;

b. the Charges are inconsistent with Article 2.1(a) and (b), or in the alternative, Article 3.1(a) and (b) of the CVA, because they improperly treat King Power's purchase prices as transaction values for identical or similar goods; and

c. the Philippines has not demonstrated that Thai officials were responsible for disclosing PMTL's import prices to the media contrary to Thailand's obligation under Article 10 of the CVA.

8.3. Regarding the requirement under Notification 187 and Order Por. 145-2555 to notify the average actual market price of cigarettes on the date of notification for the purpose of determining the VAT base, we conclude that:

a. Thailand's failure to publish the administrative ruling of general application that cigarette importers can notify RRSPs to the extent they reflect the average actual market prices under Notification 187 and Order Por. 145-2555, is inconsistent with Article X:1 of the GATT 1994;

b. Thailand has administered its Revenue Code provisions in an unreasonable manner, inconsistently with Article X:3(a) of the GATT 1994, by imposing on cigarette importers the VAT notification requirement with which it is impossible to ensure compliance and which exposes importers to potential consequences of non-compliance; and

c. Thailand has acted inconsistently with Article III:4 of the GATT 1994 by imposing the VAT notification requirement, which accords less favourable treatment to imported cigarettes than like domestic cigarettes.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the Customs Valuation Agreement and the GATT 1994, they have nullified or impaired benefits accruing to the Philippines under those agreements.

8.5. We therefore conclude that Thailand has failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the CVA and the GATT

[2065] See Sections 7.1.3 (The ACWL/Commerce letters and lawyer-client privilege), 7.3.2 (Preclusion), 7.3.3 (Close nexus), 7.3.4 (Ripeness) above.

1994. To the extent that Thailand has failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.

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WORLD TRADE ORGANIZATION

WT/DS371/RW/Add.1

12 November 2018

(18-7027)

Page: 1/89

Original: English

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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ANNEX A

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.

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[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.

[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.

[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

[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.

[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.

[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]

2.1 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.

[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.

2.2 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.

2.3 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.

2.4 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.

2.5 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.

[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.

2.6 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).

2.7 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.

2.8 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.

[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 facie* 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.

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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

[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. "

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