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THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE PHILIPPINES

REPORT OF THE PANEL

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

WTO CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Australia – Salmon	Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, p. 3407
Australia – Tobacco Plain Packaging (Cuba)	Panel Report, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging*, WT/DS458/R, Add.1 and Suppl.1, adopted 27 August 2018
Brazil – Aircraft (Article 22.6 – Brazil)	Decision by the Arbitrator, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000, DSR 2002:I, p. 19
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)	Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS222/ARB, 17 February 2003, DSR 2003:III, p. 1187
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – Electronic Payment Services	Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – Intellectual Property Rights	Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, DSR 2009:V, p. 2097
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, p. 1127

Short title	Full case title and citation
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
Colombia – Textiles	Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
Colombia – Textiles (Article 21.5 – Colombia/Panama)	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Colombia / Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Recourse to Article 21.5 of the DSU by Panama*, WT/DS461/RW and Add.1, circulated to WTO Members 5 October 2018 [appealed by Panama 20 November 2018]
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Article 21.5 – Ecuador II / US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
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EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
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EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995

Short title	Full case title and citation
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Trademarks and Geographical Indications	Panel Reports, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R *(Australia)* / WT/DS174/R *(US)*, adopted 20 April 2005, DSR 2005:VIII, p. 3499 / DSR 2005: X, p. 4603
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, p. 685
EU – Energy Package	Panel Report, *European Union and its member States – Certain Measures Relating to the Energy Sector*, WT/DS476/R and Add.1, circulated to WTO Members 10 August 2018 [appealed by the European Union 21 September 2018]
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
EU – PET (Pakistan)	Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018
EU – PET (Pakistan)	Panel Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/R, Add.1 and Corr.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS486/AB/R
EU – Poultry Meat (China)	Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R and Add.1, adopted 19 April 2017
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295

Short title	Full case title and citation
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
India – Solar Cells	Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Indonesia – Chicken	Panel Report, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, WT/DS484/R and Add.1, adopted 22 November 2017
Indonesia – Iron or Steel Products	Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
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Japan – Apples (Article 21.5 – US)	Panel Report, *Japan – Measures Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States*, WT/DS245/RW, adopted 20 July 2005, DSR 2005:XVI, p. 7911
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Dairy	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, p. 49
Korea – Radionuclides (Japan)	Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WT/DS495/AB/R and Add.1, circulated to WTO Members 11 April 2019
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Morocco - Hot-Rolled Steel (Turkey)	Panel Report, *Morocco – Anti-dumping Measures on Certain Hot-Rolled Steel from Turkey*, WT/DS513/R and Add.1, circulated to WTO Members 31 October 2018 [appealed by Morocco 20 November 2018]
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Russia – Railway Equipment	Panel Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/R and Add.1, circulated to WTO Members 30 July 2018 [appealed by Ukraine 27 August 2018]
Russia – Tariff Treatment	Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Add.1, Corr.1, and Corr.2, adopted 26 September 2016, DSR 2016:IV, p. 1547
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299

Short title	Full case title and citation
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018 [appealed by Thailand 9 January 2019]
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831
US – Carbon Steel	Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report WT/DS213/AB/R, DSR 2002:IX, p. 3833
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865
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US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL (Article 22.6 – United States)	Decisions by the Arbitrator, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 22.6 of the DSU the United States*, WT/DS384/ARB and Add.1 / WT/DS386/ARB and Add.1, circulated to WTO Members 7 December 2015, DSR 2015:XI, p. 5877
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, p. 8243
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
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
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, circulated to WTO Members 9 June 2017 [appealed by the European Union 29 June 2017]
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257

Short title	Full case title and citation
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US – Section 110(5) Copyright Act	Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, DSR 2000:VIII, p. 3769
US – Section 211 Appropriations Act	Panel Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, p. 683
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	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821
US – Shrimp (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011, DSR 2011:X, p. 5301
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
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
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, p. 599
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
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
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 – 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

TABLE OF ABBREVIATIONS

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
BoA	Board of Appeals
November 2012 BoA Ruling	Board of Appeals Ruling No. GorOr 112/2555/Por9/2555(3.1) of 16 November 2012
2003-2006 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
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
DGCE	Indonesian Directorate General of Customs and Excise
DSB	Dispute Settlement Body
DSI	Department of Special Investigation
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAAP	Generally Accepted Accounting Principles
GATT 1994	General Agreement on Tariffs and Trade 1994
HJE	Harga Jual Exeran
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*
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
MoA	DSI, Memorandum of Allegations, dated 22 September 2016
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)
NoAs	Notices of Assessment
P&GE	Profits and General Expenses
PM Indonesia	Philip Morris Indonesia (also referred to as PTPMI)
PMTL	Philip Morris (Thailand) Limited (also referred to as PM Thailand)
PM	Philip Morris
PMPMI	Philip Morris Philippines Manufacturing Inc.
Revised Kyoto Convention	*International Convention on the Simplification and Harmonization of Customs Procedures*, done at Kyoto, 18 May 1973, 950 UNTS 269, as amended by the *Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures*, done at Brussels, 26 June 1999, 2370 UNTS 27
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
THB	Thai baht
TTM	Thailand Tobacco Monopoly
USD	United States dollar

Abbreviation	Description
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-8-B	Customs Act (No. 17), B.E. 2543 (2000) (English translation)
PHL-13-B	DSI, Memorandum of Allegations, 22 September 2016 (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-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-32-B	Central Tax Court Ruling, 29 October 2014 (English translation)
PHL-34-B	Custom Act B.E. 2469 (1926) (as amended to (No. 22) B.E. 2557 (2014)) (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-240-B	Sample Notices of Assessment (English translation)
PHL-241-B	TTM Position Paper, 16 November 2017 (English translation)
PHL-243-B	Letter from the Public Prosecutor to PMTL, 8 December 2016 (English translation)
PHL-244-B	Supreme Court decision on Nov 2012 BoA Ruling of 7 May 2018, 28 December 2017 (English translation)
PHL-246-B	Thai Customs Act B.E. 2560, 14 May 2017 (English translation)
PHL-247-B	Letter from PMTL to the Director General of the Customs Department, 14 December 2017 (English translation)
PHL-248-B	a Sample PMTL appeal against the NoAs to the BoA, 26 December 2017 (English translation)
PHL-249-B	Sample PMTL appeal against the NoAs to the Excise Department, 28 December 2017 (English translation)
PHL-250-B	Letter from the Customs Department to PMTL, 10 January 2018 (English translation)
PHL-253-B	Letter from the DSI to PMTL, 3 June 2011 (English translation)
PHL-254-B	Letter from the DSI to PMTL, 11 September 2013 (English translation)
PHL-255-B	Witness statement of Dr. Joko Wiyono, 20 April 2012 (English translation)
PHL-256-B	Witness statement of Eka Siswani, 3 May 2012 (English translation)
PHL-257-B	Letter from the DSI to PMTL, 21 August 2015 (English translation)
PHL-258-B REV	T&G statement, 11 September 2015 (English translation)
PHL-259-B	Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation)
PHL-260-B	Decision of the Director General of Customs and Excise No. KEP-17/BC/2000 (English translation)
PHL-263-B	Indonesian Law on Excise, Law No. 11/1995 (English translation)
PHL-264	Example Form CK-21A
PHL-265-B	Decision of the Director General of Customs and Excise No. KEP 19/BC/1997 (English translation)
PHL-273-B	Annex to the 2002-2003 Charges, 26 January 2017 (English translation)
PHL-275-B	Letter from PMTL requesting clarification of the MOA, 7 October 2016 (English translation)
PHL-276-B	Letter from the DSI to PMTL, 3 November 2016 (English translation)
PHL-277-B	Letter from PMTL to the Public Prosecutor, 14 November 2016 (English translation)
PHL-279-B	Request for Fair Treatment and Justice, 4 February 2011 (English translation)
PHL-280-B	Letter on evidence and witnesses in relation to CK-21A, 26 September 2013 (English translation)
PHL-281-B	Letter from PMTL to the DSI, 4 May 2012 (English translation)
PHL-282-B	Letter from PMTL to the Public Prosecutor, 28 October 2016 (English translation)
PHL-292-B	Letter from PMTL to the Customs Department, 4 May 2018 (English Translation)
PHL-293-B	Letter from the Customs Department to PMTL, 28 May 2018 (English Translation)
PHL-295-B	Official Statement from the Indonesian Ministry of Law and Human Rights dated 13 May 2016 (English translation)

Exhibit Number	Full Title
PHL-296-B	BOA Ruling, 30 August 2018 (English Translation)
THA-55	Kyoto Convention on the Simplification and Harmonization of Customs Procedures, Chapter 2
THA-57	Letter from the Thai Customs Department to PMTL, 21 March 2018
THA-58	Letter from the Thai Customs Department to PMTL, 23 March 2018
THA-59	Statement by the Director-General of the Thai Customs Department
THA-67-B	Letter from the Director-General of the Customs Department to PMTL, 21 August 2018 (English Translation)
THA-68	Communication from the World Customs Organization to Thailand's Director of Customs Standards and Procedure Bureau, 6 July 2018
THA-78	Article 10 of *Ley Orgánica de Represión del Contrabando 12/1995* (Organic Act on the Repression of Smuggling 12/1995)
THA-80	ASEAN Treaty on Mutual Legal Assistance in Criminal Matters 2004
THA-81-B	Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) (English translation)
THA-82-B	Regulation of the Central Authority on Providing and Seeking Assistance in Criminal Matters B.E. 2537 (1994), (English translation)
THA-84	Thai Criminal Code B.E. 2499 (1956)
THA-85	Memorandum from the Commissioner of the Philippines' Bureau of Customs, 2018-06-18, 14 June 2018

1 INTRODUCTION

1.1 Prior proceedings in DS371

1.1. This is the Philippines' second recourse to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concerning 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: (1) delays by Thailand's Board of Appeals (BoA) in resolving appeals brought by PMTL challenging the Thai Customs Department's rejection of PMTL's transaction values for 210 entries of cigarettes over the period 2002-2003; (2) the Thai Customs Department's determination of customs value for 118 entries over the period 2006-2007; and (3) several measures relating to Thailand's Value-Added Tax (VAT) regime as applied to domestic and imported cigarettes.[1]

1.3. In its first recourse to Article 21.5 of the DSU, the Philippines challenged three sets of measures taken by Thai authorities after the adoption of the panel and Appellate Body reports in the original proceeding. The three sets of measures included:

a. A ruling by the BoA issued in November 2012. The BoA compared PMTL's profit and general expenses (P&GE) rate with an industry benchmark P&GE range that the BoA calculated. The BoA found that PMTL's P&GE rate fell outside of that range, and on that basis concluded that the price paid by PMTL for 210 entries of cigarettes between 2002-2003 was influenced by the relationship between the buyer and seller. The BoA rejected the customs value as declared by PMTL, and proceeded to determine a higher customs value using the so-called deductive method. The Philippines challenged multiple aspects of the November 2012 BoA Ruling itself, and alleged several procedural violations, under the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (CVA).

b. A set of criminal charges filed in January 2016 by the Public Prosecutor against PMTL and seven of its employees. The Charges alleged that PMTL under-declared the customs values for 272 entries of cigarettes between 2003-2006. The Philippines challenged the substance of Charges under the CVA, as well as an alleged disclosure of PMTL's confidential information to Thai newspapers the day after the Charges were filed.

c. The Ministry of Finance's administration of the VAT regime for cigarettes. Under this regime, PMTL was required to notify the average actual market price of its cigarettes in Thailand for the purpose of determining the base for collecting the VAT on those cigarettes. The Philippines challenged this notification requirement, including the required timing of the notification and the government's refusal to publish an unwritten rule allegedly followed in implementing this requirement.

1.4. Regarding the November 2012 BoA Ruling, the Panel found that:

a. The BoA violated Articles 1.1 and 1.2(a) of the CVA by rejecting PMTL's declared transaction values without a valid basis, because the BoA's comparison of PMTL's P&GE rate with the industry P&GE range constructed by the BoA was flawed in a manner that rendered it inapt to reveal whether the relationship between PMTL and PM Indonesia[2]

[1] For a list of the findings made by the panel and the Appellate Body in the original proceeding, Thailand's declared measures taken to comply, and the three sets of measures that were challenged by the Philippines in its first recourse to Article 21.5, see Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 1.2-1.9.

[2] The full name of PM Indonesia is PT Philip Morris Indonesia (with "PT" being an acronym for a term that represents a limited liability company in Indonesia). In the Panel Report in the first recourse to Article 21.5, the Panel referred to the importer in Thailand by the acronym "PMTL". The Panel also used an acronym to refer to Philip Morris Philippines Manufacturing Inc. (i.e. "PMPMI"). The Panel referred to the producer/seller based in Indonesia as "PM Indonesia", rather than using the acronym "PTPMI", only to avoid a

influenced the price. Furthermore, the BoA failed to communicate its grounds for considering that the relationship influenced the price and thereby failed to give PMTL an opportunity to respond.

b. The BoA violated Article 5.1(a)(i), (ii) and (iv) of the CVA, when applying the deductive method to determine an alternative customs value, by failing to deduct appropriate amounts in respect of P&GE, transport costs and provincial taxes payable.

c. The BoA violated Article 11.3 of the CVA by failing to provide sufficient reasons for its decision in the Ruling, and also violated Article 16 of the CVA by failing to provide a timely explanation of how the customs value was determined, following the importer's request for an explanation.

1.5. Regarding the Charges, the Panel found that:

a. The Charges violated Articles 1.1 and 1.2(a) of the CVA because they rejected the importer's declared transaction values without a valid basis. In particular, the Public Prosecutor's use of a duty-free operator's prices as a benchmark was not apt to reveal whether the relationship between the importer and the seller influenced the price.

b. The Charges determined a revised customs value on a basis that was inconsistent with the customs valuation rules in Articles 2.1 and/or 3.1 of the CVA.

c. The Philippines did not demonstrate that Thai officials were responsible for disclosing PMTL's import prices to the media contrary to Article 10 of the CVA.

1.6. Regarding the VAT notification requirement, the Panel found that:

a. Thailand violated Article X:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) by adopting an administrative ruling of general application without publishing it.

b. Thailand violated Article X:3(a) of the GATT 1994, because it administered its Revenue Code provisions in an unreasonable manner by imposing on cigarette importers a VAT notification requirement with which it was impossible to ensure compliance and which exposed importers to potential consequences of non-compliance.

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

1.7. The Report of the Panel in the first recourse to Article 21.5 was circulated on 12 November 2018. On 9 January 2019, Thailand filed an appeal.[3]

1.2 Complaint by the Philippines

1.8. This second recourse to Article 21.5 was initiated by a request for consultations by the Philippines dated 21 February 2018[4], 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 Understanding between the Philippines and Thailand of 1 June 2012 regarding Procedures under Articles 21 and 22 of the DSU (Sequencing Agreement).[5]

potentially confusing proliferation of acronyms. In their submissions in this proceeding, the parties use the abbreviation "PTPMI" when referring to PM Indonesia. In order to align the terminology used here with that already used in the Panel Report in the first recourse to Article 21.5, the Panel will refer to the producer/seller based in Indonesia as "PM Indonesia".

[3] See WT/DS371/27.

[4] See WT/DS371/21/Rev.1, which replaced and superseded an earlier request for consultations dated 6 July 2017.

[5] WT/DS371/16.

1.9. In its request for consultations, the Philippines identified two distinct sets of measures that were taken by Thailand after the establishment and composition of the Panel in the first recourse to Article 21.5:

a. Charges filed by the Public Prosecutor against PMTL and one of its former employees on 26 January 2017, in respect of 780 entries[6] of cigarettes imported over the period 2002-2003 (the 2002-2003 Charges); and

b. 1,052 revised Notices of Assessment ("NoAs") that PMTL received in November 2017 from Thailand's Customs Department, rejecting PMTL's declared transaction values, and determining revised customs values, for 1,052 entries of cigarettes imported over the period 2001-2003 (the 1,052 revised NoAs).

1.10. Both the 2002-2003 Charges and the 1,052 revised NoAs rest on the same basis, namely the calculation, by the Thai Department of Special Investigation (DSI), of the "actual" price/value of PMTL's imports of cigarettes over the 2001-2003 period. Whereas the 2003-2006 Charges at issue in the first recourse to Article 21.5 alleged that PMTL under-declared its customs values by reference to the selling price of a duty-free operator (King Power), the DSI is said to have calculated the "actual" price/value of the entries subject to the 2002-2003 Charges based on certain pricing and cost information reported by the producer and seller of the cigarettes at issue, PM Indonesia, to Indonesian tax authorities in the CK-21A form.[7] The 2002-2003 Charges refer to the "actual price" of the cigarettes imported by PMTL, whereas the 1,052 revised NoAs refer to the "actual value" of those cigarettes.

1.3 Panel establishment and composition

1.11. The Philippines and Thailand held consultations on 12 March 2018. On 14 March 2018, 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.[8] At its meeting on 27 March 2018, the DSB established a second compliance panel to examine the matter raised by the Philippines in document WT/DS371/22.[9]

1.12. 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/DS371/22 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[10]

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[6] In its panel request, the Philippines indicates that the Charges cover 779 entries. (Panel request, paras. 18 and 19.) In its first written submission, the Philippines clarified that the Charges cover 780 entries, including 779 entries that overlap with the 1,052 revised NoAs, and one additional entry which does not. (See e.g. Philippines' first written submission, paras. 9, 28, and 69.) Thailand has not taken issue with this correction. The Panel has reviewed the Charges, and they indeed state that "[t]he incidents in the above Clauses 2.1-2.780 constituted 780 offenses". (The Criminal Court, Charges, Case Black No. Or. 232/2560, 26 January 2017 (English translation), (Exhibit PHL-14-B), p. 2.) The Annex to the Charges likewise presents data on 780 entries. (Annex to the 2002-2003 Charges, 26 January 2017 (English translation), (Exhibit PHL-273-B).)

[7] The Panel provides detailed information on the nature of the CK-21A form in the context of its findings in Section 7.2 (The Thai authorities' reliance on the information in the CK-21A forms) of the Report. During the proceeding, the Philippines raised doubts about whether Thailand had actually received the information contained in CK-21A forms from Indonesia. In its comments on the draft descriptive part of the Report, the Philippines considered it appropriate to reflect these doubts by suggesting that the paragraphs containing the Panel's description of Thailand's reliance on information obtained from Indonesian authorities be qualified with phrases and terms such as "is said to have", "said to be", "asserted" and "allegedly". The Panel considers this to be the more neutral formulation for purposes of the descriptive part, and has made this change. The Panel elaborates on this issue below in Section 7.1.4.2 (Relevance of the presumption of good faith to accepting the veracity of Thailand's representations).

[8] WT/DS371/22.

[9] WT/DSB/M/410.

[10] WT/DS371/23.

1.13. On 9 May 2018, the parties agreed that the panel would be composed as follows[11]:

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

1.14. Australia, China, Colombia, the European Union, India, Indonesia, Japan, the Russian Federation, Singapore, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.4 Panel proceedings

1.4.1 General

1.15. The Panel adopted its Working Procedures and a partial timetable on 24 May 2018, based on the drafts jointly proposed by the parties.[12]

1.16. The Panel held its substantive meeting with the parties on 29-30 October 2018, including a session with the third parties which took place on 30 October 2018. On 7 January 2019, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 4 March 2019. The Panel issued its Final Report to the parties on 23 April 2019.

1.17. The Panel was confronted with a number of contentious procedural issues during the proceeding. These included the issue of third-party access to the confidential Final Report, submissions and exhibits in the first recourse to Article 21.5; several issues arising from the Philippines' request for copies of communications between Indonesian and Thai government officials; and Thailand's request that the Panel decline to rule on certain legal claims that, in its view, were not adequately specified in the panel request or raised in a timely manner. The Panel ruled on the first two sets of issues during the proceeding, and those rulings are recapitulated in relevant part below. The Panel recalls the procedural aspects of Thailand's terms of reference objections below, and addresses the substance of those objections below in Section 7.1.3.3 (The Philippines' alternative claims under Article 7.1 of the CVA).

1.4.2 Third-party access to the confidential Final Report, submissions and exhibits in the first recourse to Article 21.5

1.18. The Final Report of the Panel in the Philippines' first recourse to Article 21.5 was issued to the parties on 12 March 2018. At that time, the Secretariat informed the parties that it expected that the Final Report would not be translated and circulated before the last quarter of 2018.

1.19. On 15 May 2018, the Philippines requested that the Members participating as third parties in this second recourse to Article 21.5 of the DSU be granted access to the confidential Final Report prior to its circulation. On 24 May 2018, the Panel issued a procedural ruling granting the Philippines' request. The Panel elaborated the reasons for granting the request in its procedural ruling, which it circulated to the DSB on 1 June 2018.[13]

1.20. On 29 May 2018, Thailand suggested that it would be in line with the Panel's procedural ruling if the parties were to assume the obligation to provide to third parties, upon request, copies of all the parties' submissions and exhibits from the first recourse to Article 21.5. Thailand suggested that the Panel amend its Working Procedures to that effect, and the Philippines responded that it had no

[11] As Mr Roberto Carvalho de Azevêdo and Mr Richard Gottlieb, both original panellists, were no longer available, they were replaced in the first recourse to Article 21.5 by Mr Thomas Cottier and Mr Alvaro Espinoza, respectively.

[12] The Panel's Working Procedures, as amended on 30 May 2018, are reproduced in Annex A-1.

[13] WT/DS371/24. The Panel also annexed its ruling to the Report of the Panel in the first recourse to Article 21.5. See Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Annex A-3.

objection to Thailand's proposal.[14] On 30 May 2018, the Panel amended its Working Procedures to include the language proposed by Thailand.[15]

1.4.3 The Philippines' request for copies of communications between Indonesian and Thai government officials

1.4.3.1 Thailand's objection to the Philippines' letter of 24 September 2018

1.21. As indicated above, the 2002-2003 Charges and the 1,052 revised NoAs contain figures on the "actual price" and "actual value" of PMTL's imports of cigarettes over the 2001-2003 period that the Thai authorities are said to have calculated using pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A form. In a set of pre-hearing written questions sent to the parties on 17 September 2018, the Panel sought clarification of certain issues relating to the Thai authorities' asserted reliance on the pricing and cost information reported by PM Indonesia to Indonesian tax authorities in the CK-21A form. The timetable adopted by the Panel provided that the parties would submit their written responses to those questions on 8 October 2018.

1.22. On 24 September 2018, the Philippines sent a letter to Thailand, copied to the Panel, expressing its hope that, when Thailand responded to the Panel's questions, it would "provid[e] copies of its communications with Indonesia to establish how Indonesia described the relevant CK-21A information, as well as the CK-21A forms". On 25 September 2018, Thailand objected that the Philippines' letter "submits additional comments not contemplated in the Panel's timetable", and requested the Panel "to exclude the Philippines' letter from the Panel's record and not to take the comments made in that letter into consideration during the course of this compliance proceeding".

1.23. In a communication dated 27 September 2018, the Panel informed the parties that:

> In response to Thailand's request, the Panel hereby confirms that any substantive comments that a party wishes to make on the factual or legal issues in dispute will be taken into account by the Panel only insofar as those comments are made in the context of a written or oral submission that is scheduled according to the timetable, in the context of an unscheduled submission that the Panel has previously granted leave to file, or in the context of procedural request addressed to the Panel.
>
> The Panel notes that the Philippines' letter of 24 September 2018 is addressed to Thailand, and not to the Panel. The letter is forward-looking, and concerns information that, in the Philippines' view, Thailand could usefully provide in its responses to the Panel's questions due on 8 October 2018. At this time, the Philippines has made no request, pursuant to Article 13 of the DSU, that the Panel seek from Thailand the information referenced in the Philippines' letter of 24 September 2018.
>
> Accordingly, the Panel expects that, insofar as the Philippines wishes for the Panel to take into consideration any of the comments contained in the Philippines' letter of 24 September 2018, the Philippines will proceed to make those comments in the context of its responses to the Panel's questions due on 8 October 2018 or in its oral submissions at the meeting with the Panel, and/or in the context of a future request, made pursuant to Article 13 of the DSU, that is addressed to the Panel. If the Philippines does so, then

[14] The Philippines stated that, while it had no objection to amending the Working Procedures as suggested by Thailand, such amendment was not a necessary pre-condition for the parties granting the third parties access to their submissions and exhibits from the first compliance proceeding. In this regard, the Philippines observed that either party could simply include its submissions and exhibits from the first compliance proceedings as exhibits to its submissions in this second compliance proceeding (which the Philippines itself had already done in connection with its first written submission).

[15] The Panel accepted Thailand's proposed amendment primarily for administrative reasons, to avoid the parties resubmitting all of their submissions and exhibits from the first recourse to Article 21.5 as new exhibits in this second recourse to Article 21.5. As communicated to the parties on 30 May 2018, the result of the amendment to the Working Procedures was that if either party referred to an exhibit or submission from the first compliance panel proceeding, that party was not required to resubmit a copy of that exhibit or submission to the Panel or the other party; however, if any third party requested that a party provide it with a copy of a submission or exhibit from the first compliance panel proceeding, that party would provide it directly to the requesting third party.

> Thailand's request of 25 September 2018 will be rendered moot; and if not, then the comments made in the Philippines' letter of 24 September 2018 will not be taken into account by the Panel in its resolution of the matter before it.

1.24. On 1 October 2018, Thailand sent an email to the Panel indicating its dissatisfaction with the Panel's response. Thailand stated that it had requested the Panel (1) "to exclude the Philippines' letter from the record"; and (2) "not to take the comments made in that letter into consideration during the course of this compliance proceeding". Thailand indicated that the Panel's communication of 27 September 2018 addressed only the second point, and that it was "ambiguous from the Panel's communication whether the Philippines' letter would be immediately removed from the record". Thailand requested the Panel "to address [its] request to exclude the Philippines' letter from the record".

1.25. The Panel responded with a communication dated 9 October 2018, following the receipt of the parties' written responses to the pre-hearing questions. In that communication, the Panel informed the parties that it understood its prior communication to fully and efficiently dispose of the matter raised by Thailand in its email request of 25 September 2018. The Panel further observed that Thailand's initial request had by that time "become moot, as a consequence of the Philippines reiterating the substantive comments initially made in its letter of 24 September 2018 in its comments on Panel question No. 143". However, the Panel clarified that:

> [A]s regards Thailand's request that the Panel "*exclude the Philippines' letter from the record* and not to take the comments made in that letter into consideration during the course of this compliance proceeding", the Panel refrained from specifically addressing the italicized element of Thailand's request in the interest of economy of expression. It was not clear that this sentence embodied two distinct requests, as Thailand maintains in its follow-up email request of 1 October 2018. The Panel did not consider it essential to clarify the intended meaning of Thailand's email request, and whether this sentence presents two ways of saying the same thing, because in any event the practical effect of declaring that the letter was "excluded from the record" would be the same as the Panel's confirmation that "the comments made in the Philippines' letter of 24 September 2018 will not be taken into account by the Panel in its resolution of the matter before it" except and insofar as the Philippines makes them in the context of a subsequent authorized submission or procedural request addressed to the Panel. In both scenarios, it would mean that the Panel would not take into account the substantive comments made in that letter. Thus, in the interest of disposing of the matter raised in the most economical way, the Panel did not consider it necessary or useful for its communication to engage in a discussion of this aspect of the sentence referred to above.
>
> However, in the light of Thailand's subsequent insistence that we specifically rule on this aspect of its request, and its statement that it is "ambiguous from the Panel's communication whether the Philippines' letter would be immediately removed from the record", we consider it necessary to clarify that the Panel did not and will not exclude the Philippines' letter of 24 September 2018 from the official record of this dispute settlement proceeding. It appears that Thailand is requesting the Panel to remove the electronic and paper copies of the letter from the official record of the dispute. We note that, in the light of Rule 25(2)(c) of the Working Procedures for Appellate Review, it is doubtful that a panel could instruct the Secretariat to remove the electronic and paper copies of any party correspondence from the official record of a dispute.[16] However, even assuming for the sake of argument that there may be circumstances in which a panel would have the authority to exclude a document from the record in the manner suggested by Thailand, there is no requirement in WTO dispute settlement practice that a panel rule that a document be removed from "the record" of a panel proceeding as a pre-condition for the panel excluding the contents of a document submitted to a panel

[16] (*footnote original*) Indeed, in the event that either party were to appeal the manner in which the Panel has disposed of Thailand's request, deleting the Philippines' letter of 24 September 2018 from the official record of the dispute would arguably violate the parties' due process rights insofar as it would hinder the Appellate Body's ability to meaningfully review whether the Panel committed any error of law or legal interpretation.

from its consideration of the matter before it. As one panel has recently observed, "the mere fact that exhibits submitted by parties may form part of the panel record in no way implies any judgment by the Panel on the relevance, accuracy or value of their contents to the issues before the Panel".[17]

1.26. In its opening oral statement at the substantive meeting with the parties, Thailand expressed its dissatisfaction with the Panel's response. Specifically, Thailand stated that it had "due process concerns" with the Panel's response to the Philippines' actions, which in Thailand's view "failed (i) to state that the Parties are expected to follow the Working Procedures; (ii) to recognize that the Philippines did not do so in this respect; and (iii) to take any steps to correct the Philippines' failure".[18] Thailand did not make any further request to the Panel, on this issue and the Panel did not consider that there was any further issue to resolve in this connection.

1.4.3.2 The Philippines' DSU Article 13 request of 19 October 2018

1.27. On 19 October 2018, the Philippines submitted a request for the Panel to exercise its authority under Article 13 of the DSU. The Philippines explains that its request was prompted by two factors. First, the Philippines had become aware of an official statement from the Indonesian government relating to Thailand's request for CK-21A information, in which the Indonesian government stated that it had been unable to provide, amongst others, PM Indonesia's the CK-21A information for the period 1999-2003. Second, the Philippines considered anomalous certain features of the "sample calculation" provided in Exhibit THA-74, which was submitted by Thailand with its responses to the Panel's questions on 8 October 2018. In its request of 19 October 2018, the Philippines requested that the Panel seek, in advance of the meeting with the parties scheduled for 29 October 2018, the following information from Thailand:

a. Copies of PM Indonesia's CK-8 or CK-21A information from the period 2001-2003 for *Marlboro* and *L&M* brands obtained from the Government of Indonesia, if any, and copies of communications from the Government of Indonesia, in which the CK-8 or CK-21A information was provided to Thailand;

b. Copies of the "cigarette cost structure of PT Philip Morris Indonesia obtained from the Indonesian government" referenced in Thailand's first written submission, if that information is different from the information identified above, together with copies of communications from the Government of Indonesia in which this information was provided to Thailand; and

c. Copies of the evidentiary basis for Thailand's "sample calculation" provided in Exhibit THA-74.

1.28. On 22 October 2018, the Panel invited Thailand to respond to the Philippines' request in advance of the substantive meeting if Thailand so wished, but noted that Thailand was not required to do so in view of the limited timeframe. The Panel indicated that both parties would have the opportunity to address the issues raised by the Philippines' request at the meeting, when delivering their opening statements, when asking or responding to associated questions to one another, and/or when responding to any associated oral questions from the Panel. The Panel indicated that it would rule on the Philippines' request at or following the meeting with the parties, once it was satisfied that both parties have had a full and meaningful opportunity to express their views.

1.29. At the substantive meeting, Thailand indicated that it would be willing to provide all the requested information to the Philippines and to the Panel, on the condition that the Panel adopt special procedures to protect the confidentiality of the information. At the end of the meeting, the parties indicated that they would aim to resolve the issue bilaterally through agreed procedures by 1 November 2018. The parties informed the Panel in writing, on 1 November, that they had consulted bilaterally and expressed that, regrettably, they had not been able to reach agreement. Each party proposed a different set of confidentiality procedures for the Panel's consideration, along with their respective explanations of and argumentation on their points of disagreement.

[17] (*footnote original*) Panel Report, *Russia – Railway Equipment*, para. 7.210.
[18] Thailand's opening statement at the meeting of the Panel, para. 2.2.

1.30. On 2 November 2018, the Panel informed the parties of its decision to decline the Philippines' request that the Panel exercise its authority pursuant to Article 13 of the DSU to seek the further information identified by the Philippines regarding the CK-21A forms, and that the Panel therefore considered it unnecessary to mediate the parties' disagreement on the scope of any ancillary confidentiality procedures. The Panel's communication indicated that it would elaborate on the reasons in the Report, but explained that:

> … Article 13 of the DSU is entitled "Right to Seek Information". Article 13.1 states that "[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." The text of Article 13.1 refers to information that is "necessary", and several panels have declined to exercise their authority under Article 13 to request information that, while potentially relevant, did not appear "necessary" for the Panel to make an objective assessment of the matter before it.[19]
>
> Having carefully considered the Philippines' request, and the views of both parties, the Panel does not consider that access to the information referred to by the Philippines is necessary for the Panel to make an objective assessment of the matter before it. In this regard, the Panel notes that the Philippines' claims under the CVA are premised on the understanding that the Thai authorities relied on the pricing/cost information reported by PM Indonesia in the CK-21A forms to determine the "actual price" in the [2002-2003] Charges and the "actual value" in the 1,052 revised NoAs, and that Thailand has repeatedly represented to the Panel that this understanding is correct. The Panel further notes the Philippines confirmation at the hearing, reiterated in its communication to the Panel dated 1 November 2018, that the information it identifies would serve to substantiate assertions that *Thailand* has made, but that the information is not necessary for the Philippines to make its own *prima facie* case.

1.4.4 Thailand's objection concerning the Panel's terms of reference

1.31. In its opening statement at the meeting of the Panel on 29 October 2018, the Philippines stated that the Charges and the 1,052 revised NoAs are inconsistent with Articles 1.1, 1.2(a), 6 and 7 of the CVA. Thailand reacted to the Philippines' opening statement by objecting to the reference to a claim of inconsistency under Article 7. Thailand stated that it was too late for the Philippines to raise a claim under Article 7, and that in any event the vague reference to Article 7 in the panel request does not meet the minimum requirements of Article 6.2 of the DSU. At the meeting, the Philippines expressed its disagreement on both points and added that it had already raised this claim in its earlier submissions, and indicated that if Thailand wished to raise this objection it should provide its views in writing.

1.32. On 2 November 2018, Thailand filed a communication regarding the scope of the claims advanced by the Philippines. In this communication, Thailand elaborated on its argument that no claim under Article 7 had been presented in a timely manner, and was in any event not specified in the panel request as required by Article 6.2 of the DSU. The Panel invited the Philippines to submit its response on 22 November 2018, along with its written responses to the post-hearing questions, and afforded each party the opportunity to submit a second round of comments after that. Thailand did not request that the Panel rule on this issue before the issuance of the Report.

1.33. In its comments on the draft descriptive part, Thailand requested that the Panel reflect that no claim under Article 7 appeared in the concluding paragraphs of the Philippines' first and second written submissions where it made its request for legal findings.[20] In its comments on the draft descriptive part, the Philippines requested that the Panel reflect that it has made a second alternative claim under Article 7.1, namely that "Thailand violated Article 7 by determining the customs value under Article 7 without having followed, in a sequential manner, the hierarchy of methods provided for in the *CVA*".[21] In their subsequent comments, both parties objected to one another's requests.

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[19] (*footnote original*) See e.g. Panel Reports, *EC – Seal Products*, para. 7.79. See also Panel Report, *US-– Large Civil Aircraft (2nd complaint)*, para. 7.23, and Panel Report, *Australia – Tobacco Plain Packaging (Cuba)*, para. 1.75.

[20] Thailand's comments on the draft descriptive part, paras. 2.5-2.6.

[21] Philippines' comments on the draft descriptive part, para. 15.

1.34. The Panel addresses these terms of reference issues below in Section 7.1.3.3 (The Philippines' alternative claims under Article 7.1 of the CVA).

2 FACTUAL ASPECTS

2.1 Introduction

2.1. This section identifies the entities whose actions are at issue in this dispute, including the foreign and domestic companies involved in the Thai cigarette market, and relevant Thai government agencies. It then broadly identifies the measures at issue in this dispute. A more detailed assessment of the facts, including the background and content of the challenged measures, will be provided 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.[22] PMTL is the exclusive importer of Philip Morris cigarettes in Thailand, including the *Marlboro* and *L&M* brands, which PMTL distributes to wholesalers and retailers.[23] PMTL currently imports virtually all of its cigarettes from a related supplier based in the Philippines, referred to as Philip Morris Philippines Manufacturing Inc. (PMPMI).[24] PMTL previously imported cigarettes from a related supplier based in Indonesia, i.e. PM Indonesia. The two sets of measures at issue in this proceeding concern imports that took place in the period 2001-2003 during which PMTL imported its cigarettes from PM Indonesia.[25]

2.3. 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.[26] 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.[27]

2.4. As discussed in the first recourse to Article 21.5, in the Thai cigarette market, PMTL competes with an entity formerly known as the Thailand Tobacco Monopoly (TTM), known now as the Tobacco Authority of Thailand.[28] TTM, which in and of itself is not a relevant agency for purposes of the measures and claims in this second recourse to Article 21.5, is owned and operated by Thailand's Ministry of Finance, the same agency authorized under Thai law to determine the value of goods for customs purposes. TTM enjoys a monopoly over the production of cigarettes in Thailand, and is the dominant force in the Thai cigarette market. As TTM explains in a 2017 position paper, it "has maintained its market share of 79% over all other competitors (which are foreign cigarette companies)".[29]

2.5. The DSI and the Thai Public Prosecutor are different agencies within the central government with responsibilities relating to the investigation and prosecution of criminal offences.[30] 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".[31] The DSI, which is a unit within the Ministry of Justice, assumes

[22] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.2; Philippines' first written submission, footnote 1.
[23] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.2; Philippines' first written submission, footnote 1.
[24] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.2; Philippines' first written submission, footnote 1.
[25] Philippines' first written submission, para. 10.
[26] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.4.
[27] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.4.
[28] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.3; Philippines' first written submission, para. 3.
[29] TTM Position Paper, 16 November 2017 (English translation), (Exhibit PHL-241-B), p. 3.
[30] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.5.
[31] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.5.

the investigative function[32], and the Public Prosecutor is responsible for the prosecution of criminal offences.[33]

2.3 The measures challenged in this proceeding

2.6. The measures at issue in this second compliance panel proceeding, which were issued after the establishment and composition of the Panel in the first recourse to Article 21.5, are the following:

a. the Charges filed by the Public Prosecutor against PMTL and one of its former employees on 26 January 2017, in respect of 780 entries of cigarettes imported in 2002-2003, including:

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

   ii. a procedural aspect relating to the Charges, specifically the Public Prosecutor's alleged failure to communicate to PMTL, before the issuance of the Charges, 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.

b. the 1,052 revised NoAs that PMTL received in November 2017 from Thailand's Customs Department, rejecting PMTL's declared transaction values, and determining revised customs values, for 1,052 entries of cigarettes imported over the period 2001-2003, including:

   i. various substantive aspects of the customs valuation determination reflected in the revised NoAs; and

   ii. various procedural aspects relating to the revised NoAs, including the Customs Department's alleged failure to communicate to PMTL, before the issuance of the revised NoAs, 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 Customs Department's alleged failure to provide, after issuance of the revised NoAs, a sufficient explanation to PMTL, in writing, as to how the customs value was determined.

2.7. While the 2002-2003 Charges and the 1,052 revised NoAs rest on the same asserted basis (i.e. pricing and cost information said to be reported by PM Indonesia to Indonesian tax authorities in the CK-21A form), they are distinct measures, issued by different organs and on different dates. The Charges were filed by the Public Prosecutor in January 2017, while the NoAs were issued by the Customs Department in November 2017. Of the 780 entries covered by the Charges, 779 are also subject to the revised NoAs, but the revised NoAs cover 273 additional entries not subject to the Charges.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The Philippines requests the Panel to find as follows:

a. the "actual price" in the 2002-2003 Charges and the "actual value" in the 1,052 revised NoAs reflect the Thai authorities' rejection of PMTL's transaction values and their determination of revised customs values allegedly based on the information reported by PM Indonesia to Indonesian tax authorities in excise tax form CK-21A, and this violates the following provisions of the CVA:

   i. Article 1.1 and the substantive obligation in Article 1.2(a), second sentence, because the Thai authorities' rejection of PMTL's transaction values based on the information

[32] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.5.
[33] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 2.5.

in the CK-21A forms constitutes a failure to conduct a proper examination of the circumstances surrounding the sale;

ii. Article 1.1 and the procedural obligation in Article 1.2(a), third sentence, because the Thai authorities failed to communicate to PMTL the grounds for considering that its relationship to PM Indonesia influenced its transaction values, and consequently failed to give PMTL an opportunity to respond to those grounds;

iii. Articles 2 to 6[34], because after rejecting PMTL's transaction values the Thai authorities proceeded to determine revised customs values based on Article 6, without following, in a sequential manner, the hierarchy of methods for valuation provided for in the CVA;

iv. Article 6.1 by determining revised customs values inconsistently with the requirements of that provision;

v. alternatively, insofar as the Thai authorities used the customs valuation method in Article 7 to determine the value of PMTL's goods, as opposed to determining a revised customs value on the basis of Article 6, the 2002-2003 Charges and the 1,052 revised NoAs are inconsistent with Article 7.1[35];

b. regarding the 1,052 revised NoAs specifically, the Customs Department violated the procedural obligation in Article 16 by failing to provide an adequate explanation of how the customs value was determined following a written request by PMTL.

3.2. Thailand requests the Panel to reject all the Philippines' claims, on the basis that:

a. the Philippines' alternative claim under Article 7.1 of the CVA is not properly before the Panel because this claim was not raised in a timely manner or adequately specified in the panel request;

b. the Panel should not assess the merits of the Philippines's claims regarding the 2002-2003 Charges, because:

i. there is insufficient information concerning these Charges to allow the Philippines to make a *prima facie* case by identifying the precise content of that measure;

ii. the CVA is not applicable to these Charges because the Public Prosecutor is not part of Thailand's "customs administration", and because the Charges allege "customs fraud" and do not determine "the value of goods" and are not "for the purpose of levying *ad valorem* duties of customs" in the sense of Article 15.1(a) of the CVA;

c. even if the CVA is applicable to the 2002-2003 Charges, there is no inconsistency with the CVA obligations at issue because:

i. the Public Prosecutor did not violate Article 1.2(a), second sentence, by rejecting PMTL's declared transaction values based on the information said to be reported by PM Indonesia to Indonesian tax authorities in excise tax form CK-21A;

ii. the Public Prosecutor was not subject to the procedural obligation in Article 1.2(a), third sentence, and in any event the Thai authorities did sufficiently communicate to PMTL the grounds for considering that its relationship to PM Indonesia influenced its transaction values, and gave PMTL an opportunity to respond to those grounds;

[34] The Philippines states that "[i]f Thailand applied Article 7, it further violated the sequential ordering obligations by skipping the methodology in Article 6, without explanation". (Philippines' response to Panel question No. 157, para. 265.) As noted above, in its comments on the draft descriptive part, the Philippines requested that this additional, alternative claim be reflected here. Thailand objected. The Panel addresses this issue in paragraph 7.53.

[35] The Panel recalls that, as indicated above, the Philippines' additional alternative claim under Article 7.1 is the subject of an objection by Thailand.

iii. the circumstances of the present case are such that none of the alternative methods in Articles 2, 3 or 5 could be used to determine revised customs values for PMTL's imports;

iv. the Public Prosecutor applied the computed value method to determine revised customs values with "a reasonable flexibility" as permitted under Article 7 of the CVA;

d. even if the Panel were to find that the Charges fall within the scope of, and are inconsistent with, the provisions of the CVA, they are justified under the general exceptions of Articles XX(d) and XX(a) of the GATT 1994;

e. the 1,052 revised NoAs were withdrawn before the Panel was established, and therefore the Panel should decline to rule on them;

f. if the Panel elects to rule on some or all of the 1,052 revised NoAs, then:

i. Thailand's arguments in respect of the CVA-consistency of the Charges apply *mutatis mutandis* to the Philippines' corresponding claims regarding the NoAs; and

ii. the Philippines has failed to demonstrate that Thailand has acted inconsistently with Article 16 because, following the request by PMTL, the Thai Customs Department sufficiently explained the grounds for issuing the NoAs.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 31 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union, Indonesia, Japan, and the United States are reflected in their executive summaries, provided in accordance with paragraph 32 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, and C-4).[36] Australia, China, Colombia, India, the Russian Federation, and Singapore did not make a written submission or oral statement to the Panel.

6 INTERIM REVIEW

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

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-2.

[36] Paragraph 32 of the Working Procedures provides that "If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments." Indonesia submitted a third-party submission of less than six pages, and this also serves as the executive summary of its arguments.

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).[37]

7.2. In Section 1 above, the Panel recalled the findings of the Panel in the first recourse to Article 21.5 of the DSU, recapitulated the procedural requests and rulings that arose during the present proceeding, and set out the two sets of measures challenged by the Philippines in this proceeding. In Section 2 above, the Panel identified the relevant governmental and corporate entities implicated by the measures, and in Section 3 the Panel set forth the parties' requests for findings in relation to those measures.

7.3. Before turning to its analysis of the measures at issue in this second recourse to Article 21.5, the Panel will begin by recalling the observations made in the Report in the first recourse to Article 21.5 regarding the general principles of interpretation and standard of review applicable to the CVA, and supplement that discussion to explain how it takes that Report into account in its analysis of the issues in this second recourse to Article 21.5. These are foundational issues, as they inform the Panel's approach to many of the other issues raised in this proceeding, including for example its approach to the question of whether there is a sufficiently close nexus between the measures at issue in this dispute and the DSB's recommendations and rulings.

7.4. After setting out this general framework for its analysis, the Panel will then proceed to address four issues relating to jurisdiction and admissibility, namely: (1) whether the 2002-2003 Charges and 1,052 revised NoAs have a sufficiently close nexus to the DSB's recommendations and rulings to fall within the scope of this Article 21.5 compliance proceeding; (2) the relevance of Thailand's assertions of "illegal acts" allegedly committed by PM Indonesia to the admissibility of the Philippines' claims; (3) whether the Philippines' alternative claims of inconsistency under Article 7.1 of the CVA were adequately identified in the Panel request, and raised in a timely manner during the proceeding; and (4) the Philippines' standing to challenge measures that exclusively concern PMTL's imports from another WTO Member, i.e. Indonesia. Each of these issues relates in one way or another to jurisdiction or admissibility, and as such are threshold issues that are appropriately addressed before turning to the merits of the case.

7.5. The Panel will then address the relevance of the presumption of good faith on the part of Thailand and its authorities in relation to two issues: (1) the Philippines' doubts as to the veracity of Thailand's representations that its authorities calculated the actual price/value of PMTL's imports based on the pricing and cost information reported by PM Indonesia in the CK-21A form; and (2) the interpretation of CVA obligations. The first issue is fundamental, given that the basic predicate of most of the Philippines' claims, many of Thailand's substantive defences, and much of the Panel's own analysis is that Thai authorities had access to and relied on the pricing and cost information reported by the producer and seller of the cigarettes at issue, PM Indonesia, to Indonesian tax authorities in the CK-21A form. The second issue is also horizontal in nature, and relates back to the general principles of interpretation and standard of review applicable to the CVA. Thus, these issues are also properly addressed up front.

7.1.2 General framework for the Panel's analysis

7.1.2.1 General principles of interpretation and standard of review

7.6. In its Report in the first recourse to Article 21.5, the Panel stated that it remained "ever mindful of the function and institutional role of a compliance panel under Article 21.5 of the DSU", and

[37] 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.

therefore considered 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".[38] The Panel stated that it agreed with the parties and third parties that it was not, strictly speaking, "bound" to follow the legal interpretations of the original panel; however, the Panel stated that it also shared 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".[39] The Panel recalled the Appellate Body's statement 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".[40]

7.7. The Panel then noted that it was presented with a number of interpretative issues that the original panel was not required to resolve.[41] It recalled that 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", and confirmed that 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). The Panel noted that Article 31(1) of the Vienna Convention 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".[42]

7.8. The Panel then observed that 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, it would 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".[43] The Panel observed that 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".[44] The Panel also noted that the Philippines accepted that the CVA "does not prescribe a specific process for customs authorities to follow" when conducting an examination of the circumstances of sale and that, as a consequence, the customs authority "has a degree of discretion in deciding how to conduct its examination".[45]

7.9. The Panel noted 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. It recalled 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".[46]

7.10. The Panel also referred to 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)[47], and recalled that the original panel found guidance in the Decision to confirm

[38] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.80.
[39] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.80.
[40] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.
[41] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.81.
[42] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.81.
[43] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.82.
[44] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.82.
[45] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.82.
[46] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.83 (referring to Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 650).
[47] 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, and Minutes of the Committee Meeting of 12 May 1995, G/VAL/M/1, 11 August 1995. The Decision was adopted pursuant to

its understanding of certain CVA obligations.[48] Furthermore, the Panel observed that the parties were of the view that the Decision is, or could potentially qualify as, a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the Vienna Convention.[49]

7.11. With respect to the standard of review, the Panel noted the absence of any disagreement 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 the first recourse to Article 21.5).[50] The Panel recalled that, 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".

7.12. The Panel recalled the original panel's explanation that the standard of review under the CVA requires a panel to "*critically* examine a domestic authority's explanation 'in depth, and in the light of the facts before the panel'"[51], and its reliance on the Appellate Body's statement that an "objective assessment under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review."[52] The Panel also recalled the original panel's statement that it would therefore make an objective assessment of the matter "in light of the relevant obligations" invoked.[53] The Panel recalls that it conducted a more detailed analysis of certain aspects of its standard of review when assessing the BoA's examination of the circumstances of sale under Articles 1.1 and 1.2(a) of the CVA.[54]

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

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

7.14. Despite the similarity of some of the issues raised in the Philippines' first and second recourse to Article 21.5, there are also some obvious and important differences between the relevant measures, the Philippines' claims, and Thailand's defences. First, the two sets of Charges rest on

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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).

[48] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.84 (referring to Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.172, footnotes 564 and 582).

[49] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.84.

[50] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.85.

[51] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.86 (referring to Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.104, in turn quoting Appellate Body Report, *US - Lamb*, para. 106).

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

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

[54] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.108-7.121. See also paragraphs 7.146-7.147.

different factual bases: whereas the 2003-2006 Charges at issue in the first recourse to Article 21.5 compared PMTL's declared transaction values with the prices of King Power, a Thai duty-free operator[55], the 2002-2003 Charges at issue in this proceeding allegedly compare PMTL's declared transaction values with a value constructed on the basis of certain pricing and cost information that PM Indonesia reported to the Indonesian excise tax authorities in an administrative form known as form CK-21A.[56] Second, and partly as a consequence of the fact that these two different comparisons reflect two different methods of customs valuation which implicate different valuation rules in Articles 2 to 7, the Philippines pursues different substantive and procedural legal claims. Third, Thailand's central argument in response to the merits of the Philippines' claims – which is that its authorities were entitled to assume that the pricing and cost information provided to it by the authorities of the exporting Member (in this case, Indonesia) was accurate and reliable – also raises a novel defence.

7.15. Given these differences, the Panel considers that it is self-evident that its findings in the first recourse to Article 21.5 concerning the 2003-2006 Charges cannot simply be transposed to the 2002-2003 Charges at issue in this proceeding, insofar as some of the relevant facts and/or legal claims are different.[57] Thailand has stressed this point, stating that "while the issues in the two Article 21.5 proceedings may be similar, they are by no means identical, especially with respect to the facts" and that it "would be incorrect, therefore, to conclude that the Philippines has made a *prima facie* case only because the issues addressed in these Article 21.5 proceedings are similar to those in the first Article 21.5 proceedings".[58] The Philippines does not appear to have suggested otherwise; to the contrary, a significant portion of the Philippines' first written submission is devoted to a discussion of the factual circumstances specific to the 2002-2003 Charges, and as noted above it claims that the Public Prosecutor's determinations of revised customs values in the two sets of Charges raise two different sets of issues that are governed by two different sets of valuation rules in Articles 2 to 7 of the CVA.

7.16. Having said this, and bearing in mind that the Panel is not strictly bound by any legal findings and reasoning contained in its Report in the first recourse to Article 21.5, there is nothing in the DSU that would require this Panel to treat all the legal and interpretative issues raised in this second recourse to Article 21.5 as matters of first impression. Article 11 of the DSU mandates the Panel to make an "objective assessment of the matter". The notion of objectivity embraces considerations of consistency and coherence.[59] The Panel's findings and legal interpretations in the first recourse to Article 21.5 already carefully took into account and addressed all of the legal arguments presented to it by the parties and third parties in the context of the first recourse to Article 21.5. It would arguably be capricious, not objective, for the Panel to be swayed to change its earlier legal findings and reasoning on the basis of the same arguments that it found unpersuasive in the first recourse to Article 21.5, considering that this second recourse to Article 21.5 is part of the same dispute as the first recourse to Article 21.5, is between the same disputing parties, and is being adjudicated by a compliance panel composed of the same individuals. Accordingly, in the light of Article 11 of the DSU the Panel considers that it has a duty to re-examine any earlier findings and reasoning only in the light of any new arguments presented by the parties or third parties in this second recourse to Article 21.5.

7.17. In response to a question from the Panel, the Philippines agrees that insofar as issues of law or legal interpretation arise in this second recourse to Article 21.5 that are the same issues of law or legal interpretation that were already ruled on by the Panel in the first recourse to Article 21.5, and except and insofar as a party develops novel legal arguments that were not addressed in the findings and reasoning of the Panel Report in the first recourse to Article 21.5 or identifies one or more distinguishing factual circumstances relating to the measures at issue, the Panel could incorporate by reference (and would not be required to restate) the relevant findings and reasoning

[55] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.653-7.656.

[56] In addition to these differences, the two sets of Charges relate to imports over two different time periods (i.e. 2003-2006 and 2002-2003), and they also involved two different sellers (i.e. the Philip Morris subsidiary located in the Philippines over the 2003-2006 period, and PM Indonesia over the 2002-2003 period).

[57] As the European Union puts it, "such incorporation will only suffice if the legal issues at stake are comparable and the factual basis for the conclusions is sufficiently similar". (European Union's response to Panel question No. 10 to third parties, para. 4.)

[58] Thailand's first written submission, para. 3.3.

[59] See e.g. Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 294-295; *EC and certain member States – Large Civil Aircraft*, para. 894; and *Russia – Commercial Vehicles*, paras. 5.81-5.82.

from the Panel Report in the first recourse to Article 21.5.[60] In response to the same question, Thailand ostensibly disagrees, arguing that the Panel "cannot comply with its duty under Article 11 by merely incorporating by reference the findings and reasoning of the first compliance panel".[61] However, Thailand argues that this is so because the parties "have put forth different arguments and evidence" in the two proceedings, and it emphasizes that the two cases involve "different claims", "different measures", and "different facts".[62] The Panel agrees and reiterates that it is axiomatic that, insofar as the first and second compliance panel proceedings involve different arguments and evidence (and different claims, measures and facts), then the Panel's legal findings and reasoning from the former cannot simply be transposed to the latter.

7.18. 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". Insofar as the Panel considered there to be any inconsistency between its legal findings and reasoning in the first recourse to Article 21.5 and the terms of the CVA interpreted in accordance with customary rules of interpretation, the Panel would have no choice but to reject its earlier legal findings and reasoning. However, the legal findings and reasoning of the Panel in the first recourse to Article 21.5 already reflect the Panel's analysis of how the relevant CVA provisions are to be interpreted in accordance with the customary rules of interpretation reflected in Articles 31, 32 and 33 of the Vienna Convention. There has been no amendment to the terms of the CVA since the Panel finalized its Report. As a consequence, in the absence of any novel legal arguments being put forward by the parties or third parties based on those customary rules of interpretation, the Panel remains of the view that the legal interpretations it developed are presumptively correct under those customary rules of interpretation. Accordingly, Article 3.2 of the DSU does not require the Panel to treat all issues of law and legal interpretation that arise in this proceeding as matters of first impression.

7.19. The Panel understands that some Members hold to the view that WTO panels should follow prior interpretations by default unless there is a reason not to (i.e. the cogent reasons standard), whereas other Members hold to the view that WTO panels should reach their own interpretations more independently, and follow prior interpretations only insofar as they are found to align and be assessed as persuasive (i.e. the persuasiveness standard). These different points of view have been reflected in the submissions made by the third parties in this proceeding. The fact that this Panel would be predisposed to consider the findings it made in the first recourse to Article 21.5 as still being persuasive, in the absence of novel arguments or circumstances demonstrating otherwise, implies no view on the precedential value of other panel and Appellate Body reports more generally. It only reflects the Panel's assessment of how Articles 11 and 3.2 of the DSU apply in the circumstances of successive proceedings, raising the same or similar legal issues, argued before two panels comprised of the same three individuals, in the compliance phase of the same overall WTO dispute between the same parties.

7.20. Article 12.7 of the DSU provides that the report of a panel "shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes". If a panel considers that the legal reasoning set forth in an earlier panel or Appellate Body report is persuasive and correct, it is under no obligation to restate or extensively quote from that analysis in order to comply with its duty under Article 12.7; it may instead employ the technique of incorporation by reference.[63]

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[60] Philippines' response to Panel question No. 126, para. 1.

[61] Thailand's response to Panel question No. 126, para. 1.7.

[62] Thailand's response to Panel question No. 126, paras. 1.2-1.4.

[63] In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body explained that "a panel's 'basic rationale' might be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports – provided that such reasoning is quoted or, at a minimum, incorporated by reference". (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109.) In *EU – Footwear (China)*, the panel was presented with claims and arguments on one of the measures that were largely the same as those presented by the same parties on the same issue in *EC – Fasteners (China)*, and explained that:

> In these circumstances, we see nothing to be gained, and a potential for confusion, were we to state our conclusions and analysis, which were the same as those of the panel in *EC – Fasteners (China)*, in different terms in this report. We have therefore taken the route of adopting that panel's analysis and conclusions as our own, with additional reasoning of our own when necessary to address arguments not made before that panel. When the same parties present the

7.21. The Panel sees a potential for confusion if in this second recourse to Article 21.5 it were to present its analysis and conclusions in terms different from those of the Panel Report in the first recourse to Article 21.5, insofar as it is confronted with the same or similar issues raised in the first recourse to Article 21.5. The Panel recalls and fully agrees with the observation made by the Philippines, when describing the standard of review under the CVA in the context of the first recourse to Article 21.5, that "the use of the same terminology to describe the same legal requirements is essential to promoting the objectives of security and predictability", and that "when different panels use different terminology to describe the same requirements, in particular within a single dispute, the divergence of terminology undermines those objectives, and creates confusion".[64] The Panel therefore considers that insofar as it is confronted with a legal issue that was already considered in the Panel Report in the first recourse to Article 21.5, and insofar as it sees no compelling reason to deviate from a prior interpretation, the Panel may employ the technique of incorporation by reference to avoid repetition and improve the readability of this Report.

7.22. As noted above, Thailand ostensibly disagrees and states that the Panel "cannot comply with its duty under Article 11 by merely incorporating by reference the findings and reasoning of the first compliance panel".[65] However, it would appear that Thailand's concerns do not relate *per se* to the formal technique of incorporation by reference, but rather to the prospect of the Panel ignoring material differences between the measures, claims and defences in the first and second compliance proceedings and blindly transposing its findings from the former to the latter. In that vein, Thailand observes that the compliance panel in *Mexico – Corn Syrup (Article 21.5 – US)* "did not merely incorporate the reasoning and findings of the original panel", but instead "cited to parts of the panel report discussing the legal relationship between the provisions at issue" and "nevertheless still examined the anti-dumping redetermination in light of the parties' arguments with respect to that specific measure".[66] Similarly, Thailand points out that in *EC – Footwear (China)* the complaining party brought identical claims, in respect of the same measure, that had already been ruled on in *EC – Fasteners (China)*.[67]

7.23. For greater clarity, the Panel is not suggesting that these or any other past case would support this Panel short-circuiting the analysis required, by blindly transposing its findings on the 2003-2006 Charges to the 2002-2003 Charges without conducting a proper assessment of the measures at issue in this proceeding. Instead, the Panel refers to these cases above as support for the more limited proposition that, if a panel concludes that the analysis of an earlier panel is persuasive and correct, and if the panel decides to adopt the same reasoning, then it is under no obligation to restate or extensively quote from that analysis. It may comply with its duty under Article 12.7 of the DSU by employing the technique of incorporation by reference to avoid repetition, and thereby improve the readability of the Report. Indeed, the Panel observes that Thailand has employed essentially the same technique when incorporating by reference certain sections of its submissions from the first recourse to Article 21.5.[68]

7.24. In sum, the Panel takes the legal findings and reasoning by the panel and the Appellate Body in the original proceeding, and in the Report of the Panel in the first recourse to Article 21.5, as the point of departure for its analysis of the legal issues in this case. Insofar as there are one or more factual circumstances relating to the measures at issue in this second recourse to Article 21.5 that materially distinguish them from the measures at issue in the first recourse to Article 21.5, and insofar as the legal claims are different, then the Panel cannot simply transpose its findings and reasoning from the Report in the first recourse to Article 21.5. However, insofar as issues of law or legal interpretation arise in this second recourse to Article 21.5 that are the same issues of law or

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same claims and arguments concerning the same measure in two successive disputes, as here, if it finds the analysis and conclusions of the first panel persuasive and correct, we see no reason for the second panel to restate that analysis and conclusions. (Panel Report, *EU – Footwear (China),* para. 6.5.)

Similarly, the panels in *China – Rare Earths* stated, in the context of addressing a legal issue that had already been addressed by the panel and the Appellate Body in *China – Raw Materials*, that they saw "nothing that would be gained if we were to reproduce all of the reasoning of the panel and Appellate Body in *China – Raw Materials* in the context of responding to the specific arguments presented by China in this dispute". (Panel Reports, *China – Rare Earths*, para. 7.60.)

[64] Philippines' response to Panel question No. 4, para. 60.

[65] Thailand's response to Panel question No. 126, para. 1.7.

[66] Thailand's response to Panel question No. 126, para. 1.5.

[67] Thailand's response to Panel question No. 126, para. 1.4.

[68] See e.g. Thailand's first written submission, para. 3.8.

legal interpretation that were already ruled on by the Panel in the first recourse to Article 21.5, this Panel may focus its re-examination on any novel legal arguments presented by the parties or third parties in the context of this second recourse to Article 21.5. If the Panel concludes that the legal findings and reasoning of the panel in the first recourse to Article 21.5 remain persuasive and correct, and decides to adopt the same reasoning, the Panel considers that it is under no obligation to restate or extensively quote from that analysis; it may instead employ the technique of incorporation by reference.

7.1.3 Issues relating to jurisdiction and admissibility

7.1.3.1 The nexus between the Charges/NoAs and DSB recommendations and rulings

7.1.3.1.1 Introduction

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

7.26. The Panel recalls that 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.[69] The Panel further recalls that this assessment is typically based on an assessment of "the *timing*, *nature,* and *effects* of the various measures".[70] The Panel elaborated further on the applicable legal standard for the "close nexus" analysis in its Report in the first compliance proceeding, and it is not necessary to repeat that discussion here.[71]

7.27. The Philippines has challenged two sets of measures in this second recourse to Article 21.5, namely (1) the 2002-2003 Charges, and (2) the 1,052 revised NoAs. Both the Charges and the revised NoAs rest on the same basis, namely the DSI's calculation of the "actual" value of PMTL's imports of cigarettes said to be based on pricing and cost information reported by PM Indonesia to Indonesian tax authorities in excise tax form CK-21A.

7.28. It is uncontested that both challenged measures are specifically identified in the Philippines' request for the establishment of a panel, in accordance with the requirements of Article 6.2 of the DSU. The Philippines argues that both of these measures share a "close nexus" with the DSB's recommendations and rulings in the original proceedings, and with certain of Thailand's declared measures taken to comply.[72] While Thailand submits that the Panel "must make an independent determination of whether the 2002-2003 Charges share a close nexus with the DSB recommendations and rulings and Thailand's declared measure taken to comply, rather than simply applying the first compliance panel's finding *mutatis mutandis*"[73], it does not dispute that both of the measures at issue in this second recourse to Article 21.5 fall within the scope of this Article 21.5 compliance proceeding as "measures taken to comply".

7.29. The Panel agrees that it must make an independent determination of whether the 2002-2003 Charges share a sufficiently close nexus with the DSB recommendations and rulings and Thailand's declared measure taken to comply. 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.[74] The Panel will begin by recalling the reasoning that led it to find that the 2003-

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[69] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.504.

[70] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.508 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77 (emphasis added)).

[71] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.1.2.1 (The scope of Article 21.5 compliance proceedings) and Section 7.3.3 (Close nexus).

[72] Philippines' first written submission, paras. 126-151, and 369-379.

[73] Thailand's response to Panel question No. 127, para. 1.8.

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

2006 Charges shared a sufficiently close nexus with certain of Thailand's measures taken to comply, and will then examine the relevant connections that exist between the 1,052 revised NoAs and the 2002-2003 Charges, on the one hand, and the DSB recommendations and rulings and Thailand's declared measures taken to comply, on the other hand.

7.1.3.1.2 Findings in the first recourse to Article 21.5

7.30. In the first recourse to Article 21.5, the Panel found that the 2003-2006 Charges (covering 272 entries running from July 2003 to June 2006) shared a sufficiently close nexus with the matters covered by the BoA's Ruling of 12 September 2012 (covering 118 entries running from June 2006 through to September 2007).[75] This September 2012 BoA Ruling was one of Thailand's declared measures taken to comply, and it revised an earlier valuation of the entries at issue conducted by the Thai Customs which had been found to be inconsistent with relevant CVA obligations in the original proceeding.

7.31. The Panel found, for reasons elaborated in detail in the Report[76], that the 2003-2006 Charges and the September 2012 BoA Ruling (and/or the original customs valuation determination that it reversed) shared the following set of connections:

a. both involved the same importer (PMTL);

b. both involved the same exporter (PM Philippines Manufacturing Inc.);

c. both involved the same importing country (Thailand);

d. both involved the same exporting country (the Philippines);

e. both involved the same product, brands and producer (*Marlboro* and *L&M* cigarettes produced by PM Philippines Manufacturing Inc.);

f. both involved the same transaction values, imported under the same supply contract;

g. leaving aside whether the 2003-2006 Charges constitute a "customs valuation determinations" for purposes of the CVA, both measures were related to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes;

h. while the measures were taken by different Thai governmental agencies (i.e. the Public Prosecutor and the BoA), both agencies had potentially overlapping functions in the area of customs valuation;

i. both measures related to a comparison between PMTL's declared transaction values and King Power's prices; and

j. while the two measures covered two different groups of entries over different time periods, these groups of entries immediately preceded/followed each other, such that, taken together, they comprised a continuous sequence of all entries over the period July 2003 to September 2007.

7.32. In addition to these connections relating to the nature of the measures, the Panel considered the timing and effects of the Charges. With regard to timing, the Panel observed that the 2003-2006 Charges were issued on 18 January 2016, which post-dated both the expiry of Thailand's reasonable period of time to implement the DSB's recommendations and rulings (15 May 2012), as well as the

[75] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.3.3 (Close nexus).

[76] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.3.3.3.2.3 (Close nexus > Nature).

adoption by Thailand of the relevant declared measure taken to comply (12 September 2012).[77] Regarding the effect of the Charges, the Panel concluded that the 2003-2006 Charges had the potential to circumvent Thailand's compliance with the CVA achieved through the September 2012 BoA Ruling, notwithstanding that the Charges had no legal effect on the September 2012 BoA Ruling or the entries subject to that ruling.[78]

7.1.3.1.3 The 2002-2003 Charges and the 1,052 revised NoAs

7.33. The 2002-2003 Charges and the 1,052 revised NoAs at issue in this second recourse to Article 21.5 (hereinafter, for brevity, "the Charges/NoAs at issue") concern cigarettes that PMTL imported from PM Indonesia. Therefore, instead of asking the Panel to find that these measures share a close nexus with the September 2012 BoA Ruling, which concerned PMTL's imports from PM Philippines Manufacturing Inc. (PMPMI), the Philippines seeks to demonstrate their "close nexus" to a BoA Ruling that concerned entries that took place over the period when PMTL imported its cigarettes from PM Indonesia. This Ruling also covered 206 of the same entries that are covered by the Charges/NoAs at issue. Specifically, the Philippines refers to the November 2012 BoA Ruling that was the subject of the Panel's findings in the first recourse to Article 21.5. The Panel recalls that the Philippines is free to demonstrate the existence of a "close nexus" between the Charges and either the September 2012 BoA Ruling, or the November 2012 BoA Ruling.[79]

7.34. For purposes of reviewing the connections between the measures at issue in this proceeding and the November 2012 BoA Ruling, the Panel recalls that the 2002-2003 Charges are a set of criminal charges filed by the Public Prosecutor against PMTL and one of its former employees on 26 January 2017, alleging that PMTL declared a "false price" contrary to the "actual price" in respect of 780 shipments of cigarettes imported in 2002-2003 from PM Indonesia. The Panel recalls that the 1,052 revised NoAs that PMTL subsequently received in November 2017 from Thailand's Customs Department rejected PMTL's declared transaction values for 1,052 shipments of cigarettes imported over the period 2001-2003, including 779 of the 780 shipments covered by the 2002-2003 Charges. The 1,052 revised NoAs determined revised customs values using the same "actual prices" found by the DSI, which also served as the basis for the 2002-2003 Charges.

7.35. The Panel is satisfied that the Charges/NoAs at issue share the same set of connections with the November 2012 BoA Ruling as the 2003-2006 Charges did with the September 2012 BoA Ruling, insofar as:

a. both involve the same importer (PMTL)

b. both involve the same exporter (PM Indonesia);

c. both involve the same importing country (Thailand);

d. both involve the same exporting country (Indonesia);

e. both involve the same product, brands and producer (*L&M / Marlboro* cigarettes and PM Indonesia);

f. both involve entries with the same transaction values, imported under the same supply contract;

g. leaving aside whether the 2002-2003 Charges constitute "customs valuation determinations" for purposes of the CVA, both measures relate to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes; and

[77] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.3.3.3.2.2 (Close nexus > Timing).
[78] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.3.3.3.2.4 (Close nexus > Effects).
[79] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.505.

h. while the 2002-2003 Charges and the November 2012 BoA Ruling were taken by different Thai governmental agencies (i.e. the Public Prosecutor and the BoA), both agencies have potentially overlapping functions in the area of customs valuation.

7.36. There are three differences between the set of connections that exist between the Charges/NoAs at issue and the November 2012 BoA Ruling, as compared with the set of connections that existed between the 2003-2006 Charges with the September 2012 BoA Ruling. However, none of these differences attenuates the nexus that exists between the Charges/NoAs at issue and the November 2012 BoA Ruling. In fact, as elaborated below, the first and second differences establish additional connections between these measures.

7.37. The first difference is that the Thai Customs Department issued the 1,052 revised NoAs based on the DSI's calculation of the "actual" values, and which also served as the basis for the 2002-2003 Charges filed by the Public Prosecutor. The Panel in the first recourse to Article 21.5 stated that the nexus that it found to exist between the 2003-2006 Charges and the BoA Ruling in question was "more attenuated than it would otherwise be if both measures were taken by the same Thai government agencies"; however, the Panel considered 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".[80] The fact that the Thai Customs Department issued the 1,052 revised NoAs on the basis of the exact same information and calculations underlying the 2002-2003 Charges confirms that the Customs Department, the DSI and Public Prosecutor have potentially overlapping functions in the area of customs valuation. Indeed, it further suggests that there is a degree of coordination with respect to their respective actions.

7.38. The second difference between the set of connections that exist between the Charges/NoAs at issue and the November 2012 BoA Ruling, as compared with the set of connections between the 2003-2006 Charges and the September 2012 BoA Ruling at issue in the first recourse to Article 21.5, concerns the relationship that exists between the entries covered by the Charges/NoAs at issue and the November 2012 BoA Ruling. Specifically, the 780 entries covered by the 2002-2003 Charges include 206 of the 210 entries subject to the November 2012 BoA Ruling, and 208 of those 210 entries are also covered by the 1,052 revised NoAs. These 206 entries have thus been addressed in all three WTO proceedings in this dispute, in the context of the following sets of measures: (1) the BoA's protracted delay in addressing the value of these entries (original proceedings); (2) the November 2012 BoA Ruling (first compliance proceedings); and (3) the Charges/NoAs at issue in this second recourse to Article 21.5. The foregoing establishes that the Charges/NoAs at issue and the November 2012 BoA Ruling share a further connection, in terms of overlapping entries, that did not exist with respect to the 2003-2006 Charges and the September 2012 BoA Ruling.

7.39. The third difference between the set of connections that exist between the Charges/NoAs at issue and the November 2012 BoA Ruling, as compared with the set of connections that existed between the 2003-2006 Charges with the September 2012 BoA Ruling, is the apparent lack of any connection between the *grounds* relied on in the 2002-2003 Charges and the November 2012 BoA Ruling. The Panel in the first recourse to Article 21.5 noted 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".[81] The Charges/NoAs at issue are based on a comparison between PMTL's declared transaction values and a higher, "actual" price calculated by the Thai authorities based on pricing and cost information reported by PM Indonesia, to the Indonesian excise tax authorities, in form CK-21A. There is no indication that either the November 2012 BoA Ruling, nor any of the original measures subject to the DSB recommendations and rulings, nor any other declared measure taken to comply, involved any kind of reference to pricing and cost information reported by PM Indonesia to the Indonesian excise tax authorities in the CK-21A form. That does not sever the nexus between the Charges/NoAs at issue and the November 2012 BoA Ruling: as the Panel in the first recourse to Article 21.5 stated,

[80] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.553.
[81] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.553.

"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'".[82]

7.40. In terms of *timing*, the 2002-2003 Charges at issue in this second recourse to Article 21.5 were issued in January 2017, and the 1,052 revised NoAs were issued to PMTL in November 2017. Therefore, as with the 2003-2006 Charges at issue in the first recourse to Article 21.5, the issuance of the Charges/NoAs at issue post-dates both the expiry of the reasonable period of time for implementation of the DSB's recommendations and rulings (which ended in May 2012), and Thailand's adoption of two declared measures taken to comply (September and November 2012 BoA Rulings). In the first recourse to Article 21.5, the Panel identified a further nexus in timing, focusing on the timing of certain events culminating in the Charges and the original DSB recommendations and rulings (including the fact that when the DSI recommended for a second time that 2003-2006 Charges be filed, in August 2011, this took place only one month after the DSB's recommendations and rulings were adopted).[83] In this second recourse to Article 21.5, Thailand states, without further elaboration, that "certain important facts surrounding the 02-03 Charges and the 03-06 Charges are different," and that "[f]or example, the sequence of events leading to the 02-03 Charges is relevant to the timing of the measures at issue".[84] Insofar as Thailand is suggesting that there is some important aspect of the timing of the events that led to the 2002-2003 Charges (and/or 1,052 revised NoAs) that serves to distinguish them for purposes of the "close nexus" analysis, the Panel fails to see what the relevant factual difference is.

7.41. Regarding consideration of *effects*, the Panel concluded that the 2003-2006 Charges had the potential to circumvent Thailand's compliance with the CVA achieved through the September 2012 BoA Ruling, notwithstanding that the Charges had no legal effect on the September 2012 BoA Ruling or the entries subject to that ruling. The same considerations apply *a fortiori* to the Charges/NoAs at issue, considering that they both actually revise the customs values for entries that were subject to the November 2012 BoA Ruling, and this Ruling was one of Thailand's declared measures taken to comply.

7.1.3.1.4 Conclusion

7.42. Based on the foregoing, the Panel is satisfied that the 1,052 revised NoAs and the 2002-2003 Charges share the same set of connections with the November 2012 BoA Ruling as the 2003-2006 Charges did with the DSB's rulings and recommendations and Thailand's declared measures taken to comply, such that the Panel's finding of the existence of a sufficiently "close nexus" in the first recourse to Article 21.5 applies *mutatis mutandis* to the 2002-2003 Charges at issue in this second recourse to Article 21.5. The Panel therefore concludes that each of the measures at issue in this second recourse to Article 21.5 is properly characterized as an undeclared "measure taken to comply", and thus falls within the jurisdiction of the Panel. As noted at the outset, Thailand has not argued otherwise.

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

7.43. In the context of advancing its interpretation of Article 1.2(a) of the CVA, Thailand asserted in its first written submission that the Philippines "cannot base its claims of violation against Thailand on the basis of an admitted illegal act of [PM Indonesia] in a foreign jurisdiction".[85] According to Thailand, the "admitted illegal act" in question was PM Indonesia's decision to knowingly report costs and profits in the CK-21A form that, according to the Philippines, were "fabricated arithmetical 'plugs'"[86] that were "arbitrary" and "fictitious", and which "did not – and could not – represent the actual costs and profits of the producer and the other parties in the supply chain".[87]

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[82] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.536. If it were otherwise, it would lead to the absurd result that if a Member determined the customs value of certain goods on the basis of a comparison that was subsequently found to be inconsistent with the obligations in Articles 1 to 7 of the CVA, a Member's subsequent determination of the customs value of those same goods would not fall within the scope of Article 21.5 review unless it replicated precisely the same error.

[83] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.516.

[84] Thailand's response to Panel question No. 127, para. 1.9.

[85] Thailand's first written submission, para. 3.48.

[86] Philippines' first written submission, para. 414.

[87] Philippines' first written submission, para. 237.

7.44. Thailand formulated this aspect of its argument in terms that could be understood as relating to the admissibility of the Philippines' claims.[88] Furthermore, Thailand sought to find support for this aspect of its argument on the basis of international jurisprudence that seems to concern the inadmissibility of certain types of claims and defences. Specifically, Thailand referred to the Permanent Court of International Justice's statement in the *Factory at Chorzów* case that "one party cannot avail himself of the fact that the other has not fulfilled some obligation … if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question".[89] Thailand referred to other public international law authorities, including arbitral decisions, for the related propositions and maxims that "an unlawful act cannot serve as the basis of an action in law"; that "[a] State may not invoke its own illegal act to diminish its own liability"; and "the most exceptionable of all principles" is that "he who does wrong shall be at liberty to plead his own illegal conduct on other occasions as a partial excuse".[90]

7.45. The Philippines responded that this aspect of Thailand's argumentation "does not posit a general interpretation of Article 1.2(a) that applies in all cases", but instead "posits a supposed *legal bar* to a WTO claim with the applicability of that legal bar premised on the facts of a particular case, i.e., an 'illegal act' by the importer".[91] The Philippines indicated that it doubted whether Thailand's proposed legal bar has any basis in WTO law, as it appears to attribute to a WTO Member the legal consequences of an "illegal act" allegedly committed by an importer.[92] In any event, the Philippines considered that the Panel need not decide whether Thailand's proposed legal bar has any basis in WTO law, because Thailand has failed to show that the importer and/or the producer committed any "illegal act".[93]

7.46. In its second written submission, Thailand did not specifically address the Philippines' observation that this line of argument appears to posit a legal bar to the admissibility of the claims, rather than any general interpretation of the CVA. To the contrary, Thailand reiterated the same argument[94], and formulated it in terms that implied that the commission of an "illegal act" by PM Indonesia was a ground for rejecting the Philippines' claims that was distinct from Thailand's argument relating to the interpretation of the CVA underlying the Philippines' claims. Specifically, Thailand submitted that the Philippines' claim should be rejected "*not only* because it is based on flawed *interpretations* of the CVA, but *also*, and *more importantly*, because it is based on the Philippines' open admission that [PM Indonesia], a related company of PMTL, committed *an illegal act* under Indonesian law".[95] The same distinction was reflected in Thailand's statement that "good faith" interpretation under the Vienna Convention "does not allow the Philippines to base a claim of

[88] For instance, Thailand reiterated that "a good faith interpretation must not allow parties to claim a violation of a CVA provision based on an illegal act of the company whose products were valued", and that "the Philippines cannot assert a claim of violation against Thailand on the basis of admitted illegal acts committed in Indonesia". (Thailand's first written submission, paras. 3.79 and 3.175.)

[89] Thailand's first written submission, para. 3.75 (referring to Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)* (Jurisdiction), 1927, PCIJ Series A, No. 9, p. 31).

[90] Thailand's first written submission, para. 3.74-3.76 (referring to B. Cheng, *General Principles of Law as applied by International Courts and Tribunals,* (Stevens and Sons, Ltd., 1953), Chapter 4, p. 149 and 155).

[91] Philippines' second written submission, para. 89. (emphasis added)

[92] Philippines' second written submission, para. 90.

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

[94] Thailand reiterated that a "good faith" interpretation "precludes WTO Members from bringing a claim under this provision that is based on illegal acts committed by either the importer or one of its affiliated companies", and recalled the "recognized concepts of international law" set forth in its first written submission. (Thailand's second written submission, para. 3.52.)

[95] Thailand's second written submission, para. 3.52. (emphasis added)

violation of the CVA on admitted illegal acts of its main stakeholder", and that "*[i]n any event,* the Philippines' claims should be dismissed as they are based on *flawed understandings* of the relevant CVA obligations."[96] In the request for findings set forth at the end of Thailand's second written submission, Thailand appeared to again distinguish its argument regarding "illegal acts" from its arguments on the interpretation of the CVA, stating that "the Panel must reject the Philippines' claims as they are premised on incorrect legal *interpretations* of the CVA provisions *and* because the Philippines' claims are based on *admitted illegal acts* committed by PMTL's related company in Indonesia."[97] The implication of these statements is that its argumentation regarding the alleged "illegal acts" was not part of its argumentation regarding the *interpretation* of the CVA.

7.47. Furthermore, Thailand's first and second written submissions did not articulate any clear connection between its general interpretation of the CVA, and the question of whether PM Indonesia committed an "illegal act". Thailand's interpretation of the CVA is basically that the authorities in the importing country may assume the accuracy and truthfulness of information provided by the exporting country's authorities and/or by the foreign producer or importer. However, the Panel notes that if that is correct, it would hold true regardless of whether any provision of inaccurate or untruthful information is "illegal", wrongful, or justified. Thailand did not explain why an appraisal of the legality of PM Indonesia's conduct in reporting inaccurate figures would have any bearing on the question of whether the Thai authorities were entitled to assume that the information was accurate and to rely on it; nor did Thailand explain why the argument that its authorities were entitled to assume in good faith that the information reported by PM Indonesia in the CK-21A forms was an accurate reflection of PM Indonesia's pricing and cost figures would require, as a corollary, characterizing PM Indonesia's conduct in terms of illegality, wrongfulness, or bad faith. The Panel considers that the lack of clarity as to what the one has to do with the other further reinforces the impression that Thailand's arguments regarding the alleged "illegal act", while ostensibly made in support of Thailand's general interpretation of the CVA, might also be construed as an argument relating to the admissibility of the claims.

7.48. The Panel put several questions to Thailand aimed at clarifying the nature and relevance of its arguments regarding the alleged "illegal acts" committed by PM Indonesia. In its responses to questions, Thailand reiterated that "Thailand is not alleging anything", was "simply referring to and describing the Philippines' own arguments regarding the Indonesian data", and "uses the term 'illegal act' to paraphrase the Philippines' own argument regarding the content of these forms".[98] Thailand made two further important, interrelated clarifications. First, Thailand clarified that this line of argument is not distinct from its argument regarding the interpretation of the CVA, which as noted above is basically that the authorities of the importing country should have the right to assume that the information provided by the exporting country's authority is accurate and truthful. In response to questions from the Panel, Thailand has clarified that this aspect of its argumentation is not to be construed as raising any issue concerning the admissibility of the Philippines' claims, whether in terms of the *Factory at Chorzów* principle[99], estoppel[100], the clean hands doctrine[101], Article 3.10 of the DSU[102], or otherwise. Second, and perhaps most importantly, Thailand clarified that its argumentation regarding the proper interpretation of the CVA also "does not hinge on characterizing PM Indonesia's actions as illegal acts under Indonesian law".[103]

7.49. Based on the foregoing, the Panel considers that it is sufficiently clear that Thailand is not arguing that the Philippines' claims are inadmissible by virtue of any alleged "illegal act" on the part of PM Indonesia, and that Thailand's other argumentation also does not actually depend on or entail characterizing PM Indonesia's conduct as illegal under Indonesian law. The Panel understands that

[96] Thailand's second written submission, para. 3.115. (emphasis added)
[97] Thailand's second written submission, para. 4.13(c). (emphasis added)
[98] Thailand's response to Panel question Nos. 133 and 134, para. 3.4. In its second written submission, Thailand had already responded to the Philippines' contention that Thailand's allegations of "illegal conduct" are "wholly unsubstantiated" by stating that "is not the party asserting these facts", but "is merely citing what the Philippines repeatedly and openly states in its submissions before this Panel". (Thailand's second written submission, para. 3.58.)
[99] Thailand's response to Panel question No. 131.
[100] Thailand's response to Panel question No. 132.
[101] Thailand's response to Panel question No. 164(a).
[102] Thailand's response to Panel question No. 164(a).
[103] Thailand's response to Panel question No. 165(a), para. 3.23. See also Thailand's response to Panel question No. 164(b), para. 3.21.

Thailand, despite clarifying that its argumentation regarding the proper interpretation of the CVA "does not hinge on characterizing PM Indonesia's actions as illegal acts under Indonesian law", is of the view that what matters "is that the inaccuracy was not caused by some external factor outside the control of Philip Morris", but rather "was created knowingly and voluntarily by Philip Morris itself" and that the Philippines is faulting Thailand for "relying on information that suffers from inaccuracies that are of Philip Morris' own making".[104] The Panel addresses this argument in the context of Section 7.2, when assessing whether the Thai authorities were entitled to assume that the information reported by PM Indonesia in the CK-21A forms was accurate and truthful, and concludes that as result of the regulatory constraints mandated by Indonesian excise tax law (i.e. an external factor outside the control of PM Indonesia), the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain.

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

7.1.3.3.1 Introduction

7.50. The Philippines understands that the Thai authorities' determination of the "actual" value of PMTL's imports is governed by, and inconsistent with, the rules in Article 6 of the CVA concerning the computed value method of customs valuation. Thailand submits that insofar as the CVA applies to the 2002-2003 Charges and the "actual price" is considered to be a determination of the revised customs value, the WTO-consistency of that aspect of the 2002-2003 Charges must be assessed under Article 7 and not Article 6. In response, the Philippines makes the alternative claim that, insofar as it is found that the Thai authorities resorted to the customs valuation method in Article 7 to determine the value of PMTL's goods, as opposed to determining a revised customs value on the basis of Article 6, the 2002-2003 Charges and the 1,052 revised NoAs are inconsistent with Article 7.1.

7.51. At the substantive meeting, Thailand argued that this alternative claim under Article 7.1 falls outside of the scope of the Panel's terms of reference, because it is not adequately identified in the Philippines' panel request, and also because the Philippines failed to advance said claim and the relevant arguments supporting it in a timely manner in these proceedings. The parties engaged in two rounds of written submissions on this terms of reference issue following the substantive hearing.[105]

7.52. An additional issue arose in the context of the parties' comments on the draft descriptive part of the Report. In its comments, the Philippines stated that it was seeking not one but two alternative findings of violation from the Panel in respect of its claims under Article 7.1 of the CVA in respect of the 2002-2003 Charges and the 1,052 NoAs, with the second one being that "Thailand violated Article 7 by determining the customs value under Article 7 without having followed, in a sequential manner, the hierarchy of methods provided for in the *CVA*".[106] The Philippines stated that "[i]n essence, should the Panel find that Thailand used Article 7 to determine the value of PM Thailand's goods, the Philippines' sequencing claim includes Articles 2 to 7, and not just Articles 2 to 6."[107] Thailand responded to this comment by arguing that nowhere in its prior submission "did the Philippines indicate that it had made a second claim under Article 7 which related to Thailand's alleged failure to follow the sequential order of valuation methods"[108], and that "the Philippines' comments on the Panel's draft descriptive part is the first time that the Philippines advances a second claim under Article 7".[109] Thailand submitted that "[t]he Philippines' attempt to raise new claims at this extremely late stage of the proceedings must be rejected by the Panel."[110]

7.53. The Panel considers that it is unnecessary to rule on that additional issue. Under the CVA, there is an obligation to sequentially apply the customs valuation methods set out in Articles 2 to 7 when determining a revised customs value. In Section 7.3.5 (Claim regarding sequential application of valuation methods) below, the Panel finds that the Philippines has made a *prima facie* case, which

[104] Thailand's response to Panel question No. 164(a), para. 3.13.
[105] See Section 1.4.4 above.
[106] Philippines' comments on the descriptive part, para. 15.
[107] Philippines' comments on the descriptive part, para. 15.
[108] Thailand's response to the Philippines' comments on the draft descriptive part, para. 2.17.
[109] Thailand's response to the Philippines' comments on the draft descriptive part, para. 2.18.
[110] Thailand's response to the Philippines' comments on the draft descriptive part, para. 2.18.

Thailand has not rebutted, that the Public Prosecutor did not adhere to the obligation to sequentially apply the customs valuation methods set out in Articles 2 to 7 when determining a revised customs value. The Panel reaches that finding without ruling on whether the Public Prosecutor used Article 6 (or instead Article 7) to determine a revised customs value, and without ruling on whether the customs value could have been determined on the basis of Article 6 (insofar as it was Article 7 that was instead used). In the light of the foregoing, the Panel considers it unnecessary to resolve the parties' disagreement about whether the Philippines' claim that the Public Prosecutor violated the obligation to sequentially apply the customs valuation methods in Articles 2 to 7 when determining a revised customs value is most accurately characterized as a claim of violation that includes just Articles 2 to 6, or rather a claim of violation that includes Articles 2 to 7, or their disagreement as to whether, insofar as it is more accurately characterized in terms of the latter, the aspect of that claim pertaining to Article 7 would fall within the scope of the Panel's terms of reference. Accordingly, the Panel does not consider this issue further.

7.1.3.3.2 Main arguments of the parties

7.54. Thailand argues that the Philippines' panel request, by referring to "Article 7" without specifying which subparagraph(s) and obligation(s) are at issue, fails to meet the requirements of Article 6.2 of the DSU. According to Thailand, a complainant is required to refer clearly to the particular subparagraph(s) and obligation(s) that it considers to have been violated and to make a clear link between the specific obligation(s) at issue and the relevant aspects of the challenged measure, and a failure to do so in a panel request cannot be corrected in a subsequent submission.[111] Thailand contends that "the Philippines referred generally to Article 7 without specifying which of the three paragraphs of Article 7, or which of the seven subsections of paragraph 2 of Article 7, if any, it considered to have been violated".[112] This general reference to Article 7 of the CVA is inadequate to provide a summary of the legal basis of the complaint sufficient to present the problem clearly as required under Article 6.2 of the DSU given that "Article 7 contains three sub-paragraphs with multiple obligations" and that "there are considerable differences between these sub-paragraphs"[113] of Article 7. In this connection, Thailand points out that "Article 7.1 addresses flexibility in the use of the methodologies in Articles 2-3 and 5-6 of the CVA" while, "[i]n contrast, Article 7.2 contains prohibitions on the use of seven different valuation methodologies", and "Article 7.3 contains certain procedural obligations".[114] Moreover, Thailand adds that the generic phrase "[Thailand failed to comply with] the relevant valuation rules" contained in the Philippines' panel request is "overly vague" as it does not specify which valuation rule(s) of Articles 2, 3, 4, 5, 6 or 7 it refers to[115] and the Philippines' panel request fails to plainly connect the challenged measure with the individual provisions of the CVA invoked by the Philippines.[116]

7.55. Thailand further argues that even if the Philippines' alternative claim under Article 7.1 were to fall within the Panel's terms of reference, it is not properly before the Panel on account of the Philippines' failure to pursue it in a timely manner. Thailand submits that the Philippines did not advance any claims and arguments under Article 7 of the CVA either in its first or second written submissions, and therefore cannot be said to have properly made a *prima facie* case under any obligation of Article 7. Moreover, Thailand observes that in its responses to pre-hearing questions from the Panel regarding the relationship between Articles 6 and 7 of the CVA, the Philippines omitted to make any claims or seek findings with respect to Article 7; and that even if it had, "answers to questions from a panel should not be considered as an opportunity for a complainant to make a *prima facie* case for the first time".[117] Thailand considers that it is far too late for the Philippines to raise claims under Article 7 in its opening statement at the substantive meeting with the parties, given that "at the time it prepared its first written submission (and, presumably, its request for the establishment of the panel), the Philippines had in its possession all of the information on which it appeared to rely during the hearing with respect to Article 7 of the CVA".[118] Entertaining the

[111] Thailand's first submission on the scope of the claims, para. 2.11.
[112] Thailand's second submission on the scope of the claims, para. 2.20.
[113] Thailand's second submission on the scope of the claims, para. 2.25
[114] Thailand's second submission on the scope of the claims, para. 2.26.
[115] Thailand's second submission on the scope of the claims, para. 2.26
[116] Thailand's second submission on the scope of the claims, para. 2.28.
[117] Thailand's first submission on the scope of the claims, paras. 2.5 and 2.9.
[118] Thailand's first submission on the scope of the claims, paras. 2.7.

Philippines' claim under Article 7.1 would in Thailand's view run contrary to the requirements of due process owed to it.[119]

7.56. The Philippines submits that the reference to Article 7 in its panel request, when read with the narrative text, complies with the requirement in Article 6.2 of the DSU to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In the Philippines' view, "Article 6.2 of the DSU does not prescribe that a complainant must identify the specific obligation at issue by identifying, using *numerals*, the individual subparagraph at issue. A Panel request may also identify the specific obligation using *words*".[120] In this respect, the Philippines recalls that its panel request states "that each of the measures at issue is inconsistent with Articles 2, 3, 4, 5, 6, and 7 of the CVA because, among others, Thailand failed to comply with the relevant valuation rules in establishing the alleged 'actual values' of the imported goods".[121] In the Philippines' view, the words "relevant valuation rules" have the effect of indicating that the Philippines brings a claim of inconsistency with Article 7.1 given that the valuation rules that an authority may use are only set forth in the first paragraph of Article 7.[122] The Philippines also clarifies that, unlike what is asserted by Thailand, it does not make any claims under Article 7.2 of the CVA, but rather relies on this provision only as context for its claims under Articles 1.1. 1.2(a), 6.1 and 7.1 of the CVA.[123]

7.57. The Philippines also argues that it presented a timely *prima facie* case under Article 7.1. The Philippines submits that it has done "nothing more than respond to Thailand's own shifting position", and that its own due process rights have been undermined by "the consistent failure of Thailand's authorities to explain their determinations, coupled with Thailand's own shifting, ambiguous, and misleading assertions in these proceedings".[124] The Philippines states that "as soon as it became clear that Thailand was invoking the flexibilities in Article 7.1" and was alleging that "its measures might even fall under Article 7.1", the Philippines first set forth arguments under Article 7.1 in its second written submission, and later invoked its claims under that provision in its response to the Panel's questions.[125] The Philippines explains that it could not pursue a claim under Article 7.1 from the outset, i.e. in its first written submission, because it did not have the necessary information for doing so, that is, the information that the Thai authorities had been unable to make a determination under Article 6 and had resorted to Article 7. According to the Philippines, "prior to the response to the Panel's pre-hearing questions, Thailand had never previously stated, in clear terms, that its customs valuation determinations were made under Article 7, and that its authorities had not been able to apply Article 6".[126]

7.1.3.3.3 Analysis by the Panel

7.1.3.3.3.1 General considerations

7.58. Article 6.2 of DSU provides in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.59. The requirements under Article 6.2 to identify the specific measure(s) at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly are central to the establishment of the jurisdiction of the panel. The "specific measure" identified in a panel request is the "object of the challenge", or, more precisely, "the measure that is alleged to be causing

[119] Thailand's first submission on the scope of the claims, paras. 2.6-2.8; Thailand's second submission on the scope of the claims, para. 2.13.
[120] Philippines' first submission on the scope of the claims, para. 43.
[121] Philippines' first submission on the scope of the claims, para. 45.
[122] Philippines' first submission on the scope of the claims, paras. 45-47.
[123] Philippines' first submission on the scope of the claims, para.48.
[124] Philippines' first submission on the scope of the claims, para. 49.
[125] Philippines' first submission on the scope of the claims, para. 54.
[126] Philippines' first submission on the scope of the claims, paras. 52-53; Philippines' second submission on the scope of the claims, para. 58.

the violation of an obligation contained in a covered agreement".[127] The "legal basis" of the complaint or the "claim", in contrast, is the "specific provision of the covered agreement that contains the obligation alleged to be violated".[128] Both elements constitute the "matter referred to the DSB", which forms the basis of the panel's terms of reference under Article 7.1 of the DSU.[129] Thus, in defining the scope of the dispute, Article 6.2 serves the function of establishing and delimiting the panel's jurisdiction.[130]

7.60. The Appellate Body has repeatedly held that, in order for a panel request to comply with the requirement under Article 6.2 of the DSU to provide a summary of the legal basis of the complaint, the panel request must, at a minimum, list the articles of the covered agreements claimed to have been violated.[131] While the listing of treaty provisions is a necessary minimum prerequisite, there may be situations where this may not be sufficient to present the problem clearly, as in instances where the articles contain multiple and/or distinct obligations.[132] Also, in cases where the panel request challenges a number of measures on the basis of multiple WTO provisions, providing "a brief summary of the legal basis of the complaint sufficient to present the problem clearly may depend on whether it is sufficiently clear which 'problem' is caused by which measure or group of measures".[133] Additionally, the panel request must also "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[134] Whether or not a general reference to a treaty provision will be adequate to meet the requirement of sufficient clarity under Article 6.2 is to be examined on a case-by-case basis, taking into account the extent to which such reference sheds light on the nature of the obligation at issue.[135] Thus, the Appellate Body has reiterated that the determination of whether a panel request is "sufficiently precise" requires the scrutiny of the panel request "as a whole, and on the basis of the language used".[136]

7.61. While the identification of a claim in a panel request is a necessary prerequisite for a Panel to rule on that claim, it is not always a sufficient condition as other considerations might need to be taken into account. In some circumstances, a panel may be precluded from ruling on a claim, even where it is included in the panel request, if the complainant does not articulate the claim in a clear and timely manner in its subsequent submissions. In such circumstances, the basis for the panel being precluded from ruling on the claim is not that it falls outside of its terms of reference, but rather that doing so would be inconsistent with the requirements of due process owed to the respondent. Indeed, both parties in this dispute seem to share that understanding, as they have framed their arguments regarding the timeliness of the Philippines' claim under Article 7.1 of the CVA in terms of due process.[137]

7.62. The Panel notes that there is no requirement in the DSU or in WTO practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel.[138] The panel process is a dynamic one where claims by the parties become

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[127] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

[128] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

[129] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 639 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72 and 73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416).

[130] Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Continued Zeroing*, para. 161; and *EC and certain member States – Large Civil Aircraft*, para. 640.

[131] Appellate Body Reports, *Korea – Dairy*, paras. 123 and 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89, 92, and 93); *US – Carbon Steel*, para. 130.

[132] Appellate Body Report, *Korea – Dairy*, para. 124.

[133] Appellate Body Reports, *China – Raw Materials*, para. 220.

[134] Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

[135] Appellate Body Report, *US – Carbon Steel*, para. 130 (referring to Appellate Body Report, *Korea – Dairy*, para. 124).

[136] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

[137] Thailand's first submission on the scope of the claims, para. 2.6; Philippines' first submission on the scope of the claims, paras. 57-66.

[138] Appellate Body Report, *EC – Bananas III,* para. 145.

refined and elaborated through arguments and counter-arguments.[139] The case law offers various examples of panels having to deal with evolving and shifting argumentation by a party.[140] In cases where entirely new lines of argumentation emerge at an advanced stage of the proceeding, adjudicators have sometimes ensured due process by allowing the other party to respond with an additional submission.[141]

7.63. In some cases, however, panels or the Appellate Body have found that considerations of due process precluded consideration of a claim that was not raised or supported by any arguments until a late stage of the proceeding. In *EC – Fasteners (China)* the Appellate Body found that the panel erred in ruling on a claim under Article 6.5 of the Anti-Dumping Agreement notwithstanding that it was identified in the panel request, and thus within the Panel's terms of reference. After reviewing the manner in which the particular claim was pursued by the complaining party, the Appellate Body explained that:

> [T]he Panel record shows that China asserted its claim … only in response to questions from the Panel, and articulated this claim only after the parties had provided the Panel with written submissions and had attended a substantive meeting. We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law. The late assertion of a claim …, and the absence of proper argumentation and of the provision of relevant evidence in support of this assertion, demonstrates that the European Union was not called upon to respond to China's claim under Article 6.5.[142]

7.64. The Panel recalls that a similar issue arose in the original proceeding in this dispute.[143] The Philippines introduced a claim under Article 4 of the CVA in its written responses to a second set of questions from the panel, submitted after the second substantive meeting. Prior to that point, while Article 4 was explicitly listed in the panel request, the Philippines had consistently maintained the position that Article 4 was not relevant to its claim relating to valuation methodologies under Articles 5 and 7 and had neither specifically referenced a violation of Article 4, nor provided evidence or specific arguments to demonstrate a violation of that provision. Given the absence of reference to or arguments concerning Article 4 until the last stage of the panel proceedings and the Philippines' prior statements on the irrelevance of Article 4 throughout the proceeding, the panel found that the Philippines' claim under Article 4 was "neither timely nor specific enough to warrant its inclusion in the Philippines' request for findings and recommendations".[144]

7.65. The Panel considers the two main issues raised by Thailand to be the consistency, or lack thereof, of the Philippines' claim under Article 7.1 with Article 6.2 of the DSU as well the timeliness of this claim. The Panel will analyse these issues in turn.

7.1.3.3.3.2 Article 6.2 of the DSU

7.66. The panel request states that the 1,052 revised NoAs and the 2002-2003 Charges "are inconsistent with … Articles 2, 3, 4, 5, 6 and 7 of the CVA, because, among others, Thailand failed to comply with the relevant valuation rules in establishing the alleged 'actual values' of the imported goods".[145] The issue raised by Thailand's objection is whether this item of the panel request suffices to "provide a brief summary of the legal basis of the complainant sufficient to present the problem clearly" for purposes of Article 6.2. Thailand does not take issue with the fact that the panel request simultaneously identifies all of these CVA provisions covering all of the alternative valuation methods under the CVA; rather, Thailand's objection is confined to the fact that the reference to Article 7

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[139] Panel Report, *India – Patents (US)*, para. 7.13.

[140] See e.g. Panel Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 6.28; *US – Clove Cigarettes*, paras. 7.84ff; *US – Shrimp (Viet Nam)*, para. 7.170; and *EC – Salmon (Norway)*, para. 7.609. See Appellate Body Report, *EU – Fasteners (China)*, paras. 433-434.

[141] See e.g. Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 2.16; Panel Report, *Australia – Salmon*, paras. 8.22ff.

[142] Appellate Body Report, *EC – Fasteners (China)*, para. 574. See also Panel Report, *Morocco — Hot Rolled Steel (Turkey)*, para. 7.64.

[143] Panel Report, *Thailand — Cigarettes (Philippines)*, paras. 7.271-7.278.

[144] Panel Report, *Thailand — Cigarettes (Philippines)*, para. 7.278.

[145] WT/DS371/22, paras. 14 and 20.

does not specify which of its subparagraphs and obligations is at issue. On that basis, Thailand argues that the reference to Article 7 does not meet the requirements of Article 6.2, and therefore the Philippines' alternative claim under Article 7.1 falls outside of the panel's terms of reference.

7.67. The Panel considers that in cases where the complaining party is unable to obtain from the respondent certain information regarding the content of the measures at issue, this will naturally have a bearing on the degree of specificity that could reasonably be expected in identifying the legal basis for the complaint for purposes of Article 6.2 of the DSU. The Appellate Body has confirmed that this is so with respect to the degree of specificity expected with respect to the identification of the specific measures at issue[146], and the Panel sees no reason why the same logic would not apply in the context of assessing whether a panel request identifies "the legal basis of the complaint sufficient to present the problem clearly".[147] In the Panel's view, while a complainant must always comply with this requirement, regardless of any difficulties it faces in obtaining relevant information, such difficulties in obtaining relevant information may be highly germane to the appraisal of what is "sufficient" to present the problem "clearly" in the circumstances of a particular case.

7.68. Turning to the circumstances of this case, it is not in dispute that the Thai authorities provided PMTL with very limited information on how they established the "actual value" in the NoAs, and on how they established the "actual price" in the 2002-2003 Charges. The Thai authorities did not inform PMTL of the customs valuation method used to determine those customs values at the time that the 2002-2003 Charges were issued, or at the time when the NoAs were sent. Following a request for information from PMTL, the Thai Customs Department did provide PMTL with limited information regarding the basis for determining the "actual value" in the NoAs, but that information still fell short of specifying the exact customs valuation method that was used. PMTL's similar request for an explanation sent to the Public Prosecutor received no response from the latter. It appears to be an uncontested fact that, at the time the Philippines prepared its panel request, neither PMTL nor the Philippines had been told by the Thai authorities specifically which (if any) of the customs valuation methods in Articles 2 through 7 of the CVA was used to calculate the "actual value" in the NoAs and the "actual price" in the 2002-2003 Charges.

7.69. The lack of information regarding the customs valuation method used is expressly reflected in the panel request. It states in relevant part that the NoAs provide that the DSI calculated the "actual value" on the basis of documents completed by PM Indonesia, which were obtained from the Indonesian government, "but provide[d] no further explanation on the valuation methodology".[148] The panel request likewise states that "neither the 2002-2003 Charges nor the annex state the basis for the conclusions that the declared prices are 'false' and that the declared prices should be replaced by alternative 'actual' customs values".[149] It is in this context that the panel request proceeds to state that 1,052 revised NoAs and the 2002-2003 Charges "are inconsistent with (…) Articles 2, 3, 4, 5, 6 and 7 of the CVA, because, among others, Thailand failed to comply with the relevant

[146] In *EC and certain member States – Large Civil Aircraft*, the Appellate Body stated that "[w]hether a measure can be identified in conformity with the requirements of Article 6.2 may, as is the case here, depend on the extent to which that measure is specified in the public domain." The Appellate Body stated that it did "not understand Article 6.2 to impose a standard that renders it more difficult to challenge a measure simply because information in the public domain concerning that measure is of a general character", and that "the lack of specification in the public domain should not shield this particular measure from challenge simply because greater detail in the form of, for example, an identifiable programme name was publicly available in respect of the other measures". The Appellate Body noted that in the circumstances of that case, "it is still not clear to us what additional degree of specificity could reasonably have been expected regarding the identification of R&TD funding allocated through the French Government's budgetary process", and concluded that "[t]aking into account the public information that existed regarding the French R&TD funding at the time of the United States' panel request", the description set out therein "was sufficiently precise" to establish that the funding challenged by the United States was within the Panel's terms of reference. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 648.)

[147] In *EU – Energy Package*, the panel recalled the Appellate Body's analysis above, and stated that "[w]e similarly consider that, a complainant's ability to 'provide a brief summary of the legal basis of the complaint in order to present the problem clearly' might be affected by the availability of relevant information in the public domain. In our view, it may well be open to a complainant to argue, with due substantiation, that information pertinent to its claim was not publicly available and that, as a consequence, its ability to comply with the requirements of Article 6.2 of the DSU was affected." (Panel Report, *EU – Energy Package*, para. 7.213.)

[148] WT/DS371/22, para. 11.

[149] WT/DS371/22, para. 19.

valuation rules in establishing the alleged 'actual values' of the imported goods".[150] This is followed by a claim under Article 16, on the basis that "Thailand has failed to provide, upon written request, a written explanation as to how the customs values of the imported goods were determined".[151]

7.70. The Panel considers that in some cases, a panel request that claims a violation of "the relevant valuation rules" under all of the different alternative customs valuation methods set forth in Articles 2 through 7 would not suffice to identify the legal basis of the complaint in a manner "sufficient to present the problem clearly". The reason is that each of Articles 2 (identical goods), 3 (similar goods), 5 (deductive value method), and 6 (computed value method) provides for a specific and distinct valuation method, and the relationship between these provisions and methods is such that the determination of a revised customs value generally cannot be subject to two or more of these provisions simultaneously, let alone all of them. Furthermore, while Article 7 (reasonable flexibility) is, by its nature, slightly different from other provisions in that it allows the use of the valuation methods laid down in Articles 1 through 6 with a reasonable flexibility, it also applies to the exclusion of the other methods.[152]

7.71. Having said that, in the circumstances of this case it is not clear what additional degree of specificity could reasonably have been expected from the Philippines in terms of identifying the "relevant valuation rules" in Articles 2 through 7 with sufficient precision, taking into account the limited information that was communicated to it regarding the basis for calculating the "actual" value/price in the challenged measures. Therefore, the Panel is not persuaded that the Philippines was required to specify which one of the different customs valuation methods in Articles 2 through 7 constituted the basis of its claim. It sufficed for the panel request to state that the 2002-2003 Charges "are inconsistent with … Articles 2, 3, 4, 5, 6 and 7 of the CVA", without further specification as to which of one of these different articles was applicable. *A fortiori*, if such specification was not required at the level of these different articles, then the Panel is not persuaded that the Philippines had to go even further and specify which of the three subparagraphs and obligations *within* Article 7 it was invoking.[153]

7.72. For the foregoing reasons, the Panel considers that it is unnecessary to proceed with an analysis of whether it is sufficiently clear from the panel request which obligation(s) in Article 7 would be the one(s) at issue, if the "relevant valuation rules" were those found in Article 7, as opposed to Articles 2, 3, 5 or 6 of the CVA. Assuming *arguendo* that it is necessary to continue further in assessing Thailand's objection that the Philippines failed to identify the specific paragraph of Article 7, the Panel considers that in the circumstances of this case it is sufficiently clear that the Philippines' general reference to "Article 7" in the panel request would cover a claim under Article 7.1. The panel request does not identify any specific paragraph(s) of Article 7, but this becomes apparent from a consideration of the irrelevance of Article 7.3 in this case, and the nature of the interrelationship between Articles 7.1 and 7.2.

7.73. The Panel notes that Article 7 of the CVA has three subparagraphs.[154] Article 7.1 is a general provision which provides that if the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, it shall be determined "using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation". Article 7.2 is the more specific provision, as it specifies seven specific bases for customs valuation that are prohibited (e.g. minimum customs values), and that may not be used when applying reasonable flexibilities under Article 7.1. The third paragraph then sets forth the procedural obligation that, if the importer so requests, it "shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value".

[150] WT/DS371/22, paras. 14 (second bullet) and 20 (second bullet).
[151] WT/DS371/22, paras. 14 (second bullet) and 20 (third bullet).
[152] Panel Report, *Thailand — Cigarettes (Philippines)*, para. 7.285.
[153] The Panel notes that the Philippines' panel request in the first recourse to Article 21.5 also advanced multiple alternative claims under mutually exclusive CVA provisions in respect of the 2003-2006 Charges. Specifically, it made alternative claims that the determination of the "actual price" in those Charges was inconsistent with Article 2.1, Article 3.1, and Articles 7.1. and 7.2.
[154] The text of Article 7 is reproduced below at paragraph 7.350.

7.74. The Panel considers that Article 7.3 is not relevant to the Philippines' complaint in the circumstances of this case.[155] As the original panel noted, "the request for information under Article 7.3 would become possible only if the importer was already aware at the time of requesting that the customs authority had relied on a valuation method under Article 7."[156] In this case, Article 7 was raised for the first time by Thailand in the context of this panel proceeding, and the Thai authorities never gave any indication to PMTL that they had relied on a valuation method under Article 7. Accordingly, there would have been no basis for PMTL to make the kind of request contemplated in Article 7.3, and it made no such request. Consequently, there would be no basis for the Philippines to make a claim under Article 7.3, or for Thailand to read the reference to Article 7 as embracing such a claim. This reading is further reinforced by the fact that the ensuing bullet in the panel request specifically alleges a violation of the procedural obligation in Article 16, which is similar if not identical to the procedural obligation in Article 7.3.[157] It follows that, in the circumstances of this case, the general reference to Article 7 can only be construed as a reference to Article 7.1. and/or Article 7.2.

7.75. The Panel considers that the relationship between Article 7.1 and 7.2 is such that a customs valuation determination could be claimed to violate Article 7.1 without necessarily violating any provision of Article 7.2. The reason is that subparagraphs (a) through (g) of Article 7.2 do not necessarily exhaust the universe of customs valuation bases that are not "reasonable" or "consistent with the principles and general provisions" of Articles 1 to 7. Accordingly, there could be a stand-alone claim that a customs valuation determination violates Article 7.1. However, the Panel observes that the seven bases for customs valuation identified in subparagraphs (a) through (g) are categorically prohibited, which in and of itself implies that they cannot be "reasonable" or "consistent with the principles and general provisions" within the meaning of Article 7.1. This conclusion is reinforced by the content of those enumerated bases, which include several bases for customs valuation that are inherently prohibited by the basic principles and general provisions of the CVA, such as the reliance on minimum customs values, and "arbitrary or fictitious values". This suggests that any customs valuation determination that is considered to violate Article 7.2 would likely also be considered to violate Article 7.1.

7.76. Based on this understanding of the relationship between provisions of Articles 7.1 and 7.2, it follows that a claim under the more general provisions of Article 7.1 would not necessarily imply a claim under the more specific provisions of Article 7.2, but that a claim under the more specific provisions of the latter should almost always be accompanied by, and may presuppose, a violation of the general provision of Article 7.1. Based on the foregoing, the Panel considers that the reference to Article 7 in the panel request embraces at least a claim under Article 7.1.

7.77. This conclusion is not altered by certain considerations relating to the concise narrative that accompanies the listing of Articles 2 to 7 in the panel request. As indicated above, the Philippines' panel request states that the Thai authorities acted inconsistently with Articles 2 to 7 because they "failed to comply with the relevant valuation rules in establishing the alleged 'actual values' of the imported goods". In this respect, Thailand contends that the phrase "relevant valuation rules", as used in the panel request, is generic and overly vague, and could cover "not only the various sub-paragraphs of Article 7, but also all other provisions in Part I of the CVA (that is, Articles 1 – 17)" which is titled "Rules on Customs Valuation".[158] The Philippines argues that Article 7.1 is the only provision setting forth "affirmative" valuation rules that an authority may use in establishing the customs value, and that the phrase "relevant valuation rules" can therefore only refer to that paragraph and no other paragraph.[159] The Panel is not persuaded by that argument, and considers that the phrase "relevant valuation rules" as used in the Philippines' panel request could reasonably be understood as referring not only to the valuation rules contained in Article 7.1, but also those contained in Article 7.2. Having said this, the fact that the language of the Philippines' panel request may be read as also referring to Article 7.2 does not alter the conclusion that the reference to

[155] The Panel notes that in some prior cases that raised the issue of whether a general reference to a provision allowed for the identification of the relevant claims, panels and the Appellate Body have reasoned by process of elimination. See e.g. Appellate Body Report, *US — Countervailing and Anti-Dumping Measures (China)*, para. 4.22.

[156] Panel Report, *Thailand — Cigarettes (Philippines)*, para. 7.394.

[157] Panel Report, *Thailand — Cigarettes (Philippines)*, para. 7.393.

[158] Thailand's second submission on the scope of the claims, para. 2.26.

[159] Philippines' second submission on the scope of the claims, para. 30.

Article 7 includes a claim under Article 7.1.[160] In sum, the Panel considers that, read in light of the accompanying narrative, the reference to Article 7 of the CVA necessarily encompasses a claim under Article 7.1 of the CVA, whether or not it also encompasses a claim under Article 7.2.

7.78. In the light of the foregoing, the Panel concludes that the relevant item of the panel request suffices to "provide a brief summary of the legal basis of the complainant sufficient to present the problem clearly" for purposes of Article 6.2, and that the Philippines' alternative claim under Article 7.1 falls within the Panel's terms of reference.

7.1.3.3.3.3 Timeliness of the Philippines' alternative claim

7.79. Thailand maintains that even to the extent that any claims by the Philippines under Article 7 of the CVA could be said to validly be within the Panel's terms of reference, the Philippines has in any case failed to advance such claims in a timely manner and cannot therefore be considered to have made a timely *prima facie* case in this respect. As the Panel understands it, in Thailand's view, the Philippines was in possession of enough information, from the beginning of the dispute, to be able to raise claims under Article 7 in its panel request, and develop arguments in support of its claims in its first and second written submissions, but the Philippines failed to do so. For its part, the Philippines responds that it: (1) included a claim under Article 7.1 in its panel request; (2) set forth supporting arguments in its second written submission, and indicates that it had not been able to do so earlier, that is in its first written submission, because at that time "the available evidence did not warrant making arguments under Article 7.1"[161], and (3) asserted in its responses to the Panel's questions that the Panel could address claims under both Articles 6 and 7 because both provisions were part of the Panel's terms of reference.[162]

7.80. The Panel recalls that, as explained above, despite an adequate identification of a claim in a panel request, a panel may refrain from ruling on that claim in circumstances where it is shown that doing so would have the effect of breaching the requirements of due process owed to the respondent. This could be the case where, as a result of the complainant failing to articulate the claim in a clear and timely manner, the respondent is not afforded a meaningful opportunity to respond adequately to the claim. The Panel will sequentially consider the following questions on which the parties appear to disagree: first, when was the Philippines in a position to advance a claim and raise arguments under Article 7.1? Second, at what stage of these proceedings did the Philippines actually raise its claim under Article 7.1 and advance relevant supporting arguments? Addressing these questions will enable the Panel to assess whether the Philippines raising its claim and advancing its arguments in the manner that it did resulted in Thailand being deprived of a meaningful opportunity to respond and thereby violating Thailand's due process rights.

7.81. The Panel recalls the following chronology of events which form the factual background pertaining to the evolution of the Philippines' claims regarding Articles 6 and 7 in this proceeding:

a. After the issuance of the MoA leading to the 2002–2003 Charges on 22 September 2016, and also after the issuance of the 1,052 revised NoAs on 29 November 2017, PMTL wrote to the relevant authorities (the DSI and the Public Prosecutor for the

[160] In *US — Countervailing and Anti-Dumping Measures (China)*, the panel request alleged a violation of "Article 19" of the SCM Agreement, without identifying which of its four subparagraphs and obligations was at issue. The panel considered that Articles 19.1 and 19.2 were irrelevant, and that the two "potentially relevant obligations" were those set forth in Articles 19.3 and 19.4. The panel then proceeded to infer from certain elements of the panel request that Article 19.4 should also be excluded from consideration. On appeal, the Appellate Body upheld the panel's finding that the respondent could reasonably infer from the reference to Article 19 that the complaining party was making a claim under Article 19.3, but the Appellate Body disagreed with the panel's conclusion that the reference to Article 19 could not be read as potentially also extending to Article 19.4. The Appellate Body did not consider it necessary to resolve the question of whether the reference to Article 19 covered only Article 19.3, or also Article 19.4. Evidently, the Appellate Body did not consider the lack of resolution of that question an impediment to the conclusion that the reference to Article 19 included, at minimum, a claim under Article 19.3. (See Appellate Bod Report, *US — Countervailing and Anti-Dumping Measures (China)*, para. 4.43-4.44.)

[161] Philippines' second submission on the scope of the claims, para. 48.

[162] Philippines' first submission on the scope of the claims, para. 50.

Charges and the Customs Department for the revised NoAs)[163], requesting in each instance explanations as to the reasons behind the rejection of the transaction values and the basis for calculating the alternative actual customs values. In their respective responses to PMTL's letters, the DSI and the Public Prosecutor on the one hand[164], and the Customs Department on the other hand[165], do not appear to have provided any of the explanations requested by PMTL.

b. In its panel request, the Philippines stated that the 1,052 revised NoAs and the 2002-2003 Charges are inconsistent with, *inter alia*, the relevant valuation rules in Articles 2 to 7 of the CVA because Thailand failed to comply with the relevant valuation rules in establishing the alleged actual values.[166]

c. In its first written submission, the Philippines argued that both the Customs Department and the Public Prosecutor violated Article 6 of the CVA by determining the actual customs value through improper use of the computed value method.[167] The Philippines referred to the obligation in Article 7.1 and 7.2 as relevant context for its claims under Articles 1.2(a) and 6, but did not assert any separate, alternative claim of violation under Article 7.[168]

d. In response to the Philippines' claim and arguments concerning Article 6, Thailand responded, in its first written submission, that its authorities determined the customs value by "appl[ying] the computed value method" with "a reasonable flexibility" provided for under Article 7, and that "by acting consistently with Article 7.1 of the CVA, the Prosecutor [and the Customs Department] [did] not contravene Article 6 of the CVA".[169] Thailand responded to Philippines' claims regarding the sequential application of customs valuation methods that "none of the alternative methods in Articles 2-*5* could be used to determine customs value"[170], implying that any revised value had been determined under Article 6, and not Article 7.

e. In response to Thailand raising Article 7, the Philippines argued in its second written submission, that it is impermissible to import the "reasonable flexibility" of Article 7 into Article 6, and in any event neither the Public Prosecutor nor the Customs Department used "reasonable flexibility" in determining the customs value.[171] The Philippines still understood Thailand to be arguing that the "reasonable flexibility" of Article 7 could be imported into Article 6, and thus developed these arguments in the context of advancing its claim of inconsistency under Article 6.[172]

f. In its second written submission, Thailand restated its position that the 2002-2003 Charges "are not inconsistent with Article 6 because the method of valuation used by

[163] In relation to the 2002-2003 Charges, PMTL sent letters to the DSI on 7 and 28 October 2016 and to the Public Prosecutor on 14 November 2016. In relation to the 1,052 revised NoAs, PMTL wrote to the Customs Department on 14 December 2017 and 25 January 2018.

[164] In relation to the 2002-2003 Charges, the DSI in its response to PMTL dated 3 November 2016 stated that its legal actions against PMTL were lawful and directed PMTL to the Public Prosecutor for further information; and the Public Prosecutor in its response to PMTL dated 8 December 2016 indicated that the matter was under review. (Letter from the DSI to PMTL, 3 November 2016 (English translation), (Exhibit PHL-276-B); and Letter from the Public Prosecutor to PMTL, 8 December 2016 (English translation), (Exhibit PHL-243-B))

[165] In relation to the 1,052 revised NoAs, the Customs Department, in its response of 10 January 2018, indicated that the "[DSI] prepared the table summarizing the CIF prices … for the Customs Department to assess the value and calculate the taxes and duty which were not fully paid" and advised PMTL to inquire directly from DSI for relevant information. (Letter from the Customs Department to PMTL, 10 January 2018 (English translation), (Exhibit PHL-250-B).)

[166] WT/DS371/22, paras. 14 and 20.

[167] Philippines' first written submission, sections IV.B.4 and V.B.5.

[168] Philippines' first written submission, paras. 213 and 256, and footnotes 160 and 199.

[169] Thailand's first written submission, section 3.4.4.

[170] Thailand's first written submission, para. 3.102; Thailand's second written submission, para. 3.74. (emphasis added)

[171] Philippines' second written submission, sections III.B.3 and IV.C.3.

[172] Philippines' second written submission, para. 205.

the Public Prosecutor falls under Article 7 of the CVA".[173] Thailand reiterated its arguments as to why, in its view, the Public Prosecutor "applied the computed value method with a reasonable flexibility that consists of relying on information provided by Indonesian authorities without subsequently verifying it".[174] On that basis, Thailand concluded that the Panel should find that the 2002-2003 Charges "are not inconsistent with Article 6 of the CVA".[175]

g. In a set of written questions which the Panel sent to the parties in advance of the hearing, the Panel solicited the parties' views on the appropriateness of the Panel making alternative findings under Articles 6 and 7 and the scope of the parties' claims and defences under those provisions:

   i. In its responses to these questions, the Philippines affirmed that (1) there are fundamental obligations regarding the required nature and quality of cost and profit information used for customs valuation purposes that "apply equally to determinations made under Articles 1.1, 1.2(a), 6 and 7", and that the CK-21A information "cannot be a basis for a proper valuation under Article 6 (or Article 7)"[176]; (2) the Thai authorities rejected PMTL's (declared) transaction values, and/or determined a revised customs value, based on "the price of goods on the domestic market of the country of exportation" within the meaning of Article 7.2(c)[177]; and (3) as the Panel's terms of reference included claims under both Articles 6 and 7 of the CVA and as the Philippines had made and argued a claim under each provision, the Panel could make alternative findings under the two provisions if it considers that it is unclear which of these two provisions was applied.[178]

   ii. In response to a question asking Thailand to clarify whether its arguments on the "reasonable flexibility" in Article 7 should be taken to mean that Thailand was acknowledging that any customs valuation determination reflected in the measures was inconsistent with Article 6, Thailand stated that "the valuation decision was made under Article 7.1. The WTO-consistency of the valuation must be assessed under Article 7.1, not Article 6."[179]

h. At the substantive meeting of 29 October 2018, the Philippines stated in its opening and closing statements that the 1,052 revised NoAs and the 2002-2003 Charges violate Articles 1.1, 1.2(a), 6, and 7 of the CVA and explained, *inter alia*, that the flexibilities in Article 7.1 do not extend to allowing the use of the valuation methods prohibited in Article 7.2.[180] This led Thailand to object, at the hearing, to the Philippines' reference to a claim under Article 7, on the grounds that it was untimely and not adequately specified in the panel request.

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

[173] Thailand's second written submission, para. 3.79.
[174] Thailand's second written submission, para. 3.79.
[175] Thailand's second written submission para. 3.81.
[176] Philippines' response to Panel question No. 141, paras. 115 and 117.
[177] Philippines' response to Panel question No. 146.
[178] Philippines' response to Panel question No. 157.
[179] Thailand's response to Panel question No. 156, para. 8.1.
[180] Philippines' opening statement at the meeting of the Panel, paras. 84-88; and closing statement at the meeting of the Panel, para. 13.

7.83. After being made aware through Thailand's first written submission that Thailand was relying on Article 7.1, the Philippines, in its second written submission, objected to Thailand's reliance on Article 7.1 by claiming that the "specific flexibility" invoked by Thailand does not fall within the meaning of "reasonable flexibility" as envisaged by Article 7, and the Philippines provided detailed arguments as to why Thailand's customs valuation determinations could not be justified under Article 7.1. It did so in the context of setting out its claim under Article 6. Specifically, in section III.B.3 of its second written submission, the Philippines first set out its interpretation of the term "reasonable flexibility" by formulating what it views as the proper legal standard under Article 7. The Philippines then proceeded to apply the legal standard to the facts of this case in order to reach the conclusion that, by relying on CK-21A information that was not subsequently verified in terms of its accuracy, the Thai Customs Department did not use "reasonable flexibility" within the meaning of Article 7.

7.84. While recognizing that the Philippines presented these detailed arguments on Article 7.1 in the context of substantiating its claim under Article 6, apparently on the understanding that Thailand's argumentation aimed to read the flexibilities of Article 7 into Article 6, the Panel considers that it would be putting form over substance to conclude that section III.B.3 of the Philippines' second written submission is not tantamount to a properly articulated and argued claim of inconsistency with Article 7.1. That this claim and its supporting arguments are made by the Philippines in the context of demonstrating that the Customs Department violated Article 6, as highlighted by Thailand[181], does not, in the Panel's view, take away from the fact that they purport to demonstrate, on an *arguendo* basis and in the alternative, that the customs valuation determinations reflected in the 2002-2003 Charges and the 1,052 revised NoAs are also not consistent with the methodology in Article 7.1. Moreover, while the Philippines does not explicitly request the Panel to make findings in respect of its claim under Article 7 in its second written submission, it subsequently reaffirms in its written responses to questions from the Panel that since it had made and argued claims under both Articles 6 and 7, the Panel could make alternative findings under each provision.[182] In the light of the foregoing, the Panel considers that the Philippines effectively asserted its claim under Article 7.1 and adduced supporting arguments in its second written submission, which was the earliest possible opportunity for doing so, and reaffirmed its request for alternative findings under that provision in its responses to questions from the Panel.

7.85. The Panel has explained above that a respondent's due process right would be breached, *inter alia,* in situations where the respondent is not afforded an opportunity to respond to a claim raised against it. In the circumstances of this case, the Panel does not consider that Thailand's due process rights would be violated if the Panel were to rule on the Philippines' alternative claim under Article 7.1 of the CVA. As the Panel has made clear above, the Philippines has adequately included in its panel request a claim under Article 7, which the Philippines asserted and supported with arguments in its second written submission, and which the Philippines clarified was an alternative claim that could be the subject of alternative findings by the Panel.

7.86. While it may in general be desirable that a complainant assert all claims and advance all pertinent arguments in its first written submission so as to allow the respondent to respond to them as early as possible, nothing in the DSU or in WTO practice requires this in all cases. In the circumstances of this case, the Philippines was arguably not in any position to do so. Of greater importance, however, is the fact that Thailand still had ample opportunity to address the Philippine's detailed argumentation under Article 7.1 in its own second written submission, in its responses to the pre-hearing written questions from the Panel, at the hearing with the Panel, and in its responses to the Panel's post-hearing questions. In these circumstances, the Panel is of the view that Thailand's due process rights would not be breached if it were to entertain the Philippines' alternative claim under Article 7.1. Indeed, it was Thailand, not the Philippines, that sought to rely on Article 7 in the first place.

7.87. This conclusion is reinforced by another consideration. There has been a persistent ambiguity in Thailand's position, apparently linked to its uncertainty as to whether there is any clear binary distinction between the methods under Articles 6 and 7, and as a result it is actually still not clear whether it is of the view that any customs valuation determination made by its authorities was made on the basis of Article 6, or instead on the basis of Article 7. In its responses to the post-hearing questions sent by the Panel, Thailand formulated its position in terms that circled back to the idea

[181] Thailand's second submission on the scope of the claims, para. 2.14.
[182] Philippines' response to Panel question No. 157.

that any revised customs value was determined on the basis of Article 6, incorporating the reasonable flexibilities of Article 7. It stated that the authorities "applied the computed method under Article 6, taking advantage of the flexibilities allowed under Article 7.1"[183]; and that as it "has previously explained, the values were calculated on the basis of the methodology in Article 6, using the flexibilities allowed under Article 7.1".[184] In its comments on the Interim Report, Thailand stated that it "repeatedly (and accurately) described the determination as having been made using the Article 6 method as a base and using the flexibilities under Article 7", and "made clear that it was for the Panel to decide whether, as a legal matter, such a determination should be characterized as made under Article 6 or Article 7".[185] Given the way that Thailand's arguments on this issue have unfolded – including its apparent uncertainty of the existence of any clear binary distinction between the methods under Articles 6 and 7 – the Panel does not consider that Thailand's due process rights would be violated if the Panel were to rule on the Philippines' alternative claim under Article 7.1 of the CVA.

7.1.3.3.4 Conclusion

7.88. For these reasons, leaving aside whether the Thai authorities' determination of the "actual" value/price of PMTL's imports is governed, as claimed by the Philippines, by the provisions of Article 6 of the CVA concerning the computed value method or is instead determined using the reasonable flexibilities provided for in Article 7 as Thailand seems to assert, the Panel concludes that the Philippines' alternative claim under Article 7.1 falls within the Panel's terms of reference, and is properly before the Panel.

7.1.3.4 The Philippines' standing to challenge measures concerning PMTL's imports from Indonesia

7.89. While some of the measures at issue in the original proceeding and the first recourse to Article 21.5 concerned imports into Thailand from the Philippines, the measures at issue in this proceeding relate exclusively to cigarettes that PMTL imported from Indonesia. The Panel asked Thailand whether it accepts that the Philippines has standing to challenge the measures, notwithstanding that they pertain exclusively to entries that PMTL imported into Thailand from the supplier based in Indonesia. Thailand responded that "this is a matter for the Panel to resolve concerning its jurisdiction, in light of the existing jurisprudence".[186] In the light of Thailand's response, and given that a panel must consider on its own initiative any issues of jurisdiction, and any other issues of a "fundamental nature"[187], the Panel addresses this issue below.

7.90. The Appellate Body in *EC – Bananas III* considered the issue of whether the United States, which did not at the time export bananas, had "standing" to bring a claim under the GATT against the European Communities. The Appellate Body observed that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel", and further stated that it did "not accept that the need for a 'legal interest' is implied in the DSU".[188] The Appellate Body further considered that there was no general rule under international law requiring that a complaining party must have a "legal interest"[189], and that the language of both Article XXIII:1 of the GATT 1994 and Article 3.7 of the DSU suggests that a Member "has broad discretion in deciding whether to bring a case against another Member under the DSU".[190]

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[183] Thailand's response to Panel question No. 167, para. 4.2.
[184] Thailand's response to Panel question No. 169, para. 5.4.
[185] Thailand's request to review the Interim Report, para. 2.12.
[186] Thailand's response to Panel question No. 159, para. 1.3.
[187] The Appellate Body has referred to "certain issues of a fundamental nature" that a panel must deal with, if necessary on its own motion, in order to satisfy itself that it has the "authority" to proceed. (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – United States)*, para. 36.) As the Appellate Body has observed with respect to jurisdictional issues in particular, "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it". (Appellate Body Report, *US – 1916 Act*, footnote 30) See also Decision by the Arbitrator, *US – COOL (Article 22.6 – United States)*, paras. 2.6-2.7.
[188] Appellate Body Report, *EC – Bananas III*, para. 132.
[189] Appellate Body Report, *EC – Bananas III*, para. 133.
[190] Appellate Body Report, *EC – Bananas III*, paras. 134-135.

7.91. In any event, the Appellate Body then stated its view that, on the facts of the case, the United States was "justified in bringing its claims under the GATT 1994 in this case", taking into account that "[t]he United States is a producer of bananas, and a potential export interest by the United States cannot be excluded".[191] The Appellate Body added that "[t]he internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas".[192] The Appellate Body also agreed with the panel's statement that "with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly".[193]

7.92. In several subsequent proceedings where similar issues were raised, panels have concluded that the complaining Member had the requisite interest to initiate proceedings despite the apparent absence of any exports of the product(s) at issue to the territory of the responding Member. For example, in *Colombia – Ports of Entry*, the panel ruled that "Panama currently produces apparel for export, has stated its interest in exporting domestically produced footwear and other apparel in the future, and stated its potential to manufacture textiles in the future. In the Panel's view, Panama has sufficiently demonstrated its interest in a determination of rights and obligations under the *WTO Agreement.*"[194]

7.93. The measures at issue relate to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes. PMTL currently imports substantial volumes of *Marlboro* and *L&M* cigarettes into Thailand from the Philippines. These imports are subjected to customs valuation determinations by the Thai authorities on a recurring basis. Thus, any measure that relates to customs valuation practices affecting the Thai importer that now sources from the Philippines has the very real potential to affect future exports of cigarettes from the Philippines to Thailand. Insofar as these measures threaten the continued viability of PMTL's operations in Thailand, then they have the potential to end or otherwise impair exports of cigarettes from the Philippines to Thailand.[195]

7.94. The Panel further notes that the parties' claims and defences relating to the 2002-2003 Charges in this proceeding could be said to be inextricably interwoven with their arguments relating to the 2003-2006 Charges at issue in the first compliance proceeding, which cover imports from the Philippines. In *EC – Bananas III*, the Appellate Body's analysis of the United States' standing to challenge the EC measures at issue appeared to accord some weight to the fact that "there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case".[196]

7.95. The Panel concludes that these factual circumstances more than suffice to establish that the Philippines has standing to challenge the 2002-2003 Charges and the 1,052 revised NoAs, notwithstanding that they concern imports into Thailand from Indonesia, and not the Philippines.

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

7.1.4.1 Introduction

7.96. In the original proceeding, the panel stated that it presumed good faith on the part of Thailand and its authorities. It referred to prior pronouncements that panels should "assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO

[191] Appellate Body Report, *EC – Bananas III*, para. 136.
[192] Appellate Body Report, *EC – Bananas III*, para. 136.
[193] Appellate Body Report, *EC – Bananas III*, para. 136 (referring to Panel Reports, *EC – Bananas III*, para. 7.50).
[194] Panel Report, *Colombia – Ports of Entry*, para. 7.329. See also Panel Reports, *EC – Bananas III (Article 21.5 – US)*, para. 7.34; and *Korea – Dairy*, para. 7.13.
[195] As the Philippines puts it, "[a]lthough the entries at issue in these proceedings are historical, the measures target an importer that now sources from the Philippines. The latest measures threaten the viability of the importer's operations in Thailand, and leave the Philippines with no choice but to initiate these second compliance proceedings." (Philippines' first written submission, para. 10.)
[196] Appellate Body Report, *EC – Bananas III*, para. 137.

Agreement and by international law"[197], and that it "is implicit from the duty to perform treaty obligations in good faith that a party to an international agreement should be deemed to have acted in good faith in the performance of its treaty obligations".[198]

7.97. The panel's analysis of several issues was informed by consideration of good faith. It referred to "good faith" efforts in the context of the interactions between the importer and the customs administration[199], and to the presumption of good faith in the context of assessing the likelihood of a respondent reintroducing a withdrawn measure.[200] It also referred to the presumption of good faith on the part of Thai authorities in the context of assessing the likelihood of their administering regulations in a biased manner, and concluded that "[i]n the absence of solid evidence to prove the contrary, there is no reason to assume that TTM directors, who are Thai government officials, would act in contradiction to their WTO obligations."[201]

7.98. The concept of good faith also figured prominently in the Panel Report in the first recourse to Article 21.5. Most notably, the Panel addressed at some length Thailand's argument that the Philippines failed to engage in WTO dispute settlement procedures in "good faith" as required by Article 3.10 of the DSU when it submitted a legal opinion prepared by Thailand's defence counsel.[202] As with the original panel, it also referred to good faith efforts in the context of the interactions between the importer and the customs administration.[203]

7.99. In its submissions in this second recourse to Article 21.5, Thailand has argued that it is entitled to a presumption that it will perform its WTO obligations in good faith, and it has stressed that CVA obligations must be interpreted in good faith. There are two issues related to the presumption of good faith on the part of Thailand and its authorities that the Panel considers would be best addressed at the outset because of their fundamental nature. These are addressed below.

7.1.4.2 Relevance of the presumption of good faith to accepting the veracity of Thailand's representations

7.100. The Philippines' claims under the CVA are premised on the understanding that the Thai authorities relied on pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the "actual price" in the 2002-2003 Charges and the "actual value" in the 1,052 revised NoAs. Thailand has repeatedly represented to the Panel that its authorities did indeed rely on the pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the "actual price" in the 2002-2003 Charges and the 1,052 revised NoAs. In the course of the proceeding the Philippines raised doubts about whether Thailand had actually received all the information contained in CK-21A forms from Indonesia. However, the Philippines accepts that Thailand "had *certain* pricing and cost information reported by PM Indonesia to the Indonesian government in CK-21A forms", and that "[a]lthough the precise nature of this information is unclear, the evidence shows that this information enabled Thailand to construct aggregate production costs, based on the producer's HJE retail selling price, the Indonesian taxes due on that price, and a standard amount for the costs and profits of others in the supply chain".[204]

7.101. The Philippines' doubts about the nature of the CK-21A information received arose from its discovery of an official statement from Indonesia's Ministry of Law and Human Rights relating to

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[197] Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 448 (referring to Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.)

[198] Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 1543 (referring to Panel Report, *US – Continued Suspension*, para. 7.317.)

[199] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.172 and 7.176.

[200] Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 448 (referring to Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.)

[201] Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 1543.

[202] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.1.3 (The ACWL/Commerce letters and lawyer-client privilege), including in particular paras. 7.29, 7.32, 7.34, 7.41, 7.49, and 7.56.

[203] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.106, 7.250, 7.308, 7.309, 7.332, and footnote 439.

[204] However, the Philippines "does not accept, without evidence, that Thailand had access to all of the information reported by the Indonesian producer in any CK-21A form from the relevant period". (Philippines' request to review the Interim Report, paras. 72 and 75.)

Thailand's request for CK-21A information.[205] The Ministry's statement describes, in some detail, the information that the Government of Indonesia was, and was not, able to share with Thailand. It specifically states that Indonesia could not provide Thailand with PM Indonesia's CK-21A information for *Marlboro*, for 1999-2003, because the documents had been destroyed pursuant to Indonesia's 10-year record-keeping requirements.[206] In the Philippines' view, the Ministry's statement raises questions about the information that Thailand purportedly obtained from the Government of Indonesia. These doubts motivated the Philippines' request that the Panel exercise its discretion, pursuant to Article 13 of the DSU, to ask Thailand to provide copies of the CK-21A information, and related communications, that the Indonesian officials allegedly provided to their Thai counterparts.

7.102. After hearing from the parties on this issue at the substantive meeting, the Panel informed the parties of its decision to decline the Philippines' request that the Panel exercise its authority pursuant to Article 13 of the DSU to seek the further information identified by the Philippines regarding the CK-21A forms, and that the Panel therefore considered it unnecessary to mediate the parties' disagreement on the scope of any ancillary confidentiality procedures.[207] In that communication, the Panel indicated in general terms why it did not consider that access to the information referred to by the Philippines is necessary for the Panel to make an objective assessment of the matter before it, but noted that it would elaborate on the reasons in the Report.

7.103. The Panel elaborates its reasons as follows. First, as already indicated in its earlier communication, the Philippines' own claims under the CVA are premised on the understanding that the Thai authorities relied on pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the "actual price" in the 2002-2003 Charges and the "actual value" in the 1,052 revised NoAs, and Thailand has repeatedly represented to the Panel that this understanding is correct. Consistent with this understanding, the Philippines confirmed that the copies of the CK-21A information and related communications would only serve to substantiate assertions that *Thailand* has made, but that the information is not necessary for the Philippines to make its own *prima facie* case.

7.104. The Panel did not consider it necessary to exercise its authority to verify factual issues that are not in dispute between the parties. While a panel's conclusions on questions of law, legal interpretation and the proper legal characterization of measures are not controlled by the concurring positions or shared assumptions of the parties[208], with regard to questions of fact "[i]t is usual practice for domestic and international legal tribunals, including GATT panels, to consider that, if a party admits a particular fact, the judge may be entitled to consider such fact as accurate."[209] In this connection, the Panel notes that the present case is distinguishable from *Canada – Aircraft*. In that case, Canada chose to defend its challenged measures only on the question of export contingency, and presented no defence on the issue of subsidization, and argued that the panel was wrong to request the production of evidence in respect of the issue of subsidization as it related to a defence that Canada had not made. The panel explained that it was appropriate to seek information on subsidization because Canada had expressly stated that it did not admit that the relevant measures constituted subsidies.[210] In the present case, in contrast, Thailand has confirmed, repeatedly, that the Philippines is correct in its assertion that the Thai authorities relied on the information contained in the CK-21A forms to determine the "actual " price/value of PMTL's imports.

7.105. Having said that, the Panel' decision not to request documentation verifying the veracity of Thailand's assertions was not based solely on the fact that Thailand's representations aligned with

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

[206] Official Statement from the Indonesian Ministry of Law and Human Rights dated 13 May 2016 (English translation), (Exhibit PHL-295-B), para. 4.

[207] See section 1.4.3.2 above.

[208] See e.g. Appellate Body Reports, *Brazil – Taxation*, para. 5.171; Panel and Appellate Body Reports, *Indonesia – Iron or Steel Products (Viet Nam)*, paras. 7.10 and 5.33, respectively.

[209] Panel Report, *US – Shrimp*, para. 7.15. This is not to suggest either that the absence of a disagreement between the parties on a question of fact is always controlling, or that the usual practice of accepting undisputed facts precludes a panel from seeking evidence of that fact, or from making further inquiries. The Appellate Body has observed that "a panel is not precluded from objectively determining the accuracy of a factual assertion even when it is not disputed between the parties". (Appellate Body Report, *Korea – Radionuclides (Japan)*, para. 5.181.)

[210] Panel Report, *Canada – Aircraft*, paras. 9.79-9.83.

the assumptions underlying the Philippines' own claims. Rather, in the light of the presumption of good faith on the part of Thailand, the Panel accepts the veracity of Thailand's representations that its authorities received pricing and cost information reported by PM Indonesia in the CK-21A forms. The Panel considers it useful to elaborate briefly on this point given the Philippines' continued doubts about the Thai authorities' access to the CK-21A information.[211]

7.106. 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 Panel considers that a Member would clearly fall short of engaging in WTO dispute settlement procedures in "good faith" if, as either a complaining or responding party, it were to fabricate evidence or misrepresent facts of which it possesses exclusive knowledge in such a way as to induce a panel to rely on those representations for the purpose of making findings that rest on an incorrect factual basis.[212] Accordingly, the Panel considers that the presumption that Members engage in WTO dispute settlement procedures in good faith establishes a high threshold for questioning the veracity of such factual representations. This understanding is consistent with the approach taken by panels in previous cases, including in the context of a range of issues relating to anti-dumping and subsidy measures involving information solely in the possession of the responding Member.[213]

7.107. The Panel has carefully considered the contents of the official statement from Indonesia's Ministry of Law and Human Rights relating to Thailand's request for CK-21A information, submitted by the Philippines as Exhibit PHL-295-B. In this case, Thailand has repeatedly represented that its authorities had access to and relied on the pricing and cost information reported by PM Indonesia in the CK-21A forms. Thailand also offered to provide copies of the documents that it had received from Indonesia, subject to mutually agreed confidentiality procedures. After the Panel invited Thailand to respond to the issue raised by the Philippines, it explained that Indonesia retained the data collected from the forms CK-21A in its databases. Specifically, Thailand explained that:

a. Thailand is a party to the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters 2004[214], which is enacted into Thai law in the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992), as amended in B.E. 2559 (2016)[215], and the Regulation of the Central Authority on Providing and Seeking Assistance in Criminal Matters B.E. 2537 (1994).[216]

b. Since 2008, Thailand has sought and received the information pertinent to this case under the ASEAN Treaty through several mutual assistance requests to the government of Indonesia for certain documents, including CK-21A and CK-8 forms, the price structure forms, and related laws and regulations with respect to PMTL's imports of cigarettes. Thailand states that it also collected information from "other sources" at that time.

[211] As noted earlier, in its comments on the draft descriptive part of the Report, the Philippines considered it appropriate to reflect these doubts by suggesting that the paragraphs containing the Panel's description of Thailand's reliance on information obtained from Indonesian authorities be qualified with phrases and terms such as "is said to have", "said to be", "asserted" and "allegedly". The Philippines recalled that "although Thailand asserted that this CK-21A information served as the basis for its 'actual price' and 'actual value', it declined to provide any evidence to support that assertion, despite the Philippines invitation for Thailand to do so", and that "[f]ollowing the discovery of the statement by the Government of Indonesia contained in Exhibit PHL-295, doubts emerged as to whether Thailand had, in fact, received the alleged CK-21A information from Indonesia." (Philippines' comments on the descriptive part of the Panel Report, paras. 6-7.)

[212] See e.g. Panel Report, *US – 1916 Act (Japan)*, footnote 422; Panel Report, *EC – Asbestos*, footnote 3 to paragraph 7.2.

[213] See e.g. Panel Report, *EC – Bed Linen*, para. 6.216; Panel Report, *EC — Tube or Pipe Fittings*, para. 7.47; Appellate Body Report, *EC — Tube or Pipe Fittings*, paras. 122-128; Appellate Body Report, *Russia — Commercial Vehicles*, paras. 5.120-5.137; Panel Report, *EC – Fasteners (China)*, para. 7.214 and footnote 473; Appellate Body Report, *EC – Fasteners (China)*, paras. 439-454; Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.10 and footnote 15; Panel Report, *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 7.180 and 8.660.

[214] ASEAN Treaty on Mutual Legal Assistance in Criminal Matters 2004, (Exhibit THA-80).

[215] Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) (English translation), (Exhibit THA-81-B).

[216] Regulation of the Central Authority on Providing and Seeking Assistance in Criminal Matters B.E. 2537 (1994), (English translation), (Exhibit THA-82-B).

c. Thailand received responses to these requests in 2010 and 2016, in which Indonesia provided the requested information. In the later responses, Indonesia indicated that CK-21A and CK-8 forms were normally destroyed after 10 years; however, Indonesia retained the data collected from the forms CK-21A in its databases and was able to share that information in those responses.

d. To sum up, Thailand obtained the information on which it relied to reconstruct the CIF prices contained in Exhibit THA-74 (BCI) from the original source documents and the Indonesian government's own database of records containing information from those forms.[217]

7.108. In these circumstances, and in the light of the presumption of good faith on the part of Thailand, the Panel accepts the veracity of Thailand's representations regarding its access to information reported by PM Indonesia in the CK-21A forms. Accordingly, the remainder of the Panel's analysis proceeds on the understanding that the Thai authorities received pricing and cost information reported by PM Indonesia in the CK-21A forms, and determined the "actual price" in the 2002-2003 Charges and the "actual value" in the 1,052 revised NoAs on that basis.

7.1.4.3 Relevance of the presumption of good faith to the interpretation of CVA obligations

7.109. Thailand argues that the presumption of good faith on the part of the Thai authorities (and customs authorities in general) should inform the interpretation and application of CVA obligations in cases where the authorities rely, without any further scrutiny, on a company's pricing and cost information obtained from foreign governments. The Philippines states that it accepts that a Member enjoys a rebuttable presumption that it complies in good faith with its treaty obligations[218], but disagrees with the conclusions that Thailand argues should be drawn from this presumption. In this section, the Panel addresses some of the parties' arguments on the interpretative consequences that flow from the presumption of good faith on the part of customs authorities.

7.110. First, Thailand states that an interpretation of CVA obligations that presumes good faith on the part of customs authorities in the importing country means that an interpreter "should assume that the authority of the importing country will do everything possible to rely on accurate information" for customs valuation purposes.[219] The Philippines responds that Thailand is wrong insofar as it is arguing that the Panel must *assume*, as an interpretive matter, that an authority has *in fact* done "everything possible" to meet its CVA obligations.[220]

7.111. The Panel does not understand Thailand's argument to be that the Panel should simply assume, in the face of opposing evidence, that its authorities in fact did everything possible to ensure that their determination of the transaction value, examination of the circumstances of sale, and/or determination of a revised customs value complied with CVA obligations. Insofar as that is what Thailand is arguing, then the Panel would disagree for all of the reasons presented by the Philippines in rebutting that argument. Rather, the Panel reads Thailand's argument in conjunction with its wider argument that a customs authority enjoys a considerable margin of discretion when determining an "all cost plus a profit" benchmark under Paragraph 3 of the Interpretative Note, and need not follow to the letter other CVA disciplines governing the calculation of costs and profit or "the long list of obligations suggested by the Philippines".[221] When read in conjunction with that wider argument relating to discretion, the Panel understands Thailand to essentially be making the point that the relevant CVA obligations at issue should be interpreted in a way that preserves and does not hinder this discretion, and that one of the reasons why the existence of such discretion is appropriate is that a customs authority cannot be presumed to abuse this discretion – rather, it should be assumed that the authority of the importing country "will do everything possible to rely on accurate information" for customs valuation purposes.

[217] Thailand's opening statement, paras. 3.45-3.49.
[218] Philippines' second written submission, para. 113.
[219] Thailand's first written submission, paras. 3.78 and 3.96.
[220] Philippines' second written submission, paras. 110-118.
[221] Thailand's first written submission, para. 3.85.

7.112. Insofar as this reflects a correct understanding of Thailand's point, the Panel finds it unobjectionable. Further above[222], the Panel already recalled its general understanding that 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, it would 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".[223] The Panel observed that 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".[224] The Panel considers that this interpretative approach may also be grounded in a presumption of good faith on the part of the domestic authorities whose conduct is regulated by those obligations.

7.113. Second, Thailand argues that a good faith interpretation of the CVA should not impose "excessive restrictions" on an authority's "ability to gather information on a producer's costs and profits".[225] The Philippines considers that Thailand's argument is confused, because nothing in the Philippines' interpretation would "impose excessive restrictions on the authority's ability to gather information on the producer's cost and profits" given that the Philippines' position is the CVA "*obliges* an authority to *gather actively* information on the producer's costs and profits".[226]

7.114. The Panel agrees with the general proposition that CVA obligations should not be interpreted in a manner that imposes "excessive restrictions" on an authority's ability to gather information necessary to determine the customs value of an importer's goods, whether in the context of gathering information relating to a producer's costs and profits or otherwise. Leaving aside the question of what types of restrictions are properly characterized as "excessive", and whether it is necessary to invoke a presumption of good faith to sustain the proposition that CVA obligations should not be interpreted in a way that imposes excessive restrictions on customs authority, the general proposition is unobjectionable.

7.115. Indeed, this proposition is already clearly reflected in the Panel's analysis of several issues in the first recourse to Article 21.5 in relation to the Philippines' claims under both the CVA and the GATT 1994. For example, the Panel considered 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", and explained how an authority could proceed to resolve this kind of issue through a process of consultation with the importer.[227] In this regard, the Panel considered that it would be fully consistent with the requirements of the examination required by Article 1.2(a) 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".[228]

7.116. Similar considerations informed the Panel's interpretation of the provisions of the GATT 1994 which were at issue. For example, in the context of interpreting the publication obligation in Article X:1, the Panel considered that:

> [I]mportant 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

[222] See paragraph 7.8 above.
[223] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.82.
[224] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.82.
[225] Thailand's first written submission, para. 3.79.
[226] Philippines' second written submission, paras. 119-121.
[227] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.171.
[228] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.171.

> 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 X:1 would entail unduly burdensome and unrealistic consequences for Members … .[229]

7.117. Thus, the Panel considers that CVA obligations should not be interpreted in a manner that imposes "excessive restrictions" on an authority's ability to gather information necessary to determine the customs value of an importer's goods, whether in the context of information relating to a producer's costs and profits or otherwise. The Panel considers this to be an unremarkable proposition, and one that is already reflected in the Panel's own analysis of various issues in first recourse to Article 21.5.

7.118. Finally, the Panel considers Thailand's argument that under a "good faith" interpretation of the CVA, an authority should have "the right to assume that the information provided by the exporting country's authority is accurate and truthful"[230], and it should not be faulted in a situation where a producer would "intentionally submit fabricated information to authorities in the country of exportation and, on that basis, later claim that the authority in the country of importation acted arbitrarily by relying on that same information".[231] According to the Philippines, Thailand is wrong in arguing that a "good faith" interpretation allows a customs administration to "assume" that information provided by authorities of the exporting country is reliable for customs valuation purposes.[232]

7.119. The Panel's findings in the first recourse to Article 21.5 confirm that the authority in the importing country often has no choice but to rely on the information provided to it and that the importer thus bears a responsibility to provide it with the information necessary to conduct its analysis, and that a customs authority cannot be faulted for relying on the information that the importer does, or does not, provide to it. For example, in the course of its analysis of the Philippines' claim under Article 1.2(a), second sentence, the Panel stated that because the parties did not dispute that a comparison of P&GE rates is, in principle, a valid indicator of whether the relationship influenced the price, it considered 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", and that the authority would be under an obligation to address such evidence or information only "where an importer provides certain evidence or information that is relevant to the examination of the circumstances of sale, be it quantitative or qualitative".[233] The Panel proceeded to provide the following illustration:

> 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.[234]

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[229] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.886.
[230] Thailand's first written submission, para. 3.79.
[231] Thailand's first written submission, paras. 3.79-3.80.
[232] Philippines' second written submission, paras. 122-133.
[233] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.234.
[234] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, footnote 592. (emphasis original)

7.120. In the context of its analysis of the Philippines' claims under Article 5, the Panel similarly confirmed 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."[235] In this respect, the Panel considered that an "importer may, practically speaking, 'waive' its rights in a particular set of circumstances".[236] In a passage that is highly pertinent to Thailand's point, the Panel stated that:

> [W]e 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 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.
>
> … 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.[237]

7.121. Thus, the Panel agrees in principle that an authority should have "the right to assume that the information provided by the exporting country's authority is accurate and truthful"[238], and it should not be faulted in a situation where a producer would "intentionally submit fabricated information to authorities in the country of exportation and, on that basis, later claim that the authority in the country of importation acted arbitrarily by relying on that same information".[239] This understanding may be related to considerations of good faith: like the original panel, the Panel in the first recourse to Article 21.5 considered 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".[240]

7.122. However, nothing in the Panel's prior findings implies that an authority could disregard relevant information and explanations provided by the importer as to the accuracy of information before a customs authority. For example, the Panel made clear that when a customs authority considers that the relationship influenced the price on the basis of an assessment "which is in itself a valid indicator, or is suggestive" of whether the relationship influenced the price, if the importer responds by providing other evidence that is relevant, in "such a situation, if the customs authority fail[s] 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".[241]

7.123. The Panel also finds unobjectionable the principle that there are limitations on the extent to which a party may invoke a claim or defence based on factual circumstances that it was responsible for creating. Thailand invokes the *Factory at Chorzów* case and other international authorities that

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[235] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.307.
[236] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.307.
[237] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.308-7.309.
[238] Thailand's first written submission, para. 3.79.
[239] Thailand's first written submission, paras. 3.79-3.80.
[240] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.171-7.172. Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.250.
[241] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, footnote 592.

reflect this equitable maxim[242], but the same notion is already to some extent implicit in, and assumed by, the Panel's analysis in the first recourse to Article 21.5. For example, in the context of its assessment of the Philippines' claim under Article 10 of the CVA regarding the disclosure of PMTL's confidential information to the media, the Panel concluded that the information concerning PMTL's transaction values retained the status of "confidential information", notwithstanding their prior disclosure to the press by Thai government officials. The Panel reasoned:

> 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 disclosure was made without PMTL's permission. 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.[243]

7.1.4.4 Conclusion

7.124. In sum, in the light of the presumption of good faith on the part of Thailand, the Panel accepts the veracity of Thailand's representations regarding its access to the information reported by PM Indonesia in the CK-21A forms. Regarding Thailand's arguments concerning the relevance of good faith to the interpretation of the CVA, the Panel considers that each of the specific points considered above, which in one way or another ostensibly relate to the consequences of a presumption of good faith to the interpretation and application of CVA obligations, relate to more general issues that have already been adequately clarified through the Panel's prior interpretations of the CVA. The Panel appreciates that varying nomenclature can be used to reiterate the same concepts and principles[244], but rather than approaching the disputed points as matters of first impression pertaining to interpretative consequences flowing from the presumption of good faith, the Panel grounds its analysis in its existing interpretations of the CVA. The Panel sees a potential for confusion if, in this second recourse to Article 21.5, it were to present its analysis and conclusions using different terminology and legal concepts to describe the same general legal requirements already articulated in the Report in the first recourse to Article 21.5, or to imply that a different set of requirements apply in cases where the authorities rely on pricing and cost information obtained from foreign governments.

7.2 The Thai authorities' reliance on the information in the CK-21A forms

7.2.1 Introduction

7.125. Both the 2002-2003 Charges and the 1,052 revised NoAs rest on the same basis, namely the calculation, by the DSI, of the actual price/value of PMTL's imports of cigarettes over the 2001-2003 period. The DSI calculated this price/value based on certain pricing and cost information reported by the producer and seller of the cigarettes at issue, PM Indonesia, to Indonesian tax authorities in the CK-21A form.

7.126. The Philippines advances distinct substantive claims under Articles 1.1, 1.2(a) second sentence, 6 and 7 of the CVA, and requests distinct findings in respect of each of its substantive claims. In addition, the Philippines has set out its legal claims regarding the 2002-2003 Charges and 1,052 revised NoAs in separate sections of its submissions, notwithstanding that its legal claims and supporting arguments are largely identical.

7.127. However, the Philippines considers that the Thai authorities' reliance on the CK-21A forms violate fundamental CVA principles over an "overarching nature" regarding the required "nature and quality of cost and profit information used for customs valuation purposes [that] apply equally to

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[242] See above, paragraph 7.44.

[243] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.770.

[244] See e.g. Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, footnote 1033 (observing 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.")

determinations made under Articles 1.1, 1.2(a), 6 and 7"[245], and its distinct claims under these provisions are all founded on essentially the same objections to the Thai authorities' reliance on the information in the CK-21A forms. In the Philippines' view, these fundamental problems should lead the Panel to find that the customs valuation determinations reflected in the 2002-2003 Charges and 1,052 revised NoAs are inconsistent with these CVA obligations, regardless of whether the Thai authorities made a customs valuation determination governed by Article 1.1, Article 1.2(a) second sentence, Article 6, and/or Article 7.

7.128. According to the Philippines, the fundamental deficiencies that underlie its various legal claims include "that the relevant cost information was not reliable; that the Thai authorities knew that the information was questionable, both because it was questionable on its face and because the importer made submissions to that effect; and, the authorities nonetheless did nothing whatsoever to review the reliability of the information".[246] Thailand acknowledges that the information that its authorities relied upon "was not subsequently verified in terms of its accuracy"[247], but maintains that PM Indonesia must be blamed for any inaccuracies in the CK-21A information, and that in the particular circumstances of this case, its authorities were entitled to assume that it was accurate and truthful.

7.129. The Panel will address the fundamental factual premises of the Philippines' legal claims below, before turning to those specific legal claims. The Panel will refer back to these findings later in the context of its analysis of the Philippines' specific legal claims.

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

7.130. The Panel will first consider the alleged inaccuracy of the information reported in the CK-21A forms, and in particular whether the Philippines has established that, as a result of the regulatory constraints mandated by Indonesian excise tax law at the time that PM Indonesia completed the CK-21A forms, the costs and profits reported by PM Indonesia in these forms were overstated and "did not – and could not – represent the actual costs and profits of the producer and the other parties in the supply chain".[248] Thailand counters that the Philippines' assertion regarding these Indonesian regulatory constraints "should not be considered or accepted" by the Panel for several reasons, one of which is that the Panel "cannot make findings that would call into question the WTO-consistency of Indonesia's laws or how they are administered".[249]

7.131. The Panel notes that the Philippines has the burden of substantiating its assertion that as a result of the regulatory constraints mandated by Indonesian excise tax law, the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain. Thus, the Panel will begin by reviewing the Philippines' exposition of the operation of the Indonesian excise tax system for tobacco products and the form CK-21A, and will then consider Thailand's rebuttal arguments.

7.132. The Philippines explains that under the Indonesian excise tax law that was in force in 2001-2003, the excise tax on tobacco products was payable by the producer, when products left the factory gate, even though the tax was ostensibly due on the retail sale.[250] The Government of Indonesia thereby centralized the collection of excise tax in the hands of the producer (as opposed to the many retailers) and also collected the tax in advance of the retail sale.[251] This excise tax base for tobacco products sold in Indonesia was known as the "Harga Jual Exeran" or "HJE", which translated means "retail selling price" (RSP).[252]

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[245] Philippines' response to Panel question No. 141, para. 115.
[246] Philippines' second written submission, para. 118.
[247] Thailand's first written submission, para. 3.110.
[248] Philippines' first written submission, para. 237.
[249] Thailand's first written submission, para. 3.99.
[250] Philippines' first written submission, para. 107, referring to Indonesian Law on Excise, Law No. 11/1995 (English translation), (Exhibit PHL-263-B), Article 7.
[251] Philippines' first written submission, para. 107.
[252] Philippines' first written submission, footnote 74, referring to Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B), Article

7.133. As elaborated below, the HJE functioned as a maximum retail selling price.[253] It was set with a view to achieving tax revenue targets set annually by the Government of Indonesia.[254] The maximum retail price was governed by regulations that aimed to ensure that it was high enough to meet those tax revenue targets.[255]

7.134. The HJE was fixed by the Directorate General of Customs and Excise (DGCE), the Indonesian excise tax authority, according to the size of the producer and the type and brand of tobacco product.[256] The producer was responsible for obtaining an HJE for a given product and, when it launched a new product, was required to obtain an HJE even before it began to manufacture the new product.[257] After a product was launched, if the average actual retail sales price exceeded the HJE for a product, or if the DGCE increased the minimum HJE above the level of the HJE currently assigned for a product, the producer had to seek an increased HJE.[258]

7.135. In order to obtain an HJE from the DGCE, a producer submitted a proposed HJE for the approval of the DGCE.[259] The producer was required to do so before it began manufacturing a new product for sale in Indonesia.[260] When the DGCE approved a requested HJE, this figure became the excise tax base for that product.[261] This application for an HJE for a particular product was accompanied by administrative form CK-21A, entitled "Calculation of the Retail Selling Price of Domestic Tobacco Products".[262]

7.136. In completing form CK-21A form, a producer had to fill in a series of pre-established rows in the form in which the producer ostensibly reported to DGCE purported "costs" and "profits" of all parties in the supply chain, leading from the producer to the retailer. Specifically, form CK-21A contained a series of line-items relating to:

a. the producer's costs of production, which included pre-established rows for (1) mix tobacco; (2) cut cloves; (3) sauce; (4) filter; (5) wrapper; (6) glass paper; (7) pack paper, including printing cost; (8) aluminum foil paper; (9) outside label; (10) pressed paper and box; (11) glue material; (12) costs of rolling, grinding and cutting; (13) costs of packaging, pressing and boxing; (14) sale/transportation costs; (15) company costs; (16) other costs;

b. the domestic excise tax and VAT due on the product (based on the requested HJE);

c. the producer's profits; and,

2; Witness statement of Dr. Joko Wiyono, 20 April 2012 (English translation), (Exhibit PHL-255-B), p. 2; and Witness statement of Eka Siswani, 3 May 2012 (English translation), (Exhibit PHL-256-B), p. 2.

[253] Philippines' response to Panel question No. 146, para. 162, and Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B), Article 8(1). In its third-party submission, Indonesia states along the same lines that "The translation of "HJE" into English would be "retail selling price". However, although the GOI fixed the minimum tax base (HJE), it did not fix the actual selling price. Sellers could sell tobacco products at any price. When we refer to the HJE in this submission, we refer to the tax base." (Indonesia's third-party written submission, footnote 7.)

[254] Indonesia's third-party written submission, paras. 4-5, referring to Law No. 15 of 2017, Article 1(4).

[255] Indonesia's third-party written submission, para. 10, referring to Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B).

[256] Philippines' first written submission, para. 105, referring to Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B).

[257] Philippines' first written submission, para. 107, referring to Indonesian Law on Excise, Law No. 11/1995 (English translation), (Exhibit PHL-263-B), Article 7.

[258] Philippines' first written submission, para. 107, referring to Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B), Article 8(1).

[259] Philippines' first written submission, para. 108, referring to Decision of the Director General of Customs and Excise No. KEP-17/BC/2000 (English translation), (Exhibit PHL-260-B), Article 2.

[260] Philippines' first written submission, para. 108, referring to Indonesian Law on Excise, Law No. 11/1995 (English translation), (Exhibit PHL-263-B), Article 7 and Witness statement of Dr. Joko Wiyono, 20 April 2012 (English translation), (Exhibit PHL-255-B), p. 4.

[261] Philippines' first written submission, para. 108, Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B), Article 2.

[262] See Example Form CK-21A, (Exhibit PHL-264).

d. a single item to cover the costs and profits of other parties in the supply chain (i.e., distributor/agent/retailer).[263]

7.137. With respect to this last item, the applicable regulation provided that figures reported for parties other than the producer could not be less than 10 percent of the total.[264] Moreover, when reporting figures in form CK-21A, a producer was required to ensure that the reported figures for the apparent "costs" (including taxes) and "profits" of all parties in the supply chain added up, in total, to the requested HJE.[265]

7.138. While the reported profit and cost figures had to add up to the requested HJE, that same HJE had to be set at a level that exceeded certain thresholds prescribed by regulation, including but not limited to the actual sales price. More specifically, the Philippines identified the following regulatory requirements imposed by Indonesian excise tax law:

a. the requested HJE had to exceed the prescribed minimum HJE fixed by the DGCE for the particular category of tobacco product;

b. the requested HJE had to exceed the actual retail sales price that would be charged by retailers for the producer's product in question; and

c. the requested HJE also had to exceed the previously approved HJE of any other products in the same cigarette category manufactured by the producer.[266]

7.139. The Philippines asserts that, as a result of the figures reported in the CK-21A form having to add up to the total HJE being requested, coupled with proposed HJE having to exceed these regulatory thresholds and requirements and be set prior to the start of manufacturing, the costs and profits reported by PM Indonesia to Indonesia did not – and could not – represent the actual costs and profits of the producer and the other parties in the supply chain; rather, they would necessarily be inaccurate, and err towards overstating the actual costs and profits incurred by PM Indonesia.

7.140. In its first written submission, the Philippines explained the above points with reference to Indonesian laws and regulations, which it has provided as exhibits to the Panel. The relevant laws and regulations governing the administration of Indonesia's excise tax referenced by the Philippines include Indonesian Law on Excise, Law No. 11/1995[267], the Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, dated 29 March 2000[268], the Decision of the Director General of Customs and Excise No. KEP-17/BC/2000[269], and the Decision of the Director General of Customs and Excise No. KEP 19/BC/1997.[270] The Philippines also provided an example of the CK-21A form.[271]

7.141. The operation of these regulatory requirements was further elaborated in the two expert statements, which PMTL obtained and provided to the DSI in 2012, by Joko Wiyono, a former Director of the DGCE, and Eka Siswani, a practicing Indonesian-qualified lawyer with expertise in Indonesian

[263] Philippines' first written submission, para. 109, referring to the Example Form CK-21A, (Exhibit PHL-264).

[264] Philippines' first written submission, para. 110, referring to Decision of the Director General of Customs and Excise No. KEP 19/BC/1997 (English translation), (Exhibit PHL-265-B); and Witness statement of Dr. Joko Wiyono, 20 April 2012 (English translation), (Exhibit PHL-255-B), p. 4.

[265] Philippines' first written submission, para. 111, referring to Decision of the Director General of Customs and Excise No. KEP-17/BC/2000 (English translation), (Exhibit PHL-260-B), Article 2; and Example Form CK-21A, (Exhibit PHL-264).

[266] Philippines' first written submission, para. 112, referring to Decision of the Director General of Customs and Excise No. KEP-17/BC/2000 (English translation), (Exhibit PHL-260-B), Article 9; and Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B), Articles 8(1) and (2).

[267] Indonesian Law on Excise, Law No. 11/1995 (English translation), (Exhibit PHL-263-B).

[268] Decree of the Minister of Finance of the Republic of Indonesia No. 89/KMK.05/2000, 29 March 2000 (English translation), (Exhibit PHL-259-B).

[269] Decision of the Director General of Customs and Excise No. KEP17/BC/2000 (English translation), (Exhibit PHL-260-B).

[270] Decision of the Director General of Customs and Excise No. KEP 19/BC/1997 (English translation), (Exhibit PHL-265-B).

[271] Example Form CK-21A, (Exhibit PHL-264).

excise tax law. In their statements, these two experts explained the consequence of these requirements on the figures contained in the CK-21A form. Both explain that the figures contained therein were "estimates", or "approximations":

a. The Wiyono statement characterizes these figures as "the manufacturer's estimated values of the components" which constituted the proposed retail selling price.[272] The statement explains that there was no requirement that the DGCE consider "the estimated costs, profit and taxes"[273] listed in the CK-21A form, and that it was well aware that the form did "not consist of actual costs".[274] The statement indicates that "it was common knowledge at the DGCE that manufacturers would 'plug-in' numbers to show their justification for a proposed HJE above the 'minimum HJE' required by the DGCE".[275] The statement contrasts "actual costs" with "the approximate values" in the form.[276] In the context of explaining why the figures cannot be relied upon to compute a revised customs value, the statement again states that the data in the form "is based on estimates".[277] The statement noted that CK-21A forms "clearly lacked sufficient details to allow verification against a company's GAAP compliant accounts"[278] and the DGCE had "no procedure or methodology" to verify the reported information.[279] Further, the statement also explains that the information in form CK-21A did not account for "differences" in costs and profits as between goods sold domestically and for export.[280]

b. The Siswani statement likewise confirms that as part of its application for an approved retail selling price, the manufacturer submitted the CK-21A form setting out the proposed retail selling price which comprised "its estimated production, marketing and distribution costs"[281]; and the Siswani statement confirms that because the CK-21A form was prepared well in advance of production of the cigarettes at issue, it contained "estimated" costs and could not contain "actual cost information".[282] The Siswani statement concludes by observing that the CK-21A form was repealed in 2008, after which the application for an approved retail selling price no longer requires "estimated manufacturing costs, local taxes or profits" as an attachment to the application.

7.142. In its third-party submission, Indonesia also confirms various aspects of the Philippines' description of its tax system. Among other things, Indonesia confirms that the HJE was set to ensure that tax revenue targets were met, and that the DGCE was not interested in verifying whether the reported CK-21A figures reflected a producer's actual costs and profits. It characterized the figures reported in form CK-21A as a "pre-calculation".[283]

7.143. The Philippines further explained how the figures reported in the CK-21A forms were not merely inaccurate, but necessarily overstated the actual costs and profits of PM Indonesia and other parties in the supply chain. It points out that "if the Indonesian regulations required (1) that 'costs' and 'profits' reported in form CK-21A add up to the HJE, and (2) that the HJE had to exceed the actual [Retail Selling Price], then, as a matter of logic, the CK-21A 'costs' and 'profits' *necessarily* overstate the actual costs and profits"[284]; the Philippines added that "[f]urther compounding this necessary overstatement is the requirement that the requested HJE exceed a prescribed minimum, determined on the basis of Indonesia's excise tax revenue targets", and "the requirement that the

[272] Witness statement of Dr. Joko Wiyono, 20 April 2012 (English translation), (Exhibit PHL-255-B) p. 3, para. 5.2. (emphasis original)
[273] Witness statement of Dr. Joko Wiyono, p. 3, para. 5.3.
[274] Witness statement of Dr. Joko Wiyono, p. 4, para. 5.5(a).
[275] Witness statement of Dr. Joko Wiyono, p. 4, para. 5.5(a)(iii).
[276] Witness statement of Dr. Joko Wiyono, p. 4, para. 5.5(c).
[277] Witness statement of Dr. Joko Wiyono, p. 6, para. 7.2(a).
[278] Witness statement of Dr. Joko Wiyono, p. 4.
[279] Witness statement of Dr. Joko Wiyono, p. 3.
[280] Witness statement of Dr. Joko Wiyono, p. 4.
[281] Witness statement of Eka Siswani, 3 May 2012 (English translation), (Exhibit PHL-256-B), p. 2, para. 4.3.
[282] Witness statement of Eka Siswani, p. 2, para. 4.3.
[283] Indonesia's third-party submission, para. 9. See also Witness statement of Dr. Joko Wiyono, pp. 1 and 4.
[284] Philippines' response to Panel question No. 144, para. 152. (emphasis original)

requested HJE exceed the assigned HJE of any other products in the same cigarette category manufactured by the producer".[285]

7.144. The Philippines explained more concretely that, in the period 2000-2003, to meet revenue collection targets, the Government of Indonesia raised the HJE by 69.5 percent. It then states the consequences with reference to Exhibit THA-74, in which Thailand provided a sample of how it calculated the actual price/value using the information reported in the CK-21A forms:

> Because Thailand used the HJE as the starting point to construct PTPMI's "costs", the company's costs move in lockstep with the HJE. The supposed "costs" are simply a residual amount or "plug" that moves in tandem with the HJE. Thus, just like the HJE, PTPMI's "costs" seemingly also jump by 69.5 per cent in just two years.[286] However, this apparent jump in PTPMI's costs is simply an arithmetic consequence of Thailand's decision to construct PTPMI's costs by "pegging" them to the HJE.[287]

7.145. The Panel considers that in the absence of effective refutation, the above explanation suffices to establish that as a result of the regulatory constraints mandated by Indonesian excise tax law, the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain. Furthermore, nothing in this description suggests to the Panel that PM Indonesia, by reporting the information that it did in the CK-21A form, engaged in conduct that could be characterized as involving an "illegal act"[288] under Indonesian law, or systematically or intentionally "deceived"[289] the Indonesian authorities.

7.146. Thailand does not specifically contest any particular aspect of the Philippines' description of Indonesian law, supported by evidence in the form of the relevant Indonesian laws and regulations, and expert testimony. However, Thailand presents several lines of argument, cast at a higher level of generality, as to why the Philippines has not substantiated its assertion that the information reported in the CK-21A forms was necessarily inaccurate. Thailand suggests that if PM Indonesia reported inaccurate information it was because it freely chose to do so.[290]

7.147. First, Thailand submits that the Philippines' assertion that the information reported by manufacturers in form CK-21A was necessarily inaccurate as a result of the operation of Indonesia's tax system should not be "considered or accepted" by the Panel, because that assertion implies that Indonesia's tax system was in violation of Article X:3(a) of the GATT 1994, and the Panel "cannot make findings that would call into question the WTO-consistency of Indonesia's laws or how they are administered".[291] Thailand suggests that the Panel is not in a position to make findings on the regulatory requirements identified by the Philippines, "unless and until they have been properly challenged and found to be inconsistent in WTO dispute settlement proceedings".[292] In response to a question from the Panel, Thailand reiterates the idea that because "the Philippines has not challenged Indonesia's method of determining the tax base of cigarettes in the WTO", it follows that "Indonesia's method, and reporting requirements, enjoy a presumption of WTO consistency".[293] The Philippines responds by stating that with "this absurd argument, Thailand seems to be engaged in an effort to distract attention from the shortcomings in its own measures", and clarifying that "[f]or the record, the Philippines makes no such allegations about Indonesian law".[294]

7.148. The Panel fully agrees that Indonesia's measures cannot be presumed to have been administered in an unreasonable manner under Article X:3(a). In the light of the Panel's relevant findings under Article X:3(a) in the first recourse to Article 21.5, the Panel accepts the premise that

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[285] Philippines' response to Panel question No. 144, para. 152.

[286] (*footnote original*) The "Cost" in line 9 in Exhibit THA-74 increases from 1870.36 (first row) to 3170.56 (last row) in the period 1 November 2000 – 30 December 2003, which is an increase of 69.5 per cent. *See* Exhibit THA-74.

[287] Philippines' opening statement at the meeting of the Panel, para. 77.

[288] Thailand's first written submission, paras. 1.5, 3.47, 3.48, 3.79, 3.96, and 3.175.

[289] Thailand's first written submission, paras. 3.47 and 3.80.

[290] Thailand's response to Panel question Nos. 133 and 134, para. 3.7.

[291] Thailand's first written submission, para. 3.99.

[292] Thailand's first written submission, para. 3.99.

[293] Thailand's response to Panel question Nos. 133 and 134, para. 3.8.

[294] Philippines' second written submission, para. 107.

it would be *prima facie* inconsistent with Article X:3(a) if Indonesia had imposed regulatory requirements on PM Indonesia that were impossible to comply with, and exposed the producer to legal jeopardy as a consequence of that non-compliance.[295] However, this does not cast doubt on the Philippines' factual assertion, which is substantiated with evidence in the form of the relevant Indonesian laws and regulations and expert testimony, that the figures reported in the CK-21A form could not reflect the actual costs or profits of PM Indonesia. Rather, relying on the presumption that Indonesia would not impose impossible legal requirements in violation of Article X:3(a) serves to contradict Thailand's own assumption, which is unsubstantiated by any concrete evidence or argumentation, that PM Indonesia was obliged to provide accurate figures when reporting its pricing and cost information in the CK-21A form.

7.149. Additionally, Thailand asserts that "[u]nder Indonesian law, [PM Indonesia] had a legal obligation to provide truthful and accurate information"[296], and that "there is a general obligation to provide accurate information on such government forms".[297] Thailand states that its authorities assumed that "there is no provision under Indonesian law that allows private entities to legally submit inaccurate information"[298], and states that "the Philippines was unable to identify such a provision [of Indonesian law] during the hearing".[299]

7.150. The Panel notes that Thailand does not identify any specific provision of Indonesian law to substantiate the above assertion or respond to the Philippines' description of how the regulatory requirements discussed above necessarily result in the inclusion of inaccurate figures in the CK-21A form. The Panel has no difficulty with the proposition that there is a general obligation to provide truthful information in the context of government forms, but this does not mean or imply that there cannot be government forms that, in certain contexts and prepared for certain purposes, call for rough estimates or approximations. The requirement as to the level of accuracy depends on the nature of the information provided, the purpose for which it was provided, and the regulatory context in which it was provided. As a simple hypothetical example to illustrate this point, reporting figures that understate one's annual salary in an income tax form in a way that triggers a reduced tax liability is not necessarily the same thing as providing approximate arrival and departure dates when applying for a travel visa months in advance of making a holiday booking. The provision of "proxy costs" in the CK-21A form, made pursuant to the regulatory requirements as described by the Philippines and its experts and in keeping with the context and purpose of that governmental form, cannot be equated with lying, deception, or illegality.

7.151. Based on the foregoing, the Panel concludes that, as a result of the regulatory constraints mandated by Indonesian excise tax law, the figures in the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain.

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

7.152. Another fundamental premise of the Philippines' case is that the Thai authorities knew, or should have known, that the information in the CK-21A forms was inaccurate. According to the Philippines, the content, purpose and format of the information reported in the CK-21A forms, and the fact that it was not provided by the importer or producer, all raised serious questions about its accuracy, relevance and reliability for Thailand's customs valuation purposes.[300] It asserts that the

[295] The Panel recalls that in the first recourse to Article 21.5, the Philippines challenged a VAT notification requirement, arising under Notification 187 and Order Por. 145-2555, obliging importers of cigarettes to notify in June of each year the "average actual market price" as of the date of notification. The Panel concluded that the importer could not know the "average actual market price" on the date of notification, and thus was unable to ensure that it complied with the VAT notification requirement, and that this exposed cigarette importers to the potential consequences of non-compliance, all of which gave rise to a violation of Article X:3(a). (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.924 and 7.935.)

[296] Thailand's second written submission, para. 3.65.

[297] Thailand's response to Panel question Nos. 133 and 134, para. 3.4.

[298] Thailand's response to Panel question No. 165(a)-(c), para. 3.24.

[299] Thailand's response to Panel question No. 165(a)-(c), para. 3.24.

[300] Philippines' first written submission, paras. 252ff.

Thai authorities "knew that the information was questionable, both because it was questionable on its face and because the importer made submissions to that effect".[301]

7.153. Thailand counters that its authorities had "the right to assume that the information provided by the exporting country's authority is accurate and truthful"[302], and stresses the particular circumstances surrounding the provision of the CK-21A information to the Thai authorities. The notable circumstances identified by Thailand are that the CK-21A information was provided by PM Indonesia to the Indonesian tax authorities as part of tax filings required under the law[303]; that it was furnished to Thai officials by the Government of Indonesia[304]; that it was reasonable to presume that under Indonesian law, PM Indonesia had a legal obligation to provide truthful and accurate information[305]; that Indonesian authorities had already processed and relied on this information for collecting local taxes[306]; and that the Thai authorities had no way of independently verifying PMTL's characterization of Indonesia's tax system.[307]

7.154. The Panel agrees with Thailand that the authorities in an importing country are not required to start their examination from a "presumption that information provided by foreign governments is not accurate, or even worse, that producers knowingly submitted fabricated information", and accepts that this would "impose excessive restrictions on the authority's ability to gather information on the producer's costs and profits".[308] The Panel is inclined to agree with Thailand that in principle the customs authorities in an importing country have "the right to assume that the information provided by the exporting country's authority is accurate and truthful"[309], and based on that assumption may regard such information as "presumptively reliable"[310] in terms of its accuracy.

7.155. However, such an assumption can only operate as that, i.e. rebuttable presumption, and does not entitle an authority to deem information to be accurate without taking into account relevant explanations subsequently provided by the importer. As already recalled further above, 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 an assessment "which is in itself a valid indicator, or is suggestive", of whether the relationship influenced the price; however, if the importer responds by providing other evidence that is relevant, in "such a situation, if the customs authority fail[s] 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".[311] In this case, the record of communications from PMTL to the DSI and the Public Prosecutor shows that PMTL repeatedly informed the DSI and Public Prosecutor that the pricing and cost information reported in the CK-21A forms did not represent PM Indonesia's actual costs and profits, and could not be relied upon for customs valuation purposes without violating the CVA.

7.156. According to the Philippines, at some point in early 2011, the DSI informed PMTL of its suspicions that PMTL had under-declared customs values on entries in 2001-2003 based on CK-21A excise tax forms obtained from the Government of Indonesia.[312] From the record of communications before the Panel, it appears that this information led PMTL to provide a detailed response, and also to obtain and submit the two expert statements. The Panel has reviewed these communications made by PMTL to the DSI and Public Prosecutor regarding the unsuitability of the information reported in the CK-21A forms, and summarizes them below.

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[301] Philippines' second written submission, para. 118.
[302] Thailand's first written submission, para. 3.79.
[303] Thailand's response to Panel question No. 164, para. 3.11.
[304] Thailand's response to Panel question No. 164, para. 3.11.
[305] Thailand's second written submission, para. 3.65.
[306] Thailand's second written submission, para. 3.65. Elsewhere, Thailand refers to "the specific situation of information provided by foreign governments that has already been used to collect taxes in that foreign country". (Thailand's second written submission, para. 3.67.)
[307] Thailand likewise maintains that, in the context of this WTO dispute settlement proceeding, it has no way of independently verifying the Philippines' characterizations of Indonesia's excise tax system. (Thailand's response to Panel question No. 134, para. 3.7.)
[308] Thailand's first written submission, para. 3.79.
[309] Thailand's first written submission, para. 3.79.
[310] Thailand's response to Panel question No. 164, para. 3.15.
[311] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, footnote 592.
[312] Philippines' first written submission, paras. 95-96.

7.157. On 4 February 2011, PMTL sent a letter to the DSI in which PMTL made a "Request for Fair Treatment and Justice".[313] In this letter, PMTL states that it "understands that the DSI has formed the view that the retail selling prices set out in the so-called Form CK-21A are comparable to PM Thailand's declared customs values and therefore evidence to show that PM Thailand's import prices declared to Thai Customs are incorrect".[314] The letter then proceeds to set out a brief explanation of "why, for the purposes of Thai customs valuation law, the information and retail selling prices contained in Form CK-21A are not relevant to an assessment of the values declared as the import prices by PM Thailand, and, most importantly, why it is unlawful and against customs valuation principles to compare the retail selling prices of products manufactured in Indonesia for sale in the Indonesian domestic market (CK21-A values) with the declared customs values of products manufactured in Indonesia and exported to Thailand for resale in the Thailand domestic market (PM Thailand's customs values)".[315] After setting forth this explanation, the letter states, "[t]o obtain confirmation that the form and the information contained in the form have nothing to do with customs valuation in respect of the products sold by the Indonesian manufacturer and imported by PM Thailand, you can ask the above-mentioned Indonesian authority to verify the above explanation."[316]

7.158. On 3 June 2011, the DSI sent a letter to PMTL's attorney, recalling an earlier meeting held on 14 March 2011 during which it was "agreed to discuss the possibility with PMTL regarding submission for the DSI team's consideration of Form CK-21A, which provides details about calculation of the domestic retail selling prices of tobacco products of the manufacturer in Indonesia".[317] The letter states that "a reasonable time has elapsed", and proposes a meeting "to confirm information and submit the above-mentioned documents to the DSI team".[318]

7.159. On 4 May 2012, counsel for PMTL responded by sending two witness statements to the DSI to "support the facts asserted in the said Request for Fair Treatment and Justice".[319] These two statements concerned the operation of Indonesia's excise tax system for tobacco products in the period 2001-2003, including the role of administrative form CK-21A.[320] As noted earlier, the two statements were prepared by: (1) Joko Wiyono, a former Director of the Directorate General of Customs and Excise, the Indonesian excise tax authority responsible for administering Indonesian excise tax; and (2) Eka Siswani, a practicing Indonesian-qualified lawyer with expertise in Indonesian excise tax law. Each statement provides a detailed explanation of why the figures reported in CK-21A forms were not an accurate and reliable reflection of PM Indonesia's actual costs and profits and, therefore, why the information in the forms was not suitable for Thailand's customs valuation purposes.

7.160. The record before the Panel includes an exchange of letters between PMTL and the DSI regarding the CK-21A forms over a period of years. In these letters, PMTL repeatedly articulates the reasons why the information in the CK-21A forms is not relevant to the determination of PMTL's customs values, and the DSI repeatedly requests that PMTL provide it with copies of all of the CK-21A forms:

a. On 11 September 2013, the DSI sent a letter to PMTL's attorney, recalling an earlier meeting held on 28 June 2011 during which it was confirmed that PMTL had been notified "of DSI's request for documents about the cost prices of cigarettes (i.e., CK-21A forms) but the Company still had to provide the requested documents".[321] The letter states that "considerable time has elapsed without your submission of the documents about the cost prices of cigarettes (CK-21 forms) to DSI", and to "please expedite your process of submitting such documents".[322]

[313] Request for Fair Treatment and Justice, 4 February 2011 (English translation), (Exhibit PHL-279-B).
[314] Request for Fair Treatment and Justice, p. 1.
[315] Request for Fair Treatment and Justice, p. 2.
[316] Request for Fair Treatment and Justice, p. 4.
[317] Letter from the DSI to PMTL, 3 June 2011 (English translation), (Exhibit PHL-253-B), p. 1.
[318] Letter from the DSI to PMTL, 3 June 2011 (English translation), (Exhibit PHL-253-B), p. 1.
[319] Letter from PMTL to the DSI, 4 May 2012 (English translation), (Exhibit PHL-281-B), p. 1.
[320] Witness statement of Dr. Joko Wiyono, 20 April 2012 (English translation), (Exhibit PHL-255-B); Witness statement of Eka Siswani, 3 May 2012 (English translation), (Exhibit PHL-256-B).
[321] Letter from the DSI to PMTL, 11 September 2013 (English translation), (Exhibit PHL-254-B), p. 1.
[322] Letter from the DSI to PMTL, 11 September 2013 (English translation), (Exhibit PHL-254-B), p. 1.

b. On 26 September 2013, counsel for PMTL responded that "after June 28, 2011 (the date referred to by you), by letters dated May 4 and 10, 2012, we have submitted to you the statements made by two witnesses in relation to Forms CK 21-A to clarify facts about the cost prices of cigarettes as declared to the Indonesian authorities by Philip Morris Indonesia".[323] The letter resubmitted the same two witness statements again.

c. On 21 August 2015, the DSI sent a letter to PMTL requesting that the latter submit the so-called CK-8 documents, another form related to the CK-21A forms that was submitted to the Indonesian authorities by the exporter upon exportation.[324] The letter proposed "a person who can give explanation of the details of such document be assigned to meet with and give statements to" a DSI official.[325]

d. In response, counsel for PMTL provided a statement on 11 September 2015 recalling that, as set out in the expert witness statements provided, "it is not possible under Thai law to compare the declared customs value with the retail selling price, such as the HJE, in the exporting country".[326] It reiterated that "[t]he hypothetical HJE is not relevant to exported goods, as explained in the expert witness statement of Dr Joko Wiyono, himself a former Director of the DGCE, which was submitted by the Company to the DSI on May 4, 2012."[327]

7.161. On 22 September 2016, i.e. a decade after launching its initial investigation and 13-16 years after the entries at issue cleared Thai Customs, the DSI issued a Memorandum of Allegations ("MoA") against PMTL.[328] One former employee of PMTL was informed of the allegations by way of a second Memorandum of Allegations, dated 7 October 2016. Although the MoA dated 22 September 2016 compared the "false" transaction values to the supposed "actual" prices of the imported goods, it did not explain or provide any further information on the grounds for doubting PMTL's declared transaction values, or the basis upon which the "actual" customs values were determined. This prompted PMTL to send a "request for fair treatment and justice" to the Public Prosecutor, on 28 October 2018, after the DSI had issued the MoA. In that request to the Public Prosecutor, PMTL recalled that the information in the CK-21A forms could not be used to determine a customs value for its imports into Thailand, explaining that:

> While it is unclear from the Memorandum of Allegations on which basis the DSI rejected PMTL's declared customs values and which valuation method (if any) was used to determine the DSI's view of the customs value, PMTL understands that the DSI has raised a concern about information contained in Form CK-21A, which was a form previously required of the manufacturer in Indonesia by the Indonesian Customs and Excise Department. For locally produced tobacco products the Indonesian manufacturer was required to provide details of the prescribed components that are used to determine the Retail Selling Price (known as the HJE) for all tobacco products to be sold in the Indonesian domestic market. This form was required for all locally manufactured tobacco products irrespective of whether the product would be sold domestically or exported.
>
> The HJE reflected what the domestic retail selling price would be if the goods were sold in Indonesia and was not the same as the manufacturers selling price to PMTL. The HJE comprised numerous additional costs and charges that are only relevant to a sale in the domestic market (e.g. Indonesian excise tax and the manufacturer's and Indonesian distributors' profits).
>
> It is possible that the DSI may have mistakenly formed the view that the Form CK-21A includes values which should be used as PMTL's declared customs values and therefore evidence to show that PMTL's import prices declared to Thai Customs Department are incorrect. For the reasons explained and as clearly stipulated in Thai and international

[323] Letter on evidence and witnesses in relation to CK-21A, 26 September 2013 (English translation), (Exhibit PHL-280-B), p. 1.
[324] Letter from the DSI to PMTL, 21 August 2015 (English translation), (Exhibit PHL-257-B), p. 1.
[325] Letter from the DSI to PMTL, 21 August 2015 (English translation), (Exhibit PHL-257-B), p. 1.
[326] T&G statement, 11 September 2015 (English translation), (Exhibit PHL-258-B REV), p. 2.
[327] T&G statement, 11 September 2015 (English translation), (Exhibit PHL-258-B REV), p. 2.
[328] DSI, Memorandum of Allegations, 22 September 2016 (English translation), (Exhibit PHL-13-B).

> customs valuation laws, a domestic retail sales value in the country of export, such as the HJE, cannot be used to reject or stipulate (i.e. replace) an importer's declared customs value in another country.
>
> In this regard, PMTL submitted to the DSI two Indonesian expert opinions, from Eka Wahyuning Siswani, dated 3 May 2012, and from Drs Joko Wiyono, dated 20 April 2012 (Attachment 2) by the cover letter dated May 10, 2012, as well as PMTL's own request for fair treatment dated February 4, 2011 (Attachment 3) and written explanation dated September 24, 2015 (Attachment 4) explaining the background to the CK-21A and a similar Form CK-8 as well as why, for the purposes of customs valuation law, the information and retail selling prices contained in Forms CK-21A and CK-8 are not relevant to an assessment of the values declared as the import prices by PMTL, and, most importantly, why it is unlawful and against customs valuation principles to compare the retail selling prices of products manufactured in Indonesia for sale in the Indonesian domestic market (CK-21A values) with the declared customs values of products manufactured in Indonesia and exported to Thailand for resale in the Thailand domestic market (PMTL 's customs values).[329]

7.162. In the light of the foregoing, the Panel considers that the DSI and Public Prosecutor had no basis upon which to assume that the CK-21A information was reliable for the purpose of determining the customs value of the cigarettes imported by PMTL, in the light of PMTL's repeated written explanations as to why it was not. Furthermore, for the reasons set forth below, none of the specific circumstances identified by Thailand would justify the Thai authorities disregarding the explanations and additional information subsequently provided by PMTL to the Thai authorities.

7.163. First, the fact that PM Indonesia itself provided the CK-21A information to the Indonesian tax authorities does not, in the light of the explanations provided by PMTL and its experts to the Thai authorities, sustain an assumption that the figures reported therein are correct. To the contrary, the fact that the figures were provided by PM Indonesia itself means that that PM Indonesia and PMTL, the affiliated importer, would have been uniquely well positioned to explain to the Thai authorities whether and if so why the information reported was inaccurate. Insofar as Thailand's arguments are to be taken as suggesting that PM Indonesia or PMTL were somehow estopped from subsequently disputing the accuracy of the information because that information originated from PM Indonesia, there is nothing in the CVA or the findings of the original or first compliance panel to sustain the suggestion that an importer is somehow barred from pointing out errors or inaccuracies in the information that it previously submitted or, as in the case with respect to the CK-21A information, that an affiliated company/producer previously submitted to another government for purposes unrelated to customs valuation.

7.164. Second, the fact that the CK-21A information was furnished to Thai officials by the Government of Indonesia did not entitle the Thai authorities to deem it to be accurate and disregard the explanations and additional information subsequently provided by PMTL to the Thai authorities explaining why it was not. There is nothing in the CVA to suggest that information provided by a foreign government is exempted from the general provisions requiring an authority to examine the information before it.[330] Furthermore, the Panel finds force in the Philippines' argument that if exporting countries, like Indonesia, knew that the importing country would "blindly" rely on any information provided, "this might have a chilling effect on the willingness of the exporting country

[329] Letter from PMTL to the Public Prosecutor, 28 October 2016 (English translation), (Exhibit PHL-282-B).

[330] As Japan observed in its oral statement, the third sentence of the CVA Article 1.2(a) stipulates that "[i]f, 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" (emphasis added). Japan notes that this sentence allows the customs administration of an importing Member to use information provided by the customs administration of other Members, including, but not limited to, an exporting Member. Japan further observes that there "is no provision which distinguishes such information provided by the customs administrations of other Members from information provided by the importer. Nor is there a provision which exempts such information from examination by the customs administration of an importing Member under Article 1.2(a)." (Japan's third party statement, para. 9.)

to provide information, given that it is unlikely to be itself well-placed to judge the suitability of the information for the particular purposes of the importing country".[331]

7.165. Third, the fact that it may have been reasonable to presume that PM Indonesia had a legal obligation to provide truthful and accurate information in government forms would also not entitle the Thai authorities to disregard the detailed explanations and additional information subsequently provided by PMTL to the Thai authorities. In this regard, the Panel detects a significant unexplained tension within the internal logic of Thailand's argumentation. On the one hand, Thailand maintains that its authorities were entitled to presume that PM Indonesia had a legal obligation to provide truthful and accurate information, and suggests that this presumption entitled the Thai authorities to disregard the detailed information provided by PMTL as to why the information reported in the CK-21A forms was not an accurate reflection of its costs. On the other hand, Thailand accepts that its authorities relied on pricing and cost information reported by PM Indonesia in the CK-21A forms to reach the conclusion that PMTL and PM Indonesia engaged in customs fraud, in violation of Section 27 of the Thai Customs Act, by declaring false prices to the Thai authorities for imports of cigarettes over the period 2002-2003. Thus, the Thai authorities appeared to rely on the presumption that PM Indonesia would never report inaccurate prices in a government form provided to the Indonesian excise tax authorities to reach the conclusion that PM Indonesia and PMTL reported inaccurate prices in the customs forms provided to the Thai customs authorities.

7.166. Fourth, Thailand emphasises that it was reasonable for the Thai authorities to assume the accuracy of the information reported in the CK-21A forms because the Indonesian authorities had already processed and relied on the CK-21A information for collecting taxes. The Panel considers that insofar as PMTL's explanations to the DSI and Public Prosecutor would have implied that PM Indonesia engaged in tax fraud by reporting information that resulted in it paying less tax than it should have, the DSI and Public Prosecutor might have had solid grounds for being deeply sceptical of PMTL's explanations.[332] However, as a preliminary point, the collection of Indonesian excise taxes were not based on the breakdown of the pricing and cost information reported in the CK-21A form, but rather on the HJE proposed by the producer and approved by the DGCE. But more fundamentally, for the reasons already given further above, the regulatory constraints mandated by Indonesian excise tax law at the time (e.g. that the HJE had to exceed the prescribed minimum HJE fixed by the DGCE for the particular category of tobacco product) resulted in an *overstatement* of PM Indonesia's costs and profits. Thus, PMTL's explanation implied that, as a consequence of the regulatory requirements already discussed, PM Indonesia paid *more* in taxes to the Government of Indonesia than PM Indonesia would have paid if the HJE had been based on PM's *actual* costs and profits. In these circumstances, it is not clear why the Thai authorities would assume the accuracy of the information reported in the CK-21A forms on the basis that the Indonesian authorities had already processed and relied on the CK-21A information for collecting local taxes.

7.167. Furthermore, the same unexplained tension in the internal logic of Thailand's argumentation resurfaces. The relevant Thai authorities, i.e. the Customs Department and its BoA, had themselves already processed and relied on the information provided by PMTL in the context of previously determining the customs values of the imports at issue.[333] Accordingly, if the DSI and Public Prosecutor had actually proceeded on the basis of an assumption that information provided by PMTL was accurate and truthful, especially where prior assessments of taxes and customs duties owed had been carried out on the basis of that information, this would not have led them to the conclusion that PMTL under-declared its customs values, fraudulently and dishonestly, to avoid the payment of the full import duties due on the actual price of goods. Thus, Thailand's argument appears to assume that its authorities' could have regarded the Indonesian authorities' decision to collect taxes based on certain information reported by PM Indonesia as establishing the accuracy of that information,

[331] Philippines' second written submission, para. 132. Thailand argues that the Philippines has adduced no evidence of such a chilling effect, but the Panel does not consider that this addresses the issue raised by the Philippines' argument. The Philippines' has not argued that there has in fact been such a chilling effect, but rather that there could be such a chilling effect if it were the case that authorities in exporting countries considered that authorities in importing countries would rely on information provided without conducting any examination of its accuracy or reliability. This is an argument laying out a hypothetical scenario, not a factual assertion in respect of which evidence would need to be adduced.

[332] The Panel recalls that in the first recourse to Article 21.5, it countenanced against lightly presuming that a producer or importer would have engaged in tax fraud. See Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.362 and footnote 820.

[333] See below, paragraph 7.175.

without according any weight to the Thai authorities' decision to collect customs duties and related taxes based on certain other information reported by PMTL and PM Indonesia.

7.168. Fifth, Thailand suggests that its authorities had no way of independently verifying PMTL's characterization of Indonesia's tax system. However, the Panel does not see how the Thai authorities' lack of knowledge about the CK-21A forms could serve as a basis for relying on that same information, and deeming it to be accurate in disregard of the information subsequently provided by PMTL explaining why it was not. The Panel recalls that it was the Thai authorities that decided to value PMTL's imports on the basis of costing information reported by PM Indonesia in the context of Indonesian tax forms. Furthermore, it is not clear why the Thai authorities, having obtained this information from the Indonesian authorities, could not have sought to follow up on PMTL's invitation to contact relevant Indonesian authorities to corroborate its explanations. In its letter of 4 February 2011 to the DSI, PMTL stated that "[t]o obtain confirmation that the form and the information contained in the form have nothing to do with customs valuation in respect of the products sold by the Indonesian manufacturer and imported by PM Thailand, you can ask the above-mentioned Indonesian authority to verify the above explanation."[334]

7.169. In addition to these particular factual circumstances, which the Panel considers to be unavailing, Thailand has sought to justify the Thai authorities' disregard of the Joko and Siswani expert statements as follows:

> The Philippines mentions repeatedly that PMTL provided expert reports to Thai authorities explaining why PM Indonesia's information reported in form CK-21A is not suitable for purposes of customs valuation in Thailand. However, the Philippines' expert reports do not explain *how,* in these circumstances, could Thai authorities have overcome the problem of the alleged inaccuracy. It would be naïve to think that the alleged inaccuracy could be overcome simply by requiring PMTL to voluntarily provide information on its own costs and profits. Moreover, the Philippines' expert reports do not provide the accurate information on costs and profits that would be necessary for Thailand to properly apply the "cost plus profit" benchmark.

7.170. In the Panel's view, the principal difficulty with this argument is that it appears to assume that the Thai authorities were entitled to rely on the computed value method of customs valuation for purposes of examining the circumstances of sale, and/or determining a revised customs value. It is thus worth recalling that the primary basis for determining the customs value is the transaction value; that the fact that the buyer and seller are related is not in itself grounds for regarding the transaction value as unacceptable; that it is only where the authorities determine, on the basis of a proper examination of the circumstances of sale, that the relationship influenced the price that they may proceed to determine the customs value on an alternative method; and that those methods must then be applied sequentially, such that the determination of a revised customs value on the basis of the computed value method is only permissible where the customs value cannot be determined on the basis of any of the preceding methods. Further, even if a customs authority determines that the customs value cannot be determined under Articles 2-5, recourse to Article 6 may raise difficulties. For example, Article 6.2 of the CVA clarifies that a foreign producer cannot be compelled to provide its accounting records. If Article 6 is not available, an authority can resort to the fall-back method under Article 7. Thus, the Thai authorities could have overcome the problem of the alleged inaccuracy of the costing information reported in the CK-21A forms by accepting PMTL's transaction values, or if they had other grounds for doubting the acceptability of those values, by determining the customs value on the basis of a different method of customs valuation.

7.171. In the light of the foregoing the Panel is of the view that, while there may be cases in which the customs authority in the importing country is entitled to assume that pricing and cost information obtained from a foreign government is accurate and truthful, in this case the DSI and Public Prosecutor had no basis upon which to assume that the CK-21A information was reliable in the light of PMTL's repeated written explanations as to why it was not.

[334] Request for Fair Treatment and Justice, 4 February 2011 (English translation), (Exhibit PHL-279-B), p. 4.

7.2.4 Conclusion

7.172. The Panel concludes that: (1) as result of the regulatory constraints mandated by Indonesian excise tax law, the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain; and (2) there may be cases in which the customs authority in the importing country is entitled to assume that pricing and cost information obtained from a foreign government is accurate and truthful, but in the circumstances of this case the DSI and Public Prosecutor had no basis upon which to assume that the CK-21A information was reliable in the light of PMTL's repeated written explanations as to why it was not.

7.3 The 2002-2003 Criminal Charges

7.3.1 General

7.3.1.1 Factual description of the Charges

7.173. This section provides a brief general factual description of the 2002-2003 Charges. It begins with the events that culminated in the Public Prosecutor issuing them on 26 January 2017, and then sets out the legal basis for the Charges under Thai law, the content of the Charges and their Annex, and relevant events subsequent to the issuance of the Charges. The Panel will not repeat its earlier factual findings on the Thai authorities' reliance on the CK-21A forms to determine the "actual price" and actual value in the 2002-2003 Charges and the 1,052 revised NoAs respectively.[335]

7.3.1.1.1 The prior assessments of the entries at issue

7.174. Between January 2002 and July 2003, PMTL imported into Thailand 780 entries of *Marlboro* and *L&M* cigarettes from Indonesia. PMTL's declared transaction values for each of these entries was in the range of THB 7.35-7.70 per pack for *Marlboro* cigarettes, and THB 6.13-6.55 per pack for *L&M* cigarettes.[336]

7.175. The customs values of the 780 entries were all assessed by other Thai government agencies other than the DSI based either on those agencies' acceptance of PMTL's declared transaction values, or based on the application of the deductive method pursuant to Article 5 of the CVA. Different sets of entries were subject to different decisions, made at different points in time. The following table[337] provides information on these other decisions made by Thai Customs Department, its BoA, and/or the Supreme Court:

Number of entries, brand(s), and period covered by previous decision(s)	Decision(s) and customs value(s) assessed	Entry Nos. in the Annex to the Charges
573 entries of *Marlboro* and *L&M* cigarettes imported between 3 May 2000 and 28 December 2002 Out of these 573 entries, 321 entries of *L&M* cigarettes imported between 22 January 2002 and 28 December 2002 are subject to the Charges.	• in the first instance, the Customs Department rejected PMTL's declared transaction values, and assessed a higher customs value • in a series of three BoA rulings issued on 30 September 2004, 26 July 2005, and 19 June 2006, the BoA: (i) accepted PMTL's declared transaction values for 467 entries of *L&M* cigarettes; and (ii) revised the Customs Department's assessed values downwards for 106 entries of *Marlboro* cigarettes	Charges Nos. 1-321
210 entries of *Marlboro* imported between 8 January	• in the first instance, the Customs Department rejected PMTL's declared transaction values, and assessed a higher customs value	Charges Nos. 322-527

[335] See Section 7.2 (The Thai authorities' reliance on the information in the CK-21A forms).
[336] See DSI, Memorandum of Allegations, 22 September 2016 (English translation), (Exhibit PHL-13-B); Philippines' first written submission, para. 345.
[337] This table is based on the information provided by the Philippines in response to Panel question No. 160, and by Thailand in its comments on the Philippines' response.

Number of entries, brand(s), and period covered by previous decision(s)	Decision(s) and customs value(s) assessed	Entry Nos. in the Annex to the Charges
2002 and 28 December 2002 206 entries of *Marlboro* cigarettes imported between 22 January 2002 and 28 December 2002 are subject to the Charges, the rest are outside the scope of the Charges	• the BoA Ruling of 16 November 2012 revised the Customs Department's assessed values upwards (to THB 9.30/pack[338]) • on appeal by PMTL, the Tax Court ruled on 29 October 2014 that both the initial rejection of transaction value and the subsequent BoA decision were unlawful[339] • on appeal by the Customs Department, the Supreme Court ruled on 28 December 2017 (read on 7 May 2018) that the BoA decision was not unlawful, but amended the BoA Ruling by deducting a P&GE rate of 15.05% for PMTL, rather than the 12.44% (revising the THB 9.30/pack downwards, but no exact figure provided)[340] • the Customs Department must now take action to implement this ruling, which will take the form of revised customs valuation determinations that may result in the issuance of new NoAs	
60 entries of *Marlboro* and *L&M* cigarettes imported between 1 January 2003 – 19 February 2003 All of these entries are subject to the Charges	• the Customs Department rejected PMTL's declared transaction values, and assessed a higher customs value • PMTL did not pursue the appeal because of commercial reasons	Charges Nos. 528-557, 560-561, 564, 567-568, 672-693, 696-697 and 699
193 entries of *Marlboro* and *L&M* imported after 10 March 2003[341] (up to 2006) All of these entries are subject to the Charges	• the Customs Department accepted PMTL's transaction values THB 7.35-7.70 (i.e. USD 9.71/1000 sticks) (*Marlboro*) / THB 6.13-6.55 (i.e. USD 7.35/1000 sticks) (*L&M*)	Charges Nos. 558-559, 562-563, 565-566, 569-671, 694-695, 698, 700-780

7.3.1.1.2 Events culminating in the Charges

7.176. In August 2006, the DSI launched two criminal investigations into allegations that PMTL had evaded customs duties and internal taxes by under-declaring the customs values of certain historical entries. One of these investigations covered approximately 1,094 entries of cigarettes imported from Indonesia over the period March 2000 to August 2003. The other investigation concerned entries imported over the period between 2003 and 2007, and culminated in the Charges filed in January 2016 which are the subject of the first recourse to Article 21.5. 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.

7.177. On 22 September 2016, i.e. a decade after launching its initial investigation and 13-16 years after the entries at issue cleared Thai Customs, the DSI issued a Memorandum of Allegations ("MoA") against PMTL.[342] One former employee of PMTL was informed of the allegations by way of a second Memorandum of Allegations, dated 7 October 2016. In the MoA dated 22 September 2016, the DSI alleged that PMTL committed offences under Section 27 of the Customs Act of Thailand (B.E. 2469

[338] BoA Ruling, No. GorOr 112/2555/Por9/2555(3.1) and cover letter No. GorKor 0519(8)/(GorOr)/118, 16 November 2012 (English translation), (Exhibit PHL-21-B), p. 3. In the first recourse to Article 21.5, the Panel found that this BoA Ruling was inconsistent with several provisions of the CVA.

[339] Central Tax Court Ruling, 29 October 2014 (English translation), (Exhibit PHL-32-B), p. 18.

[340] Supreme Court decision on Nov 2012 BoA Ruling of 7 May 2018, 28 December 2017 (English translation), (Exhibit PHL-244-B).

[341] At paragraph 77 of its first written submission, the Philippines stated that the Customs Department accepted the declared transaction values for entries that cleared customs after 10 March 2003. Based on the text of the Annex to the 2002-2003 Charges (Exhibit PHL-273-B), it appears that 67 entries cleared customs after 10 March 2003.

[342] DSI, Memorandum of Allegations, 22 September 2016 (English translation), (Exhibit PHL-13-B).

(1926)) (the "Customs Act"), and Section 83 of the Thai Criminal Code and Section 4 of the Amendment Act of the Criminal Code (No. 6) B.E. 2526 (1983) (the "Criminal Code"). More specifically, the DSI alleged that, over the period October 2001 through to August 2003, PMTL imported 897 entries of *Marlboro* and *L&M cigarettes*, and that "the price of the imported articles … was declared for the calculation of import duty by fraudulently and dishonestly using false price lower than the actual price in order to avoid the payment of import duty and to pay lower import duty than the one to be paid according to the actual price of goods".[343] The MoA based this conclusion on a comparison between: (1) PMTL's declared transaction values, referred to as the "false" price; and (2) alternative, "actual" customs values referred to as the "actual" price.

7.178. Although the MoA compared the "false" transaction values to the supposed "actual" prices of the imported goods, it did not explain or provide any further information on the grounds for doubting PMTL's declared transaction values, or the basis upon which the "actual" customs values were determined. The MoA included the following figures on the "actual" customs price, and the total government revenue lost as a result of the alleged under-declaration:

> The prices of Marlboro in all import entries were declared at USD 8.50 and USD 9.71 per50 packs (1,000 cigarettes), which was calculated into Thai currency at the then exchange rate to be THB 7.35 to THB 7.70 per1 pack (20 cigarettes) for each period of importation. The prices of L&M in all import entries were declared at USD 7.35 per50 packs (1,000 cigarettes), which was calculated into Thai currency at the then exchange rate to be THB 6.13 to THB 6.55 per1 pack (20 cigarettes). For the actual prices of goods which should have been declared for the payment of import duty at such time, Marlboro cigarette was THB 9.133353715 to THB 16.70387976 per 1pack (20 cigarettes) according to the import period and exchange rate whereby L&M was THB 7.561466 to THB 13.9932672 per 1 pack (20 cigarettes) according to the import period and exchange rate.
>
> The above fraudulent acts caused the payments of customs tax and import duty for Marlboro and L&M cigarettes in all import entries to be lower than the actual amount and the shortage amount was THB 8,684,393,280.12.

7.179. On 26 January 2017, the Public Prosecutor filed the 2002-2003 Charges against PMTL and one of its former employees. The competent criminal court accepted and issued the Charges on the same day.[344] The Charges cover 780 entries of *Marlboro* and *L&M* cigarettes imported from Indonesia between January 2002 and July 2003. In respect of these 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.[345]

7.3.1.1.3 Section 27 of the Customs Act

7.180. As the Panel explained in Section 7.3.1.1.2 (Section 27 of the Customs Act) of its Report in the first recourse to Article 21.5, 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 which must be paid for such goods. The English translation of Section 27 submitted by the Philippines reads as follows[346], with relevant terms highlighted:

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[343] DSI, Memorandum of Allegations, 22 September 2016 (English translation), (Exhibit PHL-13-B).

[344] The Criminal Court, Charges, Case Black No. Or. 232/2560, 26 January 2017 (English translation), (Exhibit PHL-14-B).

[345] The other alleged violations are: Section 115 quater 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).

[346] In the first recourse to Article 21.5, the Panel referred to the English translation submitted by the Philippines for the reasons set forth in footnote 980 of its Report. In this second recourse to Article 21.5, Thailand again submits its own English translations of certain Thai government documents already submitted by the Philippines, even though Thailand "does not consider that there are any substantive differences between

> 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.

7.181. 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 are "due on such goods". It further provides that the "fine" for such offense shall be four times the "duty-paid value of the goods".

7.3.1.1.4 The content of the Charges and the Annex

7.182. The Charges set forth the allegation that PMTL and one of its former employees 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.[347] The Charges repeat this allegation in the context of providing particulars on each of the 780 entries of *Marlboro* and *L&M* cigarettes set forth therein. For each of those 780 entries, the Charges identify the "actual price" and state that "the Exhibit attached to the Complaint", or the "Annex" as referred to by the parties, shows the details "with respect to the Number of Import Entry, details and quantity of cigarettes for each brand, price per pack of cigarettes falsely and jointly declared by the two Defendants, actual price of cigarettes for each brand, amount of tax and duty under customs law that the two Defendants and others were liable to pay, and the price of goods including the duty".

7.183. The penalties following a conviction under Section 27 of the Customs Act could include the imprisonment of one of PMTL's former employees, and the payment of fines by PMTL in an amount that shall equal four times the duty-paid value. Under the new Customs Act, in the event of a conviction, Section 243 provides for the imposition of "a fine from one half but not exceeding four times of the duty additionally payable".[348] The Annex to the 2002-2003 Charges calculates the deficit

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Thailand's and the Philippines' translations". Thailand requests that the Panel "use and refer to Thailand's translations in its proceedings and report", as there "is no a priori reason why the Panel should refer to the Philippines' translations simply because the Panel received them first", and as "this is a dispute involving Thai measures, the Panel should, a priori, refer to Thailand's own translations of its own measures". According to Thailand, this "will also assist the relevant Thai officials in reading and understanding the Panel's report. The Philippines retains the right to object to any of Thailand's translations." (Thailand's first written submission, footnote 13.)

The Panel recalls that paragraph 16 of its Working Procedures establishes a procedure for the parties to object to translations submitted by one another. It is not clear that it would be consistent with the purpose of paragraph 16 to rely on the English translations submitted by Thailand, in the absence of any objection from Thailand as to the accuracy of the translations already submitted by the Philippines (and/or putting the onus on the Philippines to object). However, it is unnecessary to dwell on that issue, because the Panel Report in the first recourse to Article 21.5 already presents English translations of certain provisions and terms in the Thai Customs Act that are relevant in this second recourse to Article 21.5. The Panel sees an obvious potential for confusion if the Panel in this second recourse to Article 21.5 were to rely on different English translations of provisions in the Thai Customs Act that differ from the English translations of the same provisions already contained in the Panel Report in the first recourse to Article 21.5. In addition, Thailand has not explained how the use of Thailand's English translations would assist the relevant Thai officials in reading and understanding the Panel's Report, in the absence of any substantive differences between Thailand's and the Philippines' translations.

[347] The Criminal Court, Charges, Case Black No. Or. 232/2560, 26 January 2017 (English translation), (Exhibit PHL-14-B).

[348] Thai Customs Act B.E. 2560, 14 May 2017 (English translation), (Exhibit PHL-246-B). See Philippines' first written submission, para. 348; Thailand's first written submission, footnote 159.

duty payable on the imports, which amounts to THB 108,928,466 (approximately USD 3.4 million).[349] Thus, the maximum fine, therefore, would amount to four times the deficit duty payable (i.e. USD 13.6 million). The Charges also request the Court to order "the payment of a bounty to the informant according to the law".

7.184. There were more entries covered in the DSI investigation than in the 2002-2003 Charges because of the 15-year statute of limitation contained in Section 95(2) of the Thai Criminal Code.[350] Thailand explains that this provision applies in the following manner to the facts of this case[351]: the DSI investigation, which started in August 2006, originally covered 1,094 entries imported from Indonesia between 1 March 2000 and 26 August 2003; the MoA, dated 22 September 2016, mentions all 1,094 entries because it is required to inform the accused of the entire set of entries for which the DSI originally considered whether there was any wrongdoing; however, by the time the MoA was filed, the statute of limitations had expired for some entries, reducing the number of entries subject to the DSI's case to 897 entries imported from 9 October 2001 to 26 August 2003. Finally, when the Public Prosecutor issued the 2002-2003 Charges on 26 January 2017, the statute of limitations had expired for a further set of entries, reducing the number of entries subject to the Charges to 780 entries dated from 22 January 2002 to 28 July 2003.

7.3.1.1.5 The explanation of how the "actual" value/price was determined

7.185. The Charges themselves do not specify what the "actual price" refers to or how it was calculated, but as explained below, the Thai authorities subsequently offered some clarification to PMTL in the context of explaining the basis for the "actual value" in the NoAs.

7.186. After the DSI issued its MoA on 22 September 2016, PMTL sought clarification regarding the basis for the determination of the "actual" value therein. Specifically, on 7 October 2016, PMTL wrote to the DSI, requesting that the DSI explain, among other things, the basis for the valuation of the "actual" value of goods and which method of customs valuation was employed in the allegation, as well as the reasons why the transaction value was rejected.[352] PMTL stated that without the information that it requested, it was "unable to understand the allegation and unable to give statements in defending the case".[353] On 3 November 2016, the DSI responded by informing PMTL that if it "wish[ed] to obtain the information which [it] stated in the letters that [it] sent to the Special Investigation Officers as mentioned above, please contact and coordinate with the public prosecutor".[354]

7.187. On 14 November 2016, PMTL addressed the same questions to the Public Prosecutor, with respect to the MoA.[355] PMTL received no response.[356] There is no information before the Panel on whether PMTL sought any further explanation following the issuance of the Charges in January 2017.[357]

7.188. Although the 2002-2003 Charges do not provide any indication of the factual basis for the "actual price", certain information can be gleaned from the Customs Department's explanation regarding the basis used to determine the "actual value" set out in the 1,052 NoAs. To recall, on 29 November 2017, Thailand issued 1,052 revised NoAs covering customs entries imported between

[349] Annex to the 02-03 Charges, 26 January 2017 (English translation), (Exhibit PHL-273-B).
[350] Section 95(2) of the Thai Criminal Code B.E. 2499 (1956), (Exhibit THA-84).
[351] Thailand's response to Panel question No. 158, para. 1.1.
[352] Letter from PMTL requesting clarification of the MOA, 7 October 2016 (English translation), (Exhibit PHL-275-B), p. 3.
[353] Letter from PMTL requesting clarification of the MOA, 7 October 2016 (English translation), (Exhibit PHL-275-B), p. 1.
[354] Letter from the DSI to PMTL, 3 November 2016 (English translation), (Exhibit PHL-276-B).
[355] Letter from PMTL to the Public Prosecutor, 14 November 2016 (English translation), (Exhibit PHL-277-B).
[356] Philippines' first written submission, para. 354.
[357] In its comments on the Interim Report, the Philippines states that "As the Panel indicates in paragraph 7.191, on 24 July 2017, the Public Prosecutor successfully obtained a court order preventing information regarding the 02-03 Charges from being shared with the Philippines and, hence, the Panel. Due to this far-reaching non-disclosure order, the Philippines was unable to provide the Panel with information on any additional efforts made by PM Thailand to clarify the basis for the determination of the "actual price" in the 02-03 Charges. Nor can the Philippines indicate whether, if such efforts were made, they were successful." (Philippines' request to review the Interim Report, para. 117.)

January 2001 and July 2003. The revised NoAs demanded payment of THB 25,480,317,518 (approximately USD 800 million) within 30 days. Under the "reason for assessment" for each NoA, the Customs Department stated that "[f]rom the investigation of the Department of Special Investigation, it was found that the actual value" was a specified amount per pack (varying by NoA), and that was "calculated from the cigarette cost structure of PT Philip Morris Indonesia obtained from the Indonesian government".[358] On 14 December 2017, PMTL sent a letter to the Customs Department requesting an explanation of the customs valuation determinations in the 1,052 revised NoAs.[359] In a letter of 10 January 2018, the Customs Department responded to PMTL's request for an explanation of the customs valuation determinations as follows:

> [T]he Department of Special Investigation had conducted an investigation into Philip Morris (Thailand) Limited in the case of importation of Marlboro and L&M cigarettes from Indonesia by false declaration to evade duty. The Director General of the Department of Special Investigation recommended for prosecution an offence under Section 27 of the Customs Act B.E. 2469 (1926), incorporating Section 83 of the Criminal Code and Section 20 of the Criminal Procedure Code. The Attorney General issued a prosecution order in a black case No. Or.232/2560. The Customs Department was informed of the case status to proceed with relevant actions. In this regard, the Department of Special Investigation prepared the table summarizing the CIF prices of Marlboro and L&M cigarettes for the Customs Department to assess the value and calculate the taxes and duty which were not fully paid. The information of prices in this case is taken care of by the Department of Special Investigation. If you wish to know relevant information, [you] can inquire directly from the Department of Special Investigation.[360]

7.189. The reasons given by the Customs Department are relevant to the 2002-2003 Charges because 779 of the 780 entries subject to the 2002-2003 Charges were also covered by the 1,052 revised NoAs, and the "actual value" that the Customs Department determined for those overlapping 779 entries subject to the NoAs is identical to the "actual price" that the Public Prosecutor determined for the purpose of the 2002-2003 Charges, and that the DSI determined in the MoA. Thus, when the Customs Department stated that the "actual" values reflected in the 1,052 revised NoAs were "calculated from the cigarette cost structure of PT Philip Morris Indonesia obtained from the Indonesian government", that means that the same is true of the "actual" prices reflected in the 2002-2003 Charges.

7.3.1.1.6 The criminal proceedings

7.190. There are ongoing proceedings before the Thai Criminal Court relating to the Charges. The parties indicated that the trial was expected to begin in late 2018 and would last until early 2019, with a decision from the court due shortly thereafter.[361]

7.191. On 24 July 2017, the Public Prosecutor successfully obtained a court order preventing information regarding the 2002-2003 Charges from being shared with third parties to the criminal proceedings, including the Philippines. The non-disclosure order is far-reaching and covers every aspect of the proceedings. For example, PMTL cannot share with any third party – including the Philippines and the Philippines' WTO counsel – any part of the case record, including: (1) the charge documents; (2) court orders (including the non-disclosure order itself) and other formal procedural documents; (3) the submissions made by either party to the court on any topic; and, (4) documentary evidence submitted by either party.[362]

7.3.1.2 Claims and order of analysis

7.192. The parties' requests for findings in relation to the Charges are set out in greater detail in Section 3 of the Report. As reflected there, the Philippines' claims and Thailand's defences raise

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[358] Sample Notices of Assessment (English translation), (Exhibit PHL-240-B).

[359] Letter from PMTL to the Director General of the Customs Department, 14 December 2017 (English translation), (Exhibit PHL-247-B).

[360] Letter from the Customs Department to PMTL, 10 January 2018 (English translation), (Exhibit PHL-250-B).

[361] Philippines' first written submission, para. 341; Thailand's first written submission, paras. 3.39-3.40.

[362] Philippines' first written submission, para. 362.

numerous issues. In this section, the Panel will briefly set out the considerations that inform the order of analysis of those claims and defences. For the most part, the Panel's order of analysis reflects the order of analysis in the parties' submissions.

7.193. The Panel will begin with Thailand's argument that the 2002-2003 Charges contain insufficient information to allow the identification of the precise content of any conduct that could be declared WTO-inconsistent. The Philippines submits that this argument is essentially a "re-packaging" of Thailand's "ripeness" argument from the first recourse to Article 21.5.[363] Leaving aside that characterization, there is undoubtedly a significant degree of overlap and repetition between the argument that Thailand makes in this case, and its argument from the first recourse to Article 21.5 that was formulated in terms of "ripeness". In the first recourse to Article 21.5, Thailand characterized the "ripeness" issue as one going to the Panel's competence, and presented it as a threshold issue to be resolved prior to addressing the applicability of the CVA to the Charges.[364] Thailand follows a similar approach in its submissions in this second recourse to Article 21.5. In the first recourse to Article 21.5, the Panel addressed this argument as a threshold issue, prior to addressing the applicability of the CVA to the Charges. The Panel will follow the same approach, with a view to harmonizing the structure of its analysis with that of the Panel Report in the first recourse to Article 21.5.

7.194. The Panel will then proceed to address the applicability of the CVA to the Charges. In that connection, the Panel will first address Thailand's argument that the 2002-2003 Charges are not subject to the CVA on the grounds that the Public Prosecutor is not part of Thailand's "customs administration". The Panel will then address Thailand's additional arguments that the 2002-2003 Charges are not subject to the CVA on the grounds that the Charges do not meet the first or second elements of the definition of "customs valuation" in Article 15.1(a) of the CVA. The Panel will also consider Thailand's additional comments relating to the "intention to defraud" aspect of the Charges.

7.195. After addressing the above issues relating to the applicability of the CVA to the 2002-2003 Charges, the Panel will turn to the Philippines' claims that the 2002-2003 Charges are inconsistent with the CVA obligations invoked by the Philippines. In the context of addressing the Philippines' claims, the Panel will refer back, as necessary, to its earlier factual findings on the Thai authorities' reliance on the CK-21A forms to determine the "actual price".[365]

7.196. Finally, the Panel will address Thailand's defence under Article XX of the GATT 1994. Thailand's defence under Article XX of the GATT 1994 in this second recourse to Article 21.5 raises the same two main issues that arose in the first recourse to Article 21.5. 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).

7.3.1.3 Claims not pursued

7.197. The Philippines' panel request contains a number of claims in respect of the 2002-2003 Charges, 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. The Philippines has pursued its claims under Articles 1.1 and 1.2(a) of the CVA (including both the substantive obligation in the second sentence and the procedural obligation in the third sentence[366]), and its claims under Articles 2 to 7 of the CVA. However, the Philippines did not pursue its claims that were included in the panel request under Article 16 of the CVA, or under Article III:2 of the GATT 1994.[367]

[363] Philippines' second written submission, paras. 243, 292, and 305.
[364] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.459.
[365] See Section 7.2 (The Thai authorities' reliance on the information in the CK-21A forms).
[366] The Panel recalls that in the first recourse to Article 21.5, the Philippines' panel request included a claim under Article 1.2(a), third sentence, in relation to the 2003-2006 Charges; however, the Philippines did not pursue that claim in the course of the proceeding. (See Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.463.)
[367] Panel request, para. 20, third and fourth bullets. The Philippines has pursued its parallel claim under Article 16 of the CVA in relation to the 1,052 revised NoAs.

7.198. In its first written submission, the Philippines observes that the 2002-2003 Charges "invoke the provisions of a Thai law that provides for the payment of a 'bribe' to informants who facilitate the prosecution of certain offences".[368] The Philippines states that the relevant provisions of Thai law provide that an informant is entitled to receive a "bounty" or "bribe" amounting to 30 percent of the potential fine, and therefore the "informant" is personally eligible to receive approximately USD 4.1 million in the event of PMTL's conviction.[369] The Panel notes that in this second recourse to Article 21.5, the Philippines has not requested that the Panel make any finding that the alleged "bribes" or "rewards" are inconsistent with the CVA. Thus, as was the case in the first recourse to Article 21.5, the Panel is not called upon to make findings as to the WTO-consistency of Thailand's "bribes" and "rewards" scheme.[370]

7.3.2 Existence of a challengeable measure

7.3.2.1 Introduction

7.199. In the first recourse to Article 21.5, Thailand argued that the 2003-2006 Charges were not a matter "ripe" for adjudication in WTO dispute settlement proceedings, because they constituted merely an allegation of criminal conduct, and not a judgment by the Criminal Court. In this connection, Thailand submitted that: (1) the 2003-2006 Charges were inseparable from the criminal proceedings that they triggered; (2) the 2003-2006 Charges did not represent a customs valuation "determination" for the purposes of the CVA; and (3) the Philippines' claims directed at the Charges were effectively seeking "an abstract ruling on hypothetical future measures", namely on the outcome of the then ongoing criminal court proceedings.[371] The Panel found that it was not precluded from considering the WTO-consistency of the Charges on the basis of a "ripeness doctrine", because the Charges constituted a distinct measure for purposes of WTO dispute settlement, because they were a determination for purposes of the CVA, and because an assessment of the WTO-consistency of the Charges did not require the Panel to engage in speculation on future measures or events, notwithstanding that no judgment had been rendered by the Criminal Court.[372]

7.200. In this second recourse to Article 21.5, Thailand argues that due to the insufficient factual information contained in the 2002-2003 Charges, it is impossible to identify the precise content of any conduct in the Charges that could be declared WTO-consistent or WTO-inconsistent and, as a consequence, the Philippines cannot make a *prima facie* case of inconsistency under the CVA.[373] Moreover, were the Panel to examine the CVA-consistency of a conduct whose precise content has not yet materialized or of facts not yet confirmed by the Thai criminal court, the Panel would be substituting its own judgement for the competent authority's judgment and thereby engaging in a *de novo* review.

7.201. The Philippines submits that it is able to make, and has made, a *prima facie* case that the 2002-2003 Charges are inconsistent with the CVA[374] and adds that Thailand's argument "re-packages" its "ripeness" argument raised in the first recourse to Article 21.5.[375]

7.202. The Panel will begin with a summary of the main arguments of the parties. The Panel will then analyse the issues raised through the same analytical framework used by it in the context of the first recourse to Article 21.5. As indicated above, the Panel considered that the salient issues are: (1) whether the Charges are a distinct measure for purposes of WTO dispute settlement; (2) whether the Charges constitute a "determination" for the purposes of the CVA; and (3) 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.[376] The Panel will then examine whether a different conclusion would be arrived at if it were to analyse the issue before it in terms

[368] Philippines' first written submission, para. 350.
[369] Philippines' first written submission, para. 351.
[370] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.464.
[371] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.558.
[372] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.606.
[373] Thailand's first written submission, paras. 3.26-3.43; second written submission, paras. 3.40-3.48; opening statement at the meeting of the Panel, paras. 3.24-3.28.
[374] Philippines' second written submission, paras. 290-317.
[375] Philippines' second written submission, paras. 243, 292, and 305.
[376] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.575.

of the legal concepts that Thailand urges the Panel to apply, namely the Philippines being unable to make a "*prima facie* case" or the Panel engaging in a "*de novo* review".

7.3.2.2 Main arguments of the parties

7.203. Thailand submits that the 2002-2003 Charges do not contain sufficient factual information to allow the Philippines to make a *prima facie* case of inconsistency under the CVA.[377] Thailand recalls that under the standard of review of Article 11 of the DSU, panels are required to make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements and that this standard, according to the Appellate Body, constitutes neither *de novo* review as such, nor total deference.[378] Thailand argues that because a panel cannot conduct a *de novo* review and must critically examine the authority's explanation in depth, a complaining party can make a *prima facie* case only if the "precise content" of the measure, at the time of the panel's examination, "reflects a conduct that is inconsistent with the CVA".[379] In other words, Thailand states that "if a panel were to examine the CVA-consistency of a conduct whose precise content has not yet materialized or of facts not yet confirmed, that panel would risk conducting a *de novo* examination" as it would be substituting its own judgement for the authority's judgement with respect to the fact and "would also risk making predictions about events or measures taken subsequent to the adoption of the challenged measure".[380]

7.204. Thailand submits that "[t]he veracity and reliability of the arguments put before this Panel by the Philippines regarding the information provided by the Indonesian government is a factual matter that has not yet been fully addressed or resolved by any Thai governmental agency or Thai court".[381] Specifically, PMTL's assertion that "the costs reported to the Indonesian government are its own 'fabricated plugs' and, therefore, cannot be used by Thailand for customs valuation purposes … is a factual assertion that has not been addressed yet by Thailand's Criminal Court".[382] Therefore, "one cannot expect that the criminal charges will contain final determinations of the factual circumstances"[383], which means that "there is not enough information to identify the precise content of any conduct that could be declared WTO-consistent or WTO-inconsistent".[384] Thailand clarifies that "it is not arguing that there is no measure in the sense of Article 6.2 of the DSU. Rather, the amount and clarity of information available makes it impossible for the Philippines to make a *prima facie* case in respect of the 02-03 charges".[385]

7.205. Moreover, Thailand claims that, were the Panel to examine the Philippines' claims in light of the unconfirmed facts, "it would necessarily engage in a *de novo* review of these facts" as "it would 'conduct[] its own assessment, relying on its own judgment' of the facts before the Thai criminal court" thereby in effect "substituting its judgment for that of the Thai Criminal Court"[386] and pre-empting the analysis to be conducted by the Thai criminal court.[387] Additionally, an examination of the CVA-consistency of the 2002-2003 Charges "would force the Panel to make predictions about the outcome of the Criminal Court's assessment of the facts, the same type of analysis against which the first Article 21.5 panel and the Appellate Body have previously cautioned".[388]

7.206. The Philippines submits that it has made a *prima facie* case that the 2002-2003 charges are inconsistent with the CVA.[389] Thailand's argument that "a lack of factual information in the charges means that 'the precise content of the measure' is uncertain" and the ensuing result that the "Philippines cannot make a *prima facie* case unless the Panel undertakes a *de novo* review" is

[377] Thailand's first written submission, para. 3.26; second written submission, para. 3.40.
[378] Thailand's first written submission, para. 3.27.
[379] Thailand's first written submission, para. 3.29.
[380] Thailand's first written submission, para. 3.30.
[381] Thailand's first written submission, para. 3.36.
[382] Thailand's first written submission, para. 3.41.
[383] Thailand's first written submission, para. 3.37.
[384] Thailand's first written submission, para. 3.38.
[385] Thailand's first written submission, para. 3.42.
[386] Thailand's first written submission, para. 3.39.
[387] Thailand's first written submission, para. 3.40.
[388] Thailand's first written submission, para. 3.41.
[389] Philippines' second written submission, paras. 290–317.

incorrect.[390] The Philippines asserts that "[t]here is nothing uncertain … about 'the precise content of the measure'."[391]

7.207. The Philippines recalls that "where a customs administration fails to provide a reasoned and adequate explanation for its customs valuation determinations, a panel has no option but to find that the competent authority has not performed the analysis correctly".[392] More concretely, the Philippines contends that it has "made a *prima facie* case of CVA-inconsistency by showing that the Public Prosecutor rejected the transaction values and determined alternative actual values using CK-21A information that was not fit for use under the CVA".[393] In these circumstances, the Philippines asserts, the Panel would not be conducting a *de novo* review, because it would simply be reviewing the customs valuation determinations made by the Public Prosecutor.[394] Rather, "[t]he Panel would only undertake a *de novo* review if it made its *own* determination, under Article 1.2(a), whether the transactions values are acceptable and/or if it determined its *own* alternative customs values".[395]

7.208. The Philippines further recalls that the Panel in the first recourse to Article 21.5 ruled that it could make findings on the WTO-consistency of the 2003-2006 Charges without engaging in speculation on future measures or events and held that the 2003-2006 Charges were intended to have legal effects and legal status in and of themselves; involved a final decision, and not a provisional or intermediate step; and were a defined and formal act taken by an organ of the Thai state.[396] In this connection, the Philippines points out that Thailand has not explained "how the 2002-2003 Charges are substantively different from the [2003-2006] Charges, such that these findings do not apply".[397] The Philippines asserts that both sets of Charges reject the transaction value on the basis of a comparison with alternative "actual" customs values; were adopted by the Public Prosecutor, alleging an offense under Section 27 of the Customs Act; are "intended to have legal effect under Thai Law", and "have legal status in and of themselves"; involve "a final decision" and "a defined formal act" by the Public Prosecutor; and are not "provisional" or "intermediate" steps.[398] In the Philippines' view, Thailand's argument that "the 02-03 charges are based on 'unclear', 'unexamined', '[un]verified' and 'insufficient' information"[399] and Thailand's acceptance "that these 'unclear' facts constitute Thailand's *only evidence* supporting the 02-03 Charges"[400] is "deeply troubling" considering the serious and direct legal consequences that the Charges entail: the accused becoming subject to the mandatory jurisdiction of the criminal court; being required to appear before the court to answer the Charges and attend the hearings relating to the Charges; having to apply for and pay bail to secure temporary release during the proceedings; having an officially recorded indictment and accusations, and having to pay the costs of a defence for criminal proceedings.[401]

7.3.2.3 Analysis by the Panel

7.3.2.3.1 General considerations

7.209. In the first recourse to Article 21.5, Thailand claimed that the 2003–2006 Charges constituted merely an allegation of criminal conduct, not a judgment by the Criminal Court, and on that basis Thailand argued that those charges were not a matter "ripe" for adjudication in WTO dispute settlement proceedings. The Panel noted that the concept of "ripeness" does not appear explicitly in any of the covered agreements, and indicated that it was 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.[402] Rather than framing the analysis in terms of an "undefined" and

[390] Philippines' second written submission, para. 294.
[391] Philippines' second written submission, para. 295.
[392] Philippines' second written submission, para. 299.
[393] Philippines' second written submission, para. 301.
[394] Philippines' second written submission, para. 303.
[395] Philippines' second written submission, para. 304.
[396] Philippines' second written submission, para. 307.
[397] Philippines' second written submission, para. 308.
[398] Philippines' second written submission, para. 308.
[399] Philippines' second written submission, para. 312.
[400] Philippines' second written submission, para. 312.
[401] Philippines' second written submission, paras. 313–314.
[402] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.569.

"novel" ripeness doctrine, the Panel opted to analyse Thailand's arguments using the more precise standards reflected in the covered agreements and WTO jurisprudence.

7.210. In this connection, and as already noted above, the Panel identified three distinct questions raised by Thailand's ripeness arguments: (1) whether the Charges were a *distinct* measure for purposes of WTO dispute settlement; (2) whether the Charges constituted a "determination" for the purposes of the CVA; and (3) whether the Panel could 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 would be concluded, and without issuing abstract rulings on hypothetical future measures. The Panel then addressed Thailand's ripeness argument by answering these questions.

7.211. In this second recourse to Article 21.5, Thailand couches its argument in terms that are divorced from the analytical framework developed by the Panel in the first recourse to Article 21.5. Thailand appears to reframe the same issue in terms of whether or not there is "insufficient information" contained "in" or "concerning" the 2002-2003 Charges to allow the Philippines to identify the "precise content" of that measure in order to "make a *prima facie* case". In its written submissions, Thailand employs variable terminology when developing this argument. As noted, Thailand sometimes states that there is insufficient information "in" the Charges, and sometimes formulates its argument in terms of there being insufficient information concerning the facts underlying the Charges. Thailand sometimes states that there has been no "determination"[403] of the facts, and in other instances states that the factual circumstances surrounding the 2002-2003 Charges which underpin the Philippines' claims and arguments have not been "confirmed" by the Criminal Court. These appear to be alternative ways of formulating the proposition that the Charges do not amount to, and no Thai court or agency has yet made, any "determination" of the relevant facts, and thus the Charges do not constitute a "determination" for purposes of the CVA. The Panel also observes that, unlike its argumentation in the first recourse to Article 21.5, Thailand's arguments in this second recourse to Article 21.5 are formulated in a manner that stresses the well-established concepts of "a *prima facie* case" and the impermissibility of the Panel conducting a "*de novo* review".

7.212. The Panel appreciates that Thailand's arguments in this second recourse to Article 21.5 and its arguments in the first recourse to Article 21.5 are not, in terms of *form*, expressed in an identical manner. Indeed, Thailand appears to have gone to some lengths to formulate its arguments in this proceeding in a manner that is divorced not only from the analytical framework developed by the Panel in the first proceeding, but also from the manner in which Thailand formulated its own arguments in that proceeding. Indeed, the Panel notes that there is not a single reference to "ripeness" in Thailand's submissions in this proceeding. However, a careful examination of both sets of arguments leads us to conclude that the substance of Thailand's argument that the 2002–2003 Charges do not contain sufficient factual information to allow the Philippines to make a *prima facie* case of inconsistency raises in essence the same issues raised by the "ripeness" argument advanced by Thailand in relation to the 2003–2006 Charges, and already addressed – in considerable detail – by the Panel in the first recourse to Article 21.5. In other words, the Panel does not consider that Thailand has developed a substantively novel legal argument different in substance from its "ripeness" argument made in the first recourse to Article 21.5.

7.213. The Panel considers the similarity between Thailand's arguments in the first recourse to Article 21.5 and its arguments in this second recourse to Article 21.5 to lie in the fact that both sets of arguments fundamentally rest on the same premise, that is, Thailand's assertion that until the Charges have been addressed by the Criminal Court and a judgment has been issued, the Charges may not be the subject of an examination of WTO-consistency by a panel. As the Panel understands it, in both the first recourse to Article 21.5 and now in this second recourse to Article 21.5, Thailand posits that the existence of pending criminal proceedings, or the lack of a judgement by the Criminal Court, constitutes a bar to the Panel's examination of the Charges. In the first recourse to Article 21.5, Thailand argued that, absent a judgment by the Criminal Court the 2003–2006 Charges themselves remained merely an "allegation" of criminal conduct and therefore "a WTO panel has no basis on which to evaluate the outcome of the matter at this point".[404] In this second recourse to Article 21.5, Thailand maintains that there has been no "determination" of the facts underlying the

[403] See e.g. Thailand's first written submission, paras. 3.2, 3.31, 3.37-3.38, and 3.40.

[404] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.561 (referring to Thailand's first written submission, para. 6.73).

Philippines' claims, and that the "factual assertions" contained in the 2002-2003 Charges thus remain "unconfirmed", insofar as they have not been addressed by Thailand's Criminal Court, which ultimately results in the Charges lacking enough information to identify the precise content of any conduct that could be declared WTO-consistent or WTO-inconsistent.[405]

7.214. Additionally, the Panel sees a further point of similarity between Thailand's arguments in the first recourse to Article 21.5 and Thailand's arguments in this second recourse to reside in the consequences that Thailand claims would result from the panel examining the Charges. As will be recalled, in the first recourse to Article 21.5, Thailand argued that the "Philippines [was] seeking an abstract ruling on hypothetical future measures"[406] and that if a panel were to adjudicate the CVA-consistency of the Charges it would be "put[ting] itself in the place of a domestic tribunal and mak[ing] a determination that is within the jurisdiction of that tribunal before the tribunal itself has a chance to make its ruling".[407] In the current proceeding, by claiming that examining the CVA-consistency of the 2002-2003 Charges would result in the Panel "making predictions about the outcome of the Criminal Court's assessment of the facts"[408] and "substituting its judgment for that of the Thai Criminal Court"[409], Thailand appears to be reiterating in very similar terms the same argument that it raised in the first recourse to Article 21.5.

7.215. Thailand's argument that there is "insufficient information" contained in, or concerning, the 2002-2003 Charges also seems to prompt the same question that the Panel asked Thailand to clarify in the first recourse to Article 21.5 in relation to its "ripeness" argument. In the first recourse to Article 21.5, the Panel asked Thailand to clarify whether it was arguing that the 2003-2006 Charges did "not contain sufficient information to discern exactly what is being alleged and exactly what are the grounds for that allegation, such that there is not sufficient information in the *content* of the Charges to assess their consistency with the CVA, and in that sense the Charges are not "ripe" for adjudication". In response, Thailand first specified that it was rather arguing that the making of an allegation of possible customs fraud cannot be ripe for adjudication by a WTO panel before all of the evidence has been heard and there has been a determination by the criminal court that fraud actually took place, and Thailand then clarified that it was *not* arguing that the 2003-2006 Charges contained insufficient information to discern the grounds for the accusation of customs fraud.[410]

7.216. In this second recourse to Article 21.5, Thailand has framed its argumentation in terms that could be construed that it *is* now making that argument with respect to the 2002-2003 Charges (i.e. "insufficient information" to discern what is being alleged and the grounds for that allegation). Indeed, the Philippines appeared to construe Thailand's argument to be that, in the absence of an adequate explanation of the basis for the customs valuation determination, the Philippines cannot make its case.[411] More specifically, in its second written submission, the Philippines understood Thailand to be making the argument that there is a lack of explanation in the 2002-2003 Charges that makes it impossible to discern exactly what is being alleged in the Charges, and exactly what are the grounds for that allegation, such that the Philippines cannot make a *prima facie* case. Furthermore, in its responses to the first set of questions posed by the Panel, Thailand states that its argument that "because of the absence of sufficient information, the [20]02-[20]03 Charges do not contain sufficiently clear information on which to conclude that the Public Prosecutor acted in a WTO-inconsistent manner" stands in "contrast[] with the 03-06 Charges that were challenged in the first compliance proceedings, which the Panel found to contain sufficient information to be adjudicated under the CVA".[412]

7.217. The Panel notes, however, that in its second written submission Thailand clarifies that the Philippines' inability to make a *prima facie* case does *not* hinge on any alleged "absence of an explanation" in the 2002-2003 Charges and that the 2002-2003 Charges do contain an explanation

[405] Thailand's first written submission, paras. 3.37, 3.38, and 3.41.
[406] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.562 (referring to Thailand's first written submission, para. 6.81).
[407] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.562 (referring to Thailand's opening statement at the meeting of the Panel, paras. 27-28).
[408] Thailand's first written submission, para. 3.41.
[409] Thailand's first written submission, para. 3.39.
[410] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.604 (referring to Thailand's response to Panel question No. 100(a), p.26).
[411] Philippines' second written submission, paras. 298-300.
[412] Thailand's response to Panel question No. 135, para. 3.11.

as to the reasons and facts that support the decision to bring criminal charges against PMTL.[413] According to Thailand, the reason for bringing criminal charges against PMTL is the rejection by the Thai authorities of PMTL's declared transaction values based on a comparison of those values with an "actual price", which was calculated using pricing and cost information contained in the CK-21A forms.[414] On this basis, the Panel once again does not understand Thailand to be arguing that there is insufficient information in, or concerning, the 2002-2003 Charges to discern exactly what is being alleged, and exactly what are the grounds for that allegation. Therefore, the Philippines' argument concerning the lack of explanation in the 2002-2003 Charges would appear to be a rebuttal to an argument that Thailand is not making.

7.218. Based on the foregoing, the Panel's analysis proceeds on the understanding that Thailand accepts that there is sufficient factual information regarding the allegation that is made in the 2002-2003 Charges, and the basis for that allegation. Specifically, the allegation is that PMTL evaded the payment of customs duties owed by declaring a "false price" which was lower than the "actual price", and the basis for that allegation was the determination of the "actual price" on the basis of the information reported by PM Indonesia to the Indonesian excise tax authorities in the CK-21A form.

7.219. Accordingly, considering that Thailand's arguments in this proceeding are essentially the same as Thailand's arguments in the first recourse to Article 21.5, the Panel will follow the same analytical framework that it developed and applied in the first recourse to Article 21.5 and assess Thailand's arguments by analysing the following three questions: (1) whether the 2002-2003 Charges are a distinct measure for purposes of WTO dispute settlement; (2) whether the 2002-2003 Charges constitute a "determination" for the purposes of the CVA; and (3) whether the Panel can make findings on the WTO-consistency of the 2002-2003 Charges without engaging in speculation as to when or how the ongoing criminal proceedings before the Criminal Court would be concluded, and without issuing abstract rulings on hypothetical future measures. The Panel will examine these questions in in the same order as they are addressed in the Report in the first recourse to Article 21.5.

7.3.2.3.2 Existence of a distinct measure

7.220. In the first recourse to Article 21.5, the Panel explained that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings" and Thailand did not dispute that the 2003–2006 Charges were a "measure" within the meaning of Article 6.2.[415] Thailand, however, contended that because the Charges were not a "distinct" measure, or were inseparable, from the rest of the criminal proceedings that were triggered by the Charges, they could not be analysed separately or in isolation from those proceedings. The Panel acknowledged that the DSI investigation, the Charges, the subsequent criminal proceedings, and the eventual outcome of those proceedings could all be said to "form part of a continuum of events and measures that are all inextricably linked".[416] The Panel, however, concluded that the 2003-2006 Charges had their own direct legal consequences, which made them "'operate' in 'some concrete way in [their] own right' as 'an instrument with a functional life of its own'" and with an "autonomous status".[417]

7.221. The Panel held that the 2003-2006 Charges had the direct legal consequences of: (1) the accused becoming subject to the mandatory jurisdiction of the criminal court; (2) the accused being required to appear before the court to answer the Charges and attend the hearings relating to the Charges; (3) the accused having to apply for and pay bail to secure temporary release during the proceedings; (4) the accused having an officially recorded indictment and accusations; and (5) the accused having to pay the costs of a defence for criminal proceedings. Finally, the Panel noted that the Charges exposed the accused to negative reputational effects.[418]

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[413] Thailand's second written submission, paras. 3.45-3.46.

[414] The Panel has examined the manner in which the Thai authorities relied on the CK-21A information to determine the "actual price" above, in Section 7.2 (The Thai authorities' reliance on the information in the CK-21A forms).

[415] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.576-7.577. (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Revie*w, para. 81).

[416] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.581.

[417] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.580.

[418] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.580.

7.222. The Panel notes that while Thailand argues that there has been no "determination" of whether the alleged facts concerning the 2002-2003 Charges took place, and consequently that the Philippines is precluded from identifying the "precise content" of any measure that could be found to be WTO-inconsistent, Thailand does not explicitly reiterate its argument that the Charges are inseparable from the rest of the criminal proceedings including the outcome of the criminal proceedings. In its written submissions, Thailand clarified that it is *not* arguing that there is no "measure" in the sense of Article 6.2. In this connection, it may be noted that in the context of the first recourse to Article 21.5, Thailand stated that it never disputed that the 2003-2006 Charges were a "measure". However, Thailand nonetheless argued that the fact that the 2003-2006 Charges were a "measure" did not mean that they could be analysed as a measure *distinct* from the proceedings that they triggered.

7.223. In the Panel's view, an objective comparison between the 2002-2003 Charges and the 2003-2006 Charges reveals that nothing in their nature or in their substance would *prima facie* distinguish the two sets of Charges for the purposes of the Panel's assessment of whether they constitute a distinct measure for purpose of WTO dispute settlement. Both sets of Charges were issued subsequent to, and on the basis of, recommendations resulting from a criminal investigation by the DSI; both sets of Charges allege the violation by PMTL of Section 27 of the Customs Act; and both sets of Charges were filed by the same state organ, i.e. the Public Prosecutor, and were accepted and issued by the same judicial body, the Criminal Court. Given that the 2002–2003 Charges are similar in nature and substance to the 2003–2006 Charges, it then follows that the 2002–2003 charges also entail the same legal consequences which, as explained in the first recourse to Article 21.5, give them the status of an "autonomous" instrument that "operates" in "some concrete way in its own right" vis-à-vis the remaining steps or actions in the criminal proceedings, including the final ruling by the Criminal Court.

7.224. Additionally, Thailand has not identified any basis for distinguishing the 2002-2003 Charges from the 2003-2006 Charges in the Panel's assessment of whether the Charges constitute a distinct measure for purpose of WTO dispute settlement. With a view to clarifying Thailand's position, the Panel asked Thailand whether it accepts that the 2002-2003 Charges constitute a distinct measure, and if not, whether Thailand could identify any basis for distinguishing the 2002-2003 Charges from the 2003-2006 Charges so as to allow the Panel to find, without contradicting its prior findings regarding the 2003-2006 Charges, that the 2002-2003 Charges are not a distinct measure for purposes of WTO dispute settlement. In response, Thailand merely restates that its arguments with respect to the 2002-2003 Charges are different from the arguments it made in relation to the 2003-2006 Charges in the first recourse to Article 21.5, and urges the Panel not to address Thailand's arguments in these compliance proceedings "through prism of the same three questions it analysed Thailand's ripeness argument in the first compliance proceedings".[419] For the reasons already stated, the Panel disagrees.

7.225. Thus, based on the foregoing the Panel concludes that the 2002-2003 Charges, like the 2003-2006 Charges at issue in the first recourse to Article 21.5, constitute a distinct measure for purposes of WTO dispute settlement. The Panel hereby incorporates by reference the reasoning in Section 7.3.4.3.2 (Existence of a distinct 'measure') of the Panel Report in the first recourse to Article 21.5.

7.3.2.3.3 Existence of a determination for purposes of the CVA

7.226. The Panel recalls that in the first recourse to Article 21.5, Thailand argued that because the 2003-2006 Charges were "a mere accusation of wrong-doing, they [did] not represent a customs valuation 'determination' for the purposes of the CVA". Among other things, Thailand argued that the 2003-2006 Charges did not meet the threshold of a "determination" in the ordinary sense of the term, one dictionary definition of which is "the settlement of a suit or controversy by the authoritative decision of a judge or arbiter".[420] In responding to Thailand's argument the Panel anchored its reasoning in the consistent line of cases interpreting the term "determination" by the Appellate Body.[421] On this basis, the Panel reasoned that the Charges represented "the determinate opinion"

[419] Thailand's response to Panel question No. 135, para. 3.13.

[420] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.586 (referring to Thailand's responses to Panel question No. 38(b) and (c)).

[421] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.591.

or "determinate conclusion" of the Public Prosecutor[422], and the "final decision", and not a "provisional" or "intermediate" step, "arrived at" again by the Public Prosecutor, that PMTL acted in violation of Section 27; and for the purpose of prosecuting an offence under Section 27, the issuance of the Charges constitutes a "determination".[423] The Panel therefore concluded that the 2003-2006 Charges constituted a "determination" for purposes of the CVA.

7.227. In this second recourse to Article 21.5, Thailand appears to raise a similar line of argument. Specifically, Thailand repeatedly couches its argumentation in terms of the absence of a "determination" of the facts. Thus, Thailand variously states that the Philippines cannot sustain its claim that, through 2002-2003 the Charges, "Thailand has made a '*determination*' of customs value when it has merely initiated a process to determine whether customs fraud took place"[424], and that "one cannot expect that the criminal charges will contain *final determinations* of the factual circumstances".[425]

7.228. In the Panel's view, an objective comparison between the 2002-2003 Charges and the 2003-2006 Charges reveals that nothing in their nature or in their substance would *prima facie* distinguish the two sets of Charges for the purposes of assessing of whether they involve a "determination" for the purposes of the CVA. As the Panel has outlined above, the nature and substance of the 2002-2003 Charges resemble those of the 2003-2006 Charges.[426] Like the 2003-2006 Charges in the first recourse to Article 21.5, the Panel considers that the 2002-2003 Charges, too, represent the "final decision" or "determinate conclusion", and not an intermediate act, by the Public Prosecutor that PMTL acted in violation of Section 27 of the Customs Act. This "final decision" by the Public Prosecutor is taken for the purpose, and with the clear intention, of triggering criminal proceedings aimed at prosecuting an offence under Section 27. Although Thailand clarifies that these facts will subsequently have to be clarified or confirmed by the Thai Criminal Court, the Panel does not see this subsequent step by the Criminal Court as attenuating the prior distinct "determination" by the Public Prosecutor that PMTL has contravened Section 27 and the ensuing decision to file charges in order to prosecute this offence.

7.229. Furthermore, the Panel notes that Thailand in its submissions does not point to any fact that would serve as a basis for distinguishing the 2002-2003 Charges from the 2003-2006 Charges for purposes of assessing whether the Charges constitute a "determination" for purpose of the CVA. With a view to clarifying Thailand's position, the Panel asked Thailand whether it accepts that the 2002-2003 Charges constitute a "determination", and if not, whether Thailand could identify any basis for distinguishing the 2002-2003 Charges from the 2003-2006 Charges so as to allow the Panel to find, without contradicting its prior findings regarding the 2003-2006 Charges, that the 2002-2003 Charges are not a "determination" for purposes of the CVA. In response, Thailand merely restates that its arguments with respect to the 2002-2003 Charges are different from the arguments it made in relation to the 2003-2006 Charges in the first recourse to Article 21.5, and urges the Panel not to "address Thailand's arguments in these compliance proceedings through prism of the same three questions it analysed Thailand's ripeness argument in the first compliance proceedings".[427] For the reasons already stated, the Panel disagrees.

7.230. Based on the foregoing, the Panel considers that the 2002-2003 Charges, like the 2003-2006 Charges at issue in the first recourse to Article 21.5, constitute a "determination" for purposes of the CVA. The Panel hereby incorporates by reference the reasoning in Section 7.3.4.3.3 (Existence of a "determination" for purposes of the CVA) of the Panel Report in the first recourse to Article 21.5.

7.3.2.3.4 Speculation on future measures or events

7.231. In the first recourse to Article 21.5, Thailand argued that "panels should not engage in exercises in speculation to predict either when or how a matter before it may be concluded and

[422] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.590.
[423] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.595.
[424] Thailand's first written submission, para. 3.31.
[425] Thailand's first written submission, para. 3.37. (emphasis added)
[426] As already noted above, both sets of Charges were issued subsequent to, and on the basis of, recommendations resulting from a criminal investigation by the DSI; both sets of Charges allege the violation by PMTL of Section 27 of the Customs Act; and both set of Charges were filed by the same state organ, i.e. the Public Prosecutor, and were accepted and issued by the same judicial body, the Criminal Court.
[427] Thailand's response to Panel question No. 135, para. 3.13.

should not issue abstract rulings on hypothetical future measures", such as the outcome of pending criminal proceedings, and that "an abstract ruling on hypothetical future measures is not necessary nor helpful to the resolution of this dispute".[428] While the Panel agreed with the general proposition that panels should not engage in such speculation, the Panel considered that in the circumstances of that case, it would not need to engage in speculation on future measures or events in order to make findings on the WTO-consistency of the 2003-2006 Charges because the Charges were "a defined and formal act, taken by an organ of the Thai Sate, on a date certain in the past" and an assessment of the content and meaning of the Charges did "not necessitate" making "predictions about events or measures taken subsequent to the issuance of the Charges on 18 January 2016".[429]

7.232. In this second recourse to Article 21.5, Thailand appears to be reiterating the same argument, in almost identical terms, when it states that examining the CVA-consistency of the 2002-2003 Charges would force the Panel to make predictions about the outcome of the Criminal Court's assessment of the facts.[430] However, in its submissions, Thailand asserts that this is so, without engaging at all with the Panel's prior analysis of this point, and without elaborating on why or how an assessment of the content and meaning of the 2002-2003 Charges would necessitate making predictions about events or measures taken subsequent to the issuance of the Charges.

7.233. In the Panel's view, an objective comparison between the 2002-2003 Charges and the 2003-2006 Charges reveals that nothing in their nature or in their substance would *prima facie* serve to distinguish the two sets of Charges for the purposes of assessing whether an examination of the Charges would necessarily require speculating about future events or measures. In these circumstances, the Panel considers, as it did in relation to the 2003-2006 Charges, that the 2002-2003 Charges are a "defined and formal act, taken by an organ of the Thai state, on a date certain in the past", an act which was completed on the day the 2002-2003 Charges were issued, i.e. 26 January 2017 and which is "distinct" from the subsequent criminal court proceedings or their outcome. Furthermore, the Panel sees no indication in the Philippines' arguments that would suggest that the Philippines is relying on events or measures subsequent to the Charges to establish the WTO-inconsistency of the Charges. Bearing these considerations in mind, the Panel holds the view that an assessment of the content and meaning of the 2002-2003 Charges does not necessitate that it make predictions about events or measures taken subsequent to the issuance of the Charges.

7.234. Additionally, Thailand does not appear to raise, in its submissions, any basis for distinguishing the 2002-2003 Charges from the 2003-2006 Charges in this respect. With a view to clarifying Thailand's position, the Panel asked Thailand whether there is any basis for the Panel to distinguish the 2002-2003 Charges from the 2003-2006 Charges so as to allow the Panel to find, without contradicting its prior findings regarding the 2003-2006 Charges, that the Panel cannot rule on the WTO-consistency of the 2002-2003 Charges without engaging in speculation on future measures or events. In response, Thailand merely restates that its arguments with respect to the 2002-2003 Charges are different from the arguments it made in relation to the 2003-2006 Charges in the first recourse to Article 21.5, and urges the Panel not to address Thailand's arguments in these compliance proceedings "through prism of the same three questions it analysed Thailand's ripeness argument in the first compliance proceedings".[431] For the reasons already stated, the Panel disagrees.

7.235. On the basis of the foregoing, the Panel considers that, as was the case with respect to the 2003-2006 Charges at issue in the first recourse to Article 21.5, it can make findings on the WTO-consistency of the 2002-2003 Charges without engaging in speculation on future measures or events. The Panel hereby incorporates by reference the reasoning in Section 7.3.4.3.4 (Speculation on future measures or events) of the Panel Report in the first recourse to Article 21.5.

7.3.2.3.5 The issues of making a *prima facie* case and conducting a *de novo* review

7.236. As already explained, in this second recourse to Article 21.5 Thailand seeks to reframe the issue in terms of whether there is "insufficient information" contained "in" or "concerning" the 2002-2003 Charges to allow the Philippines to "make a *prima facie* case" by identifying the "precise

[428] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.598 (referring to Thailand's first written submission, paras. 6.64 and 6.70).
[429] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.604.
[430] Thailand's first written submission, para. 3.41.
[431] Thailand's response to Panel question No. 135, para. 3.13.

content" of that measure. Thailand's arguments are formulated in a manner that stresses the well-established concepts of "a *prima facie* case" and the impermissibility of the Panel conducting a "*de novo* review".

7.237. Based on the Panel's reading of Thailand's submissions, it appears that the fundamental premise at the root of Thailand's argument is that the 2002-2003 Charges do not constitute a "determination" for purposes of the CVA. For instance, Thailand states that "the 2002-2003 Charges do not constitute a *final determination* regarding PMTL's customs values, and therefore, their content cannot yet reflect any WTO-inconsistent conduct"[432]; and that, through the 2002-2003 Charges, Thailand has merely initiated "a process to determine whether the customs fraud took place" rather than "a *determination* of customs value".[433] In developing this argument, Thailand clarifies that the Charges do not contain "final *determinations* of the factual circumstances" and this means that, at present, there is not enough information to identify the "precise content" of any conduct that could be declared WTO-consistent or WTO-inconsistent.[434] According to Thailand, it follows from the absence of any such "determination" that if the Panel were to rule on the Philippines' claims concerning the 2002-2003 Charges, the Panel would necessarily conduct an impermissible "*de novo* review" as the Panel "would have to examine facts and to reach conclusions, specifically, as to whether customs fraud took place even before a Thai court has made this *determination*".[435]

7.238. Therefore, it appears that the essence of Thailand's argumentation is premised on the proposition that because there is no ruling of the Criminal Court, and hence no confirmation of the factual matters, there can be no "determination".[436] While Thailand seeks to reframe the issue in terms of the Philippines' ability to make "a *prima facie* case" and the impermissibility of the Panel conducting a "*de novo* review", its arguments in connection with those concepts appear to be inextricably linked to the premise that the Charges do not reflect, or entail, any customs valuation "determination". The Panel already concluded above that the 2002-2003 Charges do constitute a "determination" for purposes of the CVA. Accordingly, even if the Panel reframed the issue in the manner suggested by Thailand, the outcome would be no different: the Panel would find, as a result of the 2002-2003 Charges constituting a "determination", that there is "sufficient information" contained "in" or "concerning" the 2002-2003 Charges to allow the Philippines to "make a *prima facie* case" by identifying the "precise content" of that measure, and that the Panel can rule on the WTO-consistency of the Charges without engaging in an impermissible "*de novo* review".

7.239. Having said this, the Panel sees no reason to reframe the issue in terms of whether there is "insufficient information" contained "in" or "concerning" the 2002-2003 Charges to allow the Philippines to "make a *prima facie* case" by identifying the "precise content" of that measure, or in terms of the Panel engaging in "*de novo* review". As explained at the outset[437], the Panel sees a potential for confusion if it were to present its analysis and conclusions in terms different from those of the Panel Report in the first recourse to Article 21.5, insofar as it is confronted with the same or similar issues raised in the first recourse to Article 21.5.

7.3.2.4 Conclusion

7.240. For the reasons set forth above, the Panel finds, as it did in relation to the 2003-2006 Charges in the first recourse to Article 21.5, that it is not precluded from considering the WTO-consistency of the 2002-2003 Charges, because they constitute a distinct "measure" for purposes of WTO dispute settlement, they constitute a "determination" for purposes of the CVA, and because

[432] Thailand's first written submission, para. 3.2; and second written submission, para. 3.40. (emphasis added)
[433] Thailand's first written submission, para. 3.31. (emphasis added)
[434] Thailand's first written submission, paras. 3.37-3.38. (emphasis added)
[435] Thailand's second written submission, para. 3.40. (emphasis added)
[436] Thailand further explains that the Philippines' claim that the cost information reported to the Indonesian authorities by PM Indonesia cannot be used by Thailand for customs valuation purposes is a "factual assertion" or "factual matter" that has not been "addressed" or "resolved" by Thailand's Criminal Court, and therefore remains "unexamined" and "unconfirmed" or that the "veracity" or "reliability" of the factual assertions underpinning the Philippines' claim can only be confirmed by way of a ruling of the Criminal Court. (Thailand's first written submission, paras. 3.36 and 3.41) The Panel understands this "confirmation" of the factual assertions to be the "determination" that is lacking in the Charges, the absence of which, in the view of Thailand, makes it impossible to identify the precise content of any conduct that could be declared WTO-consistent or WTO-inconsistent.
[437] See Section 7.1.2.2 (Reliance on the Report in the Philippines' first recourse to Article 21.5).

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. Reframing the issue in terms of whether there is "insufficient information" contained "in" or "concerning" the 2002-2003 Charges to allow the Philippines to "make a *prima facie* case" by identifying the "precise content" of that measure, or whether an assessment of the WTO-consistency of the Charges would require the Panel to engage in a "*de novo* review" would not change the outcome.

7.3.3 Applicability of the CVA to the Charges

7.3.3.1 Introduction

7.241. Articles 1 through 7 of the CVA provide for 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". As with the 2003-2006 Charges at issue in the first recourse to Article 21.5, the 2002-2003 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 one of PMTL's former employees, and the payment of fines by PMTL.

7.242. In the first recourse to Article 21.5, Thailand argued that the CVA was inapplicable to the 2003-2006 Charges. Thailand argued that this was the case because: (1) the CVA only applies to measures taken by a "customs administration", which the Public Prosecutor is not a part of; (2) the 2003-2006 Charges did not satisfy the first element of the definition of "customs valuation" in Article 15.1(a) of the CVA, as they did not determine "the value of goods" imported by PMTL and the references to the "actual prices" contained in the Annex to the 2003-2006 Charges only served to establish a possible benchmark for a fine in the event of a conviction for customs fraud; (3) the Charges did not satisfy the second element of the definition of "customs valuation" in Article 15.1(a), as they were not "for purposes of levying *ad valorem* duties"; and (4) allegations under Section 27 of the Customs Act have at their core the element of an "intention to defraud" the government, which is neither found nor regulated in Articles 1 through 7 of the CVA.

7.243. The Panel individually addressed each of these arguments in its Report in the first recourse to Article 21.5.[438] For the detailed reasons set forth in its Report, the Panel concluded that: (1) "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", and it was therefore "unable to agree with Thailand that the CVA is inapplicable to the Charges on the grounds that they were issued by the Public Prosecutor, which is not a part of the 'customs administration'"[439]; (2) the 2003-2006 Charges did determine "the value of goods" imported by PMTL, finding that "[b]ased on … the plain meaning of the Charges and their Annex, … 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"[440]; (3) the Public Prosecutor's determination of the monetary worth or price of PMTL's imported goods for the purpose of determining the amount of the *ad valorem* customs duties that should have been levied on these goods, in the context of an allegation that PMTL declared false prices in order to evade customs duties, sufficed to establish that this valuation was made "for the purposes of levying *ad valorem* customs duties on imported goods"[441]; and (4) in line with the Appellate Body's analysis in *US – 1916 Act*, the obligations in Articles 1 to 7 of the CVA applied to the customs valuation aspect of the Charges, despite the fact that the measure at issue included an additional aspect not regulated by the CVA, i.e. the "intention to defraud".[442]

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[438] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.3.5 (Applicability of the CVA to the Charges).

[439] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.644. The Panel added that "[h]aving reached that conclusion, we consider it unnecessary to reach any definitive conclusion on the scope of the term 'customs administration'".

[440] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.664.

[441] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.762.

[442] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.683

7.244. In this second recourse to Article 21.5, the Philippines submits that the CVA applies to the 2002-2003 Charges.[443] It maintains that the 2002-2003 Charges and their Annex, like the 2003-2006 Charges and their Annex, determine the monetary value of PMTL's imported goods for the purposes of calculating the amount of *ad valorem* customs duties due on those goods in the sense of Article 15.1(a) of the CVA.[444]

7.245. Thailand argues that the CVA does not apply to the 2002-2003 Charges.[445] The Panel understands Thailand to argue that: (1) the CVA is inapplicable to the 2002-2003 Charges because the Public Prosecutor is not a part of Thailand's "customs administration"[446]; (2) the 2002-2003 Charges do not satisfy the first element of the definition of "customs valuation" in Article 15.1(a) of the CVA, because the reference to the "actual price" in the 2002-2003 Charges is to be understood as merely establishing an approximate value of the goods made in the context of setting out the accusation that PMTL's declared price *is not* the price actually paid, and merely identifying a possible benchmark for a fine[447]; (3) the 2002-2003 Charges do not satisfy the second element of Article 15.1(a), because they are not "for purposes of levying *ad valorem* duties"[448]; and (4) the Appellate Body' findings in *US -1916 Act* do not support the conclusion that the CVA applies to measures that have, as their core element, the "intention to defraud" the government.[449]

7.3.3.2 Main arguments of the parties

7.246. Thailand argues that the CVA does not apply to the 2002-2003 Charges because the Public Prosecutor is not part of Thailand's "customs administration". Thailand reiterates its argument, made in the first recourse to Article 21.5, that the disciplines of the CVA apply only to WTO Members' "customs administration", and recalls that the CVA "contains multiple references to 'customs administration' when explaining the organ of the state to which CVA disciplines apply".[450] Thailand incorporates its arguments from the first compliance proceeding[451], and emphasizes that the Revised Kyoto Convention of the World Customs Organization (WCO) provides a definition of "Customs" which confirms that entities responsible for enforcing criminal offences, such as the Public Prosecutor, are not considered part of "customs".[452] Thailand also refers to a letter from the WCO Secretariat to Thailand dated 6 July 2018 that, in Thailand's view, confirms that the Public Prosecutor is not a part of the "customs administration".[453]

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

[443] Philippines' second written submission, paras. 211-289.
[444] Philippines' first written submission, paras. 380-410; second written submission, paras. 265-289; opening statement at the meeting of the Panel, paras. 30-58.
[445] Thailand's first written submission, paras. 3.4-3.25; second written submission, paras. 3.3-3.39; opening statement at the meeting of the Panel, paras. 3.1-3.23.
[446] Thailand's first written submission, paras. 3.4-3.9; second written submission, para. 3.3.
[447] Thailand's first written submission, paras. 3.10-3.25; second written submission, paras. 3.4-3.39.
[448] Thailand's opening statement at the meeting of the Panel, paras. 3.16-3.19.
[449] Thailand's opening statement at the meeting of the Panel, para. 3.20.
[450] Thailand's first written submission, para. 3.4.
[451] Thailand's first written submission, para. 3.4 (referring to Thailand's first written submission in the first compliance proceedings, para. 6.29; Thailand's response to Panel question No. 48).
[452] Thailand's first written submission, paras. 3.5-3.7.
[453] Thailand's second written submission, para. 3.3 (referring to a Communication from the World Customs Organization to Thailand's Director of Customs Standards and Procedure Bureau, 6 July 2018, (Exhibit THA-68)).

Report, that it was inclined to agree fell outside of the scope of application of the CVA.[454] In the course of the proceeding, Thailand also developed other arguments on the first element of Article 15.1(a), as elaborated below in paragraphs 7.286-7.287.

7.248. Thailand argues that the 2002-2003 Charges do not satisfy the second element of Article 15.1(a) of being "for the purposes of levying *ad valorem* customs duties" because neither the accusation nor the related penalty have any "direct repercussion" for[455], or "direct connection" to[456], the amount of the *ad valorem* duties levied. Thailand disagrees with the Panel's finding, in the first recourse to Article 21.5, that the terms "for the purposes of levying *ad valorem* duties" embrace "any determination of the value of imported goods for the purpose of determining the amount of *ad valorem* duties due".[457] Thailand submits that, for a valuation measure to satisfy the second element of Article 15.1(a), it cannot be an abstract determination of the amount of customs duties that are "due" or that "should have been paid".[458] Rather, the valuation measure "must be made for the calculation of duties that are to be collected from the importer".[459] Thailand submits that the approach taken by the panel in *Colombia – Ports of Entry* supports its narrower interpretation.[460] Thailand notes, as examples of measures that entail a valuation of imported goods that are not adopted with the purpose of levying *ad valorem* customs duties, risk assessment tools based on reference values or minimum values and guarantees to secure the payment of customs duties ultimately levied.[461]

7.249. The Philippines recalls that in the first recourse to Article 21.5, the Panel already carefully considered and rejected Thailand's argument that the CVA did not apply to criminal charges because they were issued by the Public Prosecutor, which is not part of Thailand's "customs administration".[462] The Philippines recalls the Panel's finding that the CVA applies to any government entity that makes a customs valuation determination, as set forth in Article 15.1(a) of the CVA, and submits that there is "no basis for Thailand's new argument that the *CVA* narrows the scope of the term 'customs administration' using the definition of 'Customs' in the Revised Kyoto Convention".[463] In this regard, the Philippines considers that "[a] WTO adjudicator cannot incorporate into a WTO covered agreement a definition from a non-WTO treaty, without an appropriate textual basis in the WTO agreement itself."[464]

7.250. With respect to the first element of Article 15.1(a), the Philippines maintains that the 2002-2003 Charges and their Annex, like the 2003-2006 Charges and their Annex, fix or determine the monetary value of PMTL's imported cigarettes, because they establish the alleged "actual" or "found" price for each of the 780 entries, and compare the "declared" price against the higher "actual" price. The Philippines points out that "every single substantive clause of the 02-03 Charges refers to the 'actual' prices of the imported goods", and that the "Annex similarly provides exact figures for the 'actual' or 'found' price for each of the 780 entries".[465] In response to Thailand's assertion that the 2002-2003 Charges do not determine any customs value for the imported goods, the Philippines submits that Thailand "entirely fails to explain the nature of the 'actual price' that it determined".[466] In response to Thailand's repeated citation to the Panel's statement that "an allegation of customs fraud could be made without ever seeking to determine the customs value of the importer's goods", the Philippines states that what this Panel's statement means is that "the fact that not all cases of customs fraud involve a customs valuation determination subject to the CVA does not mean that the CVA never applies to cases of fraud".[467] The Philippines raises several grounds for rejecting Thailand's assertion that the Charges concern "customs fraud", and Thailand's initial assertion that the references to the "actual price" in the Charges should be read as a reference to the "price actually

[454] Thailand's first written submission, paras. 3.10-3.25.
[455] Thailand's opening statement at the meeting of the Panel, paras. 3.16 and 3.19.
[456] Thailand's response to Panel question No. 171(a), para. 6.27.
[457] Thailand's opening statement at the meeting of the Panel, paras. 3.15-3.16.
[458] Thailand's response to Panel question No. 171(a), para. 6.9.
[459] Thailand's response to Panel question No. 171(a), para. 6.9.
[460] Thailand's response to Panel question No. 171(a), paras. 6.4-6.10.
[461] Thailand's opening statement at the substantive meeting of the Panel, paras. 3.16–3.18.
[462] Philippines' second written submission, paras. 255-260.
[463] Philippines' second written submission, para. 264.
[464] Philippines' second written submission, para. 263.
[465] Philippines' first written submission, para. 404.
[466] Philippines' opening statement at the meeting of the Panel, para. 35.
[467] Philippines' opening statement at the meeting of the Panel, para. 56.

paid or payable".[468] In any event, the Philippines argues that even if the 2002-2003 Charges are understood as alleging "customs fraud" in the sense that PMTL's declared value was not the "price actually paid or payable", this would constitute a customs valuation determination to which the CVA would apply.[469]

7.251. As regards the second element of Article 15.1(a), the Philippines maintains that the 2002-2003 Charges and their Annex, like the 2003-2006 Charges and their Annex, calculate exactly the amount of taxes and *ad valorem* customs duties purportedly "*underdeclared*" and/or "*underpaid*" – that is, "*due*" – on each entry. The Philippines observes that every single clause of the 2002-2003 Charges refers to the "amount of tax and [*ad valorem* customs] duty under customs law that the two Defendants and others *were liable to pay*"[470], and thus establishes the amount of *ad valorem* duties that, to use the Panel's words, "should have been collected" from the importer.[471] The Philippines argues, in response to Thailand, that the Panel's interpretation of the words "for purposes of levying *ad valorem* duties" does not lead to the consequence that risk assessment tools based on reference values or minimum values, or guarantees to secure the payment of customs duties ultimately levied, constitute "customs valuation determinations" subject to the obligations in Article 1 through 7.[472]

7.3.3.3 Analysis by the Panel

7.3.3.3.1 General considerations

7.252. As already indicated above, in the first recourse to Article 21.5, the Panel separately addressed Thailand's arguments concerning the non-applicability of the CVA based on: (1) the agency that filed the Charges; (2) the meaning of the Charges; (3) the consequences of the Charges; and (4) the "intention to defraud" aspect of the Charges. Before doing so, the Panel reviewed several general considerations pertaining to the applicability of the CVA to criminal measures concerning customs fraud which may be useful to recall for the purposes of the present case.

7.253. The Panel first observed that 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, including criminal law.[473] The Panel then noted that previous dispute settlement panels had reviewed the WTO-consistency of measures taken in the sphere of criminal law, and set forth its understanding that those prior cases establish 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".[474]

7.254. The Panel also observed that it was 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.[475] With regard to the concept of "customs fraud", the Panel then explained 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 or payable".[476] The Panel explained that this understanding of customs fraud is consistent with Article 17 of the CVA[477]; the "Decision of the Committee on Customs Valuation adopted pursuant to the Ministerial Decision Regarding Cases Where Customs Administrations Have

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[468] Philippines' second written submission, paras. 276-286.
[469] Philippines' opening statement at the meeting of the Panel, paras. 45-58.
[470] Philippines' first written submission, para. 406.
[471] Philippines' first written submission, para. 408.
[472] Philippines' comments on Thailand's response to Panel question No. 171(a), paras. 189-198.
[473] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.619.
[474] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.620-622 (referring to Panel Report, *US – 1916 Act,* paras. 6.178-6.181; Panel Report, *US – Gambling*, paras. 6.499-6.509, 6.515-6.533, and 7.3-7.4; Panel Report, *China – Intellectual Property Rights*, paras. 2.2, 7.500-7.501 and 7.669; Appellate Body Reports, *China – Measures Affecting Automobile Parts*, footnote 244; *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82; *US – Softwood Lumber IV*, para. 56).
[475] The Panel notes the Philippines' agreement on this point. (See Philippines' comments on Thailand's response to Panel question No. 75).
[476] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.631.
[477] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.624.

Reasons to Doubt the Truth or Accuracy of the Declared Value"[478]; paragraph 8.3 of the Doha Ministerial Decision on Implementation-Related Issues of 14 November 2001[479]; 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)[480]; and prior WTO case law.[481]

7.3.3.3.2 The agency that filed the Charges

7.255. The Panel will 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 the Panel is 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" in the narrow sense of the term.

7.256. In the first recourse to Article 21.5, the Panel was likewise called upon to consider "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'".[482] The Panel reasoned 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", given both the customary international law rules of State responsibility and broad concept of a challengeable "measure" that apply in the context of WTO dispute settlement proceedings, and in light of the fact that none of the covered agreements contains any general scope and coverage provision limiting its applicability to particular government agencies within a Member.[483] The Panel then found that there was no such indication in the text of the CVA and noted the following: the absence of any general scope and coverage provision in the CVA and the broad language of Article 19[484]; the fact that the substantive CVA obligations which were at issue (Articles 1.1, 1.2(a), second sentence, 2.1, and 3.1 of the CVA) use the passive voice and are silent on who is applying the methodology[485]; the nature of the numerous references in the text of the CVA to the "customs administration"[486]; and the fact that the consequences of finding that the CVA only applies to customs valuation determinations made by the "customs administration" would be inconsistent with the object and purpose of the CVA.[487] The Panel also noted the fact that all third parties that expressed a view on this point rejected Thailand's interpretation of the CVA.[488]

7.257. In the first recourse to Article 21.5, the Panel took no definite position on the precise meaning of the term "customs administration", or on the question of whether the Public Prosecutor is part of the "customs administration". The Panel did not take a position on those issues because it rejected the underlying premise that the substantive CVA obligations invoked by the Philippines apply only to those state organs that are a part of the "customs administration". Specifically, the Panel concluded that the substantive CVA obligations invoked by Philippines "apply to any organ of the state that makes a 'customs valuation' determination", and was therefore "unable to agree with Thailand that the CVA is inapplicable to the Charges on the grounds that they were issued by the Public Prosecutor, which is not a part of the 'customs administration'".[489] The Panel concluded its analysis by stating that, having reached the conclusion that it did, the Panel considered it "unnecessary to reach any definitive conclusion on the scope of the term 'customs administration'".[490]

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[478] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.625-7.626.
[479] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.627-7.628.
[480] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.629.
[481] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.630.
[482] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.633.
[483] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.635-7.638.
[484] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.638.
[485] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.639-7.640.
[486] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.641.
[487] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.642.
[488] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.643.
[489] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.644.
[490] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.644. The Panel notes that it followed a consistent approach when it refrained from defining the terms "customs administration" in the context of examining the Philippines' claims, regarding the BoA, under the procedural obligations in Article 1.2(a), third sentence, and Article 16: in assessing the applicability of those procedural obligations to the BoA, the Panel proceeded on the basis that the BoA is "formally part" of the Thai Customs Department, and

7.258. In this second recourse to Article 21.5, Thailand requests that the Panel re-examine the same issue, and uphold Thailand's argument that the CVA is inapplicable to the Charges because they were issued by the Public Prosecutor, which is not a part of the "customs administration". In support of its argument, Thailand states that it reiterates its arguments from the first recourse to Article 21.5. It also sets forth two considerations that were not specifically addressed by the Panel in its reasoning. The Panel will begin by examining whether Thailand's general and specific legal arguments warrant the Panel reversing its prior findings and reasoning, or making additional findings beyond those already set forth in the earlier Report. The Panel will then examine whether those findings, which focused specifically on the substantive CVA obligations invoked by the Philippines in the first recourse to Article 21.5, extend to the different set of CVA provisions at issue in this second recourse to Article 21.5.

7.259. Beginning with Thailand's general arguments, Thailand states in its first written submission that it "reiterates its argument made in the first compliance proceedings that the disciplines of the CVA apply only to WTO Members' 'customs administration'"[491], and "incorporates into this submission its arguments from the first compliance proceedings in this respect".[492] The Panel already addressed those arguments, in detail, in its Report in the first recourse to Article 21.5. In the absence of any novel arguments that would warrant a re-examination of this issue by the Panel, nothing is to be gained by the Panel setting forth its reasoning again, or restating its reasoning in different terms. Accordingly, the Panel will not repeat the analysis that it already set forth in the first recourse to Article 21.5, and summarized further above.

7.260. Therefore, the Panel does not consider it necessary to develop any additional reasoning beyond that already set forth in the Report in the first recourse to Article 21.5. Indeed, the factual configuration of this case further corroborates the reasoning of the Panel in that Report as it provides a concrete, real-world example of the type of scenario that the Panel cautioned might arise if Thailand's restrictive interpretation of the scope of the CVA was adopted. The consequence of Thailand's position regarding the non-applicability of the CVA to measures taken by organs which are not part of the "customs administration" is that the CVA obligations at issue would apply to the 1,052 revised NoAs issued by the Customs Department in November 2017, but those obligations would not apply to the 2002-2003 Charges issued by the Public Prosecutor in January 2017, notwithstanding that both the revised NoAs and the Charges rest on the same basis (i.e. the DSI's calculation of the "actual" value of PMTL's imports of cigarettes based on the cost information in excise tax form CK-21A) and that both cover overlapping entries.[493] Therefore, the facts of this case are a variation of the hypothetical situation that the Panel alluded to in the first recourse to Article 21.5, when it expressed its concern that:

> 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. 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.[494]

7.261. The Panel thus considers that the factual configuration of this case vividly illustrates how the object and purpose of the CVA could be undermined if its substantive obligations were found to be

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is therefore part of the "customs administration" in "the narrowest understanding of this term". (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.258, footnote 651, and para. 7.419.)

[491] Thailand's first written submission, para. 3.4.

[492] Thailand's first written submission, para. 3.8.

[493] Thailand's response to Panel question No. 138.

[494] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.642.

inapplicable to customs valuation determinations made in the criminal law enforcement context. The Panel further notes that, in addition to opening the door for Members to evade their CVA obligations, it would conflict with the CVA's preambular objectives of promoting "uniformity" in the implementation of WTO customs valuation rules, and the establishment of "valuation procedures of general application", to find that the substantive obligations in the CVA apply to some state organs but not others.[495]

7.262. The Panel does not understand Thailand to argue that the inapplicability of CVA obligations to customs valuation determinations made in the criminal law context means that such determinations could be made without any reasoned basis or factual evidence. Rather, the Panel understands the implication of Thailand's argument to be that such determinations would be subject to a different set of rules, procedures and legal concepts, derived from criminal law or some other legal framework. However, Thailand does not specify exactly what these norms would be, or from which sources of law this parallel regime would be derived. While Thailand does argue that it is criminal law that would be applicable, specifically Section 27 of its Customs Act, Thailand does not explain what methodolog(ies) would be used to arrive at the customs valuation determinations required to apply that provision, and more specifically to determine the amounts "due" for purposes of Section 27. In the Panel's view, such a dichotomy of methods would further undermine the objective of promoting uniformity in the implementation of customs valuation rules, and undermine the effectiveness of the CVA.

7.263. In addition to its more general reiteration/incorporation of its earlier arguments, Thailand specifically reiterates an argument that was not explicitly addressed by the Panel in the first recourse to Article 21.5. According to Thailand, the term "customs administration" in the CVA should be interpreted in accordance with the definition of "Customs" contained in the Revised Kyoto Convention, and the Public Prosecutor does not meet the elements of the Revised Kyoto Convention's definition of "Customs". The definition is found in Chapter 2 of the General Annex to that Convention, which contains a set of provisions applicable to all the customs procedures and practices referred to in the Convention (see Article 1 of the Revised Kyoto Convention). The definition states that "Customs" means "the Government Service which is responsible for the administration of Customs law and the collection of duties and taxes and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods".[496]

7.264. In line with the approach that is already explained earlier[497], the Panel considers that it is appropriate for the Panel to confine the scope of any re-examination of its reasoning or findings to any novel arguments presented by Thailand (or any third party) in the context of this second recourse to Article 21.5. While the Philippines refers to Thailand's argument relating to the Revised Kyoto Convention as a "new argument"[498], it is not – Thailand made the same argument in the first recourse to Article 21.5.[499] However, the Panel did not specifically address Thailand's argument in its reasoning. Given that Thailand now reiterates this argument, the Panel considers it useful to spell out why it was unnecessary to specifically address that argument to resolve the issue before the Panel.

7.265. The Panel agrees with Thailand insofar as it is arguing that the definition of "Customs" contained in the Revised Kyoto Convention is relevant to the interpretation of the same term in the

[495] The Panel refers to the third, fourth and sixth recitals of the CVA preamble. These state:

> *Recognizing* the importance of the provisions of Article VII of GATT 1994 and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;
>
> *Recognizing* 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;
>
> …
>
> *Recognizing* that customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply;

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

[497] See Section 7.1.2.2 (Reliance on the Report in the Philippines' first recourse to Article 21.5).

[498] Philippines' second written submission, para. 261.

[499] Thailand's comments on the Philippines' response to Panel question No. 92, p. 25.

CVA and other covered agreements, and may thus be taken into account as one element that may be relevant to the interpretation of that term in the context of the CVA. The Panel recalls that in the original proceeding the panel and the Appellate Body actually relied on the above definition of "Customs" to inform the meaning of "customs matters" in the context of Article X:3(b) of the GATT 1994. The Panel notes that several other panels and the Appellate Body itself have also referred either to this definition of "Customs", or to other definitions contained in the Revised Kyoto Convention, for the purpose of interpreting related terms in the covered agreements.[500] The Panel considers that the Revised Kyoto Convention may in principle be regarded as a "relevant rule of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the Vienna Convention, and that even if the number of contracting parties would be considered not to meet any requisite threshold[501], it still sheds light on the ordinary meaning of certain terms used in the CVA, and would at a minimum constitute a relevant "supplementary means of interpretation" under Article 32 of the Vienna Convention.[502]

7.266. However, even assuming *arguendo* that Thailand is correct that the definition of "Customs" contained in the Revised Kyoto Convention is relevant to the interpretation of the term "customs administration" in the context of the CVA, and even assuming further that this definition supports a restrictive interpretation of the terms "customs administration" in the CVA, this would still not alter the Panel's existing conclusion or analysis. As recalled above at paragraph 7.257, the Panel did not take a position on the meaning of the terms "customs administration" in the CVA, but instead simply rejected the underlying premise that the CVA obligations invoked by the Philippines apply only to those state organs that are a part of the "customs administration". Specifically, the Panel concluded that the substantive CVA obligations invoked by Philippines "apply to any organ of the state that makes a 'customs valuation' determination", and was therefore "unable to agree with Thailand that the CVA is inapplicable to the Charges on the grounds that they were issued by the Public Prosecutor, which is not a part of the 'customs administration'".[503] This reasoning, i.e. that the substantive CVA obligations at issue apply to any organ of the state that makes a "customs valuation" determination irrespective of whether that organ forms part of the "customs administration", rendered moot Thailand's argument regarding the definition of "Customs" in the Revised Kyoto Convention and obviated any reason for the Panel to specifically address that definition in the reasoning. The Panel sees no reason to go further than the Panel in the first recourse to Article 21.5 did in seeking to define the term "customs administration" in the context of the CVA. There is no obligation upon a panel to make findings on every argument put forward by the parties in support of their respective cases, insofar as acceptance or rejection of an argument would not alter the conclusion arrived at.[504]

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[500] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1027; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 193. See also Panel Report, *China – Auto Parts*, para. 7.139 (in the context of interpreting the terms "ordinary customs duties" in Article II of the GATT 1994); and Panel Report, *Indonesia – Chicken*, footnote 776 (relying on the definition of "transhipment" in the Revised Kyoto Convention).

[501] The Revised Kyoto Convention currently has 116 Contracting Parties, including the Philippines and Thailand. The Appellate Body has observed that the meaning of the term "the parties" in Article 31(3)(c) of the *Vienna Convention* "has in recent years been the subject of much academic debate and has been addressed by the ILC", and noted that "one must exercise caution in drawing from an international agreement to which not all WTO Members are party". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* paras. 844-845.)

[502] There are past examples of panels and the Appellate Body having recourse to other international conventions and instruments to inform the ordinary meaning of certain terms, including certain terms contained in the covered agreements. See e.g. Appellate Body Report, *US – Shrimp*, para. 130 (interpreting the terms "exhaustible natural resources" in Article XX(g) of the GATT 1994 in the light of the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, Agenda 21, and the Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals); and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 141-143 (interpreting the concept of "foreign-source income" in footnote 59 of the SCM Agreement taking into account certain widely recognized principles of taxation that emerge from international instruments in the field of taxation, including the United Nations Model Tax Convention, the OECD Model Tax Convention, and a range of bilateral tax treaties, and multilateral agreements adopted by member States of the Andean Community and the Caribbean Community). Indeed, as already noted earlier, the Panel in the first recourse to Article 21.5 referred to Article 1(c) of the WCO Nairobi Convention in the context of clarifying what is generally understood by the concept of "customs fraud". (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.629.)

[503] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.644.

[504] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 6.6-6.7.

7.267. In addition to its argument based on the definition of "Customs" contained in Chapter 2 of the General Annex to the Revised Kyoto Convention, Thailand has also submitted a copy of a letter from the WCO Secretariat. The letter is addressed to Thailand, and is dated 6 July 2018. In Thailand's view, the WCO Letter confirms that the Public Prosecutor is not a part of the "customs administration" for purposes of the CVA.[505] The WCO letter states that it was provided to Thailand in response to a request, from Thailand, for clarification on: (1) the phrase "the Government Service which is responsible for the administration of the Customs law and the collection of duties and taxes…", as mentioned in Chapter 2 of the General Annex to the Revised Kyoto Convention; and (2) whether the Department of Special Investigation can be considered as a "Customs Administration" under the CVA. The letter states that:

> In response to the points you raise, neither the [Revised Kyoto Convention] nor the [CVA] provides further guidance on this question. However, in the opinion of WCO, it is normally the Customs department which has responsibility and the competence in matters relating to the interpretation and application of technical Customs issues, such as Customs valuation. We assume that DSI is not part of the Thai Customs Department; on that basis DSI would not, in our opinion, be considered as a "Customs administration" in the context of the Agreement.[506]

The letter then states that "[u]ltimately, it is a matter for a national decision to be made in this regard, taking into account national legislation", and proceeds to quote the following guidance from the *Glossary of International Customs Terms*:

> 1. This term [Customs] is also used when referring to any part of the Customs Service or its main or subsidiary offices.
>
> 2. This term is also used adjectivally in connection with officials of the Customs, duties and taxes or control on goods, or any other matter within the purview of the Customs (Customs officer, Customs duties, Customs office, Customs declaration).[507]

7.268. The Philippines responds that the Panel should attach no weight to the WCO Letter.[508] It points out that it is not clear if the letter expresses the official position of the WCO or merely the views of the official that signed the letter. It further notes that the letter references earlier correspondence between Thailand and the WCO which has not been provided by Thailand. The Philippines also questions whether the WCO was aware of the context of Thailand's question, and notes that the WCO Secretariat does not have access to the submissions before the Panel. While the Philippines does not agree with certain statements made in the WCO Letter, the Philippines also considers that the letter fails to support Thailand's position as it merely opines that "it is *normally* the Customs department which has responsibility and the competence in matters relating to the interpretation and application of technical Customs issues, such as customs valuation", and states that it "*assumes*" that the DSI is not "formally part of the Customs department".

7.269. The Panel does not exclude the possibility that the WCO Secretariat's view on the scope of certain terms used in both the CVA and certain conventions administered by the WCO, including the term "customs", might assist a panel in arriving at the correct interpretation of those terms.[509]

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[505] Thailand's second written submission, para. 3.3.

[506] Communication from the World Customs Organization to Thailand's Director of Customs Standards and Procedure Bureau, 6 July 2018, (Exhibit THA-68), p. 1.

[507] Communication from the World Customs Organization to Thailand's Director of Customs Standards and Procedure Bureau, 6 July 2018, (Exhibit THA-68), p. 2.

[508] Philippines' response to Panel question No. 137(b).

[509] There are past examples of panels engaging in such consultation. For example, the panel in *China – Auto Parts* sought clarifications from the WCO Secretariat on certain issues relating to the "Revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures" and the WCO's "Glossary of International Customs Terms." These questions touched upon the meaning of certain terms used in both in conventions administered by the WCO and in the GATT 1994, including the terms "on or in connection with importation" in Article II:1(b) of the GATT 1994. (See Panel Report, *China – Auto Parts*, Annex C-3.) In *EC — Approval and Marketing of Biotech Products,* the panel stated that it "requested several international organizations (Codex, FAO, the IPPC Secretariat, WHO, OIE, the CBD Secretariat and UNEP) to identify materials (reference works, glossaries, official documents of the relevant international organizations, including

However, even assuming *arguendo* that Thailand is correct in construing the WCO Secretariat's letter of 6 July 2018 as supporting a restrictive interpretation of the notion of "customs administration" in the CVA, which the Panel doubts for the reasons identified by the Philippines above, this would still not alter the Panel's conclusion or analysis. As already explained, the Panel rejected the underlying premise that the CVA obligations invoked by the Philippines apply only to those state organs that are a part of the "customs administration" in the narrow sense of the term. The Panel's rationale stands, and for the same reason that it is not necessary to further consider the definition of "Customs" found in Chapter 2 of the General Annex to the Revised Kyoto Convention, it is not necessary to further consider the WCO Letter, and the opinion reflected therein on whether the DSI falls within the scope of the term "customs administration".[510]

7.270. For the foregoing reasons, the Panel concludes that Thailand has not presented any legal arguments that would warrant the Panel either reversing its prior findings and reasoning, or making additional findings beyond those already set forth in the earlier Report. The Panel hereby incorporates by reference the reasoning in Section 7.3.5.3.2 (The agency that filed the Charges) of the Panel Report in the first recourse to Article 21.5

7.271. The Panel now turns to the question of whether its prior findings equally extend to the provisions at issue in the present proceeding. It is necessary to consider this question because in the first recourse to Article 21.5, the Panel limited its findings to the specific obligations invoked by the Philippines in relation to the 2003-2006 Charges. The Panel found that those obligations apply generally to "customs valuation determination[s]" attributable to a Member. The CVA obligations which were at issue included the obligations in Article 1.1, Article 1.2(a) second sentence, Article 2.1, and Article 3.1 of the CVA. In this second recourse to Article 21.5, the *substantive* CVA obligations at issue again include the obligations in Articles 1.1 and 1.2(a), second sentence, but they also include the substantive obligations in Articles 6 and 7, as well as the obligation to sequentially apply the customs valuation methods in Articles 2 to 7. In addition to these substantive obligations, the Philippines also brings a claim under the specific *procedural* obligation in Article 1.2(a), third sentence. Accordingly, the Panel must examine whether those findings, which focused specifically on the substantive CVA obligations invoked by the Philippines in the first recourse to Article 21.5, extend to the different set of CVA provisions at issue in this second recourse to Article 21.5.

7.272. Beginning with the *substantive* CVA obligations at issue in this second recourse to Article 21.5, the use of the passive voice in Articles 1.1. and 1.2(a) (second sentence) was already explained by the Panel in the first recourse to Article 21.5.[511] The Panel notes that the text of Articles 6 and 7 likewise set forth obligations that are silent on who is applying the methodology. The text of these provisions contains no reference to the "customs administration". Thus, Article 6.1 uses the passive voice when it states that the customs value of imported goods under the provisions of that Article "shall be based on computed value", and then proceeds to explain what computed value "shall consist of"; and Article 7 uses the passive voice when it states that "the customs value shall be determined using reasonable means consistent with the principles and general provisions of this

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conventions, standards and guidelines, etc.) that might aid us in determining the ordinary meaning of certain terms used in the definitions provided in Annex A to the *SPS Agreement*". (Panel Reports, *EC — Approval and Marketing of Biotech Products*, paras. 7.96.) In several cases involving the interpretation of conventions that are administered by WIPO and incorporated by reference into the TRIPS Agreement, panels have requested the WIPO Secretariat to provide information relevant to the interpretation of the provisions at issue. (See e.g. Panel Reports, *US – Section 110(5) Copyright Act*, para. 4.1; *US – Section 211 Appropriations Act*, paras. 8.11-8.13; *EC – Trademarks and Geographical Indications*, paras. 2.16-2.18; *China – Intellectual Property Rights*, paras. 2.7-2.9; and *Australia – Tobacco Plain Packaging (Cuba)*, paras. 1.63-1.65.) Finally, in *Dominican Republic – Import and Sale of Cigarettes*, the panel sought and relied upon the opinion of the IMF as to whether a foreign exchange fee applied by the Dominican Republic constituted an "exchange restriction" within the meaning of Article XV: 9(a) of the GATT 1994. (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.143-7.145.)

[510] The Panel notes that the question addressed in the WCO letter is whether the DSI (not the Public Prosecutor) is part of Thailand's "customs administration".

[511] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.639. The Panel observed that 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". The Panel observed that the first and second sentences of Article 1.2(a) are likewise formulated in the passive voice.

Agreement". There is likewise no reference to the "customs administration" in the first section of the General Note to the Interpretative Notes to the CVA, entitled "Sequential Application of Valuation Methods". Paragraph 2 thereof uses the passive voice when it states that if goods cannot be valued using the transaction value, the customs value "is to be determined by proceeding sequentially through the succeeding Articles to the first such Article under which the customs value can be determined". Accordingly, the Panel considers that its finding and reasoning from the first recourse to Article 21.5 necessarily extends and applies to the above-mentioned *substantive* obligations at issue in this dispute. These substantive obligations, like the substantive obligations considered in the first recourse to Article 21.5, apply to any organ of the state that makes a "customs valuation" determination.

7.273. The Panel addresses the procedural obligation in Article 1.2(a), third sentence, in Section 7.3.6 below, in the context of examining the Philippines' claim under that provision. As elaborated further below in the context of examining that specific claim, the Panel concludes that the procedural obligation in Article 1.2(a), third sentence, applies to the Public Prosecutor, but that the nature of the information and the "grounds" to be communicated in the context of a criminal investigation may be different from the nature of the information and the "grounds" to be communicated in the context of a typical customs valuation within the institutional framework of a "customs administration" in the narrow sense of the term.

7.274. Based on the foregoing, the Panel finds that the obligations in Articles 1.1, 1.2(a), second sentence, and the relevant custom valuation rules in Articles 2 to 7 apply to any organ of the state that makes a "customs valuation" determination, and rejects Thailand's argument that the CVA is inapplicable to the Charges because they were issued by the Public Prosecutor, which is not a part of the "customs administration". Having reached that conclusion, the Panel again finds it unnecessary to reach any definitive conclusion on the scope of the term "customs administration" in the context of the CVA.

7.3.3.3.3 The meaning of the Charges

7.3.3.3.3.1 Introduction

7.275. The Panel recalls that 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", and that the panel in *Colombia – Ports of Entry* relied on Article 15.1(a) to define the constituent elements that must be present for an action to constitute a "customs valuation" determination subject to the obligations in the CVA.[512] The Panel further recalls that in the first recourse to Article 21.5, the parties agreed 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: (1) determining the monetary worth or price of imported goods (2) for the purposes of levying *ad valorem* customs duties.[513]

7.276. In the first recourse to Article 21.5, Thailand argued that the 2003-2006 Charges did not satisfy the first element of the definition of "customs valuation" in Article 15.1(a) of the CVA, as they did not determine "the value of goods" imported by PMTL. Thailand maintained that the references to the "actual prices" contained in the Annex to the 2003-2006 Charges only served to establish a possible benchmark for a fine in the event of a conviction for customs fraud. Thailand also argued that the Charges did not satisfy the second element of the definition of "customs valuation" in Article 15.1(a), as they were not "for purposes of levying *ad valorem* duties".

7.277. The Panel was not persuaded by Thailand's arguments. As regards the first element in Article 15.1(a), the Panel explained, in Section 7.3.5.3.3 (The meaning of the Charges), why the 2003-2006 Charges did determine "the value of goods" imported by PMTL. As regards the second element of Article 15.1(a), the Panel explained, in Section 7.3.5.3.4 (The consequences of the Charges), why 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

[512] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.646-7.647 (referring to Panel Report, *Colombia – Ports of Entry*, paras. 7.81, 7.83, and 7.84). See also, more recently, Panel Report, *Colombia – Textiles (Article 21.5 – Colombia/Panama)*, para. 7.599.

[513] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.647.

levied on goods imported by PMTL was made "for the purposes of levying *ad valorem* customs duties on imported goods".

7.278. In this second recourse to Article 21.5, Thailand reiterates similar arguments in connection with the 2002-2003 Charges. Thailand's arguments are based on Article 15.1(a), and it has explained that it "does not allege that the CVA has a special 'carve out' for allegations of customs fraud, for which a different legal standard applies instead of Article 15.1(a) of the CVA"; rather, its "contention on the applicability of the CVA is grounded directly in Article 15.1(a)".[514] Thailand further explains that its arguments in this proceeding relating to "customs fraud" are tantamount to, and "nothing else tha[n] another way of illustrating why the 02-03 Charges do not meet both elements of Article 15.1(a) of the CVA".[515]

7.279. The Panel's analysis is likewise grounded in the elements of Article 15.1(a). As it did in its prior Report in relation to the 2003-2006 Charges, the Panel will separately and sequentially make an assessment of whether the 2002-2003 Charges (1) determine the monetary worth or price of imported goods (2) for the purposes of levying *ad valorem* customs duties.

7.280. In this section, the Panel will consider whether the 2002-2003 Charges seek to determine the monetary value of PMTL's imported cigarettes in a way that meets the first element of Article 15.1(a). This point of disagreement between the parties requires the Panel to resolve certain issues relating to the meaning of the Charges filed by the Public Prosecutor, and in particular how the reference to the "actual price" is to be understood in the context of the 2002-2003 Charges and their Annex. As elaborated below, the parties' arguments raise two issues.

7.3.3.3.3.2 The issues in dispute

7.281. As the parties have formulated certain of their arguments in this proceeding by reference to the Panel's reasoning regarding the 2003-2006 Charges in the first recourse to Article 21.5, the Panel begins by briefly summarizing that reasoning. It then sets forth the evolution of the parties' arguments regarding how the "actual price" is to be understood in this proceeding, with a view to identifying and disentangling the two main issues in dispute.

7.282. In the first recourse to Article 21.5, the Panel was likewise called upon to consider the meaning of the 2003-2006 Charges, and in particular what the "actual price" referred to. Regarding the 2003-2006 Charges, Thailand argued that there was no "valuation of goods", because those Charges did not actually seek to "fix or determine the monetary value of PMTL's imported cigarettes". Thailand essentially argued that although the 2003-2006 Charges expressly compared PMTL's declared or "false" price with the "actual price" based on the prices of the duty-free operator King Power, this was to be understood as alleging that the transaction value declared by PMTL was not the actual price that PMTL paid to PMPMI, and that the reference to the "actual price" in the 2003-2006 Charges and their Annex merely served the purpose of providing a possible benchmark to the Criminal Court to impose fines in the event of a conviction.[516] Thailand's argument was that the reference to the "actual price" did not actually constitute any attempt to determine a revised customs value within the scope of Articles 2 through 7 of the CVA. In other words, Thailand stressed that "the Charges do not determine or even attempt to determine what *should* be the 'true' or 'correct' or 'actual' customs value".[517]

7.283. At the outset of its analysis of this issue, the Panel stated at paragraph 7.649 that it would be inclined to agree with Thailand that the Charges would 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 basis for determining the actual customs value of PMTL's imported goods".[518] In the course of its analysis, and in line with

[514] Thailand's response to Panel question No. 171(a), para. 6.20.
[515] Thailand's response to Panel question No. 171(a), para. 6.20.
[516] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.648.
[517] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.612, 7.631, and 7.686.
[518] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.649.

that clarification, the Panel agreed 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 that the making of such 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'".[519] Thus, the Panel accepted that an allegation of customs fraud might be made without necessarily determining the monetary worth or price of imported goods, and that if Thailand's assertions about the meaning of the 2003-2006 Charges were true this would suggest that the Charges did not meet the first element of Article 15.1(a).

7.284. However, the Panel ultimately rejected Thailand's assertions regarding the meaning of the 2003-2006 Charges. The Panel explained that the text of the 2003-2006 Charges alleged that PMTL failed to comply with Section 27 of the Customs Act by declaring a "false price" for *Marlboro* and *L&M* cigarettes contrary to the "actual price".[520] The Panel concluded, based on the plain meaning of the Charges and their Annex, that the Charges did "fix or determine the monetary value of PMTL's imported cigarettes" for purposes of customs valuation.[521] The Panel found that Thailand's reading of the Charges could not be supported by the actual text of the instrument, when it was read in conjunction with its accompanying Annex, with the domestic legal framework in which the Charges were situated, or with the events culminating in the Charges.[522]

7.285. In this second recourse to Article 21.5, the Philippines maintains that the 2002-2003 Charges and their Annex, like the 2003-2006 Charges and their Annex, fix or determine the monetary value of PMTL's imported cigarettes, because they establish the alleged "actual" or "found" price for each of the 780 entries, and compare the "declared" price against the higher "actual" or "found" price. The Philippines points out that "every single substantive clause of the 02-03 Charges refers to the 'actual' prices of the imported goods", and that the "Annex similarly provides exact figures for the 'actual' or 'found' price for each of the 780 entries".[523] According to the Philippines, this "actual value" is the revised customs value which the Thai authorities calculated on the basis of Article 6 of the CVA after having determined that the price actually paid or payable was influenced by the relationship between PMTL and PM Indonesia. In other words, the Philippines understands that the 2002-2003 Charges reject transaction values and calculate alternative "actual" customs values, using the computed value method in Article 6, and on the basis of information in Indonesian excise tax form CK-21A.[524]

7.286. Thailand disagrees with both aspects of this understanding of the Charges. Thailand's position on how the reference to the "actual price" is to be understood in the context of the 2002-2003 Charges has unfolded in the course of the proceeding, as follows:

a. In the context of arguing that the CVA does not apply to the Charges as this measure constitutes an allegation of customs fraud, Thailand argued in its first written submission that PMTL's declared value was not the price that PMTL actually paid to PM Indonesia for the goods.[525] The Panel notes that this argument implies that the reference to the higher "actual price" in the Charges was "the price actually paid or payable" in the sense of Article 1.1 of the CVA.

b. Also in its first written submission, Thailand presented alternative arguments assuming *arguendo* that the CVA applies to the Charges. As part of these alternative arguments, Thailand responded to the Philippines' claims under Articles 1.1 and 1.2(a) by arguing that the Thai authorities were justified in rejecting the price PMTL paid to PM Indonesia as the basis for valuing the goods because the authorities found that this price was influenced by the relationship between PM Indonesia and PMTL[526], and by suggesting that the Charges reflect a revised customs value computed consistently with Articles

[519] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.659.
[520] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.661.
[521] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.661.
[522] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.653-7.664.
[523] Philippines' first written submission, para. 404.
[524] See e.g. Philippines' first written submission, section V.A.4 ("The 02-03 Charges reject transaction values and calculate alternative "actual" customs values on the basis of information in Indonesian excise tax form CK-21A")
[525] Thailand's first written submission, paras. 1.4, 3.19, 3.22, and 4.3(a).
[526] Thailand's first written submission, para. 3.91.

6.1 and/or 7.1 of the CVA.[527] The Panel notes that this argument presupposes that the Thai authorities assumed that the declared price *was* the price actually paid or payable, and that the "actual price" in the Charges refers to the revised customs value determined in accordance with Articles 6.1 and/or 7.1, and does not represent "the price actually paid or payable".

c. In its second written submission, in the context of arguing that the CVA does not apply to the Charges, Thailand clarified that "the reference to 'actual value' [in the 2002-2003 Charges] refers to the price actually paid or payable for the goods in question"[528] and not to "alternative" values as alleged by the Philippines, and explained that its contradictory assertions made in the context of rebutting the Philippines' claims under Articles 1.2(a) and 6 were to be construed as arguments in the alternative.[529] The Panel notes that this clarification implies that the reference to the higher "actual price" in the Charges was "the price actually paid or payable" in the sense of Article 1.1 of the CVA, and that the authorities never proceeded to examine the circumstances of sale under Article 1.2(a), or to determine a revised customs value under Articles 6.1 and/or 7.1.

d. In its response to Panel question No. 139, Thailand confirmed that "the 02-03 Charges allege that the transaction value declared by PMTL was not the price actually paid"[530], but Thailand then submits that the Charges do *not* determine the "price actually paid or payable" for the goods in the sense of Article 1.1 of the CVA, or any other revised customs value, because the Charges are an accusation of customs fraud, and in cases of customs fraud the authorities are not necessarily required to determine "the correct customs value"[531] and "need not calculate exactly the price actually paid".[532] The Panel notes that this argument implies that the "actual price" does not refer to either the transaction value or a revised customs value, but without specifying what the "actual price" refers to.

e. In its opening oral statement at the meeting of the Panel, Thailand stated that in cases where penalties for customs fraud are determined by reference to the value of the goods, the value of the goods "is a simple benchmark for a penalty" and not "a customs valuation determination"[533]; and in response to Panel question Nos. 166 and 167, Thailand stated that its position is that the reference to the "actual price" in the 2002-2003 Charges refers to a determination by Thai authorities of a possible benchmark for the imposition of a fine that does not represent any determination by Thai authorities of the price actually paid or payable by PMTL to PM Indonesia, or of the revised value that was determined after concluding that the price actually paid or payable was influenced by the relationship between PMTL and PM Indonesia.[534] The Panel notes that this argument implies that the "actual price" does not reflect a determination of the "price actually paid or payable", or a revised customs value determined pursuant to Articles 6.1 and/or 7.1.

7.287. In the light of Thailand's clarifications, the Panel understands Thailand's position to be that the 2002-2003 Charges do not satisfy the first element of the definition of "customs valuation" in Article 15.1(a) of the CVA for two related but independent reasons:

a. First, because the reference to the "actual price" in the 2002-2003 Charges is to be understood as merely establishing an "approximate"[535] value of the goods in the context of setting out the accusation that PMTL's declared price *is not* the price actually paid[536], and for the limited and distinct purpose of identifying a possible benchmark for a fine[537],

[527] Thailand's first written submission, paras. 3.105 and 3.110-3.111.
[528] Thailand's second written submission, para. 3.14.
[529] Thailand's second written submission, paras. 3.15-3-16.
[530] Thailand's response to Panel question No. 139, para. 4.3.
[531] Thailand's response to Panel question No. 139, para. 4.7.
[532] Thailand's response to Panel question No. 139, para. 4.9.
[533] Thailand's opening statement at the meeting of the Panel, para. 3.11.
[534] Thailand's response to Panel question No. 167, para. 4.4.
[535] Thailand's response to Panel question No. 171(a), para. 6.15.
[536] Thailand's response to Panel question No. 171(a), para. 6.22.
[537] Thailand's response to Panel question Nos. 166 and 167(a), and No. 171(a), para. 6.28.

and for either of these purposes it is "unnecessary to quantify the exact amount"[538] of the price actually paid or a revised customs value.[539] In making this argument, Thailand relies on the Panel's statement, at paragraph 7.659 of its Report in the first recourse to Article 21.5, that "an allegation of customs fraud could be made without ever seeking to determine the customs value of the importer's goods," and that the making of such 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'".[540]

b. Second, even if the Charges are read as fixing or determining the actual and exact monetary value of PMTL's imported cigarettes, which in Thailand's view they do not, the 2002-2003 Charges accuse PMTL of declaring an import value that is not the price actually paid by the buyer to the seller, and therefore constitute the kind of measure taken against "customs fraud" that the Panel in the first recourse to Article 21.5 said, at paragraph 7.649 of its Report, that it was inclined to agree fell outside of the scope of application of the CVA.[541] Thailand argues that the Panel's clarification at paragraph 7.649 "is of the utmost importance as it provides guidance on the possible limits of the scope of application of the CVA"[542], and states that it seeks to "apply[] the first Article 21.5 panel's standards and analysis to the facts of this case".[543]

7.288. Finally, the Panel understands Thailand's arguments made in the context of rebutting the Philippines' claims regarding the rejection of the transaction value and the determination of a revised customs value, to be "alternative arguments" based on the *arguendo* assumption that the Thai authorities rejected PMTL's transaction values, and determined a revised customs value.[544]

7.289. Based on the foregoing, the Panel understands the parties to disagree on two different issues as to how the reference to the "actual price" is to be understood in the context of the 2002-2003 Charges and their Annex. According to the Philippines: (1) the "actual price" in the 2002-2003 Charges is to be understood in the same way that the Panel understood the reference to the "actual price" in the context of the 2003-2006 Charges, namely as fixing or determining the actual and exact monetary value of PMTL's imported cigarettes; and (2) this "actual price" is the revised customs value which the Thai authorities calculated on the basis of Article 6 of the CVA after having determined that the price actually paid or payable was influenced by the relationship between PMTL and PM Indonesia. According to Thailand: (1) as a threshold matter the reference to the "actual price" in the 2002-2003 Charges does not fix or determine the actual and exact monetary value of PMTL's imported cigarettes as it is merely an "approximate" value of the goods made for the more limited and distinct purposes of setting out the accusation that PMTL's declared price *is not* the price actually paid and identifying a possible benchmark for a fine, for which it is unnecessary to quantify the exact amount; and (2) if the "actual price" *does* fix or determine the actual and exact monetary value of PMTL's imported cigarettes, it refers to the "price actually paid or payable" for the goods in question, and not to "alternative" value as alleged by the Philippines, for the purpose of establishing that PMTL's declared import value is not the price actually paid by the buyer to the seller, and therefore the 2002-2003 Charges constitute the kind of measure taken against "customs fraud" that the Panel in the first recourse to Article 21.5 said, at paragraph 7.649 of its Report, that it was inclined to agree fell outside of the scope of application of the CVA.

7.290. The Panel will first consider the question of whether the reference to the "actual price" in the 2002-2003 Charges fixes or determines the actual and exact monetary value of PMTL's imported cigarettes, as the Philippines contends, or is instead merely an "approximate" value included for other purposes, as Thailand contends. The Panel will then address the second disputed issue, which is whether the "actual price" is to be understood as a revised customs valuation following the rejection of the transaction value, as the Philippines contends, or instead refers to the "price actually paid or payable" as Thailand contends. In addressing these two issues, the Panel will follow the

[538] Thailand's response to Panel question No. 171(a), para. 6.22.
[539] Thailand's first written submission, paras. 3.10-3.25; second written submission, paras. 3.4-3.39.
[540] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.659.
[541] Thailand's first written submission, paras. 3.10-3.25.
[542] Thailand's first written submission, para. 3.17.
[543] Thailand's first written submission, para. 3.18.
[544] Thailand's second written submission, paras. 3.15-3-16; response to Panel question No. 139, para. 4.11, and No. 167(a), para. 4.2; opening statement at the meeting of the Panel, para. 3.29.

applicable principles for resolving the meaning and content of municipal legal instruments as set forth in the Report in the first recourse to Article 21.5.[545]

7.3.3.3.3.3 The issue of the "actual price" as merely an approximate reference value

7.291. Beginning with the first disputed issue, the Panel observes that the text of the 2002-2003 Charges alleges 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". As with the 2003-2006 Charges[546], they do not elaborate on whether PMTL declared a "false" price in the sense that it was contrary to the "actual price" that PMTL paid or payable to PM Indonesia, or rather a "false" price that was contrary to an "actual price" determined, using another benchmark, as the price to be used for customs valuation. However, as with the 2003-2006 Charges, the terms of the 2002-2003 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.

7.292. On the other hand, for each of the 780 entries at issue, there is a clause which: (1) states that for the particular entry at issue, the defendants declared a "false" value, and gives the price corresponding to PMTL's declared price paid or payable, that was "contrary to the actual price and against the law of customs", and specifies with another higher figure what that "actual price" was; (2) 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 for each brand"; (3) then concludes that "[t]he two Defendants 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 actions 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".[547] Thus, the Charges refer to these elements as the "acts" that "constituted" the crime. In each of these respects, there is no difference between the 2003-2006 Charges and the 2002-2003 Charges.

7.293. As with the 2003-2006 Charges, the 2002-2003 Charges repeat for each of the 780 entries at issue 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"[548] to the Charges, provides information on the 780 entries at issue in the form of a table. For each of the 780 entries, Columns 2 through 5 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 6 and 7 provide information and exact figures on the "declared" and the "found" prices, as follows:

a. Column 6 specifies the "declared price" by PMTL. The figures contained in Column 6 indicate that PMTL's declared transaction values for each of these entries was in the range of THB 7.35-7.70 per pack for *Marlboro* cigarettes, and THB 6.13-6.55 per pack for *L&M* cigarettes.[549] These figures on the "declared price" in the Annex correspond to the "false price" in the Charges.

b. Column 7 of the Annex specifies the alleged "found price". In contrast to the corresponding column in the Annex to the 2003-2006 Charges, which expressly indicated that the "found"/"actual" price was the "price of goods imported by King Power", Column 7 of the Annex to the 2002-2003 Charges does not specify what the "found" price refers to.

c. Column 8 then calculates the "Amount underdeclared". Based on the difference between the prices in Columns 6 and 7, i.e. between the "declared price" paid by PMTL and the "found price", it provides this information on an entry-by-entry basis. Thus, the Annex

[545] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.650-7.652.
[546] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.653.
[547] The Criminal Court, Charges, Case Black No. Or. 232/2560, 26 January 2017 (English translation), (Exhibit PHL-14-B).
[548] Annex to the 2002-2003 Charges, 26 January 2017 (English translation), (Exhibit PHL-273-A).
[549] See DSI, Memorandum of Allegations, 22 September 2016 (English translation), (Exhibit PHL-13-B); Philippines' first written submission, para. 345.

provides a comparison between PMTL's declared transaction values and the "found price", with the stated "Amount underdeclared" based on the precise difference between the two.

d. Column 9, 10 and 11 then calculates the exact "declared", "found", and "underpaid" amounts for import duties, excise tax, VAT, and an earmarked tax paid to the Thai Health Promotion Found.

e. The last row of the table indicates, among other figures, that the difference between the "declared price" and the "found price", i.e. the "Amount underdeclared", was THB 2.178 billion. On that basis, and applying the *ad valorem* rate of 5% to the "Amount underdeclared", it calculates a figure of THB 108.9 million in "underpaid" import duties (and corresponding amounts for the three sets of additional taxes).

7.294. Thus, like the 2003-2006 Charges, the 2002-2003 Charges specify in exact detail both the "false" price and the "actual price", and they also calculate the exact amount of the *ad valorem* customs duties that should have been paid by PMTL. Each of the 780 clauses of the 2002-2003 Charges refers to the "amount of tax and [*ad valorem* customs] duty under customs law that the two Defendants and others *were liable to pay*", and calculates that "amount", in precise numerical terms, using the "actual price" as the tax base.[550] Like the 2003-2006 Charges, the Annex to the 2002-2003 Charges compares the "declared" (or "false") price against the higher "actual" (or "found") price, and calculates exactly the amount of taxes and *ad valorem* customs duties purportedly "underdeclared" and/or "underpaid" on each entry, by reference to the difference between the "false" transaction value and the "actual" (or "found") price. Accordingly, like the 2003-2006 Charges, the plain meaning of the text of the 2002-2003 Charges and the Annex fixes the monetary value of the imported goods and, on that basis, calculates the amount of *ad valorem* customs duties due on those goods.

7.295. Regarding Thailand's assertion that the "actual price" is simply an approximate reference value that only serves to establish a possible benchmark for a fine in the event of a conviction for customs fraud, the Panel is unpersuaded for essentially the same reasons that it was not persuaded by Thailand's assertion that this is how the "actual price" should be understood in the context of the 2003-2006 Charges. As already noted, there is no specific reference to any "fine" in the Charges and the "actual price" is not synonymous therewith. But more fundamentally, and as the Panel found when addressing the same issue in the context of the 2003-2006 Charges:

> 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" and that "[l]ogically, a penalty for the commission of a crime can be considered only *after* the substantive elements of the crime itself have been established". 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, 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'."[551]

7.296. Thailand argues that although the reference to the "actual value" in the 2002-2003 Charges refers to the "price actually paid or payable" for the goods in question[552], the Charges cannot be understood as reflecting any customs valuation determination, and thus the reference to the "actual value" is not a determination of the "price actually paid or payable" in the sense of Article 1.1 of the CVA.[553] That is so, Thailand argues, because "alleging that a price is not the price actually paid is

[550] The Criminal Court, Charges, Case Black No. Or. 232/2560, 26 January 2017 (English translation), (Exhibit PHL-14-B). (emphasis added)

[551] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.655. (fns omitted)

[552] Thailand's second written submission, para. 3.14.

[553] Thailand's response to Panel question No. 139, para. 4.4.

not the same as determining the correct customs value".[554] Referring to the statement by the Panel at paragraph 7.659 of its Report in the first recourse to Article 21.5, Thailand reasons that:

> This type of determination does not require an assessment of the customs value of imported merchandise. As acknowledged by the panel, "[w]e 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 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'". In making this statement, the panel referred to Thailand's example illustrating why, from a practical perspective, an accusation of customs fraud does not require a determination of the value of the imported goods. In this sense, an accusation of customs fraud would fall outside the scope of the CVA.[555]

7.297. The Panel remains of the view it expressed in the first recourse to Article 21.5 that there are circumstances in which "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 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'".[556] The Panel also remains of the view that these general considerations apply equally in the context of Section 27 of the Customs Act, and does 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.[557] The Panel also continues to 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".[558]

7.298. Thus, the Panel acknowledged that there are circumstances in which a determination of customs fraud *could* be made without ever seeking to determine the customs value of the importer's goods, and that the making of an accusation of customs fraud 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". To illustrate how that could be, the Panel gave an example of a particular set of circumstances in which that might be the case.[559] However, the Panel manifestly did not say, or suggest, that as a general rule an allegation of customs fraud can *never* involve any determination of the customs value of the goods. Nor did the Panel suggest that where an allegation of customs fraud expressly reflects a determination of the "price actually paid or payable", that determination is one to which the CVA is inapplicable on account of the fact that there might be other circumstances in which there is an allegation of customs fraud in which no such determination is made.

7.299. In other words, the fact that there may be circumstances in which an allegation of customs fraud could be made without ever seeking to determine the customs value of the importer's goods does not imply that this will always be the case. Accordingly, there is no presumption that whenever there is a determination of the customs value based on the "price actually paid or payable", such determination must automatically be deemed to be an exercise in which the authorities are not

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[554] Thailand's response to Panel question No. 139, para. 4.7.
[555] Thailand's response to Panel question No. 139, para. 4.5. See also paragraph 4.9. (fns omitted)
[556] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.659.
[557] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.660.
[558] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.660.
[559] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.659. The panel Report in *Colombia – Textiles (Article 21.5 – Colombia/Panama)* was circulated after the Report in the first recourse to Article 21.5 was finalized and issued to the parties. In the context of discussing guarantees aimed at securing payment in situations of suspected under-invoicing, the panel stated that "there is an element of uncertainty inherent in any valuation dispute, since it is not known at the start of the dispute what the final determination will be. This situation makes it difficult to be more precise at the time of setting the amount of the bond. The Panel appreciates that in the event of a dispute concerning the value of goods when there is a suspicion of under-invoicing, it is understandable that the amount of the bond be calculated on the basis of a reference value". (Panel Report, *Colombia – Textiles (Article 21.5 – Colombia/Panama)*, para. 7.232.) The Panel agrees.

making a determination of the "price actually paid or payable" within the meaning of Article 1.1. The Panel recalls that the 2002-2003 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", and they specify in exact detail both the "actual price", and the basis for determining that "actual price".

7.300. Furthermore, as the Panel indicated already in the first recourse to Article 21.5, a reading of the terms of the Charges and their accompanying Annex in the context of Section 2 of the Customs Act reinforces the conclusion that the "actual price" referred to in the Charges necessarily involves a customs valuation determination, which *a fortiori* includes a determination of the "value of the goods" in the sense of the first element of Article 15.1(a). The Panel stated that:

> 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*".[560] 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. 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". 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".[561]

7.301. Finally, the Panel does not see how Thailand's assertions regarding the meaning of the Charges – that the "actual price" in the 2002-2003 Charges is to be understood as merely establishing an "approximate" reference value of the goods for which it is "unnecessary to quantify the exact amount"[562] – can be reconciled with the content of the 1,052 revised NoAs. The figures presented in the revised NoAs as the "actual value" used by the Thai Customs for determining the customs duties due in respect of the 779 entries covered by both sets of measures are the same figures found in the Charges under "actual price". In the context of the 1,052 revised NoAs, the "actual value" is undoubtedly not an "approximate" reference value, and cannot be understood as anything other than the result of the Thai authorities' exercise of quantifying the exact value of the goods at issue.[563] The NoAs reflected the final determination of the value of the goods at issue made by the Thai Customs Department, not some intermediate or provisional step in respect of which the use of an approximate reference value might be conceivable or acceptable. The inescapable conclusion is that both the 1,052 revised NoAs and the Charges fix or determine the monetary value of PMTL's imported cigarettes.

7.302. Based on the foregoing, the Panel concludes that, like 2003-2006 Charges, the "actual price" in the 2002-2003 Charges *prima facie* fixes or determines the monetary value of PMTL's imported cigarettes, and cannot be construed as merely an approximate reference value as asserted by Thailand.

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[560] (*footnote original*) 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.

[561] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.662. (fns omitted)

[562] Thailand's response to Panel question No. 171(a), para. 6.22.

[563] Thailand accepts that, in issuing the 1,052 revised NoAs, the Customs Department made customs valuation determinations that are subject to Thailand's procedural and substantive obligations under the CVA. (Thailand's response to Panel question No. 163(a).)

7.3.3.3.3.4 The issue of the "actual price" as the "price actually paid or payable"

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

7.304. The 2003-2006 Charges at issue in the first recourse to Article 21.5 explicitly stated that the "actual price" which they contained was a reference to the prices of King Power, the duty-free operator, which was the benchmark that the Thai authorities relied upon to reject PMTL's transaction values for purposes of customs valuation. As regards the 2003-2006 Charges, Thailand asserted that they too were to be understood as alleging customs fraud, in the sense that the price declared by PMTL was not the price actually paid or payable to PMPMI. However, Thailand never suggested that the "actual price" was the "price actually paid or payable" in the case of the transactions at issue between PMTL and PMPMI, which would have amounted to saying that PMTL's purchase prices happened to be identical to King Power prices. What Thailand argued was that this reference to King Power's prices did not constitute any attempt to determine a revised customs value within the scope of Articles 2 through 7 of the CVA, and was rather merely a possible benchmark for determining a penalty in the event that the Court convicted PMTL of violation Section 27. As already noted, the Panel found that Thailand's reading of the Charges could not be 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 were situated, and the events culminating in the Charges.

7.305. In the Panel's view, the circumstances surrounding the 2002-2003 Charges suggest that the "actual price" in the 2002-2003 Charges refers to a revised customs value calculated using the computed value methodology under Article 6 and/or the flexibilities under Article 7 of the CVA, and not, as Thailand suggests, a determination of the "price actually paid or payable" for the goods in question. While the 2002-2003 Charges are not free of ambiguity on this point, the Panel considers that each of the considerations that Thailand refers to in support of its position actually point in the opposite direction.

7.306. First, Thailand suggests that because the 2002-2003 Charges allege that PMTL committed an offence of customs fraud under Section 27 of Thailand's Customs Act, this is an indication that the Charges accuse PMTL of declaring an import value that is not the price actually paid by the buyer to the seller[564], and that the "actual price" in the Charges refers to the latter.[565] However, for the reasons that follow the Panel considers that the nature and legal basis of the Charges brought against PMTL by the Public Prosecutor do not permit concluding that the "actual price" reflects a determination of the price actually paid or payable by PMTL to PM Indonesia.

7.307. The 2003-2006 Charges alleged the same offense under the same provision of Thai law (Section 27 of the Customs Act), and the Panel found that the 2003-2006 Charges used the term "actual price" to refer not to the price actually paid or payable, but to a benchmark and revised customs value used for the purpose of rejecting the price paid by PMTL to PMPMI as a basis for customs valuation. The same entity (the Public Prosecutor) prepared and filed both sets of Charges, and both are based on the same investigations and prosecution recommendations made by the same entity (the DSI). It may not be inconceivable that the responsible Thai authorities could have used the term "actual price" in a completely different sense in the two sets of Charges; however, that abstract possibility alone is not sufficient to distinguish the 2002-2003 Charges from the 2003-2006 Charges. Because the two sets of Charges are based on the same provision and were brought by the same Thai entity, only one year apart from one another, and dealing with the same importer, the Panel's understanding of the term "actual price" in the context of the 2003-2006 Charges may be relevant, and taken into account, to understand how the same Thai authorities bringing another Charges under Section 27 used the same term – i.e., the "actual price" – in the context of the 2002-2003 Charges.

[564] Thailand's first written submission, para. 3.19.
[565] Thailand's second written submission, para. 3.14.

7.308. Second, Thailand argues that the nature of the information used to calculate the "actual price", namely the exporter's own declaration of its costs and profits to its own government as reported in the CK-21A forms, is an indication that the authorities were seeking to determine the "price actually paid or payable" by PMTL to PM Indonesia.[566] However, for the reasons that follow the Panel considers that the pricing and cost information used by the Thai authorities to calculate the "actual price" also does not serve as an indication that the Thai authorities were seeking to discover the price actually paid or payable by PMTL to PM Indonesia. In the Panel's view, the nature of the pricing and cost information relied upon by the Thai authorities rather suggests that they were constructing a benchmark value, and not attempting to discover the "price actually paid or payable" between two parties.

7.309. As the European Union observes in its third-party submission, "cost structure information received from the Indonesian government … would qualify as meta-data rather than as actual prices paid in Thailand".[567] In its response to a question from the Panel asking it to explain exactly how it determined the actual price on the basis of the information in CK-21A, Thailand confirms that it used the information in the CK-21A forms to "calculate[] a *constructed* CIF price".[568] Specifically, Thailand states that its authorities proceeded as follows: "Thailand obtained the cost of production by subtracting from the retail price the following: excise tax, value-added tax, and profits for agents and distributors. Once the cost was obtained, Thailand added an amount for freight and insurance, which gave a CIF price per pack in Rupiahs (Indonesia's currency). This amount was then converted to Thai baht using the applicable exchange rates."[569]

7.310. As explained by Thailand, its constructed CIF price based on data of the type reflected in the CK-21A forms constitutes a constructed benchmark value. Such data is not directly related to the transactions at issue, whereas the very notion of "transaction value" is inherently *transactional*. Moreover, as the Philippines points out, there is no necessary relationship between a producer's costs and profits and its selling price in particular transactions.[570] As the European Union puts it, "if the cost information in CK-21A were to prove the price actually paid, it would in the European Union's understanding, need to relate to the actual transactions at stake. If it relates to Philip Morris' cost structure more generally, it rather serves to establish abstract benchmark prices which by definition cannot be the price actually paid."[571]

7.311. Additionally, the Panel notes that Paragraph 3 of the Interpretative Note to Article 1.2 envisages that when an examination of the circumstances of sale finds that the "price actually paid or payable" (the transaction value) is inadequate to ensure recovery off all costs plus a representative profit, this could support a determination that the price paid was influenced by the relationship between the parties. Contrary to what Thailand's argument seems to suggest, such a finding does not in itself imply that the declared price was not "the price actually paid or payable", and that the importer committed customs fraud.

7.312. In any event, the Panel considers that even if the reference to the "actual price" in the 2002-2003 Charges is understood as a determination of the "price actually paid or payable", this would

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[566] Thailand's first written submission, paras. 3.20-3.21; second written submission, para. 3.11. Thailand states that "where the transaction value reported by the *importer* into Thailand appears to reflect very different values than might be expected based on the *exporter's* declarations of costs and profits to the Indonesian government, any reasonable authority would have grounds to suspect that the declared transaction value does not reflect the price actually paid or payable". (Thailand's second written submission, para. 3.4.)

[567] European Union's third-party submission, para. 24.

[568] Thailand's response to Panel question No. 143, para. 5.3. (emphasis added)

[569] Thailand's response to Panel question No. 143, para. 5.2. The Panel notes that there is a degree of ambiguity surrounding Thailand's explanations as to the manner in which the Thai authorities calculated the CIF price. Commenting on Thailand's statement that its authorities had proceeded by "subtracting from the retail sales price" the specified taxes and profits, the Philippines argued that this meant that Thailand used a deductive calculation, working backwards "from the retail price", in a way that inconsistent with both Article 7.2(c) and 7.3(d). (Philippines' opening statement at the meeting of the Panel, paras. 69-76.) In response to a question from the Panel asking Thailand to respond, Thailand stated that its authorities had calculated the CIF price on the basis of the pricing and cost information reported by PM Indonesia in the CK-21A forms, and "[t]he fact that these costs figures can also be revealed by subtracting from the retail price certain expenditures … does not imply that Thailand calculated the constructed CIF price on the basis of the retail price in Indonesia within the meaning of Article 7.2(c)." (Thailand's response to Panel question No. 169, para. 5.4.)

[570] Philippines' response to Panel question No. 140, para. 91.

[571] European Union's response to Panel question No. 14(b) to third parties, para. 15.

still reflect a customs valuation determination subject to the disciplines in Article 1.1 of the CVA. There is nothing in the ordinary meaning of the terms of Article 1.1 to suggest that an authority has a free hand to determine the "price actually paid or payable". Furthermore, it would be contradictory for the CVA to establish that the "primary basis for customs value under this Agreement is 'transaction value' as defined in Article 1"[572], and then find that the same CVA does not apply to the authorities' determination of the transaction value (i.e. the "price actually paid or payable"). The Panel does not see any legal basis for, or the logic in, the view that an authority's determination of the "price actually paid or payable" under Article 1.1 is a matter to which the CVA does not apply. The Panel notes that neither party, nor any third party, has argued that an authority has a free hand in determining the price actually paid or payable.[573]

7.313. Thailand argues that the 2002-2003 Charges accuse PMTL of declaring an import value that is not the price actually paid by the buyer to the seller, and therefore constitute the kind of "customs fraud" that the Panel stated that it was inclined to agree fell outside of the scope of application of the CVA.[574] In Thailand's view, if a measure concerns "customs fraud", then it follows that it does not determine "the monetary worth or price of imported goods for the purposes of levying *ad valorem* customs duties".[575] Thailand repeatedly asserts that the 2002-2003 Charges fall outside of the scope of the CVA simply because they allege "customs fraud", and imputes that view to the Panel on the basis of what the Panel said in paragraph 7.649 of the Report.[576]

7.314. Contrary to Thailand's reading, the Panel did not say that the CVA would not have applied if Thailand had been able to substantiate its assertion "that the allegation against PMTL relates to customs fraud as previously defined by the panel". The Panel stated that it would have been inclined to agree with Thailand that the CVA would not apply to the challenged measure if, as Thailand had asserted, the allegation against PMTL relates to customs fraud as previously defined by the panel, *and if it did not determine the actual customs value of the imported goods*. It was in response to Thailand's core assertion that "the Charges do not determine or even attempt to determine what *should* be the 'true' or 'correct' or 'actual' customs value"[577] that the Panel stated:

> 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 basis for determining the actual customs value of PMTL's imported goods*.[578] [579]

7.315. The wording of this statement is clear. However, in its interim review comments in the first recourse to Article 21.5, Thailand made comments on paragraphs 7.681 and 7.682 that seemed to assume that paragraph 7.649 contained the broad statement that the CVA would not apply insofar as the declared transaction value is not the price actually paid or payable.[580] The Philippines

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[572] CVA, General Introductory Commentary, para. 1.

[573] Parties' responses to Panel question No. 142; European Union's response to Panel question No. 15 to third parties; United States' response to Philippines' question No. 1 to third parties.

[574] Thailand's first written submission, paras. 3.10-3.25.

[575] Thailand's first written submission, para. 3.23.

[576] See e.g. Thailand's first written submission, para. 3.16 (stating that "[a]s part of its reasoning, the panel clarified that, in the specific circumstances of the 03-06 charges, the CVA would not have applied if Thailand had been able to substantiate its assertions that the allegation against PMTL relates to customs fraud as previously defined by the panel"); opening statement at the meeting of the Panel, para. 3.7 (asserting that "[t]he Panel stated, in no uncertain terms, that it "would be inclined to agree with Thailand that the Charges fall outside the scope of the CVA" should Thailand be able to demonstrate that Charges allege customs fraud as previously defined by the Panel.")

[577] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.612, 7.631, and 7.686.

[578] (*footnote original*) 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.

[579] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.649. (emphasis added)

[580] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.39.

considered that the statement in paragraph 7.649 was unnecessary *obiter dicta*, and expressed the concern, in the light of Thailand's apparent misreading of that statement, that Thailand's "reliance upon this statement at the first opportunity" illustrates "the dangers of the Panel's approach" in making this *obiter* statement.[581] The Panel explained that it retained this statement because the circumstances addressed by the Panel were those put forth by Thailand as part of its argumentation as to the meaning of the 2003-2006 Charges.[582] However, the Panel clarified that:

> [P]aragraph 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".[583] (emphasis original)

7.316. Additionally, the Panel notes that it reiterated, in the context of responding to Thailand's interim review comments on paragraphs 7.681 and 7.682, 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".[584] Furthermore, the Panel notes that it made certain other statements in its Report that assume the applicability of the CVA to measures combatting customs fraud, insofar as such measures reflect a customs valuation determination. For instance, in the context of its analysis under Article XX of the GATT 1994, the Panel stated that "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*."[585]

7.317. In conclusion, the Panel concludes that the "actual price" does not refer to the "price actually paid or payable", as Thailand maintains, but is rather a revised customs value determined by the DSI and Public Prosecutor. In any event, the Panel considers that even if the reference to the "actual price" in the 2002-2003 Charges is understood as a determination of the "price actually paid or payable", this would still reflect a customs valuation determination subject to the disciplines in Article 1.1 of the CVA.

7.3.3.3.3.5 Conclusion

7.318. The Panel finds that the 2002-2003 Charges meet the first element of the definition of "customs valuation" in Article 15.1(a) of the CVA as understood by the Panel in the first recourse to Article 21.5. Like 2003-2006 Charges, the 2002-2003 Charges fix or determine the monetary value of PMTL's imported cigarettes by determining the "actual price" of the 780 entries of cigarettes.

7.3.3.3.4 The consequences of the Charges

7.319. The Panel will now turn to Thailand's argument that the 2002-2003 Charges do not satisfy the second element of Article 15.1(a), because they are not "for purposes of levying *ad valorem* duties of customs". Thailand made a similar argument in the first recourse to Article 21.5, when it argued that the 2003-2006 Charges did not meet the second element of Article 15.1(a) because they would only result in criminal fines and penalties, and would not result in border measures levying *ad valorem* customs duties on imported goods.[586] The Panel noted that Thailand's argument essentially related to the consequences that may follow from the Charges[587], and for that reason

[581] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.39.
[582] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.34.
[583] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.34.
[584] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.39.
[585] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.756. (emphasis added)
[586] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.613, 7.668.
[587] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.665.

addressed this argument in Section 7.3.5.3.4 under the heading, "The consequences of the Charges".

7.320. The Panel considers it useful to recall Thailand's arguments on this issue in the first recourse to Article 21.5. Thailand referred to the ordinary meaning of the term "levy", and submitted 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".[588] Thailand stated 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".[589] Thailand further submitted 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 had concluded.[590] Furthermore, Thailand pointed 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.[591] 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"[592], and the potential criminal fine at issue "would not be a charge levied at the border on goods entering Thailand".[593]

7.321. The Panel rejected Thailand's restrictive interpretation of the terms "for purposes of levying *ad valorem* duties of customs on imported goods". The Panel concluded that by their plain terms, the 2003-2006 Charges read in conjunction with their Annex determined 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".[594] The Panel 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".[595] The Panel explained why it did not consider that the applicability of the CVA to the Charges turned on the meaning of the term "levying"[596], and observed that Thailand's interpretation of Article 15.1(a) was "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".[597] The Panel also explained that 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".

7.322. Thus, the Panel based its interpretation on the ordinary meaning of the terms of Article 15.1(a) read in their context and in the light of the CVA's object and purpose as required by Article 31(1) of the Vienna Convention. The Panel also took note of how Thailand's arguments on this point evolved in the first recourse to Article 21.5, stating that:

> 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.[598]

7.323. In its first and second written submissions in this second recourse to Article 21.5, Thailand argued that the CVA is inapplicable to the 2002-2003 Charges because the Public Prosecutor is not part of the "customs administration", and because the 2002-2003 Charges are the kind of measure

[588] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.613.
[589] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.613.
[590] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.613.
[591] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.613.
[592] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.613.
[593] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.613.
[594] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.667.
[595] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.669.
[596] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.669.
[597] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.670.
[598] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.671 (referring to Thailand's response to Panel question No. 105).

taken against "customs fraud" that the Panel indicated did not involve a determination of the "customs value of imported goods" in the sense of the first element of Article 15.1(a). However, in its opening statement at the meeting of the Panel, Thailand reverted back to its argumentation on the second element of Article 15.1(a), and argued that the Panel was wrong to reject Thailand's interpretation of the terms "for purposes of levying *ad valorem* duties" in Article 15.1(a).[599]

7.324. Thailand argues that the terms "for purposes of levying *ad valorem* duties of customs on imported goods" only embrace measures that that have a "direct repercussion" for[600], or "direct connection" to[601], the amount of the *ad valorem* duties levied. Thailand submits that, for a valuation measure to satisfy the second element of Article 15.1(a), it "must be made for the calculation of duties that *are to be collected* from the importer"[602], and cannot be an abstract determination of the amount of customs duties that are "due" or that "should have been paid".[603] At the hearing and in its responses to the post-hearing questions from the Panel, Thailand maintained that it is the interpretation and application of the *second* element of Article 15.1(a) that actually constitutes the "key issue" concerning the applicability of the CVA to the 2002-2003 Charges.[604]

7.325. In developing this argument, Thailand reiterates some of the same points that it made, and which the Panel's reasoning already addressed, in the first recourse to Article 21.5. For instance, Thailand states that in the case of the entries covered by the Charges, "the *ad valorem* duties were calculated, levied and paid years ago".[605] It refers, as it did in the first recourse to Article 21.5, to the analysis by the panel in *Colombia – Ports of Entry*.[606] It observes, as it did in the first recourse to Article 21.5, that a fine is not the same as a customs duty, and that to conclude otherwise would lead to the conclusion that fines would be subject to all obligations under the GATT 1994 including tariff bindings. The Panel considers that its reasoning in the Report in the first recourse to Article 21.5 sufficiently addresses these points, and that there is no reason to repeat that analysis or dwell further on these points here.

7.326. The Panel does not consider it necessary to develop any additional reasoning beyond that already set forth in the Report in the first recourse to Article 21.5. In fact, the factual configuration of this case further corroborates the reasoning of the Panel in that Report as it provides a concrete, real-world example of the type of scenario that the Panel cautioned might arise if Thailand's restrictive interpretation of the scope of the second element of Article 15.1(a) of the CVA was adopted. The consequence of Thailand's position is that the CVA obligations at issue would apply to the 1,052 revised NoAs issued by the Customs Department in November 2017, but those obligations would not apply to the 2002-2003 Charges issued by the Public Prosecutor in January 2017, notwithstanding that both the revised NoAs and the Charges rest on the same basis (i.e. the DSI calculation of the "actual" value of PMTL's imports of cigarettes based on the cost information in excise tax form CK-21A) and that both cover overlapping entries.[607] Therefore, the facts of this case are a variation of the hypothetical situation that the Panel alluded to in the first recourse to Article 21.5, when it expressed its concern that if Thailand's restrictive interpretation of the second element of Article 15.1(a) were adopted, then:

> 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.[608]

[599] Thailand's opening statement at the meeting of the Panel, paras. 3.16-3.19.
[600] Thailand's opening statement at the meeting of the Panel, paras. 3.16 and 3.19.
[601] Thailand's response to Panel question No. 171(a), para. 6.27.
[602] Thailand's response to Panel question No. 171(a), para. 6.9. (emphasis added)
[603] Thailand's response to Panel question No. 171(a), para. 6.9.
[604] Thailand's response to Panel question No. 171(a), para. 6.11.
[605] Thailand's response to Panel question No. 171(a), para. 6.27.
[606] Thailand's response to Panel question No. 171(a), paras. 6.4-6.10.
[607] Thailand's response to Panel question No. 138.
[608] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.671.

7.327. It is also important to clarify that, contrary to what Thailand's arguments in this case seem to imply, the Panel's interpretation of the words "for purposes of levying *ad valorem* duties" does not lead to the consequence that approximate reference values used for risk assessment or guarantees to secure the payment of customs duties are themselves "customs valuation determinations" that must be calculated in accordance with the customs valuation rules in Article 1 through 7. The reason is that the use of such reference values for these purposes would typically not reflect any determination of the monetary worth or price of imported goods in a way that would meet the first element of Article 15.1(a); and as a consequence of not meeting the first element of Article 15.1(a), they would not be able to serve as the basis for determining the amount of customs duties that were or are actually due from the importer, in the sense of the amount of customs duties that should have been or should be collected from the importer, in a way that would satisfy the second element of Article 15.1(a).

7.328. To elaborate, risk-assessment tools based on "reference" or "minimum" values are established for the purpose of identifying suspicious imports: these do not, in any way, determine the amount of *ad valorem* customs duties actually due.[609] As for guarantees, the wording of Article 13 of the CVA makes it clear that they serve the purpose of securing potential future liability for duties that *might* be due; a guarantee does not serve the purpose of determining the amount of *ad valorem* customs duties actually due. As the original panel explained, the determination of the amount of a guarantee is not undertaken for the levying of *ad valorem* duties "due", because a guarantee is "not the final determination of a customs value of a good".[610]

7.329. Thus, the problem with Thailand's argument is that it presupposes that approximate reference values used for risk assessment or guarantees to secure the payment of customs duties entail a determination of the monetary worth or price of imported goods that suffices to meet the first element of Article 15.1(a)[611]; and based on that premise, Thailand then argues that it is necessary to develop a restrictive interpretation of the second element of Article 15.1(a) ("for purposes of levying *ad valorem* duties of customs on imported goods") to avoid the absurd result that such values would have to be determined in accordance with the customs valuation rules in Articles 1 to 7 (which would defeat the purpose of relying on such values in the first place).[612] For the foregoing reasons, the Panel does not agree with the first underlying premise of this reasoning. The Panel hereby incorporates by reference the reasoning in Section 7.3.5.3.4 (The consequences of the Charges) of its Report in the first recourse to Article 21.5.

7.330. Based on the foregoing, the Panel finds that the second element of Article 15.1(a) is also satisfied, and thus reaches the overall conclusion that the 2002-2003 Charges meet both elements of the definition of "customs valuation" in Article 15.1(a) of the CVA as understood by the Panel in the first recourse to Article 21.5: (1) like 2003-2006 Charges, the 2002-2003 Charges fix or determine the monetary value of PMTL's imported cigarettes by determining the "actual price" of the 780 entries of cigarettes; and (2) like 2003-2006 Charges, the 2002-2003 Charges rely on this "actual price" for the purpose of determining the amount of *ad valorem* duties that were due, and that should have been paid by the importer at the time of importation, on those imported goods.

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[609] Thailand explains that "[t]hese tools, which are known as 'valuation databases' or 'reference values', are widely used by countries around the world and are recommended by the World Customs Organization. The WTO Technical Committee on Customs Valuation has noted that 'the use of a national valuation database as a risk assessment tool' was among the list of measures mentioned in the Control Handbook prepared by the World Customs Organization. Even the Philippines maintains a system of 'reference values' for a wide range of products, whereby further customs controls are applied whenever the declared import values fall below the reference values." (Thailand's response to Panel question No. 171(a), para. 6.12 (referring to Committee on Customs Valuation, Minutes of the meeting of 8 May 2007, G/VAL/M/43, p. 10).)

[610] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1041. The Appellate Body confirmed this determination in paragraphs 215-216 of its report.

[611] Thailand's response to Panel question No. 171(a), para. 6.13.

[612] In *Colombia – Textiles (Article 21.5 – Colombia/Panama)*, the panel stated, at paragraphs 7.608-609 of its Report, that it did "not find any provision in the text of the relevant articles of the Customs Valuation Agreement that requires a Member's customs authorities to use the valuation methods established in Articles 1, 2, 3, 5, 6 and 7 of the Agreement in order to determine the coverage of a guarantee that permits goods to be withdrawn. … the provision of a valuation dispute guarantee must be requested, by definition, before the final value of the goods has been clarified in accordance with the valuation methods established in the above-mentioned Articles."

7.3.3.3.5 The "intention to defraud" aspect of the Charges

7.331. The Panel now briefly considers Thailand's comments on the relevance of the Appellate Body' findings in *US -1916 Act* to the question of whether the CVA applies to measures that have, as their core element, the "intention to defraud" the government. While Thailand comments only in passing[613], the Panel addresses Thailand's comment in the interest of clarifying the context and purpose for which the Panel relied on that reasoning in the Report in the first recourse to Article 21.5.

7.332. 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, as explained by the Panel in the first recourse to Article 21.5, 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: (1) the first element of the allegation is that PMTL did not pay the customs duties due on the imported goods (*actus reus*); and (2) the second element of the allegation is that PMTL did so with the intention to defraud (*mens rea*).[614] In the first recourse to Article 21.5, Thailand argued that even if the Charges contained a "customs valuation" determination that satisfied both the first and second elements of Article 15.1(a), the CVA should nonetheless 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.[615] As Thailand put it, "even if the Charges were to qualify as 'customs valuation', the Charges would still fall outside the scope of the CVA because the Charges relate to a criminal accusation that focuses on whether PM Thailand had the intention to defraud the government".[616]

7.333. The Panel was not persuaded by Thailand's argument that the CVA would be inapplicable to the "customs valuation" aspect of the Charges covered by Article 15.1(a) of the CVA as a consequence of the non-applicability of the CVA to the "intention to defraud" aspect of the Charges. As explained in greater detail in the Report[617], the Panel noted that it is a general principle of WTO law 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".[618] Against this background, the Panel held that the additional "intent" element under Section 27 of the Customs Act did not exclude the application of the CVA. To this end, the Panel referred to the Appellate Body's finding in *US – 1916 Act*, which found that, because the measure at issue in those proceedings – the United States' Anti-Dumping Act of 1916 – contained the constituent elements of dumping, it was subject to the Anti-Dumping Agreement, notwithstanding that it also contained a requirement that conduct be undertaken with a particular "intent".[619]

7.334. In this second recourse to Article 21.5, Thailand expresses its disagreement with the Panel's reliance on the Appellate Body's analysis in *US – 1916 Act*. According to Thailand, the Appellate Body correctly indicated that a measure cannot be excluded from the scope of WTO law simply because that measure has components that are not regulated by WTO law. However, Thailand states that "[i]n the case of criminal charges of customs fraud, however, neither component of the measure is covered by the CVA".[620] Therefore, in Thailand's view, because the Charges pertain to customs fraud and do not meet the first or second element of Article 15.1(a), they are, in their entirety, not covered by the CVA and "the reference to the Appellate Body's findings in *US – 1916 Act* in the Panel's reasoning is equally misplaced".[621]

7.335. The Panel agrees with Thailand that if the 2003-2006 Charges had not met the two elements in Article 15.1(a) of the CVA, then they would not reflect a "customs valuation" determination subject to Articles 1 to 7 of the CVA. The CVA could not be made applicable to the Charges by virtue of any reasoning in *US – 1916 Act*. In that sense, it would indeed be "misplaced" to rely on the Appellate

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[613] Thailand's opening statement at the substantive meeting, para. 3.20.
[614] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.674.
[615] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.614, 7.674 and 7.676.
[616] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.614 and 7.676 (referring to Thailand's response to Panel question No. 47(b), p. 45.)
[617] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.677-7.683.
[618] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.677.
[619] Appellate Body Report, *US – 1916 Act*, paras. 131-132.
[620] Thailand's opening statement at the substantive meeting, para. 3.20.
[621] Thailand's opening statement at the substantive meeting, para. 3.20.

Body's findings in *US – 1916 Act* to reach the conclusion that the CVA applies to the Charges even when both elements in Article 15.1(a) of the CVA were not met. However, contrary to what might be implied by Thailand's comments in this proceeding, the Panel did not refer to the reasoning in *US – 1916 Act* for that purpose and in that sense.

7.336. As explained above, it was Thailand that argued that even if the Charges met both elements of Article 15.1(a), they would still not be subject to the CVA by virtue of the additional "intention to defraud" aspect of the Charges. Thailand argued that this was so because that aspect of the Charges is not regulated by the CVA. The Panel addressed this argument, separately from and only after having addressed, the question of whether the Charges met the two elements of Article 15.1(a). In the context of addressing that separate argument, the Appellate Body's reasoning in *US – 1916 Act* was relied on because of its pertinence. Insofar as Thailand's comments on that aspect of the Panel's reasoning are to be construed, in this second recourse to Article 21.5, as a reiteration of the argument that the Panel was responding to in the first recourse to Article 21.5, the Panel hereby incorporates by reference the reasoning in Section 7.3.5.3.5 (The 'intention to defraud' aspect of the Charges) of the Panel Report in the first recourse to Article 21.5.

7.3.3.4 Conclusion

7.337. Based upon the findings above, the Panel concludes that the substantive obligations relating to customs valuation in Articles 1 to 7 of the CVA apply to 2002-2003 the Charges.

7.3.4 Claims under Articles 1.1 and 1.2(a), second sentence, and Articles 6 and 7 of the CVA

7.3.4.1 Introduction

7.338. In the first recourse to Article 21.5, the Panel found that the 2003-2006 Charges were inconsistent with Articles 1.1 and 1.2(a) of the CVA because they rejected 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. The Panel additionally found that the 2003-2006 Charges were inconsistent with Article 2.1(a) and (b) of the CVA, or in the alternative Article 3.1(a) and (b) of the CVA, because they improperly treated the purchase prices of duty-free operator (King Power) as transaction values for "identical" or "similar" goods.[622] The Panel did not consider it necessary to resolve whether the revised customs value was based on Article 2 (identical goods) or instead Article 3 (similar goods) of the CVA, and made findings of inconsistency in the alternative.

7.339. In this second recourse to Article 21.5, the Philippines similarly claims that the 2002-2003 Charges violate Articles 1.1 and 1.2(a) of the CVA, because they reject PMTL's declared transaction values without a valid basis, and that the revised customs value violates the applicable CVA obligations governing the use of the computed value benchmarks. The Philippines understands the relevant CVA rules to be those set forth in Article 6, but also makes an alternative claim in respect of Article 7. It argues that the Thai authorities' comparison of PMTL's declared transaction values with the benchmark price that the Thai authorities constructed on the basis of pricing and cost information reported by PM Indonesia in the CK-21A forms is inconsistent with the CVA, regardless of whether it was relied upon for the purpose of determining: (1) whether the transaction value was influenced by the relationship between the buyer and the seller pursuant to Article 1.2(a), second sentence, of the CVA; or (2) the "price actually paid or payable" within the meaning of Article 1.1 of the CVA; and/or (3) a revised customs value based on Article 6 of the CVA; or (4) a revised customs value based on Article 7 of the CVA.[623]

7.340. The Panel has already addressed the fundamental premises underlying the Philippines' claims. In Section 7.2 (The Thai authorities' reliance on the information in the CK-21A forms) above, the Panel concluded that (1) as result of the regulatory constraints mandated by Indonesian excise tax law, the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other

[622] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, Section 7.3.6 (Consistency of the Charges with CVA disciplines) and para. 8.2.

[623] Philippines' response to Panel question No. 141, paras. 113-118.

parties involved in the supply chain; and (2) there may be cases in which the customs authority in the importing country is entitled to assume that pricing and cost information obtained from a foreign government is accurate and truthful, but in this case the DSI and Public Prosecutor had no basis upon which to assume that the CK-21A information was reliable in the light of PMTL's repeated written explanations as to why it was not.

7.341. Although the Panel has upheld these premises, this does not necessarily dispose of the Philippines' claims under the substantive CVA provisions referred to above. That is because the Panel must still consider the matter before it in the light of the particular legal standards that arise under the substantive obligations in Articles 1.1 and 1.2(a) second sentence, and under Articles 6 and 7 of the CVA. The parties disagree on several issues relating to the interpretation of these legal standards, some of which the Panel has already addressed earlier in its analysis.[624] The Panel will address these issues to the extent necessary to reach a conclusion on the CVA-consistency of the 2002-2003 Charges.

7.3.4.2 Analysis by the Panel

7.3.4.2.1 General considerations

7.342. Article 1.1 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…

7.343. Subparagraph 1.1(d) includes the relevant proviso that the customs value of imported goods shall be the transaction value (that is the price actually paid or payable) 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". PMTL and PM Indonesia are "related"[625], and thus it would *a priori* be WTO-consistent for the Thai authorities to reject PMTL's declared transaction value if it were deemed unacceptable pursuant to Article 1.2.

7.344. 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.

7.345. 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

[624] See Section 7.1.4.3 above (Relevance of the presumption of good faith to the interpretation of CVA obligations).

[625] The Panel recalls 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)*, footnote 460)

the sale, and the customs authority may reject the transaction value if it establishes that the relationship influenced the price.

7.346. The CVA does not prescribe the methodology that the customs administration must use to conduct its examination of the circumstances of sale for purposes of Article 1.2(a). In that respect, paragraph 3 of the Interpretative Note to Article 1.2 provides a non-exhaustive list of "example[s]" of how the examination may be conducted.[626] Each of these examples contemplates a comparison between some aspect of the circumstances of the transaction under consideration, and some comparator or benchmark. Paragraph 3 envisages that one such comparator or benchmark could be a comparison of declared transaction value with a constructed price based on "all costs plus a profit". Thus, a comparison between the transaction value and a properly established "cost-plus" benchmark can shed light on whether the relationship between the buyer and seller influenced the price. Specifically, if the transaction value is lower than such a benchmark, this would suggest the producer is selling to the buyer at a price insufficient to cover the costs of production for the goods, plus profits, and that would be an indication that the price may have been influenced by the relationship between the parties (unless there is some valid commercial reason for the failure to recover costs and make a profit).

7.347. Article 6 of the CVA provides an alternative basis for customs valuation based on a cost-plus, or computed value, methodology. It is the penultimate methodology in the hierarchy set out in Articles 2 to 7 of the CVA; and an administration may only have recourse to Article 6 if it cannot calculate customs value using the methodologies set out in Articles 1 to 5. Article 6 provides for the calculation of a computed value, based on the sum of: (1) the cost of producing the imported goods; (2) an amount for profit and general expenses; and (3) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8. The Interpretative Note to Article 6 also incorporates certain aspects of Article 8, which provides further detail on the specific costs that must be included in a computed value.

7.348. The text of Article 6.1 reads as follows:

> The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:
>
> (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
>
> (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the 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;
>
> (c) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8.

7.349. Paragraphs 1 through 8 of the Interpretative Note to Article 6 elaborate in detail on certain aspects of the computed value method. Notably, paragraph 2 of the Interpretative Note mandates that:

> The "cost or value" referred to in paragraph 1(a) of Article 6 is to be determined on the basis of information relating to the production of the goods being valued supplied by or on behalf of the producer. It is to be based upon the commercial accounts of the producer, provided that such accounts are consistent with the generally accepted accounting principles applied in the country where the goods are produced.

[626] The three examples of an examination of the circumstances of sale given in Paragraph 3 of the Interpretative Note to Article 1.2(a) are: (1) if the price had been settled in a manner consistent with the normal pricing practices of the industry in question; (2) if the price had been settled in a manner consistent with the way the seller settles prices for sales to buyers who are not related to the seller; and (3) 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 (e.g. on an annual basis) in sales of goods of the same class or kind.

7.350. Article 7 of the CVA provides for reasonable flexibilities in the event that the customs value cannot be determined on the basis of any of the preceding methods. The text of Article 7 reads as follows:

> 1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.
>
> 2. No customs value shall be determined under the provisions of this Article on the basis of:
>
> (a) the selling price in the country of importation of goods produced in such country;
>
> (b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;
>
> (c) the price of goods on the domestic market of the country of exportation;
>
> (d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;
>
> (e) the price of the goods for export to a country other than the country of importation;
>
> (f) minimum customs values; or
>
> (g) arbitrary or fictitious values.
>
> 3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

7.3.4.2.2 Claims under Article 1.1 and Article 1.2(a), second sentence

7.351. The Panel will first consider the Philippines's claims that the 2002-2003 Charges violate Article 1.1 and 1.2(a), second sentence, by rejecting PMTL's declared transaction values without any valid basis. The Philippines argues that the Thai authorities' comparison of PMTL's declared transaction values with the benchmark price that the Thai authorities constructed on the basis of pricing and cost information reported by PM Indonesia in the CK-21A forms is inconsistent with the CVA, regardless of whether it was relied upon for the purpose of determining: (1) whether the transaction value was influenced by the relationship between the buyer and the seller pursuant to Article 1.2(a), second sentence, of the CVA; or (2) the "price actually paid or payable" within the meaning of Article 1.1 of the CVA.

7.3.4.2.2.1 Claim under Article 1.2(a), second sentence

7.352. The parties disagree on several issues relating to the legal standard under Article 1.2(a), second sentence, in the context of an examination of the circumstances of sale that involves a benchmark price based on the computed value of the goods. In general, the disputed issues relate to how much leeway and discretion an authority has, and whether some or all of the specific requirements of Article 6 (or other CVA provisions and interpretative notes that are not expressly cross-referenced in Article 1.2(a)) apply, if not directly then as relevant interpretative context, for the examination of the circumstances of sale under Article 1.2(a).

7.353. In its first written submission, the Philippines argues that where a customs authority relies on a benchmark price based on the computed value of the goods for the purpose of its examination of the circumstances of sale under Article 1.2(a), it is legally obliged to respect a number of rules.

In its view, these rules limit a customs authority's discretion, and inform the interpretation of the phrase "all costs plus a profit", which is found in the last sentence of paragraph 3 of the Interpretative Note to Article 1.2(a). The Philippines offers the following interpretation:

a. an examination of the circumstances of sale must involve a process of consultation[627];

b. the "detailed rules" of Article 6 of the CVA and its Interpretative Notes, which regulate the construction of a cost-plus value also known as the "computed value", are important context in interpreting and applying Paragraph 3 of the Interpretative Note to Article 1.2[628];

c. in accordance with Article 8, the cost-plus benchmark under Paragraph 3 of the Interpretative Note to Article 1.2 must also include costs of containers, packing, materials, tools, dies, engineering, development, artwork, etc.[629];

d. the information considered in the cost-plus benchmark in Paragraph 3 of the Interpretative Note to Article 1.2 must follow the Generally Accepted Accounting Principles (GAAP) because of an overarching obligation to do so as reflected in the GAAP Interpretative Note[630];

e. based on Paragraphs 2 and 5 the Interpretative Note to Article 6, for the determination of the cost-plus benchmark under Paragraph 3 of the Interpretative Note to Article 1.2, authorities must use only (1) information that relates to goods being valued, that was (2) provided by or on behalf of the producer and (3) based on commercial accounts of the producer[631];

f. finally, on the use of "objective and accurate information", the Philippines also proposes to incorporate the standards reflected in "[n]umerous other CVA provisions", namely Articles 2.1(b), 3.1(b), 7.2, Paragraph 5 of the Interpretative Note to Articles 2.1(b) and 3.1(b), Paragraph 11 of the Interpretative Note to Article 5, Paragraph 1 of the Interpretative Note to Article 8.1(b)(iv), Article 8.3, Paragraph 1 of the Interpretative Note to Article 8.3, Article 17, and Paragraph 6 of Annex III.[632]

7.354. Thailand responds that this is a "wish list" that lacks any textual support in the CVA.[633] It emphasizes that Paragraph 3 of the Interpretative Note to Article 1.2(a) "provides no guidance on how to apply the test of 'adequate to ensure recovery of all costs plus a profit'".[634] It recalls the Panel's reflection of the parties' agreement, in the first recourse to Article 21.5, 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".[635] Thailand also relies on the Panel's conclusion in the first recourse to Article 21.5 that the "essential requirement under Article 1.2(a), second sentence, is that an examination of circumstances of sale must be apt to reveal whether the relationship between the buyer and seller influenced the price".[636] Thailand refers to the Panel's statement that "[g]iven the discretion that the CVA accords to the customs authority in determining its approach to examining the circumstances of sale", the Panel did "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".[637] In the light of the foregoing, Thailand argues that the "authorities need not follow to the letter other CVA disciplines governing the calculation of costs and profit", and "certainly need not follow the long list of obligations suggested by the Philippines".[638]

[627] Philippines' first written submission, paras. 164-168.
[628] Philippines' first written submission, paras. 182–188.
[629] Philippines' first written submission, paras. 189–194.
[630] Philippines' first written submission, paras. 195–205.
[631] Philippines' first written submission, paras. 206–212.
[632] Philippines' first written submission, paras. 213–215.
[633] Thailand's first written submission, para. 3.56.
[634] Thailand's first written submission, para. 3.68.
[635] Thailand's first written submission, para. 3.83.
[636] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.107.
[637] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.105.
[638] Thailand's first written submission, para. 3.85.

7.355. The Panel notes that in the context of the first recourse to Article 21.5, it relied on other CVA provisions, including the Interpretative Notes to Articles 5 and 6, as relevant interpretative context when reviewing the BoA's examination of the circumstances of sale under Article 1.2(a). In that case, the authority's examination of the circumstances of sale involved a benchmark relating to PMTL's "profits and general expenses" ("P&GE"), and the Panel found that the obligations in Article 6 regarding this same term were "instructive" in informing the legal standard under Article 1.2(a). The Panel explained that:

> 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.[639]

7.356. Having said that, the Panel considers it unnecessary to resolve the parties' disagreement over the extent to which the detailed rules in Article 6 governing the computed value method, and other CVA provisions referred to by the Philippines, should inform the examination of the circumstances of sale under Article 1.2(a) based on a cost-plus benchmark. The reason is that both parties agree that an authority's examination of the circumstances of sale under Article 1.2(a) must, at minimum, be apt to reveal whether the relationship between the buyer and seller influenced the price. In the circumstances of this case, the nature of the information contained in the CK-21A form and the manner in which the Thai authorities relied on that information clearly did not meet that minimum standard, regardless of whether other CVA provisions are taken into account as context.

7.357. First, the Panel has found that, as result of the regulatory constraints mandated by Indonesian excise tax law, the figures in the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain.[640] The Panel accepts that a comparison between the transaction value and a properly established cost-plus benchmark can shed light on whether the relationship between the buyer and seller influenced the price, because if the transaction value is lower than such a benchmark, this would suggest the producer is selling to the buyer at a price insufficient to cover the costs of production for the goods, plus profits. However, the validity of this means of examining the circumstances of sale depends on the cost-plus benchmark being properly established, so that it provides an accurate and reliable reflection of the producer's costs and profits.

7.358. Second, the Panel found that in the circumstances of this case, the DSI and Public Prosecutor had no basis upon which to assume that the CK-21A information was reliable in the light of PMTL's repeated written explanations as to why it was not.[641] Thailand acknowledges that the information that its authorities relied upon "was not subsequently verified in terms of its accuracy".[642] The original panel has clarified that when the customs authorities receive relevant information from an importer, the requirement to conduct an "examination" of the circumstances of sale requires "an active, critical review and consideration of the information before them".[643] As recalled earlier, in the first recourse to Article 21.5, the Panel explained that "if the customs authority failed to take into account" relevant information provided by the importer, "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".[644]

7.359. Based on the foregoing, the Panel finds that insofar as the Thai authorities relied on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms

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[639] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.165.
[640] See Section 7.2.2 (The nature of the cost information reported in the CK-21A forms).
[641] See Section 7.2.3 (The circumstances surrounding the Thai authorities' reliance on the CK-21A forms).
[642] Thailand's first written submission, para. 3.110.
[643] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.171.
[644] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, footnote 592.

for the purpose of determining whether the transaction value was influenced by the relationship between the buyer and the seller, this determination was inconsistent with Article 1.2(a), second sentence, which entails a consequential violation of Article 1.1.[645]

7.3.4.2.2.2 Alternative claim under Article 1.1

7.360. As discussed at length earlier in the context of the Panel's analysis of the meaning of the 2002-2003 Charges, the parties have different understandings of what the "actual price" refers to.[646] For the reasons set forth earlier, the Panel considers that the circumstances surrounding the 2002-2003 Charges suggest that the Philippines has demonstrated *prima facie* that the "actual price" in the 2002-2003 Charges refers to the revised customs value that was calculated using the computed value methodology under Articles 6 and/or 7 of the CVA, and not, as Thailand suggests, a determination of the "price actually paid or payable" for the goods in question. However, the facts are not entirely clear on this point, and the Panel makes the following alternative finding under Article 1.1, based on the *arguendo* assumption that the 2002-2003 Charges determine the "price actually paid or payable".

7.361. The Panel considers that an authority enjoys a margin of discretion in how it determines the "price actually paid or payable" within the meaning of Article 1.1, just as the authority enjoys a margin of discretion in how it conducts its "examination of the circumstances of sale" in the context of Article 1.2(a). The existence of certain parallels in the minimum requirements for each provision does not mean that the methods of enquiry used under Article 1.2(a) are equally appropriate under Article 1.1.[647] However, the obligations in Articles 1.1 and 1.2(a), second sentence, are interrelated in a way that makes it illogical for an investigating authority to be free to disregard the minimum requirements of the examination under Article 1.2(a) when seeking to determine the "price actually paid or payable" under Article 1.1. In this regard, it bears recalling that Article 1.2(a) and Article 1.1 not only comprise part of the same article, but are interrelated such that a violation of Article 1.2(a) necessary implies a violation of Article 1.1. Thus, the Panel considers that the chosen means or methodology must be capable of, and suitable for, revealing whether the declared transaction price corresponds to the "price actually paid or payable". Accordingly, the Panel's reasoning above regarding the claim under Article 1.2(a) second sentence applies *mutatis mutandis*.

7.362. Based on the foregoing, the Panel finds that insofar as the Thai authorities relied on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms for the purpose of determining the "price actually paid or payable", this was inconsistent with Article 1.1 of the CVA.

7.3.4.2.3 Claims under Article 6.1 and/or Article 7.1

7.3.4.2.3.1 Claim under Article 6.1

7.363. The Panel understands Thailand's position to be that any revised customs value determined by the Thai authorities was determined on the basis of the reasonable flexibilities in Article 7, and not on the basis of the detailed rules set forth in Article 6. Thailand appears to implicitly acknowledge that this determination would not satisfy the detailed requirements of Article 6, if that were the applicable provision (which, in its view, it is not).[648]

7.364. The Panel notes that Article 6 and its related Interpretative Notes establish a number of detailed rules regarding the use of computed values, which potentially raise a number of interpretative issues. These issues include the extent to which the authorities in the importing country can obtain a producer's cost information from third parties, rather than directly from the producer itself. In this connection, Paragraph 1 of the Interpretative Note to Article 6 states that the

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[645] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.103 (stating that "[t]here 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.")

[646] See Section 7.3.3.3.3 (The meaning of the Charges).

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

[648] Thailand's response to Panel question No. 156.

computed value method will "generally be limited to those cases where … the producer is prepared to supply to the authorities of the country of importation the necessary costings", and Paragraph 2 provides that the "cost or value" is to be determined on the basis of information relating to the production the goods being valued "supplied by or on behalf of the producer". However, Paragraph 6 of the Interpretative Note contemplates that there could be cases in which "information other than that supplied by or on behalf of the producer is used"; and the wording of Paragraph 6 further envisages that, in such cases, the confidentiality provisions of Article 10 may prevail over the importer's right to be informed of the source, data used and related calculations.

7.365. While recognizing the importance of these issues, the Panel considers it unnecessary to engage in a comprehensive interpretation of the requirements of Article 6 in the circumstances of this case. The reason is that both parties seem to agree that an authority's examination of the circumstances of sale under Article 1.2(a) must, at minimum, be based on the producer's actual costs, and that when applying Article 6, the authority in the importing country is under an obligation to verify the accuracy of those costs. In the circumstances of this case, the nature of the CK-21A information and the Thai authorities' examination of that information clearly did not meet that minimum standard, regardless of whether other detailed requirements of Article 6 were complied with.

7.366. First, the Panel has found that, as result of the regulatory constraints mandated by Indonesian excise tax law, the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain.[649] There may well be circumstances in which the information before an authority justifies the use of estimated costs[650], or in which judgement must be exercised in the context of allocating costs across different product lines.[651] However, the Panel does not understand Thailand to argue that the "costs" relied upon under Article 6 for the purpose of determining a revised customs value could include cost figures that are known to overstate the actual costs of the producer. The Panel considers it abundantly clear form the text of Article 6 and the wider context of the CVA that the "[t]he object [of Article 6] is to find the *actual figures* relating to the production of the imported goods being valued".[652]

7.367. Second, the Panel found that in the circumstances of this case, the DSI and Public Prosecutor had no basis upon which to assume that the CK-21A information was reliable in the light of PMTL's repeated written explanations as to why it was not.[653] The Panel understands Thailand to accept that, when applying Article 6, the authority in the importing country is under an obligation to verify the accuracy of those costs. This understanding stems from Thailand's argument that "[t]he specific flexibility is that the Public Prosecutor relied on information that, although it was provided by [PM Indonesia] to Indonesian authorities, was not subsequently verified in terms of its accuracy".[654] The logical implication of Thailand's argument is that subsequent verification in terms of the accuracy of the information would have been required pursuant to Article 6.[655]

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[649] See Section 7.2.2 (The nature of the cost information reported in the CK-21A forms).

[650] According to Sherman and Glashoff, "[i]n some circumstances, so-called 'standard costs' estimated in advance of actual production may be the most appropriate or even the only available basis for use in customs valuation, as they often are in making commercial pricing decisions." (Saul L. Sherman and Hinrich Glashoff, *Customs Valuation: Commentary on the GATT Customs Valuation Code* (ICC Publishing S.A./Kluwer Law and Taxation Publishers, 1988), p. 228.)

[651] The Appellate Body has addressed the meaning of "costs associated with the production and sale of the product under consideration" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The Appellate Body found that these treaty terms refer to costs incurred by the investigated exporter or producer that correspond to or reproduce the costs "that have a genuine relationship" with the production and sale of the specific product under consideration. (Appellate Body Report, *EU – Biodiesel*, paras. 6.22 and 6.30.)

[652] Saul L. Sherman and Hinrich Glashoff, *Customs Valuation: Commentary on the GATT Customs Valuation Code* (ICC Publishing S.A./Kluwer Law and Taxation Publishers, 1988), p. 228.

[653] See Section 7.2.3 (The circumstances surrounding the Thai authorities' reliance on the CK-21A forms).

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

[655] The Panel notes that Thailand's position is not entirely clear. The Panel asked Thailand whether its argument under Article 7 meant that it "accepts that, insofar as the Public Prosecutor determined a revised customs value (i.e. assuming *arguendo* that there was a determination of a revised customs value at all, as opposed to a determination only of "the price actually paid or payable"), it was determined in a manner inconsistent with Article 6 of the CVA". Thailand responded that because the valuation was made under

7.368. Based on the foregoing, the Panel finds that insofar as the Thai authorities relied on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms for the purpose of determining a revised customs value using the computed value method under Article 6, this was inconsistent with Article 6 of the CVA.

7.3.4.2.3.2 Alternative claim under Article 7.1

7.369. Thailand maintains that the detailed rules in Article 6 are inapplicable to any determination of the revised customs value in this case, because any such determination applied the computed value method with "a reasonable flexibility" as permitted by Article 7.

7.370. The Panel accepts that there could be cases in which a customs authority determines a revised customs value on the basis of a computed value method that deviates from the strict requirements of Article 6. The Panel is mindful of Article 7.2(d), which provides that no customs value shall be determined on the basis of the cost of production "other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6". However, the Panel does not read this language to mean that no deviation from the strict rules of Article 6 is ever permissible; rather, Article 7.2(d) appears to envisage that in appropriate cases the rules of Article 6 may be applied with reasonable flexibility, but clarifies that any computed values must nonetheless relate either to identical goods, as defined in Article 15.2(a), or to similar goods, as defined in Article 15.2(b).

7.371. While recognizing that there could be cases in which a customs authority uses Article 7 to determine a revised customs value on the basis of a computed value method that deviates from the strict requirements of Article 6, the Panel agrees with the Philippines that it is unnecessary to decide "on the precise scope or extent of the flexibilities that are available" to a customs administration, under Article 7 of the CVA, in calculating a computed value.[656] The reason is that any determination made pursuant to Article 7 must, at minimum, use "reasonable means consistent with the principles and general provisions of this Agreement", and cannot be determined on the basis of "arbitrary or fictitious values". In the circumstances of this case, the nature of the information contained in the CK-21A forms and the manner in which the Thai authorities relied on that information clearly did not meet these minimum standards. Secondly, and contrary to Thailand's argument, the reasonable flexibilities of Article 7.1 do not extend to exempting an authority from engaging in proper consultation with the importer and/or allowing it to rely on information without verifying its accuracy.

7.372. First, the Panel has found that the nature of the information contained in the CK-21A forms was such that the Thai authorities' chosen means or methodology was incapable of, and unsuitable for, revealing whether the relationship between PMTL and PM Indonesia influenced the price, or whether the declared transaction price corresponds to the price actually paid or payable. The Panel considers that, *a fortiori*, reliance on such information to determine a revised customs value for PMTL's imported cigarettes cannot be a "reasonable means consistent with the principles and general provisions" of the CVA. Furthermore, the Panel considers that its finding that the CK-21A forms could not represent PM Indonesia's actual costs and profits, and necessarily erred on the side of overstating the actual costs and profits of PM Indonesia and other parties involved in the supply chain, is tantamount to characterizing the figures relied upon by the Thai authorities as "arbitrary or fictitious" values in the sense of Article 7.2(g) of the CVA.

7.373. Second, Thailand's argumentation under Article 7.1 is that "[t]he specific flexibility is that the Public Prosecutor relied on information that, although it was provided by [PM Indonesia] to Indonesian authorities, was not subsequently verified in terms of its accuracy".[657] The Panel understands Thailand to be arguing that the process of consultation discussed at length by the original panel and the Panel in the first recourse to Article 21.5, which is normally required in the context of applying Article 6, may be dispensed with in certain circumstances in the context of using "reasonable flexibility" under Article 7. However, insofar as this is what Thailand is arguing, it appears to contradict the findings of the original panel, which suggested that this consultative

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Article 7.1, this meant that the valuation decision must only be assessed under Article 7.1 and would not mean that it was inconsistent with Article 6. (Thailand's response to Panel question No. 156, para. 8.1.)

[656] Philippines' response to Panel question No. 170, para. 32.

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

process is part and parcel of "using reasonable means consistent with the principles and general provisions of this Agreement". Specifically, the panel stated that:

> Although the first sentence of paragraph 2 refers to "value under the provisions of Article 2 or 3", we consider that the spirit of the Customs Valuation Agreement envisaged under this paragraph, namely the determination of customs value through *a process of consultation* between the customs administration and importer*,* equally applies to other valuation methods. The phrase "using reasonable means consistent with the principles and general provisions of this Agreement" in Article 7.1 also supports this view. As the Philippines submits, while the importer is the party that typically possesses relevant information for a deductive calculation, it is the customs authority that knows the specific information necessary to accept the requested deductions. Viewed in this light, it is difficult to conceive that the drafters of the Agreement would have intended a process of consultation between the customs administration and importer to be limited solely to the valuation process under Article 2 or 3.[658]

7.374. The Panel in the first recourse to Article 21.5 agreed, and proceeded on the understanding that "the obligation to conduct consultations is integral to the manner in which the customs authority applies the deductive value method".[659]

7.375. Based on the foregoing, the Panel finds that insofar as the Thai authorities relied on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms for the purpose of determining a revised customs value using the reasonable flexibilities under Article 7, this was inconsistent with Article 7 of the CVA.

7.3.4.3 Conclusion

7.376. In sum, the Panel finds that it was improper for the DSI and the Public Prosecutor to rely on pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A forms for purposes of determining the customs value of PMTL's imports into Thailand, regardless of whether it was relied upon for the purpose of determining: (1) whether the transaction value was influenced by the relationship between the buyer and the seller pursuant to Article 1.2(a), second sentence, of the CVA; or (2) the "price actually paid or payable" within the meaning of Article 1.1 of the CVA; and/or (3) a revised customs value based on Article 6 of the CVA; or (4) a revised customs value based on Article 7 of the CVA. The Panel finds that by doing so, the 2002-2003 Charges reflect a customs valuation determination that is inconsistent with Article 1.1 and Article 1.2(a), second sentence, insofar as it is a determination that the price actually paid or payable was influenced by the relationship between PMTL and PM Indonesia; with the substantive obligations in Article 1.1 insofar as it is a determination of "the price actually paid or payable"; with Article 6, insofar as it is a determination of a revised customs value based on the computed value method; and/or with Article 7, insofar as it is a determination of a revised customs value on the basis of the reasonable flexibilities provided for in that provision.

7.377. In the absence of any contemporaneous explanation from the Thai authorities, it is impossible to say with any certainty which of these determinations was made. However, it ultimately makes no difference to the Panel's assessment. Regardless of which of these types of alternative determinations the "actual price" is supposed to represent, the Panel reaches the same conclusion of WTO-inconsistency, for essentially the same reasons. Therefore, the Panel considers it unnecessary to rule on which of these alternative determinations the "actual price" represents in the context of the 2002-2003 Charges.[660]

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[658] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.327. (emphasis original)

[659] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.337.

[660] The Panel followed a similar course in the first recourse to Article 21.5, when it found that the 2003-2006 Charges reflected a revised customs value that was inconsistent with Articles 2 and/or 3 of the CVA. Although that revised customs value could only be based on one of these provisions, the Panel considered it unnecessary to rule on whether the Public Prosecutor used the method in Article 2, or instead Article 3. Thus, the Panel made alternative findings. (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.728 and 7.731.)

7.3.5 Claim regarding sequential application of valuation methods

7.3.5.1 Introduction

7.378. As the Panel observed in the first recourse to Article 21.5, "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".[661] One of the fundamental and integral rules of this system is the obligation to respect the sequential order of application of the methods in Articles 1 through 7.

7.379. In the first recourse to Article 21.5, the Panel found that the 2003-2006 Charges rejected PMTL's transaction values under Articles 1.1 and 1.2(a), and then determined a revised value on the basis of the Articles 2 and/or 3 of the CVA. While the Panel found this customs valuation determination to be flawed and rest on an invalid basis, it appeared to follow the sequential application of customs valuation methods. The Panel was not presented with any claim or issue regarding the sequential application of customs valuation methods in connection with either of the measures at issue, i.e. the 2003-2006 Charges or the November 2012 BoA Ruling.[662]

7.380. In this second recourse to Article 21.5, the Philippines claims that the 2002-2003 Charges reject PMTL's transaction values under Articles 1.1 and 1.2(a), and determine a revised value on the basis of Articles 6 and/or 7 of the CVA. In addition to its claims of violations under these provisions, which the Panel has already considered and upheld, the Philippines claims that the Thai authorities did not respect the sequential application of customs valuation methods by jumping directly to the computed value method under Article 6 without first seeking to use the valuation methods in Articles 2, 3 or 5.[663]

7.381. Thailand accepts that the customs valuation methods in Articles 1 to 7 must be applied sequentially, but submits that the present case involves special circumstances in which none of the prior alternative methods in Articles 2, 3 or 5 could be used to determine the customs value of PMTL's imports.[664]

7.3.5.2 Main arguments of the parties

7.382. According to the Philippines, the Public Prosecutor "failed to provide any explanation for jumping directly to a computed value under Article 6, and not using the methods in Articles 2, 3 and 5".[665] The Philippines recalls that, according to the panel findings in the original proceeding and the first recourse to Article 21.5, where a customs administration has not provided a reasoned and adequate explanation to support its determination, "the panel has *no option* but to find that the [customs administration] has not performed the analysis correctly".[666] In response to Thailand's assertion that none of the prior methods could be used, the Philippines submits that Thailand engages in "an improper and unsubstantiated *ex post* justification of the Public Prosecutor's actions".[667] It submits that Thailand has been unable to substantiate its alleged justification by reference to documents from the record of the customs valuation determination, and that the *ex post* nature of its alleged justification is exemplified by Thailand's reliance on the findings of the

[661] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.752.

[662] With regard to the BoA Ruling, the Panel noted that while "[u]nder 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", the Philippines did "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." (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.75 and footnote 254.)

[663] Philippines' first written submission, paras. 474-489; second written submission, paras. 333-336.

[664] Thailand's first written submission, paras. 3.101-3.103; second written submission, paras. 3.74-3.77.

[665] Philippines' first written submission, para. 482.

[666] Philippines' first written submission, para. 483 (referring to Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.117, citing Appellate Body Report, *US – Steel Safeguards*, para. 303 (emphasis added), and Panel Report, *Thailand – Cigarettes (Philippines)*, footnote 499.) See also Philippines' responses to Panel question Nos. 152-153.

[667] Philippines' second written submission, para. 333.

Panel in the first recourse to Article 21.5; the Philippines observes that the Public Prosecutor could not have relied on these findings in bringing the Charges, because they came out nearly one year after the 2002-2003 Charges were issued.[668]

7.383. In addition, the Philippines notes that PMTL never requested, under Article 4, the reversal of the sequential ordering as between Article 5 (deductive value) and Article 6 (computed value), to the contrary, and that in a letter to the Public Prosecutor on 28 October 2016, PMTL insisted that the deductive valuation method should precede the computed valuation method.[669] Furthermore, the Philippines states that the Public Prosecutor's decision to use a computed value under Article 6 "stands in stark contrast" to Thailand's historic approach to valuation of PMTL's imported goods, because "for the past 15 years, the Customs Department and its BoA have rejected the transaction value from time to time and, after consultation with the importer, have *uniformly* applied the deductive valuation methodology under Article 5 of the *CVA*".[670]

7.384. Thailand denies that the Public Prosecutor acted inconsistently with Articles 2 to 6, on the basis that the "present case involves special circumstances, in which none of the alternative methods in Articles 2-5 could be used to determine a customs value".[671] Thailand elaborates that because PMTL is the only major cigarette importer in Thailand, this places the authorities in "the unusual situation of not having sufficient previously determined customs values for identical or similar goods", and the determination that the declared value is insufficient to ensure the recovery of costs plus a reasonable profit means that the deductive method under Article 5 "is not appropriate either because it would simply result in determining the same CIF price that was previously determined to have been affected by the relationship between the exporter and the importer".[672]

7.385. In this regard, Thailand submits that the Panel's findings in the first recourse to Article 21.5 made clear that "it is virtually impossible to identify an appropriate amount for profit and general expenses in the Thai market other than PMTL's own ratio"[673] and "the extensive debate before the first compliance panel illustrates the many difficulties in establishing an appropriate P&GE ratio for PMTL's imports".[674] Thailand elaborates that "[t]he issues concerning the lack of other importers of cigarettes, the difficulties in establishing a comparison group, and the relative size of PMTL compared to other market participants all create substantial difficulties in the deductive value method to analyse PMTL", and that "[i]n the light of these difficulties, it cannot be unreasonable to move on to the next approach".[675]

7.3.5.3 Analysis by the Panel

7.3.5.3.1 General considerations

7.386. The first section of the General Note to the Interpretative Notes to the CVA, entitled "Sequential Application of Valuation Methods", explains that these six methods are to be applied in sequence. Paragraph 1 of the general Interpretative Note on 'Sequential Application of Valuation Methods' states that "[t]he methods of valuation are set out in a sequential order of application". Paragraph 2 adds that, when goods cannot be valued using the transaction value, the value "is to be determined by proceeding sequentially through the succeeding Articles to the first such Article under which the customs value can be determined".

7.387. The sequential ordering of valuation methods is also expressly reflected in the text of Articles 2, 3, 4, and 7 of the CVA. The introductory clause of each provision sets forth this requirement. Article 2 opens with the words "[i]f the customs value of the imported goods cannot be determined under the provisions of Article 1", and continues by setting forth an alternative valuation method that may be applied in the event the condition in the first clause is met. Article 3 has the same introductory clause, ending with a reference to "Articles 1 and 2", and then sets forth the next valuation method. Article 4 of the CVA provides that the customs value may only be

[668] Philippines' second written submission, para. 336.
[669] Philippines' first written submission, paras. 484-486.
[670] Philippines' first written submission, para. 487.
[671] Thailand's first written submission, para. 3.102.
[672] Thailand's first written submission, para. 3.102.
[673] Thailand's first written submission, para. 3.102.
[674] Thailand's second written submission, para. 3.77.
[675] Thailand's second written submission, para. 3.77.

determined under the provisions of Article 5 if the customs value "cannot be determined" under the provisions of Articles 1, 2 or 3, and that unless the importer requests otherwise, the method in Article 6 can be applied only if the customs value "cannot be determined" under Article 5. The opening words of Article 7.1 provide that recourse to the flexibilities of that provision may be used "[i]f the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6". Furthermore, although there is no express provision that the sequential ordering of the methods in Articles 1 to 6 should be followed again in the context of having recourse to the reasonable flexibilities in Article 7.1, the Technical Committee on Customs Valuation has recommended that, where reasonably possible, this sequence should also be observed in applying Article 7.[676]

7.388. The requirement to adhere to the hierarchical order of the sequential valuation methods is a legal obligation, and the failure to comply with that obligation would constitute an independent basis for finding a violation of the CVA. As highlighted by the original panel, "[i]f a customs authority decides to reject the transaction value, another valuation method must be used by observing the sequential order of the methods stipulated in Articles 2, 3, 5, 6 and 7."[677]

7.389. The fundamental nature of this obligation finds further reflection through the manner in which it informs the application of other CVA provisions, including the nature and the content of the explanation that must be provided pursuant to Article 16. 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."[678]

7.3.5.3.2 Review of the 2002-2003 Charges

7.390. In this case, there is no direct, contemporaneous or documentary evidence as to whether the Thai authorities sought to apply the methods of customs valuation sequentially. Under the applicable standard of review, it is not for a panel to decide which of the six recognized customs valuation method(s) should have been used in relation to a particular set of imports. However, the Panel considers that in the circumstances of this case, it can assess whether one or more of the customs valuation methods in Articles 2, 3 or 5 of the CVA could have been used to value PMTL's imports, without engaging in a *de novo* review beyond the scope of its mandate.[679]

7.391. The Panel recalls that a given method (e.g. Article 6) can be used only if the customs value "cannot be determined" under the preceding method (i.e. Article 5). Thus, it stands to reason that the stronger the basis for considering that the customs value of certain imported goods could have been determined using the preceding method, then the stronger the basis for considering that an

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[676] Technical Committee on Customs Valuation, Advisory Opinion 12.2, "Hierarchical Order in Applying Article 7", 16 September 1983, reproduced in Saul L. Sherman and Hinrich Glashoff, *Customs Valuation: Commentary on the GATT Customs Valuation Code* (ICC Publishing S.A./Kluwer Law and Taxation Publishers, 1988), Annex III/A.

[677] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.154.

[678] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.240.

[679] In a case involving the review of a customs valuation determination by the domestic authorities, the applicable standard of review may confine the scope of a panel's analysis to the reasons communicated to the importer in the contemporaneous explanation(s) provided to the importer, and/or to the information forming part of the record of the determination. In such cases, if the written determination fails to adequately explain how the authority addressed an issue that it was required to consider, that may compel a panel to find that the issue in question was not properly examined and refuse to consider any *ex post* rationalizations. (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.108-7.121. See also paragraphs 7.146-7.147.) However, neither the MoA nor the 2002-2003 Charges purport to provide any explanation of the customs valuation methodology that was applied to determine the "actual price". For this reason, the Panel is not persuaded by the Philippines' argument that under the applicable standard of review, the absence of any direct, contemporaneous or documentary evidence as to whether the Thai authorities sought to apply the methods of customs valuation sequentially in relation to the 2002-2003 Charges compels the Panel to conclude that the Thai authorities failed to comply with the obligation to apply the methods of customs valuation sequentially.

authority's decision entailed a violation of the obligation to sequentially apply the customs valuation methods.

7.392. In this case, there is evidence that the Public Prosecutor could have determined the customs value of PMTL's imported cigarettes using the deductive method in Article 5. It is an uncontested fact that, as asserted by the Philippines, for the past 15 years, on all occasions where the Customs Department and its BoA have rejected PMTL's transaction values, they have, after consultation with PMTL, uniformly applied the deductive methodology under Article 5.[680] Indeed, as discussed earlier, the customs values of all of the 780 entries subject to the 2002-2003 Charges had previously been determined by Thai Customs or its BoA, which used either the transaction value or the deductive method under Article 5 as the basis for valuing the entries at issue.[681] It appears that the Thai Customs and its BoA have never before relied on the computed value method under Article 6 to determine the value of any of PMTL's imports of *Marlboro* or *L&M* cigarettes from Indonesia or the Philippines.

7.393. The Panel notes that Thailand lists "special circumstances" that, in its view, justify the conclusion that the customs value of PMTL's imports into Thailand cannot be determined using any of the methods in Articles 2, 3 or 5. Yet without further elaboration, that conclusion appears to be contradicted by 15 years of practice of the Thai Customs Department and the BoA. The circumstances now described by Thailand as "special circumstances" would appear to be no different from those prevailing during that period of 15 years.

7.394. Furthermore, the Panel considers that it is worth clarifying that in neither the original panel proceeding nor the first recourse to Article 21.5 did the Philippines challenge the Customs Department's reliance on the use of the deductive method in Article 5 to value its imports; to the contrary, the Philippines only challenged the *specific* P&GE rate determined by the BoA for purposes of the November 2012 BoA Ruling. The Panel's own findings were also confined to this specific challenge by the Philippines.[682] In the context of reviewing the BoA's determination, the Panel addressed certain difficulties that were "specific to an examination that relied on a comparison of PMTL's P&GE rates with an industry benchmark group", and observed that the CVA contemplates other methods of customs valuation.[683] However, the Panel never stated that this rendered the deductive method of customs valuation impossible to apply in the specific circumstances of PMTL's imports into Thailand, and stated *inter alia* that:

> [W]e 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. 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.[684]

7.395. Thus, there is no direct, contemporaneous or documentary evidence indicating that the Thai authorities sought to apply the methods of customs valuation sequentially. As set forth above, there are strong indications that the Thai authorities did not respect the sequential application of customs

[680] Parties' response to Panel question No. 153.

[681] See above paragraph 7.175.

[682] Philippines' second written submission, paras. 168-169. The Philippines requested that the Panel "clarify this important point in its ruling to avoid the Customs Department (or any other Thai authority) subsequently asserting, in Thai domestic proceedings, that the Panel found that the Customs Department (or any other Thai authority) cannot determine a proper P&GE rate for PM Thailand under Article 5". (Philippines' second written submission, para. 170.)

[683] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.154.

[684] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.156. (fn omitted)

valuation methods by jumping directly to computed value under Article 6 without first seeking to use the valuation methods in Articles 2, 3 or 5. Thailand has asserted that there were "special circumstances" establishing that PMTL's imports could not be valued under Articles 2, 3 or 5, but its arguments are not elaborated, and appear to be contradicted by 15 years of practice of the Thai Customs Department and the BoA.

7.396. The Panel therefore considers that the Philippines has made a *prima facie* case that the Public Prosecutor failed to follow the sequential ordering of customs valuation methods provided for in Articles 2 to 7 of the CVA when determining the revised customs value, and the Panel considers that Thailand has not rebutted this *prima facie* case. To the contrary, the Panel notes that, in the context of advancing its arguments under Article XX of the GATT 1994, Thailand has also stated that "[i]t would be unreasonable to expect the Public Prosecutor to go through all the sequential steps in the CVA when the evidence it is confronted with leads him to suspect that the importer engaged in fraudulent activities".[685]

7.397. To avoid any misunderstanding, the Panel's finding and reasoning does not imply that the Customs Department and the BoA's longstanding practice of applying the deductive method in Article 5 to value PMTL's imports of *Marlboro* and *L&M* cigarettes precludes any Thai authority from ever having recourse to the computed value method in Article 6, or making use of the reasonable flexibilities in Article 7. Notwithstanding that the CVA itself recognizes that the use of Article 6 "present[s] certain difficulties"[686] (which partly explain why it falls last in the hierarchy of distinct methods), it is not inconceivable that the Thai authorities could provide a reasoned explanation as to why the methods in Articles 2, 3 and 5 (and/or 6 itself) are not applicable to value PMTL's imports. In this case, however, that kind of reasoned explanation is missing.

7.3.5.4 Conclusion

7.398. The Panel finds that the Public Prosecutor acted inconsistently with the obligation to sequentially apply the customs valuation methods in Articles 2 through 7 when it determined the revised customs values of PMTL's imported goods.

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

7.3.6.1 Introduction

7.399. In the first recourse to Article 21.5, the Panel upheld the Philippines' argument that the procedural obligation in Article 1.2(a), third sentence, applies to the BoA, and its claim that the BoA acted inconsistently with this obligation by not communicating its grounds for considering that the relationship between PMTL and PM Indonesia influenced the price, sufficiently for PMTL to meaningfully respond.[687] The Philippines did not pursue any similar claim in respect of the 2003-2006 Charges.

7.400. In this second recourse to Article 21.5, the Philippines claims, in connection with the 2002-2003 Charges, that the Public Prosecutor failed to comply with the procedural obligation in Article 1.2(a), third sentence, to communicate the grounds for doubting the declared transaction value to PMTL and provide it with an opportunity to respond.[688] In the Philippines' view, the Public Prosecutor is subject to this obligation, and it was not discharged by the communications between the DSI and PMTL regarding the CK-21A forms.

7.401. Thailand responds that the Public Prosecutor is not subject to the procedural obligation in Article 1.2(a) third sentence.[689] In addition, Thailand states that it is of the view that the DSI

[685] Thailand's first written submission, para. 3.150. In response to a question from the Panel asking whether this meant that Thailand was saying that the Public Prosecutor did not adhere to the sequential ordering of customs valuation methods, Thailand stated that this statement should not be so construed. (Thailand's response to Panel question No. 154.)

[686] CVA, General Introductory Commentary, paragraph 3.

[687] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.278.

[688] Philippines' first written submission, paras. 496-516; second written submission, paras. 344-350.

[689] Thailand's first written submission, paras. 3.112-3.116; second written submission, paras. 3.82-3.87; response to Panel question No. 151.

communicated its grounds to PMTL and that PMTL was given a reasonable opportunity to respond, and that the Public Prosecutor was not required to repeat the process previously conducted by the DSI prior to filing the 2002-2003 Charges.[690]

7.3.6.2 Main arguments of the parties

7.402. As for the applicability of Article 1.2(a), third sentence, to the Public Prosecutor, the Philippines recalls the Panel's finding that the substantive obligations in Articles 1 to 7 of the CVA apply to any state organ that engages in customs valuation, and suggests that much of the Panel's reasoning would also extend to the procedural obligation in Article 1.2(a), third sentence.[691] It also explains that the procedural and substantive obligations in Article 1.2(a) "work together, as an integrated package", such that the Public Prosecutor could not be subject to the substantive obligation without being subject to the procedural obligation.[692] The Philippines also highlights, as context, that under the Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, when a customs authority assesses potentially fraudulent declarations by an importer "it is subject to procedural obligations that are very similar to those in Article1.2(a)" which underscores that the procedural obligations in Article 1.2(a) apply in the case of customs valuation assessments with a criminal dimension.[693]

7.403. In its first written submission, the Philippines accepts that the DSI informed PMTL that it had obtained copies of the CK-21A forms and had doubts or suspicions based on these forms to the effect that the importer had under-declared the customs values on entries in 2001-2003.[694] However, the Philippines considers that the DSI did not discharge the obligation in Article 1.2(a), third sentence, because it communicated only limited information, at an early stage of the investigation, never communicated to PMTL how it assessed the information received from PMTL regarding the CK-21A information, and did not communicate whether the CK-21A information constituted the grounds for the DSI's allegation in the formal MoA issued on 22 September 2016.[695] Furthermore, the Philippines argues that the Public Prosecutor is an entity distinct from the DSI that made its own distinct customs valuation determination, and was thus required to adequately communicate its grounds for doubting the declared transaction value prior to issuing the 2002-2003 Charges in January 2017.[696]

7.404. In its first and second written submissions, Thailand's response to the Philippines' claim under Article 1.2(a), third sentence, is confined to arguing that procedural obligations of the CVA cannot apply to the Public Prosecutor. Thailand submits that this is so because "there are certain features of criminal procedures which prevent the application of the CVA procedural obligations"[697], and that this "is the case, for example, of the obligation to consult with the importer, which would be incompatible with the principle in criminal law that the accused has the right to remain silent".[698] In response to a question from the Panel, Thailand elaborates on the basis for its view that customs fraud investigations do not follow the same timeframes or procedures as customs valuation examinations which are carried out at the moment of customs clearance.[699] Thailand adds that even if the procedural and substantive obligations in the CVA are "closely entwined", that does not erase the distinction between them.[700] Thailand also considers that the reference to paragraph 1 of the

[690] Thailand's second written submission, paras. 3.21–3.39; response to Panel question No. 151, paras. 6.13-6.14.
[691] Philippines' first written submission, para. 502.
[692] Philippines' first written submission, paras. 503-506.
[693] Philippines' first written submission, para. 507.
[694] Philippines' first written submission, paras. 95-96. In its subsequent submissions, the Philippines argued that the evidence casts doubt on its earlier understanding that the DSI had obtained copies of those forms, but nonetheless shows that the DSI had access to certain pricing and cost information submitted by the Indonesian producer to the Indonesian government in CK-21A forms. See paragraph 7.100 above.
[695] Philippines' response to Panel question No. 151, paras. 229-239.
[696] Philippines' response to Panel question No. 151, paras. 240-245.
[697] Thailand's first written submission, para. 3.113.
[698] Thailand's first written submission, para. 3.113.
[699] Thailand's response to Panel question No. 150.
[700] Thailand's second written submission, para. 3.85.

Ministerial Decision is unavailing, because an enquiry into customs fraud is not subject to the CVA or the Ministerial Decision.[701]

7.405. In response to a question from the Panel, Thailand states that, even assuming arguendo that the procedural obligation in Article 1.2(a), third sentence, applies in the context of customs fraud, the DSI did communicate its grounds to PMTL and PMTL was given a reasonable opportunity to respond[702], and the Public Prosecutor and the Customs Department were not required to repeat the process previously conducted by the DSI prior to filing the 2002-2003 Charges.[703]

7.3.6.3 Analysis by the Panel

7.3.6.3.1 General considerations

7.406. 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. 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.

7.407. Regarding the requirement to communicate "grounds" to the importer, the original panel considered that the term "grounds" means the "reasons for considering".[704] The original panel also 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".[705] 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."[706]

7.408. 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.[707]

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[701] Thailand's second written submission, paras. 3.21–3.39; response to Panel question No. 150, paras. 6.2-6.3.

[702] Thailand's response to Panel question No. 151, para. 6.13.

[703] Thailand's response to Panel question No. 151, para. 6.14.

[704] 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 esas razones al importador y le dará oportunidad razonable para contestar." In the French version, 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."

[705] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.220.

[706] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.214.

[707] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.214.

7.409. 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."[708] 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."[709]

7.410. After recalling these general interpretations, the Panel in the first recourse to Article 21.5 concluded:

> 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.[710]

7.411. In the context of addressing the Philippines' claim under Article 1.2(a), third sentence, regarding the November 2012 BoA Ruling, the Panel linked this procedural obligation to the general principle of due process of law, to the wider objectives of the CVA, and to closely related CVA obligations comprising relevant context:

> [T]he 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. 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. 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. 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.
>
> 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".[711]

7.412. 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 in the context of investigations into customs fraud, and to customs valuation determinations made by entities such as the DSI and the Public Prosecutor. Second, in the event such obligations do apply to those entities, whether the DSI and/or Public Prosecutor satisfied those obligations.

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[708] 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).

[709] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.220.

[710] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.254.

[711] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.259-7.260. (fn omitted)

7.413. The Panel notes that Thailand has not elaborated at all on the second point, or responded to any of the arguments presented by the Philippines as to why the obligation in Article 1.2(a) was not discharged by the communications between the DSI and PMTL regarding the CK-21A forms. However, for the reasons set forth in analogous circumstances in the context of a claim under Article 16 in the first recourse to Article 21.5, the Panel must independently and objectively address the evidence before it to determine whether the Philippines has met its burden of proof.[712]

7.3.6.3.2 The applicability of Article 1.2(a), third sentence, to the Public Prosecutor

7.414. The Panel recalls that in the first recourse to Article 21.5, it was unnecessary to rule on whether the procedural obligation in Article 1.2(a), third sentence, applies to the Public Prosecutor, because the Philippines elected not to pursue any claim under Article 1.2(a), third sentence, in relation to the 2003-2006 Charges. As a consequence, the Panel stated that:

> 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. 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". 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.[713]

7.415. While the Panel did not rule on this question, elsewhere in its analysis it identified a series of different considerations that cumulatively led the Panel to conclude that the substantive CVA obligations at issue apply to any organ of the state that makes a "customs valuation" determination.[714] Many of those considerations, including general principles of state responsibility, would equally support the conclusion that the procedural obligation in Article 1.2(a), third sentence, applies to state organs that are not part of the "customs administration" in the narrow sense of the term. Furthermore, the Panel considers that the procedural and substantive obligations in Article 1.2(a) are integrally related to one another, and both are integrally linked to the obligation in Article 1.1, such that the Public Prosecutor could not be subject to the general obligation in Article 1.1, and to the substantive obligation in Article 1.2(a) second sentence, without also being subject to the procedural obligation in the third sentence of that same provision. Finally, as recalled further above, in the context of addressing the Philippines' claim under Article 1.2(a), third sentence, regarding the November 2012 BoA Ruling, the Panel linked this procedural obligation to the general principle of due process of law, to the wider objectives of the CVA, and to the interrelated obligation in Article 1.2(a), second sentence.[715] For these reasons, the Panel considers that the procedural obligation in Article 1.2(a), third sentence, applies to any entity making a customs valuation determination that is subject to the obligation in Article 1.2(a), second sentence.

7.416. The Panel agrees with Thailand that it is necessary to give careful consideration to the practicalities of superimposing CVA procedural obligations onto entities involved in criminal investigations into customs fraud. The Panel recalls that in reaching its finding that the BoA is subject to the procedural obligation in Article 1.2(a), third sentence, the Panel did exactly that: it carefully considered whether any practical difficulties would arise from subjecting the BoA to that obligation, and expressly reserved judgment on whether and if so how that procedural obligation would apply in respect of other appellate tribunals, stating that its analysis proceeded by "[a]ssuming 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".[716] The Panel conducted a very similar analysis when assessing the applicability of the procedural obligation in Article 16 to an appeals tribunal such as the BoA.[717]

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[712] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.431 and footnote 942.
[713] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.463.
[714] As summarized above, in Section 7.3.3.3.2 (The agency that filed the Charges).
[715] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.259.
[716] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.261.
[717] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.421.

7.417. In the Panel's view, these considerations also pertain to the manner in which the procedural obligation may be discharged. In other words, the Panel considers that the procedural obligation in Article 1.2(a), third sentence, applies to any entity making a customs valuation determination, but that the nature of the agency and the circumstances in which a determination was made could be highly germane to the appraisal of whether or not the obligation was discharged. Furthermore, if there were circumstances in which it was impossible for entities that do not form part of the "customs administration" in the narrow sense of the term to comply with the procedural obligation in Article 1.2(a), third sentence, without violating other rules, such as the right to remain silent, then it would apply *mutatis mutandis*. Here again, there is a degree of balance inherent in the CVA.[718]

7.418. The Panel does not consider it is necessary or advisable to attempt to specify, in the abstract, the extent to which the procedural obligations in the CVA, including the one articulated in the third sentence of Article 1.2(a), may be discharged in different ways in the context of diverse factual configurations. In this regard, the Panel recalls the original panel's view that it is 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."[719] That observation holds true in general, and carries particular force when applying CVA procedural obligations to entities outside of the narrow definition of a "customs administration".

7.419. In the light of the foregoing, the Panel concludes that the procedural obligation in Article 1.2(a), third sentence, applies to the Public Prosecutor. However, the Panel considers that the nature of the information and the "grounds" to be communicated in the context of a criminal investigation may be different from the nature of the information and the "grounds" to be communicated in the context of a typical customs valuation within the institutional framework of a "customs administration" in the narrow sense of the term.

7.3.6.3.3 The communications between the DSI and PMTL

7.420. In this proceeding, the Philippines claims that the Public Prosecutor acted inconsistently with Article 1.2(a), third sentence, by not communicating its grounds to PMTL for considering that the relationship between the parties influenced the declared transaction value. As with the other claims submitted by the Philippines in relation to the 2002-2003 Charges, this claim concerns the Thai authorities' reliance on information obtained from CK-21A forms. The Panel has already found that the Thai authorities' reliance on pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the customs value of PMTL's cigarettes imported into Thailand violates multiple substantive CVA requirements arising under Article 1.1, Article 1.2(a) second sentence, Article 6, and/or Article 7. In reaching that finding under these provisions, the Panel concluded that, *inter alia*, both the DSI and the Public Prosecutor disregarded the detailed explanations and expert statements that PMTL provided (and then repeatedly reiterated) as to why the information reported in the CK-21A forms could not be used to determine the customs value of its imported cigarettes.

7.421. To recall, as described in greater detail earlier[720], the record shows that at some point in early 2011, the DSI apparently informed PMTL of its suspicions that PMTL had under-declared customs values on entries in 2001-2003 based on CK-21A excise tax forms obtained from the Government of Indonesia. That led PMTL to provide a detailed response, and also to obtain and submit the two expert statements that have already been referred to. More specifically:

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[718] The Panel notes that Annex III, paragraph 6 of the CVA provides that Members, "subject to their national laws and procedures," have the right to expect the "full cooperation" of importers in enquiries "concerning the truth or accuracy" of statements, documents, and declarations presented to them for customs valuation purposes. If "the right to expect the full cooperation of importers" in such enquiries is "subject to" each Member's "national laws and procedures", and those national laws or procedures reflect the principle that the accused has the right to remain silent in the context of criminal procedures, this could adequately address any incompatibility that might arise from finding that the procedural obligation in Article 1.2(a) third sentence, and/or the corresponding procedural obligation in the Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value, is applicable to criminal procedures.

[719] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.214.

[720] See Section 7.2.3 (The circumstances surrounding the Thai authorities' reliance on the CK-21A forms).

a. On 4 February 2011, PMTL sent a letter to the DSI in which PMTL made a "Request for Fair Treatment and Justice".[721] The letter states that it "understands that the DSI has formed the view that the retail selling prices set out in the so-called Form CK-21A are comparable to PM Thailand's declared customs values and therefore evidence to show that PM Thailand's import prices declared to Thai Customs are incorrect".[722]

b. On 4 May 2012, counsel for PMTL sent two witness statements to the DSI to "support the facts asserted in the said Request for Fair Treatment and Justice".

c. The record before the Panel includes an exchange of letters between PMTL and the DSI regarding the CK-21A forms over a period of years. In these letters, PMTL repeatedly articulates the reasons why the information in the CK-21A forms is not relevant to the determination of PMTL's customs values, and the DSI repeatedly requests that PMTL provide it with copies of all of the CK-21A forms.

d. On 28 October 2016, after the DSI had issued the MoA and before the Public Prosecutor filed the Charges on 26 January 2017, PMTL sent a letter to the Public Prosecutor recalling why the information in the CK-21A forms could not be used to determine a customs value for its imports into Thailand.

7.422. In these circumstances, the Panel considers that the fundamental flaw on the part of the DSI and the Public Prosecutor was not so much a failure to communicate and provide PMTL with an opportunity to respond to the grounds for doubting the acceptability of the declared transaction value, but rather the Thai authorities' repeated disregard of the information provided by PMTL after the DSI communicated the grounds for doubting the transaction value. In the Panel's view, this shortcoming therefore pertains more to the substantive obligation in Article 1.2(a), second sentence, concerning the duty to conduct a proper examination of the circumstances of sale, than it does to the procedural obligation in Article 1.2(a), third sentence.

7.423. The Panel has considered the Philippines' argument that the DSI and Public Prosecutor "did not communicate to the importer how it assessed the importer's information, in particular the two expert reports"; and subsequently did not "clearly indicate to the importer *how* it evaluated the information submitted by the importer, including the sufficiency of the information submitted".[723] Indeed, the evidence shows that the Thai authorities never communicated to PMTL how they assessed the information received from PMTL regarding the CK-21A information, and the Panel also considers that they were under a legal obligation to do so, prior to making a customs valuation determination, insofar as they considered that information insufficient to address their concerns. However, the Panel considers that such an obligation arises in the context of the process of consultation under Article 1.2(a), second sentence. As the original panel stated, in a passage subsequently referred to and relied upon by the Panel in the first recourse to Article 21.5 in the context of its formulation of the legal standard under the second sentence of Article 1.2(a):

> [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.[724]

7.424. In support of its claim under Article 1.2(a), third sentence, the Philippines observes that the DSI did not indicate "whether, and if so how, the DSI had used the CK-21A information to calculate an alternative customs value for the imported goods being valued, given that the form dealt with goods being sold in Indonesia"[725], and further notes that the MoA subsequently issued on

[721] Request for Fair Treatment and Justice, 4 February 2011 (English translation), (Exhibit PHL-279-B).
[722] Request for Fair Treatment and Justice, 4 February 2011 (English translation), (Exhibit PHL-279-B), p. 1.
[723] Philippines' response to Panel question No. 151, paras. 230-234.
[724] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.164 (referred to in Panel Report, *Thailand – Cigarettes (Philippines) (Art. 21.5 – Philippines)*, at para. 7.106).
[725] Philippines' response to Panel question No. 151, para. 220.

22 September 2016 did not state any grounds in respect of the allegations.[726] Here again the Panel is sympathetic to the Philippines' due process concerns, but considers that this alleged shortcoming would be more germane to an assessment of a claim under Article 16 of the CVA. This provision, which was discussed at some length in both the first recourse to Article 21.5[727] as well as in the original proceeding[728], establishes the obligation to provide, upon request, an explanation "as to how the customs value of the importer's goods was determined" once the relevant authorities have made a customs valuation determination. The Philippines has asserted that PMTL directed such requests to both the DSI and the Public Prosecutor, and received no satisfactory response from the DSI and no response at all from the Public Prosecutor.[729] However, the Philippines has not pursued a claim under Article 16 with respect to the 2002-2003 Charges.[730]

7.425. The Panel has also considered the Philippines' argument that "[t]he DSI investigation did not meet the standard in Article 1.2(a) (third sentence)" because "the DSI's intimation of [its] early doubts came too early in the investigation to constitute the DSI's grounds under Article 1.2(a)"; and provided "only limited information".[731] As a general consideration, the Panel considers that it is reasonable to expect that the nature of the information and the "grounds" communicated in the context of a criminal investigation may be different from the nature of the information and the "grounds" communicated in the context of a typical customs valuation within the institutional framework of a "customs administration" in the narrow sense of the term. In this regard, the Panel recalls the original panel's view that it is 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."[732] As to the information coming "too early" in the investigation, the Panel recalls that the record before it includes an exchange of letters between PMTL and the DSI regarding the CK-21A forms spanning a period of years. As to the DSI communicating only "limited information", the Panel considers that regardless of whether the information that the DSI communicated to PMTL regarding the CK-21A forms was limited, the record establishes that it was sufficient to put PMTL in a position to provide the detailed response that it did, including the two expert statements that have already been referred to. Thus, the purpose of Article 1.2(a), third sentence, which is to "ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price"[733], appears to have been achieved.

7.426. In this connection, the circumstances of this case are materially distinguishable in several respects from the circumstances that led the Panel to find a violation of Article 1.2(a), third sentence, in respect of the November 2012 BoA Ruling in the first recourse to Article 21.5. In respect of the BoA, the Panel observed that Thailand had "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)"[734]; in this case, however, there is evidence on the record of the repeated exchanges between the DSI and PMTL specifically concerning the CK-21A forms. In respect of the BoA in the first recourse to Article 21.5, the Panel agreed with the Philippines that insofar as letters between the BoA and PMTL showed that PMTL was aware that the BoA's customs valuation determination involved consideration of PMTL's P&GE rate, they would not have made PMTL aware that the BoA was undertaking an examination of the circumstances of sale based on a comparison of PMTL's P&GE rate with the P&GE rates of comparable companies[735]; in this case,

[726] Philippines' response to Panel question No. 151, paras. 221-222.
[727] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.407-7.434.
[728] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.224-7.266.
[729] See paragraph 7.187.
[730] The Philippines has pursued a claim under Article 16 in respect of the 1,052 revised NoAs.
[731] Philippines' response to Panel question No. 151, paras. 209, 230 and 232.
[732] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.214.
[733] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.171.
[734] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.275.
[735] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.276, where the Panel explained that "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. 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."

however, the communications show that PMTL was aware and stated that it understood, as far back as February 2011, that "the DSI has formed the view that the retail selling prices set out in the so-called Form CK-21A are comparable to PM Thailand's declared customs values and therefore evidence to show that PM Thailand's import prices declared to Thai Customs are incorrect".[736] In respect of the BoA, the Panel found that, taking into account the evidence before it, the BoA did not communicate its grounds "sufficiently for PMTL to meaningfully respond"[737]; in this case, however, the record shows that PMTL was able to provide a detailed response, and to obtain and submit the two expert statements, on the unsuitability of relying on the CK-21A forms to determine the customs value of its imports.

7.427. The Panel is also not persuaded by the Philippines' further argument that, even if the DSI's investigation complied with Article 1.2(a), third sentence, the Public Prosecutor was necessarily required to communicate these same grounds again prior to issuing the 2002-2003 Charges.[738] Beginning with the text of Article 1.2(a), third sentence, the wording of this provision does not directly speak to the question of whether "each time a distinct customs valuation determination is made, the grounds must be adequately communicated by the customs administration that is responsible for making the determination".[739] While the Panel did not directly rule on this issue in the context of the first recourse to Article 21.5, the Panel considered that, when analysing how the procedural obligation in Article 1.2(a), third sentence, would apply to a series of two or more successive customs valuation determinations by different entities, it would be pertinent to consider whether the later determination(s) were based on issues, evidence or grounds that were distinct from those already communicated to the importer in the context of the earlier determination.[740] The Panel's analysis appears to be consistent with the approach taken by prior panels in determining whether Article 6.9 of the Anti-Dumping Agreement requires an authority to disclose the "essential facts" again prior to making the final determination if it did so prior to making the preliminary determination.[741]

7.428. The Panel is not suggesting that either the DSI or the Public Prosecutor considered themselves to be subject to the obligation in Article 1.2(a), third sentence, or that they sought to communicate their concerns regarding the CK-21A forms to PMTL with a view to providing it with an opportunity to respond in the spirit of Article 1.2(a), third sentence. The Panel has already found, based on the evidence on record, that the DSI and the Public Prosecutor disregarded PMTL's

[736] Request for Fair Treatment and Justice, 4 February 2011 (English translation), (Exhibit PHL-279-B), p.1.

[737] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.278.

[738] Philippines' response to Panel question No. 152, para. 241.

[739] Philippines' response to Panel question No. 152, para. 241.

[740] In the first recourse to Article 21.5, Thailand accepted that the procedural obligation in Article 1.2(a), third sentence, applied in the context of the initial customs valuation determination made by the Customs Department, but argued that it did not apply in the context of an appeal of that determination before the BoA. In the context of addressing that issue, the Panel reasoned that "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". In addition, when explaining the risk of circumvention that would exist if appellate tribunals such as the BoA were not subject to this procedural obligation, the Panel contemplated a scenario in which 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). The Panel expressed the view that, in these circumstances, i.e. in which the issues, evidence and grounds involved in successive determinations were different, then finding Article 1.2(a), third sentence, to be inapplicable to the later-in-time determination would undermine the purpose of this obligation, which is to "ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price". (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.264-7.265.)

[741] Article 6.9 of the Anti-Dumping Agreement provides that "The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests." It is thus similar to the obligation in Article 1.2(a), third sentence, both in terms of what it requires and the general due process objective that it serves. In *Guatemala – Cement II*, the panel found that "disclosure of the 'essential facts' forming the basis of a preliminary determination is clearly inadequate *in circumstances where the factual basis of the provisional measure is significantly different from* the factual basis of the definitive measure". (Panel Report, *Guatemala – Cement II*, para. 8.228 (emphasis added))

explanations regarding the CK-21A forms. The DSI's motivation in repeatedly seeking copies of CK-21A forms from PMTL appears to have just been simply the desire to obtain copies of those documents, not PMTL's explanations of the unreliability of the information therein. Notwithstanding, and whatever the DSI's motivations were in requesting that PMTL provide it with copies of the CK-21A forms, those requests served to communicate the DSI's grounds for doubting the acceptability of the declared transaction values, and gave PMTL an opportunity to respond.

7.429. Based on the foregoing, having found that Thai authorities were under an obligation to communicate to and provide PMTL with an opportunity to respond to the grounds for doubting the acceptability of the declared transaction value prior to issuing the 2002-2003 Charges, the Panel's assessment of the evidence on the record leads it to conclude that the DSI sufficiently discharged that obligation.

7.3.6.4 Conclusion

7.430. The Panel finds that the Public Prosecutor did not violate the procedural obligation in Article 1.2(a), third sentence, because prior to the issuance of the 2002-2003 Charges the DSI had already sufficiently communicated its grounds for considering that the relationship between PMTL and PM Indonesia influenced the price, and PMTL responded.

7.3.7 Article XX of the GATT 1994

7.3.7.1 Introduction

7.431. In the first recourse to Article 21.5, Thailand argued that, insofar as the 2003-2006 Charges were inconsistent with the provisions of the CVA, they were justified under Article XX(d) of the GATT 1994 as measures "necessary to secure compliance with laws or regulations" and also under Article XX(a) as measures "necessary to protect public morals".[742] The Panel found 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 could not be justified under Articles XX(a) or (d) of the GATT 1994.[743]

7.432. In this second recourse to Article 21.5, Thailand similarly argues that the 2002-2003 Charges are justified under Articles XX(a) and XX(d) of the GATT 1994.[744] Thailand reiterates its arguments on why Article XX of the GATT 1994 applies to violations of the CVA[745]; maintains that any inconsistency with the CVA arising from the 2002-2003 Charges is "necessary to secure compliance with laws or regulations" under Article XX(d)[746], and is also "necessary to protect public morals" within the meaning of Article XX(a)[747]; and also argues, as it did in respect of the 2003-2006 Charges, that the 2002-2003 Charges are applied consistently with the requirements of the chapeau of Article XX.[748]

7.433. The Philippines submits that the Charges are not justified under Article XX of the GATT 1994.[749] The Philippines observes that Thailand's attempt "to re-litigate this issue" before the Panel may relate to Thailand's appeal in the first recourse to Article 21.5.[750] Recalling that the Panel addressed the merits of Thailand's defence under Article XX(d) and XX(a) of the GATT 1994 in the first recourse to Article 21.5 only in "a limited manner", the Philippines encourages the Panel "to

[742] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.732.
[743] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.761.
[744] Thailand's first written submission, paras. 3.117-3.173; second written submission, paras. 3.88-3.113; oral statement, paras. 3.31-3.38. In response to a question from the Panel, Thailand clarified that its defence under Articles XX(d) and XX(a) of the GATT 1994 applies only to the 2002-2003 Charges. (Thailand's response to Panel question No. 163(c), para. 2.13.)
[745] Thailand's first written submission, paras. 3123-3.139.
[746] Thailand's first written submission, paras. 3.140-3.152.
[747] Thailand's first written submission, paras. 3.153-3.164.
[748] Thailand's first written submission, paras. 3.165-3.173.
[749] Philippines' second written submission, paras. 351-413.
[750] Philippines' second written submission, para. 352.

address these issues in these second compliance proceedings more fully, in order to assist the Appellate Body further in understanding the issues, in the event of an appeal".[751]

7.3.7.2 Main arguments of the parties

7.434. As a threshold issue, Thailand disagrees with the finding by the Panel in the first recourse to Article 21.5 that Article XX of the GATT 1994 is not available to justify inconsistencies with the CVA.[752] Thailand indicates that it respectfully disagrees with the Panel's analysis, and requests this Panel "to consider this issue carefully and to reach a different conclusion".[753] Thailand reiterates its arguments that there is a sufficient textual basis for finding that Article XX applies to the CVA, based on the title of, and preamble to, the CVA and the reference to customs enforcement in Article XX(d); Thailand also reiterates its arguments that it would be absurd if Article XX was available to justify an inconsistency with Article VII of the GATT but not the CVA, and that the CVA must reflect a balance between a Member's obligations and its right to prosecute customs fraud.[754]

7.435. Thailand argues, as it did in the first recourse to Article 21.5, that the Charges are provisionally justified under Article XX(d) because they are "necessary to secure compliance" with Section 27 of the Customs Act.[755] Thailand also reiterates its argument that the Charges are designed to protect "public morals" within the meaning of Article XX(a) because they "fight smuggling and contraband by prosecuting customs fraud", which as Thailand noted in the first recourse to Article 21.5 "represents a real concern for Thailand".[756] With respect to the "necessity" of any inconsistencies with the CVA relating to the Charges, Thailand submits, in relation to both Article XX(d) and XX(a), that "in order to fulfil the important objective of combatting customs fraud, the Public Prosecutor had to follow rules that differ from customs valuation rules" regarding issues like cooperation with the importer and the sequential application of customs valuation methods. Thailand further submits that the Charges are not trade-restrictive.[757]

7.436. Thailand argues that the Charges satisfy the requirements of the chapeau of Article XX of the GATT 1994.[758] Thailand submits that "just like with respect to the 03-06 Charges at issue in the first compliance proceedings, there is no indication that the 02-03 Charges are applied in an arbitrary or unjustifiable discriminatory manner, or as a disguised restriction on international trade".[759]

7.437. The Philippines maintains that Article XX of the GATT 1994 does not apply to justify violations of the CVA.[760] The Philippines submits that there is no sufficient textual basis to make Article XX applicable to the CVA.[761] The Philippines submits that Thailand's reiteration of other arguments already rejected by the Panel in the first recourse to Article 21.5 is also unavailing, including Thailand's argument that the inapplicability of Article XX to the CVA would lead to an absurd result as a consequence of the applicability of Article XX to Article VII of the GATT 1994, and Thailand's argument that Article XX must apply to the *CVA* since this is the only way to establish a "balance" between a Members' obligations and a Members' right to regulate.[762]

7.438. Regarding Article XX(d), the Philippines submits, as it did in the first recourse to Article 21.5, that the 2002-2003 Charges are not "designed" or "necessary" to secure compliance with Section 27.[763] The Philippines again emphasizes that, in seeking justification under Article XX, Thailand must demonstrate why the specific aspect of the measure that is WTO-inconsistent is necessary to secure compliance.[764] The Philippines reiterates that Section 27 seeks to enforce Section 10bis of the Customs Act, which requires, according to the Philippines, that "the correct

[751] Philippines' second written submission, para. 353.
[752] Thailand's first written submission, paras. 3.123-3.139.
[753] Thailand's first written submission, para. 3.121.
[754] Thailand's first written submission, para. 3.123-3.139.
[755] Thailand's first written submission, paras. 3.140-3.152.
[756] Thailand's first written submission, para. 3.160.
[757] Thailand's first written submission, paras. 3.149-3.151, and 3.162-3.163.
[758] Thailand's first written submission, paras. 3.165-3.173.
[759] Thailand's first written submission, para. 3.168.
[760] Philippines' second written submission, paras. 354-366.
[761] Philippines' second written submission, paras. 357-359.
[762] Philippines' second written submission, paras. 360-366.
[763] Philippines' second written submission, paras. 376-392.
[764] Philippines' second written submission, paras. 374 and 398.

amount of the duties owed [be] calculated on the basis of an assessment of the 'price' – that is, the *customs value* - of the goods".[765] The Philippines insists that "[e]nforcement of the correct amount of custom duties owed depends on establishing a correct … customs value"[766], 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."[767] On the same basis, the Philippines submits that "[t]he *WTO-inconsistent customs valuation* in the 02-03 Charges is … *incapable* of securing compliance with Section 27"[768], and "there is simply *no relationship* between, on the one hand, the *WTO-inconsistent customs valuation* in the 02-03 Charges and Thailand's fight against smuggling and contraband, on the other".[769] As in the first recourse to Article 21.5, 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).[770]

7.439. Finally, the Philippines submits, as it did in the first recourse to Article 21.5, that the 2002-2003 Charges constitute a "disguised restriction" on trade, and therefore fail to meet the requirements of the chapeau of Article XX.[771] The Philippines reiterates 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 [PMTL] , and hence the Philippines' exports of cigarettes to Thailand".[772] The Philippines recalls that Thailand's Ministry of Finance owns TTM, which enjoys a monopoly over the production of cigarettes in Thailand, and "[has] complain[ed] to the Thai authorities regarding the erosion of its competitive position by imports".[773] The Philippines suggests that "[a]n objective survey of the repeated actions impugned in the DS371 proceedings, as well as the broader context of this dispute, leads inexorably to the view that Thailand has engaged in a consistent pattern of disguised restrictions on trade, ever since the Thai market was opened to import competition in 1991."[774]

7.3.7.3 Analysis by the Panel

7.440. 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 Articles XX(d) or XX(a). The Panel addresses these issues in turn.[775]

7.3.7.3.1 Applicability of Article XX of the GATT 1994 to the CVA

7.441. The Panel recalls that 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:
>
> (*a*) necessary to protect public morals;

[765] Philippines' second written submission, para. 376. (emphasis original)
[766] Philippines' second written submission, para. 379.
[767] Philippines' second written submission, para. 389.
[768] Philippines' second written submission, para. 379.
[769] Philippines' second written submission, para. 401.
[770] Philippines' second written submission, paras. 401 and 403.
[771] Philippines' second written submission, paras. 405-413.
[772] Philippines' second written submission, paras. 409 and 412.
[773] Philippines' second written submission, para. 409.
[774] Philippines' second written submission, para. 410.
[775] As noted in the Report in the first recourse to Article 21.5, this order of analysis is the one that the Appellate Body has instructed panels to follow. Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, footnote 1597 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 214).

…

> (*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

7.442. In the first recourse to Article 21.5, the Panel concluded that the general exceptions in Article XX of the GATT 1994 do not apply to the obligations in the CVA.[776] The Panel began its analysis of this issue by recalling that 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".[777] The Panel proceeded to sequentially consider Thailand's arguments regarding the title of the CVA[778]; the preamble of the CVA[779]; the reference to "customs enforcement" in Article XX(d)[780]; the alleged absurdity that would result from Article XX being applicable to violations of Article VII of the GATT but not to violations of the CVA[781]; and the need to strike a balance between the obligations assumed under the CVA and the right to take measures to combat customs fraud.[782] For the reasons set forth in its Report in the first recourse to Article 21.5, the Panel was not persuaded that Thailand's arguments provided any basis to find that Article XX of the GATT 1994 is applicable to the CVA.

7.443. In this second recourse to Article 21.5, Thailand requests that the Panel re-examine the same issue, and reverse its finding that Article XX is not applicable to the CVA. In line with the approach explained earlier[783], the Panel will confine the scope of such re-examination to any novel arguments presented in the context of this second recourse to Article 21.5.

7.444. The Panel's assessment is that Thailand's submissions on the applicability of Article XX of the GATT 1994 to the CVA mostly express its disagreement with the reasoning of the Panel in the first recourse to Article 21.5, without presenting any novel arguments. First, Thailand reiterates its argument that "there may be no direct reference in the CVA, but, as Thailand has explained, the CVA is 'closely intertwined' with the GATT 1994 because it elaborates rules for the application of the provisions of Article VII" as reflected in the preamble.[784] Second, Thailand reiterates its arguments regarding the significance of the title of the CVA and elaborates on why Thailand "respectfully disagrees that its arguments before the first compliance panel were unduly formalistic or placed undue weight on the reference to Article VII in the title of the CVA" and that it may "just as readily be argued that it is overly formalistic" to reason as the Panel did.[785] Third, Thailand recalls that it "also argued that, because of the nature of the relationship between the CVA and Article VII of the GATT 1994, it could lead to absurd situations if a Member could justify a violation of Article VII by invoking the exceptions in Article XX, but it could not do so with respect to its obligations under the CVA, notwithstanding that the CVA implements the obligations in Article VII"; in this regard, Thailand explains why it does not find persuasive force in the Panel's observation that the CVA contains rules that are different from and additional to Article VII, and also recalls the need to read the CVA and Article VII holistically, and the title and preamble of the CVA.[786] Finally, Thailand recalls the Panel's view that there is an inherent balance in the CVA between the Member's obligations and the Member's right to regulate, and that this balance "finds reflection primarily through the relatively limited scope of the substantive and procedural obligations contained in the CVA"[787], and then

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[776] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.742-7.757.
[777] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.744 (referring to Appellate Body Reports, *China – Rare Earths*, paras. 5.61-5.63).
[778] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.748.
[779] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.749.
[780] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.750.
[781] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.751-7.753.
[782] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.754-7.756.
[783] See Section 7.1.2.2 (Reliance on the Report in the Philippines' first recourse to Article 21.5).
[784] Thailand's first written submission, para. 3.124.
[785] Thailand's first written submission, para. 3.125-3.128.
[786] Thailand's first written submission, paras. 3.129-3.134.
[787] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.756.

Thailand reiterates that if the CVA applies to customs fraud "the necessary policy space to conduct criminal investigations and prosecutions can be situated only in the exceptions in Article XX".[788]

7.445. In the absence of any novel arguments that would warrant a further re-examination of this issue, the Panel agrees with the European Union's view that "the First Compliance Panel has already addressed sufficiently the arguments under Article XX of the GATT 1994, which it rightly considered inapplicable to claims under the CVA".[789] The Panel will confine its discussion to offering the following two observations on how the parties' arguments on a range of issues outside of the context of Article XX of the GATT 1994 in this case reinforce the legal findings and reasoning on the non-applicability of Article XX to the CVA already developed in the Panel's Report in the first recourse to Article 21.5.

7.446. First, the Panel considers that the parties' arguments in this case highlight the far-reaching consequences of finding that CVA obligations are subject to the general exceptions in Article XX of the GATT 1994. Some of the arguments that Thailand has advanced in support of its position on the applicability of Article XX of the GATT 1994 to the CVA are inextricably linked to the narrow subset of measures comprising criminal measures taken to prosecute allegations of customs fraud[790], and Thailand invokes a defence under Article XX of the GATT 1994 only insofar the Panel finds that the 2002-2003 Charges (as opposed to the 1,052 revised NoAs) are inconsistent with the substantive or procedural obligations of the CVA. However, as a matter of legal principle, if the obligations in the CVA are subject to the general exceptions in Article XX of the GATT, then it would follow that any measure that violates any CVA obligation – and not merely a limited subset of penal measures related to customs fraud – could in principle be justified under Article XX of the GATT 1994.[791] Therefore, if the Panel was to accept Thailand's argument that Article XX exceptions must apply to the CVA in order to allow Members "policy space"[792] to deviate from CVA rules when conducting criminal investigations into customs fraud, it would see no *a priori* basis upon which to deny Members similar policy space to deviate from CVA rules in a range of other situations, unrelated to penal measures related to customs fraud, in which they encounter other kinds of difficulties in applying the rules set forth in Articles 1 through 7 of the CVA.[793]

7.447. This is not to suggest that there is no reasonable flexibility under the CVA, and it brings the Panel to the second observation as to how the parties' arguments outside of the context of Article XX of the GATT 1994 in this case reinforce the legal findings and reasoning on the non-applicability of Article XX to the CVA already developed in the Panel's Report in the first recourse to Article 21.5. Article 7 of the CVA was not at issue in the first recourse to Article 21.5, and that is one reason why the Panel did not specifically discuss it when discussing the "inherent balance" in the CVA.[794] However, the Panel's earlier discussion of this provision in the context of addressing the parties' arguments relating to Article 7 is germane to the question of whether the general exceptions in

[788] Thailand's first written submission, paras. 3.137.

[789] European Union's third-party submission, para. 21. The Panel notes that none of the third parties have identified any novel argument, circumstance or legal development that would suggest a different conclusion regarding the applicability of Article XX of the GATT 1994 to the CVA. Japan states that it agrees with the conclusion of the first compliance panel that Article XX of the GATT 1994 is not available to justify measures that are found to be inconsistent with the CVA, and then reiterates the same arguments that it presented on this point in the first recourse to Article 21.5. (Japan's third-party submission, paras. 3-8.)

[790] These arguments include, most notably, Thailand's argument that Article XX of the GATT 1994 must be available to justify the CVA-inconsistent measures relating to customs enforcement because the text of Article XX(d) expressly refers to "customs enforcement", and Thailand's argument regarding the need to strike a balance between the obligations assumed under the CVA and the right to take measures to combat customs fraud.

[791] In this regard, the Panel fully agrees with Thailand when it says that "the question of the applicability of Article XX to the CVA cannot be resolved by examining a specific measure in a specific dispute. It should be considered in the abstract, and not in relation to the particular measure at issue before a panel." (Thailand's first written submission, para. 3.138.)

[792] See e.g. Thailand's first written submission, paras. 3.130, 3.135, 3.136, 3.137, and 3.173.

[793] For example, in the first recourse to Article 21.5, the Panel addressed Thailand's argument that the BoA encountered significant difficulties in identifying an appropriate comparison group within the Thai cigarette market. (see Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.153-7.156 and 6.14-6.15.) In this proceeding, Thailand submits that, in its view, the Report in the first recourse to Article 21.5 "makes clear that it is virtually impossible to identify an appropriate amount for profit and general expenses in the Thai market other than PMTL's own ratio". (Thailand's first written submission, para. 3.102.)

[794] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.756.

Article XX of the GATT 1994 apply to the CVA. Article 7 envisages that there may be circumstances in which the value of imported goods cannot be determined under the provisions of Articles 1 through 6, and already provides for the possibility that, in such circumstances, those methods may be applied with "a reasonable flexibility".[795] The existence of Article 7 and the reasonable flexibility that it provides for further underscore the inherent balance in the CVA.

7.448. In addition, the balance reflected in the specific provisions of Article 7.1 and 7.2 is another indication that the drafters would not have intended for another layer of general exceptions in Article XX of the GATT 1994 to apply. The Panel recalls that Articles 1 through 7 of the CVA establish a comprehensive system for customs valuation, comprising a series of multiple different steps and methods subject to detailed rules governing their sequential application.[796] Article 7.1 mandates that the customs value must be determined using "reasonable means consistent with the general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation", but Article 7.2 then categorically prohibits any of the seven enumerated bases set forth in Article 7.2(a) through (g). Given the logic and structure of these rules, and the flexibility already provided for in Article 7.1, interpolating the general exceptions in Article XX of the GATT 1994 into the CVA would create additional policy space for Members to use one or more of the valuation bases that go beyond the "reasonable flexibility" already provided for in Article 7.1, and/or which are categorically prohibited by the text of Article 7.2(a) through (g). In the Panel's view, consideration of the specific terms of Article 7 of the CVA suggests that subjecting the comprehensive system for customs valuation established in the CVA to the general exceptions in Article XX of the GATT 1994 would diminish Members' obligations contrary to Articles 3.2 and 19.2 of the DSU.

7.449. The Panel concludes that the general exceptions in Article XX of the GATT 1994 are not applicable to the obligations in the CVA. The Panel hereby incorporates by reference the reasoning in Section 7.3.7.3.1 (Applicability of Article XX of the GATT 1994 to the CVA) of the Panel Report in the first recourse to Article 21.5.

7.3.7.3.2 Justification under Article XX(a) or XX(d)

7.450. Having found that the general exceptions in Article XX of the GATT 1994 are not applicable to the obligations in the CVA, the Panel in the first recourse to Article 21.5 observed that it was therefore unnecessary to examine whether the Charges are justified under Article XX(d) or XX(a) of the GATT 1994.[797] The Panel observed that in analogous circumstances, some other panels had nonetheless proceeded to make additional findings under Article XX to assist the Appellate Body in the event that the finding on the non-applicability of Article XX was reversed on appeal.[798] However, the Panel stated that Thailand's defences under Article XX(d) and XX(a) of the GATT 1994 essentially reiterated its earlier argument that the Charges do not involve any customs valuation determination in the first place, and rested on the same factual premises that the Panel had already addressed in the context of addressing Thailand's arguments regarding the applicability of the CVA to the Charges.[799] Therefore, in the circumstances of the first recourse to Article 21.5, the Panel saw no reason to proceed with any further assessment of the merits of Thailand's defences under Article XX of the GATT 1994.[800]

7.451. In their requests for review of the Interim Report in the first recourse to Article 21.5, both parties requested that the Panel reconsider its approach and make additional findings under Article XX of the GATT 1994. For its part, Thailand disagreed with the Panel's characterization that Thailand's defences under Article XX(d) and XX(a) "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", and Thailand requested the Panel to also address what Thailand referred to as "the specific facts and arguments" put forward by Thailand in relation to its defences under Article XX.[801] The Philippines requested that the Panel supplement the

[795] See paragraph 2 of the Interpretative Note to Article 7; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.285.
[796] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.752.
[797] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.758.
[798] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.758.
[799] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.759.
[800] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.760.
[801] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.45.

observations contained in paragraph 7.759 of the Report by explicitly stating the necessary consequence of its findings in paragraph 7.759 of the Report, which in the Philippines' view 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 requested the Panel to confirm that a WTO-inconsistent customs valuation could never, by definition, be "necessary" for the proper enforcement of Thailand's customs laws.[802]

7.452. The Panel was not persuaded that there was any need to revise its characterization of Thailand's argumentation under Article XX, to make the statements requested by the Philippines, or to make any other findings on the merits of Thailand's defences under Article XX. In addressing these requests for review in relation to the Interim Report in the first recourse to Article 21.5, the Panel stated:

> 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) 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.[803]

7.453. As in the first recourse to Article 21.5, the question is whether the Panel should proceed to make additional findings on the merits of Thailand's defences under Article XX of the GATT 1994. In this second recourse to Article 21.5, the Philippines encourages the Panel "to address these issues … more fully, in order to assist the Appellate Body further in understanding the issues, in the event of an appeal".[804] However, the Philippines does not identify any distinguishing circumstances that would warrant this Panel adopting a different approach from that used in the first recourse to Article 21.5 and making *arguendo* findings on the merits of Thailand's defences under Article XX(d) and XX(a).

7.454. The Panel sees no distinguishing circumstances. Thailand's defences under Article XX(d) and XX(a) of the GATT 1994 in this second recourse to Article 21.5, concerning the 2002-2003 Charges, reiterate essentially the same arguments that the Panel has already addressed in the context of addressing whether the Charges contained insufficient information and the applicability of the CVA, and in the context of addressing the CVA-consistency of the Charges. Specifically, Thailand reiterates its argument that the Charges are a mere allegation of customs fraud and not a final determination[805], an argument that the Panel has already addressed in the context of examining Thailand's argument concerning the "insufficient information" contained in the Charges. Thailand reiterates its argument that "it was reasonable to suspect", and the Public Prosecutor "had reasonable grounds to assume", that PMTL had engaged in customs fraud on the basis of the cost

[802] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.45.
[803] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 6.45.
[804] Philippines' second written submission, para. 353.
[805] In the context of arguing that the 2002-2003 Charges are "necessary" under Article XX(d) and XX(a), Thailand also provides a reformulation of its earlier "ripeness" argument, stating that the 2002-2003 Charges filed by the Public Prosecutor "are a mere allegation of customs fraud", that "the Public Prosecutor's duty under Thai law is to present a file to the Court that provides it with sufficient support to commence a trial", and that it is "not its duty to make the final determination of whether the accused actually engaged in customs fraud or not". (Thailand's first written submission, para. 3.150.)

information reported in form CK-21A[806], an argument that the Panel has already thoroughly addressed in the context of assessing the CVA-consistency of the Thai authorities' reliance on the cost information reported in the CK-21A forms. Thailand reiterates its argument that the procedural obligations in Article 1.2(a), third sentence, of the CVA cannot be applied in the context of criminal investigations[807], an argument that it is not necessary to consider in the context of Article XX because the Panel has found that the DSI discharged any obligation arising under that provision in respect of the 2002-2003 Charges. In sum, the Panel considers that it need not make any additional factual findings to enable the Appellate Body to complete the analysis under Article XX(d) and (a) of the GATT 1994, because its earlier findings, set out in the previous Sections of this Report, are sufficient for those purposes.

7.455. The Panel therefore concludes that the disputed issues under Article XX do not raise the kinds of factual issues on which further findings by the Panel would be a necessary precondition for the Appellate Body to complete the analysis under Article XX in the event that it reverses the Panel's finding on the non-applicability of Article XX to the CVA. Accordingly, in the circumstances of this case, the Panel sees no practical reason to further assess the merits of Thailand's defences under Article XX of the GATT 1994.[808]

7.3.7.4 Conclusion

7.456. For these reasons, the Panel finds, as it did in the first recourse to Article 21.5, that the general exceptions in Article XX of the GATT 1994 are not applicable to the obligations in the CVA, and therefore that the aspects of the 2002-2003 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.

7.4 The 1,052 revised Notices of Assessment (NoAs)

7.4.1 Introduction

7.457. In addition to its claims regarding the 2002-2003 Charges, the Philippines challenges the CVA-consistency of 1,052 revised Notices of Assessment (NoAs) that PMTL received in November 2017 from Thailand's Customs Department. As with the Charges, the NoAs rejected PMTL's declared transaction values, and determined revised customs values based on the cost and profit information reported by PM Indonesia to the Indonesian tax authorities in the CK-21A form. The NoAs cover 1,052 entries of cigarettes imported over the period 2001-2003, including 779 of the 780 entries covered by the 2002-2003 Charges. For those overlapping entries, the "actual price" reflected in the NoAs is identical to the "actual price" reflected in the Charges. The NoAs demanded that the importer, PMTL, pay additional taxes and duties, a penalty and a surcharge in relation to each of the entries covered.[809] The total of these amounts, in respect of all entries, was THB 25,480,317,518 (approximately USD 800 million).[810]

7.458. The Philippines brings almost identical legal claims under the CVA in respect of both the NoAs and the Charges, and its argumentation in support of those claims is also virtually identical.

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[806] Thailand's first written submission, para. 3.150.

[807] Thailand's defences under Article XX(d) and XX(a) reiterate the argument that because "the CVA requires that the process of customs valuation should be carried out with the cooperation of the importer when the importer is affiliated to the exporter", this rule "cannot be applied in criminal investigations, because in criminal investigations the accused has the right to remain silent, which is the opposite of cooperating with the authority". (Thailand's first written submission, para. 3.149.)

[808] At footnote 1624 of its Report, the Panel referred to *China – Raw Materials*, *China – Rare Earths*, and *India – Solar Cells* as examples of panels making additional factual findings under Article XX principally for the purpose of assisting the Appellate Body in the event of a reversal of their interpretation of Article XX on appeal. After the issuance of the Report in the first recourse to Article 21.5, the panel in *EU – Energy Package* followed a similar approach. In that case, the panel concluded that the European Union had not demonstrated that natural gas is a product "in short supply" in the European Union, within the meaning of Article XX(j) of the GATT 1994. However, the panel considered that in the circumstances of that case, it was appropriate "to follow the approach of certain previous panels in conducting a limited analysis and review so that the Appellate Body may have the benefit of our factual findings" related to certain other elements of the legal standard in Article XX(j). (Panel Report, *EU – Energy Package*, para. 7.1354.)

[809] See sample Notices of Assessment, (English translation), (Exhibit PHL-240-B).

[810] Philippines' first written submission, para. 80.

The only notable difference is that the Philippines brings an additional claim in relation to the NoAs, relating to the obligation in Article 16 of the CVA, that it does not pursue in respect of the 2002-2003 Charges. Thailand states that its arguments in respect of the CVA-consistency of the 2002-2003 Charges apply *mutatis mutandis* to the Philippines' corresponding claims regarding the NoAs. In respect of the one additional procedural claim, Thailand submits that the Philippines has failed to demonstrate that Thailand has acted inconsistently with Article 16 because, following the request by PMTL, the Thai Customs Department sufficiently explained the grounds for issuing the NoAs.

7.459. As a threshold matter, Thailand requests the Panel to decline to rule on the NoAs because they were withdrawn before the Panel was established. In support of its request, Thailand submits that the NoAs have ceased to have legal effects as of the dates of their withdrawal and that there is no risk of them being reintroduced, and in any event ruling on the NoAs would not provide a positive solution to the dispute.[811] In response to Thailand's request, the Philippines highlights some "uncertainties" arising from certain letters sent by the Thai Customs Department to PMTL to communicate the "withdrawal" or "termination" of the 1,052 revised NoAs.[812] The Philippines underscores that the Panel must conduct its own objective assessment of the argumentation and evidence before it, and may not merely rely on Thailand's representations regarding the alleged withdrawal of the measures and the alleged impossibility of their reintroduction.[813] While the Philippines initially invited the Panel not to rule on the NoAs subject to, and on the basis of, the Panel finding that Thailand has withdrawn the NoAs and that they will not be reintroduced[814], it subsequently requests the Panel to reject Thailand's request with respect to at least a subset of the 1,052 revised NoAs.[815]

7.4.2 Main arguments of the parties

7.460. Thailand submits that "panels have a margin of discretion in deciding whether to make findings with respect to expired measures" and indicates that "on several occasions panels have used this authority to decide not to rule on a measure that was withdrawn before the establishment of the panel".[816] First, Thailand argues that ruling on the NoAs would do nothing to secure a positive solution to the dispute. Since PMTL requested the revocation of the NoAs and obtained that outcome prior to the establishment of the Panel, "[PMTL]/the Philippines cannot credibly argue that further action by the Panel is required to achieve a positive solution to this aspect of the dispute".[817] Moreover, a ruling on the NoAs would not impose any implementation obligation on Thailand and could not be the basis for any claim of nullification or impairment by the Philippines. Thailand also adds that "to the extent that the legal and factual arguments put forward by the Philippines regarding the NoAs mirror very closely those regarding the 02-03 Charges, a decision not to rule on the NoAs would not materially limit the Philippine's case".[818]

7.461. Second, Thailand claims that there is no "clear evidence" that the NoAs will or even could be reintroduced.[819] According to Thailand, because of the statute of limitations of 10 years under Section 21 of the Customs Act, the 1,052 revised NoAs should not have been issued in the first place and cannot be reintroduced. Furthermore, 796 of those NoAs should not have been issued because they had already been the subject of final decisions by the BoA. Therefore, there is no legal basis under Thai law by which Thailand could reintroduce the withdrawn measure.[820] Moreover, "the Panel should assume that WTO members will perform their WTO obligations in good faith consistently with Article 3.10 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties".[821]

7.462. Lastly, Thailand argues that given that the NoAs have been withdrawn and have no further legal consequences, there are no "lingering effects". In Thailand's view while panels have also looked

[811] Thailand's first written submission, paras. 2.1-2.53; Thailand's second written submission, paras. 2.1-2.43.
[812] Philippines' second written submission, paras. 14-42.
[813] Philippines' response to Panel question No. 129.
[814] Philippines' second written submission, paras. 35 and 42.
[815] Philippines' opening statement at the meeting of the Panel, para. 13.
[816] Thailand's first written submission, para. 2.17.
[817] Thailand's first written submission, para. 2.33.
[818] Thailand's first written submission, para. 2.33.
[819] Thailand's first written submission, para. 2.34.
[820] Thailand's first written submission, para. 2.34.
[821] Thailand's first written submission, para. 2.35.

at whether the expired measure at issue had any "lingering effects", they have done so only in a limited number of cases.[822] Thailand explains that lingering effects were considered relevant for the particular context of subsidies, where the effects of a subsidy may continue to be felt in the market after the subsidy has been disbursed or a subsidy programme had expired or been withdrawn[823]; it notes that outside the particular context of subsidies, however, the possible continued effects of a measure that was terminated or expired prior to the establishment of the panel have not been accorded much significance in determining whether or not to rule.[824]

7.463. In response to Thailand's request, the Philippines highlights some "uncertainties" arising from certain letters sent by the Thai Customs Department to PMTL to communicate the "withdrawal" or "termination" of the 1,052 revised NoAs. The Philippines notes that the Thai Customs Department has divided the 1,052 NoAs in two groups - one covering 796 NoAs and the other the remaining 256 NoAs - and addresses them in the same manner. With respect to 796 NoAs, the Philippines first indicates that the letter of 21 March 2018 "cancelling" said NoAs on the grounds that they had already been the subject of a final decision by the BoA does not identify any specific provision of Thai law in support of that decision and does not appear to have been signed by an official with authority to bind the Customs Department.[825] Furthermore, in its subsequent oral statement made during the substantive meeting, the Philippines adds that the Panel must take into account additional facts relating to 208 of the 796 NoAs. The Philippines recalls that on 7 May 2018, the Supreme Court found that the BoA had improperly valued the 208 entries and, as a result, the Customs department must now take action to implement the Supreme Court's decision.[826] In these circumstances, the Philippines indicates that it wishes to avoid any possibility that Thailand, in implementing the Supreme Court's decision, will reintroduce the customs valuation determinations made in the 208 NoAs and "invites Thailand to make explicit that it will comply with both the Panel's findings on the 208 entries and the Supreme Court ruling".[827]

7.464. Second, as concerns the remaining 256 NoAs, the Philippines initially notes that the letter of 23 March 2018 addressed by the Customs Department to PMTL in respect of these NoAs states that the Customs Department would "not proceed with the civil lawsuit to require [payment of] the taxes and duty shortage from [PMTL]".[828] The Philippines states that, based on this language, "it was unclear whether the 256 NoAs – including the customs valuation determinations they entail – continued to exist, but would not be enforced"[829] or whether they had been "cancelled, terminated or revoked".[830] As a further point of uncertainty, the Philippines further points to the letter dated 13 June 2018 sent by the Permanent Mission of Thailand to the WTO to the Permanent Mission of the Philippines to the WTO, enclosing a statement from the Director-General of the Thai Customs Department dated 18 May 2018 to the effect that the 1,052 revised NoAs had been terminated.[831] In the Philippines' view, the language used in the Director-General's statement, which is that the 256 NoAs were "terminated", is inconsistent with the earlier letter of 23 March, concerning the same NoAs, which stated that the Customs Department would not "proceed with civil action to enforce payment of the 256 NoAs". However, the Philippines subsequently points to the BoA's ruling of 30 August 2018 issued in the importer's appeal regarding all 1,052 revised NoAs which states that the BoA is "revoking" the 256 NoAs. On the basis of this ruling, the Philippines indicates that it now accepts that the 256 NoAs have been definitively revoked but clarifies that their date of revocation is 30 August 2018, which is several months after the Panel's establishment.[832]

7.465. On account of these uncertainties, the Philippines states that it is "unable to withdraw voluntarily its complaint" regarding the NoAs.[833] Despite these uncertainties, the Philippines indicates that "[in] the interests of security and predictability for the importer, [it] invites the Panel to confirm Thailand's representations to this Panel regarding the [1,052 NoAs] and, in that event,

[822] Thailand's first written submission, para. 2.25.
[823] Thailand's first written submission, para. 2.25.
[824] Thailand's first written submission, para. 2.27.
[825] Philippines' second written submission, para. 19.
[826] Philippines' opening statement at the meeting of the Panel, para. 22.
[827] Philippines' opening statement at the meeting of the Panel, paras. 23-28.
[828] Philippines' second written submission, para. 22.
[829] Philippines' second written submission, para. 22.
[830] Philippines' second written submission, para. 23
[831] Philippines' second written submission, para. 26.
[832] Philippines' opening statement at the meeting of the Panel, paras. 9-13.
[833] Philippines' second written submission, paras. 35 and 42.

not to rule on [them] on the basis that: *first*, Thailand has withdrawn them; and, *second*, there is no risk that Thailand will reintroduce [them], or the customs valuation methodology in [them] through subsequent actions to apply or enforce them".[834] However, during the meeting with the Panel, the Philippines subsequently requested, in respect of the 256 NoAs, the Panel to reject Thailand's request to decline to rule on the grounds that they were revoked after the Panel's establishment.[835]

7.4.3 Analysis by the Panel

7.4.3.1 General considerations

7.466. At the outset, the Panel recalls that the issue of expired, withdrawn, terminated, or revoked[836] measures is not explicitly addressed by the DSU or any other WTO agreement. In the absence of any provision in the WTO agreements concerning expired measures, the Panel will turn to the existing WTO case law for guidance. This is not the first time that a panel has been confronted with the situation in which one or more of the measures at issue was allegedly withdrawn or terminated prior to or after the establishment of the panel.

7.467. There is no question, and it is undisputed by the parties, that the Panel has jurisdiction to rule on the 1,052 revised NoAs: they are specifically identified in the request for the establishment of the panel as required by Article 6.2 of the DSU, and for reasons already stated the Panel considers that they have a sufficiently close nexus with the DSB's recommendations and rulings and certain of Thailand's declared measures taken to comply.[837] The Appellate Body has observed that the DSU "nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of the measure at issue".[838] However, the fact that the Panel has jurisdiction to rule on the NoAs does not mean that it is legally required to do so. As Thailand rightly notes, panels enjoy a margin of discretion in deciding whether to make findings with respect to expired measures. As recently reaffirmed by the Appellate Body in *EU – PET (Pakistan)*, "a panel has a margin of discretion in the exercise of its inherent adjudicative powers under Article 11 of the DSU", and that "[w]ithin this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue".[839]

7.468. In deciding whether to make findings on expired, terminated, revoked, or repealed measures, panels have been guided by the general objective of securing a positive solution to the particular dispute. In some circumstances, panels have declined to make any findings on the challenged measure; in other circumstances, panels have made findings but refrained from making any recommendation; and in other circumstances, panels have made both findings and recommendations. Panels have attached importance to several different considerations, including most notably (1) whether the measure at issue was withdrawn prior to, or only after, the establishment of the panel by the DSB; (2) whether there was a risk of reintroduction of the same or materially similar measure; and (3) whether findings on the withdrawn measure would have any practical value for implementation in the light of other findings on materially similar measures. None of these three considerations is decisive in and of itself, and they do not necessarily exhaust the circumstances that panels may take into account when deciding how to exercise their discretion in

[834] Philippines' second written submission, paras. 35 and 42.

[835] Philippines' opening statement at the meeting of the Panel, paras. 13-14.

[836] In the remainder of this section, the Panel uses "withdrawn", "terminated" or "revoked" interchangeably. These terms appear to be used interchangeably in the case law. In the original proceeding, the Panel drew an important distinction between measures that have "expired or ceased to exist" at the time of establishment (such as legislation) and measures that could be described as a "completed and final" act (such as individual customs valuation determinations that would by their nature, normally have been completed by the time such claims are brought before a WTO panel). (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.46.) The Panel fully agrees with the original panel's distinction, and its resulting decision to examine and make findings on individual customs valuation determinations that had been completed prior the establishment of the panel. (See Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.40-7.51.)

[837] See Section 7.1.3.1 (The nexus between the Charges/NoAs and DSB recommendations and rulings).

[838] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II / US)*, para. 270 (See also Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.43).

[839] Appellate Body Report, *EU – PET (Pakistan*), para. 5.19 (referring to Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, para. 5.180; *EC – Bananas III (Article 21.5 – Ecuador II / US)*, para. 270. See also Panel Reports, *US – Poultry (China)*, para. 7.54; *EC – IT Products*, para. 7.165; and *EC – Approval and Marketing of Biotech Product*, para. 7.1650.

respect of withdrawn measures. However, the Panel considers that these represent the main considerations that panels would take into account in most cases involving withdrawn measures, and they will serve as the general framework for the Panel's analysis. The Panel briefly elaborates on each of these considerations below.

7.469. Beginning with the timing of withdrawal, in many instances where expired measures arose in past cases, panels have paid particular attention to whether the measures in question had expired before or only after the panel's establishment by the DSB. This has generated on the one hand a line of case law addressing measures that expired *before* panel establishment and on the other hand a line of case law addressing measures that expired *after* panel establishment. In respect of measures withdrawn before panel establishment, panel practice appears to heavily lean against making any findings[840]; in respect of measures withdrawn after panel establishment, panel practice appears to heavily lean towards panels making findings on such measures, but not making any recommendation pursuant to Article 19.1 of the DSU.[841] The Appellate Body has recently confirmed the significance of this distinction. In *EU – PET (Pakistan)*, the panel drew this distinction. On appeal, the Appellate Body agreed, and stated that the respondent in that case appeared "to overlook this temporal distinction" in the course of suggesting that the case-law showed "a mixed picture" regarding whether panels and/or the Appellate Body have made findings in cases where the measure at issue expired or was terminated before or during the WTO proceedings.[842] The Appellate Body found that the Panel did not err in "giving importance to the fact that, in the present dispute, the measure expired after the DSB had established the Panel" and, in that situation, proceeding to make findings on the measure notwithstanding that it had expired.[843]

7.470. The Panel notes that, consistent with this practice, both the Philippines and Thailand have focused their respective arguments on the timing of withdrawal of the NoAs. The Philippines explains that, with respect to the 1,052 revised NoAs, the Panel "is to make factual findings on whether some or all of the NoAs were revoked before establishment, as Thailand alleges, or instead existed at the time of panel's establishment" and indicates that "in previous disputes, panels have consistently made findings regarding measures that existed at establishment, even when they were revoked after establishment".[844] Similarly, Thailand has consistently argued that the Panel should decline to rule on the NoAs on the ground that they were terminated prior to the establishment of the Panel. Likewise, some of the third parties that expressed a view on this issue also appeared to acknowledge the relevance, depending on the circumstances of each case, of this distinction.[845]

7.471. While the timing of withdrawal is an important consideration, it is not necessarily dispositive of whether a panel should exercise its discretion to make findings and/or recommendations. When deciding whether or not the aim of securing a positive solution warrants findings on a withdrawn measure, panels have also taken into account the likelihood that the respondent would reintroduce the same measure[846] or adopt another measure that may give rise to certain of the same, or "materially similar", WTO inconsistencies.[847] For instance, in *Argentina – Textiles and Apparel*, Argentina objected to the panel's examination of the specific duties at issue, while the United States argued that there was a risk that Argentina would reintroduce the measure. The panel explained

[840] See e.g. Panel Reports, *US – Gasoline*, para. 6.19; *China – Electronic Payment Services*, paras. 7.224-7.229; *EC – Approval and Marketing of Biotech Product*, paras. 7.1651-7.1654; *Argentina – Textiles and Apparel*, paras. 6.12-6.15; *EU – Poultry Meat (China)*, para. 7.168.

[841] Panel Reports, *EU – PET (Pakistan),* para. 7.13; *US – Poultry (China)*, para. 7.56; *Indonesia – Autos*, para. 14.9; *US — Stainless Steel (Mexico)*, paras. 7.46-7.50; *EC – Approval and Marketing of Biotech Product*, paras. 7.1655 – 7.1667. See also Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II / US)*, para. 273.

[842] Appellate Body Report, *EU – PET (Pakistan*), para. 5.38.

[843] Appellate Body Report, *EU – PET (Pakistan*), para. 5.39.

[844] Philippines' response to Panel question No. 162.

[845] In the European Union's view, the fact that the expiry or repeal took place after panel establishment, while not a "knock-out" criterion that would mandate making findings on the expired measure on its own, may play a role in a panel's exercise of its discretion depending on the circumstances of each case and alongside other factors. (European Union's third-party submission, para. 13) The United States appears to frame the issue as one concerning a panel's terms of reference and states that the measures on which the panel makes findings must be measures that are in existence at the time of the establishment of the panel. (United States' response to Panel question No.17 to third parties.)

[846] Panel Reports, *Argentina – Textiles and Apparel*, para. 6.14; *US – Gasoline*, para. 6.19; and *China — Electronic Payment Services*, para. 7.224.

[847] Appellate Body Report, *EU – PET (Pakistan*), para. 5.40.

that since there was no "clear evidence" that Argentina would re-introduce the specific duties at issue, it would not address the relevant claims. It also noted that it could not be assumed that Argentina was trying to evade the panel's consideration of the measure by withdrawing it and that it had to "assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law".[848] Likewise, in *EEC – Apples (Chile I)*, the panel ruled on a measure which due to its seasonal nature had been terminated prior to the establishment of the panel's terms of reference[849], apparently because of the risk that it could be reintroduced.[850]

7.472. The Panel further notes that, consistent with this past case law, both the Philippines and Thailand have also focused their respective arguments on the risk of reintroduction of the same or materially similar measures. Throughout its submissions, the Philippines has consistently expressed its concern over the risk of reintroduction of the NoAs or "the possibility that [Thailand] may adopt a new and distinct measure that entails a similar WTO-inconsistent determination" and has sought assurances from Thailand that it will not act in such a manner.[851] For its part, Thailand maintains that there is no risk of the NoAs being reintroduced and in any event the Philippines has not provided "clear evidence" pointing to such risk, and that there is no reason to presume that any measure that Thailand might adopt to implement the Supreme Court ruling of May 2018 will rely on the pricing and cost information found in the CK-21A forms.[852] As for the third parties, they appear to hold diverging views on the relevance of the risk of reintroduction in deciding whether to make findings on a terminated measure.[853]

7.473. In some other cases, panels appear to have accorded less weight to either of the foregoing considerations, and have focused more on whether making additional findings on the terminated measure would have any practical value for implementation in the light of its other findings on materially similar measures. For example, in the trade remedies and safeguards contexts, several panels have declined to make findings on distinct claims relating to provisional measures and preliminary determinations when they considered that similarities between the two sets of measures meant that their findings on the final duties and determinations would *a fortiori* address any corresponding issues with the earlier measures.[854] In *Dominican Republic – Safeguard Measures*, for instance, the panel observed that "insofar as the complainants [were to] succeed in making the case that the impugned measures are inconsistent with any of the provisions of the covered agreements, that finding would affect both the impugned definitive measure and the provisional measure".[855] Likewise, in cases involving laws or regulations amended in the course of the proceeding, panels have sometimes concluded that there would be no practical value in making findings on the earlier measure. In *Russia – Tariff Treatment*, for example, the panel concluded that its findings on the measure as amended were "sufficient to address the issues raised" by the complainant's claims in respect of the precursor measure as it existed at the time of the panel's establishment.[856] In *Colombia – Textiles*, the panel made findings on replacement measures that were of the "same essence" as the repealed measures, and was of the view that making findings on the repealed measures therefore "would amount to a purely academic exercise".[857]

7.474. This consideration, i.e. whether making additional findings on the terminated measure would have any practical value for implementation in the light of its other findings on materially similar

[848] Panel Report, *Argentina – Textiles and Apparel*, para. 6.14 (referring to Article 3.10 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties).

[849] GATT Panel Report, *EEC – Apples (Chile I)*, para. 2.4.

[850] See Panel Report, *US – Gasoline*, para. 6.19 (referring to GATT Panel Report, *EEC – Apples (Chile I)*).

[851] Philippines' second written submission, paras. 35 and 42; opening statement at the meeting of the Panel, paras. 25-28.

[852] Thailand's response to Panel question No. 161, paras. 2.5-2.8.

[853] The European Union remarked that the "most compelling reason for making findings despite expiry or repeal of the measure is the (real) risk of reintroduction of the measure, which is a matter for the complainant to substantiate" (European Union's third-party submission, para. 14). In contrast, in the United States' view, considering whether the Notices are likely to be reintroduced is not a useful approach, given that any measure would seem to be capable of being reintroduced, at least within the system of the Member at issue. (United States' third-party statement, para. 9)

[854] See e.g. Panel Reports, *China – GOES*, para. 7.423; *China – Broiler Products*, para. 7.326; Panel Report, *Dominican Republic — Safeguard Measures*, paras. 7.19-7.21.

[855] Panel Report, *Dominican Republic — Safeguard Measures*, para. 7.22.

[856] Panel Report, *Russia – Tariff Treatment*, para. 7.169.

[857] Panel Report, *Colombia – Textiles (Article 21.5 – Colombia / Panama)*, paras. 7.112 and 7.114.

measures, accords with the logic underlying the practice of judicial economy.[858] It also comports with the Appellate Body's view that among the powers that are inherent in a panel's adjudicative function is "the authority of a panel to assess objectively whether the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined".[859] Hence, where the "matter" before a panel can be fully resolved or examined on the basis of an examination of only those measures that are still in force, such examination obviates the need for that panel to address the expired measure, and any findings on the latter would not be necessary to secure a positive solution to the dispute.

7.475. The Panel also finds some reflection of this consideration in the arguments of the parties and third parties. For instance, Thailand states that "to the extent that the legal and factual arguments put forward by the Philippines regarding the NoAs mirror very closely" those regarding the 2002-2003 Charges, a decision by the Panel not to make findings on the NoAs "would not materially limit the Philippine's case".[860] While the Philippines stresses that the Panel's findings on the Charges could not justify a decision to exercise judicial economy in respect of its parallel claims regarding the NoAs[861], it "agrees that, *as a matter of substance*, the Panel's reasoning regarding customs valuation determinations in the 02-03 Charges would apply equally to the 1,052 NoAs, even if the Panel declines to rule on the NoAs".[862]

7.476. In the light of the foregoing, the Panel will first review the information presented by the parties regarding the termination of the 1,052 revised NoAs. The Panel will then assess the likelihood of reintroduction by Thailand of the same NoAs or the adoption of another measure with the same or similar WTO inconsistencies. Finally, the Panel will consider whether findings on the NoAs would have any practical value for implementation in the light of other findings on the 2002-2003 Charges.

7.4.3.2 The termination of the measures

7.477. The Panel begins by recalling the following chronology of events which form the factual background pertaining to the termination of the 1,052 revised NoAs:

a. PMTL received the 1,052 revised NoAs in November 2017 from Thailand's Customs Department.

b. On 14 December 2017, PMTL sent a letter to the Customs Department requesting an explanation of the customs valuation determinations in the 1,052 revised NoAs.[863] On 26 and 28 December 2017, PMTL filed appeals against the NoAs to the BoA and the Excise Department on the grounds that: (1) the declared transaction values were the prices actually paid; (2) the revised NoAs were not issued within the period required by Thai law, i.e., three years from the date of the entry, as required under Section 19 of the Customs Act; and (3) the claims for payment were now time-barred under Thai law, under Section 21 of the Customs Act.[864]

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[858] As defined by the Appellate Body, judicial economy in WTO dispute settlement refers to "a panel refrain[ing] from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute". (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para 133.)

[859] Appellate Body Report, *EU – PET (Pakistan)*, paras. 5.40 and 5.51.

[860] Thailand's first written submission, para. 2.33.

[861] Philippines' response to Panel question No. 162. The European Union likewise emphasizes that, pursuant to the concept of judicial economy, where a panel has found a measure inconsistent with one obligation, that panel may decline to rule on whether that measure is inconsistent with a second obligation that is the same or has a similar content as the first obligation because any such finding would not add anything of value to the recommendation or ruling to be given in that particular case. The European Union stresses however that applying that concept of judicial economy to a situation in which there is one obligation and two similar measures (as opposed to one measure and two similar obligations as described above) would appear to be a significant extension of the present understanding of the concept of judicial economy. (European Union's response to Panel question No. 18 to third parties, paras 3-5)

[862] Philippines' response to Panel question No. 128, para. 10.

[863] Philippines' first written submission, para. 81 (referring to a Letter from PMTL to the Director General of the Customs Department, 14 December 2017 (English translation), (Exhibit PHL-247-B).)

[864] Philippines' first written submission, para. 81 (noting that PMTL appealed the Notices on an entry-by-entry basis, and referring to a Sample PMTL appeal against the NoAs to the BoA, 26 December 2017 (English

c. On 21 February 2018, the Philippines filed a revised version of its request for consultations, which superseded an earlier request for consultations dated 6 July 2017. The revised request for consultations included claims relating to the NoAs. Consultations were held on 12 March 2018 during which, according to Thailand, "Thailand informed the Philippines that some or all of the NoAs would be withdrawn".[865] On 14 March 2018, the Philippines filed a request for the establishment of a panel.

d. On 21 and 23 March 2018, the Thai Customs Department sent two letters to PMTL explaining, respectively, that the NoAs pertaining to 796 entries had been "revoked" on the grounds that the "[NoAs] had … [already] been assessed by a ruling of the Board of Appeals" which is a "final judgment" (21 March letter)[866], and that, as concerns the remaining 256 NoAs, the Customs Department had "decided to terminate the [c]ivil [a]ction for collect[ing] the additional duties [and] taxes from [PMTL]" (23 March letter).[867]

e. On 26 March 2018, the day before the DSB meeting at which this Panel was established, bilateral discussions that took place at the WTO between the Permanent Mission of Thailand and officials from the Government of the Philippines, during which, according to Thailand, it "informed the Philippines' officials that the NoAs had been withdrawn and that PMTL had been informed of this development".[868]

f. On 4 May 2018, PMTL wrote to the Director-General of the Customs Department inviting him to confirm, by countersigning PMTL's letter, "the cancellation of all 1,052 NoAs".[869]

g. On 7 May 2018, the Supreme Court found that the BoA had improperly valued 208 entries of the group of 796 NoAs, and overturned the November 2012 BoA Ruling.[870]

h. On 28 May 2018, the Principal Advisor to the Director-General of the Thai Customs Department wrote to PMTL reiterating that the Customs had (1) "cancelled" 796 NoAs on 21 March 2018 because they have already been ruled upon by the BoA, and (2) ordered, on 22 March 2018 "the cessation of the proceedings to collect taxes and duties" in respect of 256 NoAs because they are time-barred.[871]

i. On 13 June 2018, the Permanent Mission of Thailand to the WTO wrote to the Permanent Mission of the Philippines to the WTO, attaching a statement from the Director-General of the Thai Customs Department, dated 18 May 2018, which stated that (1) the 796 NoAs were "revoked" and "ceased to have any legal standing or effect" on 21 March 2018 because they had already been the subject of a ruling of the Board of Appeals which is final according to Section 47 of the Customs Act B.E. 2560 (2017), and that (2) the 256 NoAs were terminated, and ceased to have any legal standing or effect, on the grounds that "the limitation period of 10 years for civil action regarding these entries had passed".[872]

j. On 21 August 2018, Thailand sent a copy of the statement by the Director-General of 18 May 2018 to PMTL.[873]

translation), (Exhibit PHL-248-B); Sample PMTL appeal against the NoAs to the Excise Department, 28 December 2017 (English translation), (Exhibit PHL-249-B).)

[865] Thailand's first written submission, para. 2.4.

[866] Letter from the Thai Customs Department to PMTL, 21 March 2018, (Exhibit THA-57), p.3.

[867] Letter from the Thai Customs Department to PMTL, 23 March 2018, (Exhibit THA-58), p.3.

[868] Thailand's first written submission, para. 2.6.

[869] Letter from PMTL to the Customs Department, 4 May 2018 (English Translation), (Exhibit PHL-292-B).

[870] Supreme Court decision on Nov 2012 BoA Ruling of 7 May 2018, 28 December 2017 (English translation), (Exhibit PHL-244-B).

[871] Letter from the Customs Department to PMTL, 28 May 2018 (English Translation), (Exhibit PHL-293-B).

[872] Statement by the Director-General of the Thai Customs Department, (Exhibit THA-59), p.4.

[873] Letter from the Director-General of the Customs Department to PMTL, 21 August 2018 (English Translation), (Exhibit THA-67-B).

k. On 30 August 2018, the BoA issued a ruling in the importer's appeal regarding all 1,052 revised NoAs in which it indicated that it was "striking out" the appeals pertaining to the group of 796 NoAs because the Customs Department had already "sent a letter to the [importer] cancelling the notices of assessment"; and revoking the 256 NoAs on the grounds that they were time-barred.[874]

7.478. As indicated above, Thailand, in formulating its request for the Panel not to rule on the 1,052 revised NoAs, has divided them into two groups: one of 796 NoAs, and the other of 256 NoAs. Likewise, the Philippines in responding to Thailand's request has followed the same order. The Panel will likewise take this grouping into account.

7.479. With respect to the 796 NoAs, the Panel notes that the Philippines, despite some initial uncertainty[875], "appreciates that Thailand has taken a consistent line in its communications to the importer and the Philippines"[876] and the Philippines accepts that the 796 NoAs were withdrawn as of 21 March 2018.[877] Thus, there is no dispute that more than three quarters of the 1,052 revised NoAs were withdrawn prior to the establishment of the panel. As noted earlier, panel practice heavily leans against making any findings in such circumstances.

7.480. With respect to the group of 256 NoAs, the Philippines agrees with Thailand that they too have been terminated. While the Philippines had initially pointed to some "uncertainties"[878] which led it to question whether the 256 NoAs had truly and definitively been terminated by Thailand, the Philippines subsequently indicated that, in light of the BoA Ruling of 30 August 2018 "[it] now accepts that the 256 NoAs have been definitively revoked".[879] However, the Philippines contends that these NoAs were revoked only on 30 August 2018, the date of issuance of the BoA Ruling on the importer's appeal, "which is several months after the Panel's establishment" and that "[a]s a result the Panel should reject Thailand's request for the Panel to decline to rule on the 256 NoAs".[880] Thailand maintains that the 256 NoAs were terminated as of 22 March 2018 which is before the establishment of the Panel and that on this ground the Panel should decline to rule on them.

7.481. Having reviewed the evidence provided by the parties, the Panel considers that it is unclear exactly when the 256 revised NoAs were terminated. On the one hand, and as elaborated below, certain communications provided by the Thai authorities to PMTL, the Philippines and/or the Panel suggest that the 256 NoAs were terminated as of 22 March 2018.[881] On the other hand, the BoA Ruling of 30 August 2018 can be read as suggesting that the 256 NoAs were not legally terminated prior to that time.

7.482. In a letter dated 21 March 2018, Thai Customs informed PMTL that 796 of the revised NoAs were thereby "revoked". In a separate communication to PMTL dated 23 March 2018, Thai Customs addressed the remaining 256 entries, which it indicated it had decided to "terminate the Civil Action" for collection of the duties and taxes at issue. This letter, like the one concerning the 796 NoAs,

[874] BOA Ruling, 30 August 2018 (English Translation), (Exhibit PHL-296-B), paras. 2.1-2.2.

[875] The Philippines expressed concern that the Thai Customs Department, in its 21 March Letter, failed to identify the specific provisions in Thai Law in support of the decision to cancel the 796 NoAs and that it was also not clear whether that letter was signed by an official with authority to bind the Customs Department. (Philippines' second written submission, para. 19.)

[876] Philippines' second written submission, para. 33.

[877] Philippines' opening statement at the meeting of the Panel, para.18.

[878] As points of uncertainty, the Philippines highlights (i)the fact that the 23 March Letter from the Customs Department does not identify the specific provisions of Thai Law in support of the decision not to proceed with the civil lawsuit for collecting duties and taxes in respect of the 256 NoAs; (ii) the lack of clarity as to whether the decision not to proceed with the civil lawsuit to collect duties in respect of the 256 NoAs - and the customs valuation determinations they entail - means that these NoAs would continue to exist, but would not be enforced; and (iii) the fact that the letter of 13 June 2018 from the Thai Mission to the Philippine's mission - which contains a confirmation by the Director-General that the 256 NoAs have indeed been terminated - expressly states that it cannot be used in any domestic legal proceedings before Thai courts or governmental agencies. (Philippines' second written submission, paras. 19, 22, 23, and 41.)

[879] Philippines' opening statement at the meeting of the Panel, para. 13.

[880] Philippines' opening statement at the meeting of the Panel, paras. 13-14.

[881] As the Panel understands it, based on the relevant evidence submitted by the parties, 22 March 2018 is the date the cessation of collection of duties and taxes in respect of the 256 NoAs was ordered and became effective and 23 March 2018 is the date appearing on the letter informing PMTL of this cessation.

referenced the legal bases upon which PMTL had relied in its pending appeal of the NoAs. It reads in relevant part:

> The ground for appeal is that the Notices of Assessment had mostly been assessed by a ruling of the Board of Appeals and the Notices of Assessment were time-barred. Subsequently, Risk Management Division, Post-Clearance Audit Bureau has already revoked the Notices of Assessment which had been assessed by a ruling of the Board of Appeals covering 796 entries. …
>
> Post-Clearance Audit Bureau has considered the facts, the related laws and legislations and decided to terminate the Civil Action for collect the additional duties, taxes from Philip Morris (Thailand) Limited for the Notices of Assessment 256 entries. Enclosed herewith please find detailed information in the attachment.[882]

7.483. Thus, without specifying the legal provision(s) being applied, this letter made clear that Thai Customs had decided to terminate the civil action, and that it was taking this step in response to the legal grounds invoked by PMTL in its appeal of the NoAs. Whereas the letter of 21 March indicated in unqualified terms that the NoAs are "revoked", the second informed PMTL of the decision to terminate the civil action to collect duties.

7.484. The Thai authorities subsequently clarified, through a letter of 13 June 2018[883] and their submissions in this proceeding[884], that it was on the basis of both Section 47 and Section 21 of the Thai Customs Act that the Customs Department decided to terminate the 796 NoAs and, and on the basis of Section 21 of the same Act that it decided not to collect duties and taxes in respect of the remaining 256 NoAs. Prior to that, on 28 May 2018, the Principal Advisor to the Director-General of the Thai Customs Department wrote to PMTL clarifying that the Customs had (1) "cancelled" 796 NoAs on 21 March 2018 because they had already been ruled upon by the BoA, and (2) ordered, on 22 March 2018 "the cessation of the proceedings to collect taxes and duties" in respect of 256 NoAs because they are "time-barred".[885]

7.485. Moreover, Thailand has in several instances, including through its submissions in this proceeding, confirmed that the decision not to collect duties and taxes with respect to the 256 NoAs has in effect resulted in the NoAs being terminated.[886] The Panel appreciates that a party's assertions regarding the status of a measure in its domestic legal system are not dispositive of factual issues that arise before a panel, but considers it appropriate to accord some weight to Thailand's repeated, unqualified, and clear representations to this Panel as to the termination of the 1,052 revised NoAs. In this regard, the Panel recalls its statement, in the first recourse to Article 21.5 in the context of determining the content of the practice followed in the administration of Thailand's VAT regime, that:

> 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.[887]

7.486. Finally, while Thailand has not acceded to PMTL's request of 4 May 2018 that the Director-General countersign PMTL's letter as confirmation that the 256 NoAs had been terminated as of that time, Thailand has, through its subsequent letters of 13 June 2018 and 21 August 2018 addressed

[882] Letter from the Thai Customs Department to PMTL, 23 March 2018, (Exhibit THA-58), p.3.
[883] Statement by the Director-General of the Thai Customs Department, (Exhibit THA-59), p.4.
[884] Thailand's first written submission, paras. 2.12-2.14; and second written submission, paras. 2.9, 2.22, and 2.23.
[885] Letter from the Customs Department to PMTL, 28 May 2018 (English Translation), (Exhibit PHL-293-B).
[886] Thailand's second written submission, paras. 2.12 and 2.24.
[887] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.883. (emphasis added)

respectively to the Philippines and to PMTL, explicitly made clear that the 256 NoAs had also been terminated. The statement provided by the Director-General reiterates and confirms that:

> A. First, 796 notices of assessment were revoked on 21 March 2018, because the entries at issue had already been subject to assessment following a previous ruling of the Board of Appeals. Because the Board of Appeals had already issued a ruling, these notices should not have been issued according to Section 47 of the Customs Act B.E. 2560 (2017) which states "A ruling of the Appeal Committee shall be final, made in writing and submitted to an appellant." The revocation of these notices means that they no longer have any legal standing or effect as of the date of revocation.
>
> B. Second, the notices of assessment for the remaining 256 entries were terminated on 22 March 2018. They were issued on the basis of the import declarations issue more than 10 years prior to the issuance of the notices. Thus, the limitation period of 10 years for civil action regarding these entries had passed. As of the date of termination, the 256 notices of assessment ceased to have any legal standing or effect to collect additional duty under the Thai law.
>
> C. Philip Morris (Thailand) Limited received the information about the revocation / termination of the 1,052 notices of assessment on 24 March 2018.[888]

7.487. The Panel considers that the exact wording of the letters transmitted to PMTL may not have been as perfectly clear as one might have hoped for, bearing in mind that they concern measures demanding approximately USD 800 million from PMTL. Having said that, these communications, which were provided by the Thai authorities to PMTL, to the Philippines, and to the Panel, suggest that the 256 NoAs were withdrawn no later than 22 March 2018.

7.488. On the other hand, the BoA Ruling of 30 August 2018 can be read as suggesting that the 256 NoAs were not legally revoked prior to that time. At the substantive meeting with the Panel at the end of September 2018, the Philippines highlighted that the BoA, in its Ruling, indicated that it was "striking out the appeals" for the 796 NoAs because the Customs Department had already sent a letter to the importer cancelling these NoAs; whereas for the 256 NoAs, the BoA stated it was "revoking the assessments" without mentioning any prior communication to the importer by which these NoAs had already been cancelled. According to the Philippines, the BoA's different treatment of the two sets of NoAs is highly revealing: while the Customs Department had consistently indicated in its letters that the 796 NoAs had been cancelled, terminated, or revoked, it had, until the BoA Ruling, never used similar language with respect to the 256 NoAs except in the statement of 13 June 2018; rather, the Customs Department consistently expressed its commitment not to enforce payment of the 256 NoAs. In the Philippines' view, it is the BoA Ruling of 30 August 2018 that revoked the 256 NoAs.[889]

7.489. The Panel considers that the contrasting formulations used by the Customs Department and the BoA with respect to the 256 NoAs as compared with the 796 NoAs casts a reasonable doubt on the exact date of revocation of these NoAs, and do not allow us to determine whether the 256 NoAs were withdrawn on 22 March 2018, i.e. prior this Panel's establishment, or only on 30 August 2018, i.e. after the establishment of this Panel. In any event, however, it is clear that the 256 NoAs were terminated no later than 30 August 2018.

7.490. In sum, the Panel concludes that the Thai Customs Department terminated at least 796 of the 1,052 revised NoAs prior to the Panel's establishment, and that Thai Customs may have also withdrawn the remaining 256 revised NoAs prior to the Panel's establishment and in any event terminated them no later than 30 August 2018.

[888] Statement by the Director-General of the Thai Customs Department, (Exhibit THA-59), p.4.
[889] Philippines' opening statement at the meeting of the Panel, paras. 9-13.

7.4.3.3 Reintroduction of the same or materially similar measures

7.491. The Panel recalls that due regard should be given to the likelihood of reintroduction of the same measure or adoption of another measure that may give rise to certain of the same, or materially similar, WTO inconsistencies by the respondent.

7.492. At the outset, the Panel shares Thailand's view that weight must be given to the presumption afforded to a Member that it will perform their WTO obligations in good faith. As the Appellate Body has explained, a panel cannot assume that "one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party".[890] In this case, that means that the Panel cannot presume that Thailand would withdraw, with a view to subsequently reintroducing, the revised NoAs so as to avoid scrutiny of the WTO-consistency of these measures.

7.493. The Panel considers that the stated legal bases for terminating the 1,052 revised NoAs would legally preclude the Thai authorities from reintroducing the same or materially similar NoAs. According to the Thai authorities, the 1,052 revised NoAs have been terminated as follows: first, the 796 NoAs were withdrawn on the grounds that they have already been the subject of final rulings by the BoA pursuant to Section 47 of the Customs Act and that they are also time-barred pursuant to Section 21 of the Customs Act; and subsequently, the remaining 256 NoAs were withdrawn on the grounds that they are also time-barred pursuant to Section 21 of the Thai Customs Act.[891] These are the same grounds that PMTL invoked when it filed appeals against the NoAs to the BoA and the Excise Department, i.e. it appealed on the grounds that they were not issued within the period required by Thai law, i.e., three years from the date of the entry, as required under Section 19 of the Customs Act, and that the claims for payment were now time-barred under Thai law, under Section 21 of the Customs Act. Accordingly, any NoAs reissued in relation to the same entries as those covered by the 1,052 revised NoAs would *a priori* be in violation of these provisions of the Thai Customs Act.

7.494. The Panel notes that the Philippines remains concerned with regards to the subset of 208 entries - covered by the 796 NoAs - which the Supreme Court, in its ruling of 7 May 2018, found had been improperly valued by the BoA. Given that Thailand must take action to implement the Supreme Court's decision, the Philippines explains that it seeks to ensure that Thailand, in doing so, will not reintroduce the same customs valuation determinations made in the corresponding 208 NoAs or adopt a new measure that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute.[892] The Philippines thus invites Thailand to "make explicit that … it will comply with both the Panel's findings on the 208 entries and the Supreme Court ruling".[893] In response, Thailand indicates that it intends to comply with the Supreme Court ruling but clarifies that any action that the Customs Department might take to implement the Supreme Court ruling must be considered as a new and distinct measure from the NoAs. Thailand adds that it is entitled to a presumption that it will perform its WTO obligations in good faith.[894]

7.495. While the Panel appreciates the Philippines' desire to avoid any possibility of new measures with the same, or materially similar, WTO inconsistencies being adopted, the Panel is unable to see any basis that would suggest that Thailand may act in such a manner in implementing the Supreme Court ruling of 7 May 2018. To recall, the Supreme Court ruling reviews the November 2012 BoA Ruling in which the BoA rejected PMTL's declared transaction values for 210 entries of *Marlboro* cigarettes (which include the 208 entries covered by the NoAs in the present proceeding) and determined the revised customs value by using the "deductive value" method provided in Article 5 of the CVA.[895] The Supreme Court ruling upheld the BoA's rejection of the transaction values, but found that the BoA, by deducting an incorrect amount for profits and general expenses (P&GE), had improperly determined the alternative deductive customs values. It is evident that the methodology and the main issue under scrutiny in the Supreme Court ruling, i.e. the deductive value method and the proper P&GE rate, are different from those at issue in the NoAs, i.e. the computed value method and the pricing and cost information reported by PM Indonesia to the Indonesian tax authorities in

[890] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 326.
[891] Thailand's first written submission, para. 2.14.
[892] Philippines' opening statement at the meeting of the Panel, paras. 22-27.
[893] Philippines' opening statement at the meeting of the Panel, para. 28.
[894] Thailand's response to Panel question No.161. paras. 2.5-2.6.
[895] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, paras. 7.64-7.65.

the CK-21A forms. Given these differences, the Panel is inclined to agree with Thailand that, logically, "the basis for any implementing measure regarding the 208 entries will clearly be different from the basis for issuing the NoAs at issue in this dispute"[896] as such measure would be addressing a different set of issues regarding the application of the deductive value methodology under Article 5.

7.496. Moreover, the Panel notes that by virtue of the obligation to respect the sequential ordering of alternative valuation methods in Articles 2 to 7 of the CVA, a Member is allowed to resort to the computed value method under Article 6 (or permissible variation thereof under Article 7) only after it has been determined that the deductive value method under Article 5 (or, as appropriate, Article 6) cannot be used. Therefore, Thailand would first need to apply the deductive method, before turning to the computed value method only if the former cannot be used. While this does not definitively eliminate the risk that Thailand, in implementing the Supreme Court ruling, will use the computed value method in the same manner as in the 1,052 revised NoAs, it further reduces the possibility of it doing so in a CVA-inconsistent manner.

7.497. In sum, the Panel sees no positive evidence upon which it could conclude that any future NoAs which the Thai Customs Department may issue, whether to implement the Supreme Court Ruling which modifies the November 2012 BoA Ruling or otherwise, would use either the same valuation methodology, or the same CK-21A information, as was used in the 1,052 withdrawn NoAs.

7.4.3.4 The practical value of additional findings in the event of reintroduction

7.498. The Panel now turns to the question of whether findings on the NoAs would have any practical value for implementation in the light of the Panel's other findings on the 2002-2003 Charges. The Panel will separately consider the Philippines' substantive and procedural claims.

7.499. The Panel is well aware that the 2002-2003 Charges and the 1,052 revised NoAs are two formally distinct measures. However, as indicated above, the Charges and the NoAs rest on the same basis, namely the DSI's calculation of the "actual" price/value of PMTL's imports of cigarettes based on pricing and cost information reported by PM Indonesia to Indonesian tax authorities in the CK-21A forms. More importantly, this common basis forms the impugned conduct in both the NoAs and the Charges and has led to almost identical claims by the Philippines in respect of both measures. Additionally, the Panel also recalls the overlap in the entries covered by the two measures: the NoAs cover 1,052 entries of cigarettes imported over the period 2001-2003, including 779 of the 780 entries covered by the 2002-2003 Charges. In these circumstances, despite being two formally distinct measures, the Panel considers that its findings on the Charges necessarily address the Philippines' substantive claims concerning the other measure from the perspective of providing guidance on implementation. In these circumstances, making separate and additional findings on the CVA-consistency of the withdrawn NoAs would provide no guidance for implementation beyond the findings that the Panel has already made on the Philippines' identical substantive claims in relation to the 2002-2003 Charges.

7.500. The Panel further notes that while the 2002-2003 Charges and the 1,052 revised NoAs are formally distinct measures, any new NoAs reintroduced by the Customs Department would also be formally distinct measures from the 1,052 withdrawn NoAs that would be the subject of any findings. Thus, while any findings that the Panel were to make on the 1,052 revised NoAs would effectively address the WTO-consistency of any newly introduced NoAs that are the same or materially similar as the withdrawn 1,052 NoAs, such findings would not do so to any greater extent than the Panel's findings on the 2002-2003 Charges already do. Whereas the Panel's findings on the 2002-2003 Charges do not formally apply to either the 1,052 revised NoAs, or to any future NoAs reintroduced by the Thai Customs Department, as a matter of substance the Panel's reasoning on the 2002-2003 Charges would be applicable to any reintroduced NoAs as would any findings that the Panel made in respect of the 1,052 revised NoAs if it were to decide to rule on the latter. For purposes of implementation and/or the assessment of the WTO-consistency of any future NoAs reintroduced by the Customs Department, making findings on the 1,052 revised NoAs would have no additional practical value beyond the findings already made on the Philippines' identical substantive claims in respect of the 2002-2003 Charges.

7.501. The Panel recalls that the 2002-2003 Charges and the 1,052 revised NoAs were issued by different Thai agencies, but stresses the irrelevance of this fact to the questions of whether the

[896] Thailand's response to Panel question No.161, para. 2.5.

Panel's findings on the 2002-2003 Charges and the underlying reasoning may adequately also address the 1,052 revised NoAs, or whether additional and separate findings on the 1,052 revised NoAs would have practical value for implementation in general and for providing guidance on the WTO-consistency of any reintroduced NoAs in particular. The relevance and value of the Panel's findings on the 2002-2003 for the 1,052 revised NoAs or any new NoAs that are materially similar are not attenuated by virtue of the fact that they were made in respect of a measure taken by a different agency, i.e. the Public Prosecutor. As the Panel has already elaborated in some detail, the substantive obligations in Articles 1.1, 1.2(a), second sentence, and the relevant custom valuation rules in Articles 2 to 7 apply to any organ of the state that makes a "customs valuation" determination. The CVA's preambular objectives promote "uniformity" in the implementation of WTO customs valuation rules, and "valuation procedures of general application".[897]

7.502. Thus, the identity and nature of a particular Thai agency involved in making a customs valuation determination on the basis of pricing and cost information contained in the CK-21A forms is generally irrelevant to the assessment of the CVA-consistency of such a determination. Thus, it would be redundant for the Panel to make separate and additional findings on the revised NoAs for the mere reason that its equally relevant findings on the Charges were made in respect of measures taken by a different agency. The Panel makes this clarification because it is wary of the possibility that, if it were to make separate and additional findings on the NoAs issued by the Customs Department that are superfluous in the light of its findings on the 2002-2003 Charges, this could be taken to imply that the identity and nature of the agency making a customs valuation determination is somehow relevant to the assessment of the CVA-consistency of that determination. It is not.

7.503. Thus, the Panel considers that any additional findings on the 1,052 revised NoAs would potentially have practical value only insofar as they addressed any claims that may be left unaddressed by the Panel's findings on the 2002-2003 Charges. In this regard, the Panel recalls that the Philippines has made a claim concerning Article 16 that it has not made in relation to the 2002-2003 Charges. The Panel also notes that its finding that the communications between the DSI and PMTL discharged any obligation under Article 1.2(a), third sentence, in relation to the 2002-2003 Charges issued in January 2017, does not resolve the Philippines' claim under Article 1.2(a), third sentence, in relation to the Thai Customs Department and the issuance of the 1,052 revised NoAs in November 2017.

7.504. However, the Panel considers that there would be limited practical value in making additional stand-alone findings on the procedural claims under Articles 16 and 1.2(a), third sentence, in relation to the 1,052 revised NoAs. These claims concern procedural issues in respect of measures that have already been withdrawn. The particular issues raised by these procedural claims essentially relate to the adequacy of the information that the Thai Customs Department conveyed to PMTL regarding the Customs Department's reliance on a source of information – pricing and cost information reported by PM Indonesia in the CK-21A forms – which the Panel has found is *ab initio* inconsistent with the applicable CVA provisions, and which cannot be used as the basis for any future customs valuation determination of PMTL's cigarettes imported into Thailand. The legal standards in both of these procedural obligations have already been clarified and applied in both the first recourse to Article 21.5 as well as in the original proceeding. Taking all of these circumstances together, a separate and additional assessment of whether or not the Thai Customs Department complied with the procedural obligations in Articles 16 and 1.2(a), third sentence, appears to be a largely academic issue.

7.4.4 Conclusion

7.505. For the reasons set forth above, the Panel concludes that the Thai Customs Department terminated at least 796 of the 1,052 revised NoAs before DSB established the Panel; that the Thai Customs Department may have also withdrawn the remaining 256 revised NoAs prior to the Panel's establishment, and in any event terminated them no later than 30 August 2018; that there is no reason to consider that any future NoAs which the Thai Customs Department may issue, whether to implement the Supreme Court Ruling which modifies the November 2012 BoA Ruling or otherwise, would use either the same valuation methodology, or the same CK-21A information, as was used in the withdrawn NoAs; that even if Thai Customs did reintroduce some or all of the NoAs using that same methodology and information, separate findings by the Panel concerning the WTO-consistency of the withdrawn NoAs would provide no guidance beyond the findings that the Panel has already

[897] See paragraph 7.261.

made on the Philippines' identical substantive claims in relation to the 2002-2003 Charges; and that, in the light of those findings above in this Report, the issues raised by the Philippines' procedural claims in relation to the revised NoAs are rendered largely academic.

7.506. Taken together, the foregoing considerations lead the Panel to decline to rule on the 1,052 revised NoAs that have now all been terminated.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. Regarding the Charges filed by the Public Prosecutor on 26 January 2017 concerning 780 entries of *Marlboro* and *L&M* cigarettes imported by PMTL between January 2002 and July 2003, the Panel finds that the Philippines' claims are admissible and fall within the scope of this compliance proceeding, and concludes that:

a. the 2002-2003 Charges are inconsistent with Article 1.1 and/or the substantive obligation in Article 1.2(a), second sentence, of the CVA because the Public Prosecutor's rejection of PMTL's declared transaction values based on pricing and cost information reported by PM Indonesia in the CK-21A forms constitutes a failure to conduct a proper examination of the circumstances surrounding the sale, and/or a proper determination of the price actually paid or payable;

b. the 2002-2003 Charges are inconsistent with Article 6.1 and/or Article 7.1 of the CVA, because the Public Prosecutor improperly relied on pricing and cost information reported by PM Indonesia in the CK-21A forms to determine the revised customs value of the imported goods;

c. the Public Prosecutor acted inconsistently with the obligation to sequentially apply the customs valuation methods in Articles 2 through 7 of the CVA when it determined the revised customs values of PMTL's imported goods; and

d. the Public Prosecutor did not violate the procedural obligation in Article 1.2(a), third sentence, of the CVA because prior to the issuance of the 2002-2003 Charges the DSI had already sufficiently communicated the grounds for considering that the relationship between PMTL and PM Indonesia influenced the price, and PMTL responded.

8.2. The Panel declines to make findings on the Philippines' additional claims regarding the 1,052 revised Notices of Assessment that PMTL received in November 2017 from Thailand's Customs Department, because most if not all of these NoAs were withdrawn prior to the establishment of the Panel by the DSB; there is no reason to expect that the Thai authorities would reintroduce the same or materially similar measures; and any additional findings by the Panel on the NoAs would have limited practical value for implementation beyond the Panel's other findings on the 2002-2003 Charges.

8.3. 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. The Panel concludes that, to the extent that the measures at issue are inconsistent with the Customs Valuation Agreement, they have nullified or impaired benefits accruing to the Philippines under that agreement.

8.4. The Panel therefore concludes that Thailand has failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the Customs Valuation Agreement. The recommendations and rulings of the DSB in the original proceeding in DS371 remain operative, to the extent that Thailand has failed to comply with them.