

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

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

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November 22, 2018

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<b>Short title</b>	<b>Full Citation</b>
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Thailand – Cigarettes (Panel) (Article 21.5)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 by the Philippines</i> , WT/DS371/RW
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

## RESPONSES TO THE PANEL’S QUESTIONS TO THE THIRD PARTIES

### THE 1052 REVISED NOTICES OF ASSESSMENT

#### **17. Do the third parties agree that the Panel should not rule on the WTO-consistency of the NoAs if it is found that they were withdrawn prior to the establishment of the panel?**

1. A panel’s terms of reference are set forth in Articles 7.1 and 6.2 of the DSU.<sup>1</sup> Under Article 7.1 of the DSU, a panel’s terms of reference (unless otherwise decided) are “[t]o examine . . . the matter referred to the DSB” by the complainant in its panel request. Under Article 6.2, the “matter” to be examined by the DSB consists of “the specific measures at issue” and “a brief summary of the legal basis for the complaint.”

2. Consequently, the measures with a panel’s terms of reference are defined by the complainant’s panel request, and the relevant time for defining the measures within the panel’s terms of reference is the time of the DSB’s establishment of the panel.

3. As the Appellate Body recognized in *EC – Chicken Cuts*, “[t]he term ‘specific measures at issue’ in Article 6.2 suggests that, as a general rule, the measures included in a panel’s terms of reference,” and thus the measures on which the panel makes findings, “must be measures that are in existence at the time of the establishment of the panel.”<sup>2</sup> Similarly, in *EC – Selected Customs Matters*, the panel and the Appellate Body both reasoned that, under the DSU, a panel is to determine whether the measure at issue is consistent with the relevant obligations “at the time of establishment of the Panel.”<sup>3</sup>

4. The identification of the measures identified in the request to establish a panel progresses from the measures discussed in consultations conducted pursuant to Article 4 of the DSU. Article 4.2 provides for consultations regarding “measures affecting the operation of any covered agreement.” Article 4.7 of the DSU provides that a complaining party may request establishment of a panel only if “the consultations fail to settle a dispute.”

5. Thus, the question is whether the challenged NoAs, as they existed at the time of the panel’s establishment, when the “matter” was referred to the panel, are properly within the

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<sup>1</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

<sup>2</sup> *EC – Chicken Cuts (AB)*, para. 156.

<sup>3</sup> *See, e.g., EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel’s review of the consistency of the challenged measure with the covered agreements properly should “have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel”); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they “might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel”).

panel’s terms of reference. The United States takes no position as to the facts, including the effectiveness of the NoAs at the time of panel establishment. However, as a general matter, the United States would understand that a measure that has been “withdrawn” does not “exist,” and cannot be “affecting the operation of any covered agreement.”

**18. The following question relates to the principal of judicial economy, and its potential applicability in circumstances where there are distinct measures that share common features and are subject to the same set of substantive claims. In its response to question 128, the Philippines stated that the *substantive basis* for the NoAs and the Charges is the same, as both the Customs Department and the Public Prosecutor adopted the *same* methodology, using the *same* information, in reaching their separate determinations as to the customs value of the imported goods; and in this way, the Philippines considers that the Panel’s reasoning regarding customs valuation determinations in the Charges would apply equally to the NoAs, even if the Panel declines to rule on the NoAs. In its oral statement, the Philippines now states that in the light of the BoA Ruling of 30 August 2018, it “now accepts that the 256 NoAs have been definitely revoked”. In these circumstances:**

- (a) If the Panel were to uphold the Philippines’ claims in relation to the Charges, would it be within the Panel’s discretion to exercise judicial economy in respect of the NoAs?**
- (b) Would the distinction between measures terminated pre- and post-panel establishment, and the disputed question of whether some of the NoAs were revoked only after the establishment of the panel, matter as much if the situation is analyzed from the perspective of judicial economy?**

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

7. Judicial economy is exercised at the panel’s discretion, provided that all findings are made that are necessary for resolution of the dispute. Article 3.7 of the DSU provides that “[t]he aim of the dispute settlement system is to secure a positive solution to a dispute,” while Article 3.4 provides that “[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter . . . ”

8. Pursuant to Article 11 of the DSU, a panel established by the DSB “should make an objective assessment of the matter before it” – that is, the “matter” as defined in Article 6.2, which establishes the panel’s terms of reference under Article 7.1 – “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.” And under Article 19.1, “[w]here a panel . . . concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[] bring the measure into conformity with that agreement.”

9. Thus, under the DSU, the Panel is charged with making those findings that may lead to a recommendation by the DSB to a WTO Member to bring a WTO-inconsistent measure into conformity with WTO rules. As the Appellate Body explained in *US – Wool Shirts and Blouses*,

“Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”<sup>4</sup>

10. While a panel should decline to make findings that are not necessary to resolve a dispute, as noted above in response to Question 17, a measure that has been withdrawn prior to the establishment of the panel would not be within the panel’s terms of reference and not the “matter” to be resolved. The United States takes no position as to the facts in this dispute. To the extent that there is no dispute that the NoAs did not exist as of panel establishment, the Panel should find that the measures are not within its terms of reference and therefore it cannot make findings on them. If the Philippines’ statement that it recognizes certain of the NoAs ceased to exist after panel establishment is meant to convey that the Philippines no longer seeks findings on those measures, the Panel could note that statement as a basis for not proceeding further on those claims.

#### ALLEGED ILLEGALITY

**19. Would the third parties agree that it is not necessary, in the circumstances of this case, for the Panel to address the question of whether a dispute settlement panel can apply equitable maxims, such as the “clean hands” doctrine, that are linked to “good faith” in Article 31(1) of the Vienna Convention or Article 3.10 of the DSU?**

11. The United States agrees that it is not necessary for the Panel to determine whether a dispute settlement panel can apply equitable maxims, such as the “clean hands” doctrine, in the circumstances of this dispute. Nor is it necessary for the Panel to address the extent to which such maxims are “linked to ‘good faith’” for purposes of Article 31(1) of the *Vienna Convention on the Law of Treaties* or Article 3.10 of the DSU. To the extent application of an “equitable maxim” would alter the interpretation or application of a covered agreement, however, such an approach would not appear consistent with the DSU, which provides that (Article 1.1) “[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the [covered] agreements” and (Article 3.2) “Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements.”

12. Article 3.2 of the DSU directs WTO adjudicators to interpret the existing provisions of the covered agreements “in accordance with customary rules of interpretation of public international law.” Article 31(1) of the Vienna Convention in turn provides, “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.” As used in Article 31(1) of the Vienna Convention, “good faith” refers to the approach of the treaty interpreter in the interpretation of a treaty. And as used in Article 3.10 of the DSU, “good faith” refers to

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<sup>4</sup> *US – Wool Shirts and Blouses (AB)*, page 19.

engagement by WTO Members in dispute settlement procedures (“all Members will engage in these procedures in good faith”).

13. The United States understands Thailand to argue that a WTO Member is presumed to act in “good faith,” such that Indonesia is presumed to act “in good faith” in providing information to Thailand, and Thailand is in turn presumed to act “in good faith” in relying on that information.<sup>5</sup> The United States understands that Thailand objects to an interpretation of the Customs Valuation Agreement that, in its view, would “limit the authority’s ability to rely on information provided by authorities of the exporting country”.<sup>6</sup> While Thailand asserts that the “clean hands” principle is related to the “good faith” principle, to the extent that Thailand alleges an actor has engaged in illegal conduct, that actor appears to be a private entity (the importer), not a WTO Member.<sup>7</sup>

14. The United States also notes that, to the extent that an authority has the “ability to rely on” information provided by the exporting country, that ability is subject to the obligations of the Customs Valuation Agreement. A WTO Member could not, for example, “rely on” information obtained from a third country to establish a minimum value for valuation purposes, because the use of minimum values is expressly prohibited by Article 7.2(f) of the Customs Valuation Agreement. Likewise, a customs authority that has “grounds” for considering that the relationship between the buyer and seller influenced the price could not refuse to communicate those grounds to the importer, as required by Article 1.2(a) of the Customs Valuation Agreement, simply because those “grounds” are based on information from another WTO Member. There is no basis for suggesting that a “good faith” interpretation of a treaty, or “good faith” engagement in dispute settlement procedures, negates the obligations set forth in the treaty itself.

15. As such, the United States agrees that, in the circumstances of this dispute, it is not necessary for the Panel to determine whether it can apply “equitable maxims” such as the “clean hands” doctrine. Rather, the Panel should conduct an objective assessment of whether the challenged measures are inconsistent with the identified provisions of the Customs Valuation Agreement, interpreted in accordance with customary rules of treaty interpretation.

#### **ARTICLE XX OF THE GATT 1994**

**20. In the third parties’ view, is there any novel argument, circumstance or legal development that would require the Panel to reconsider and potentially reach a different conclusion regarding the applicability of Article XX of the GATT 1994 to the CVA?**

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<sup>5</sup> Thailand’s First Written Submission, paras. 3.72-3.80.

<sup>6</sup> See Thailand’s Responses to the Panel’s Questions in Advance of the Substantive Meeting, para. 3.1.

<sup>7</sup> Thailand’s First Written Submission, paras. 3.79-3.80; Thailand’s Second Written Submission, para. 3.52.

16. In its (as of this writing, unadopted) report in the first compliance proceeding in this dispute, the Panel concluded that Article XX of the GATT 1994 is not applicable to the Customs Valuation Agreement.<sup>8</sup>

17. To the extent that the Panel is asking whether, absent “any novel argument, circumstance or legal development,” it is *required* to reach the same conclusion in this proceeding, the answer is no. There is nothing in the DSU that requires a panel to reach the same conclusion as prior panel or Appellate Body reports, including where there is a lack of novel argument, circumstance, or legal development.

18. Rather, the panel has been charged by the DSB with examining the matter and, under Article 21.5 of the DSU, resolving the disagreement as to the “existence or consistency with a covered agreement of measures taken to comply.” In resolving “the applicability of and conformity with the relevant covered agreements,”<sup>9</sup> the DSU establishes in Article 3.2 that the panel is to apply “customary rules of interpretation of public international law” to the terms of those agreements. Prior reports do not form part of the customary rules of interpretation of public international law, and the DSU assigns no particular interpretive weight to prior reports.

19. The Panel may of course take into account the reasoning of the prior compliance panel, to the extent that the Panel, having conducted an objective assessment of the matter, finds that reasoning persuasive. However, the Panel is not “required” to reach the same conclusion as the previous panel, even absent any novel argument, circumstance or development.

20. To the extent that the Panel is asking as a factual matter whether there are any different arguments, circumstances, or developments vis-à-vis the first compliance proceeding that merit consideration in its analysis in this proceeding, the United States takes no position as to the facts as presented by the parties.

#### RESPONSE TO QUESTION FROM THE PHILIPPINES TO THE THIRD PARTIES

**1. In its Third Party Statement, the United States submits that “[t]he CVA does not establish requirements with respect to determination of the ‘price actually paid or payable’ itself”.**

**The Philippines agrees that the CVA does not establish requirements with respect to the price that *the buyer and the seller* agree shall be “the price actually paid or payable”. However, the Philippines has submitted that the CVA does establish requirements that apply when a *customs administration* determines whether the declared value is the “price actually paid or payable”.**

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<sup>8</sup> *Thailand – Cigarettes (Article 21.5) (Panel)*, paras. 7.748-7.757.

<sup>9</sup> DSU, Article 11.

**In light of the Philippines’ responses to Panel Questions 140 and 142, could the Third Parties please comment on the statement that “[t]he CVA does not establish requirements with respect to determination of the ‘price actually paid or payable’ itself”?**

21. The Customs Valuation Agreement establishes disciplines with respect to the determination of “the customs value of imported goods.”<sup>10</sup>
22. As noted in the U.S. third party statement, Article 1.1 of the Customs Valuation Agreement establishes the transaction value as the primary basis for valuation, and provides that the customs value “shall be the transaction value, that is the price actually paid or payable for the goods,” except under certain specified circumstances.<sup>11</sup>
23. Article 1.1(d) further provides that the customs value shall be the transaction value, even if the buyer and seller are related, provided that the transaction value is acceptable under Article 1.2. Article 1.2(a) explicitly provides that “the fact that the buyer and seller are related . . . shall not in itself be grounds for regarding the transaction value as unacceptable.” Rather, the Customs Valuation Agreement expressly provides that the circumstances of sale shall be examined if there are doubts about the reliability of the price in related party transactions, and “the transaction value shall be accepted provided that the relationship did not influence the price.”
24. Article 1.2(a) further makes clear that, in examining the circumstances of sale, the customs authority should give the importer an opportunity to provide information,<sup>12</sup> and that, if the customs authority has grounds for considering that the relationship influenced the price, it communicate those grounds to the importer and provide the importer an opportunity to respond.<sup>13</sup>
25. Thus, Article 1.2 establishes disciplines with respect to how a customs authority examines the price actually paid or payable (that is, the transaction value) as reported by the importer *for purposes of determining whether it is acceptable*. If, after taking the necessary procedural steps, the transaction value is determined not to be acceptable, the authority proceeds to the valuation methodologies set forth in Articles 2 through 7.
26. The Customs Valuation Agreement makes clear that a WTO Member must apply the methods set forth in each of those Articles in sequence (except that, under Article 4, the order of Articles 5 and 6 must be reversed at the request of the importer). For example, Article 2 provides, “*If the customs value of the imported goods cannot be determined under the provisions*

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<sup>10</sup> See, e.g., Customs Valuation Agreement, Articles 1.1, 2.1(a), 3.1(a), 4, 5, 6, 7.1.

<sup>11</sup> U.S. Third Party Statement, para. 12.

<sup>12</sup> Customs Valuation Agreement, Article 1.2(a); Annex I, Note to Article 1, Paragraph 2, para. 3.

<sup>13</sup> Customs Valuation Agreement, Article 1.2(a).



of Article 1, the customs value *shall be* the transaction value of identical goods . . . .”<sup>14</sup> Articles 3, 5, 6, and 7 use a similar formulation.

27. Articles 2 through 7 each set forth alternative means to determine the customs value. Generally speaking, Article 2 provides for determination of the customs value based on the value of identical goods; Article 3 provides for determination of the customs value based on the value of similar goods; Article 5 provides for determination of customs value based on a deductive value; and Article 6 provides for determination of the customs value based on a computed value. Article 7 provides for determination of customs value by “reasonable means” consistent with the Agreement, and explicitly prohibits certain means of valuation.

28. Notably, none of Articles 2 through 7 requires the customs authority to determine the price paid or actually payable. Rather, they require application of the specific methodology set forth in the article itself. If the customs authority is relying on the price actually paid or payable – as submitted by the importer – to determine the customs value, it is by definition operating within the scope of Article 1, as noted above. Under Article 1, the customs authority relies on the price actually paid or payable, and may make adjustments as provided under Article 8. However, the customs administration is not itself setting the price actually paid or payable.

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<sup>14</sup> Emphasis added.