

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

(DS371)

**THIRD PARTY EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA**

October 20, 2017

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

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

1. Panel proceedings under Article 21.5 of the DSU have a more limited scope than original panel proceedings, as the only measures at issue in an Article 21.5 proceeding are “measures taken to comply.” The complainant in an Article 21.5 proceeding must show either that such a measure does not exist, or that it is inconsistent with one of the covered agreements. Measures that negate or undermine compliance with the DSB’s recommendations and rulings may also come within the scope of an Article 21.5 proceeding. In addition, panels and the Appellate Body have found that a measure that is not itself a measure taken to comply, but which has a “particularly close relationship” or “sufficiently close nexus” to a declared measure taken to comply and to the DSB’s recommendations and rulings, may fall within an Article 21.5 panel’s terms of reference.

2. The Philippines and Thailand dispute whether certain criminal charges are a “measure taken to comply” for purposes of this proceeding. The United States does not understand Thailand’s compliance obligations to be necessarily limited to the valuation of entries at issue in the original proceeding. However, the United States questions whether valuation determinations with respect to entries that pre-date entries that were the subject of recommendations and rulings would be a measure taken to comply with such recommendations and rulings as a general matter. The Panel should consider the timing of the entries in the charges vis-à-vis the timing of entries at issue in the original proceeding in evaluating whether the charges share a sufficiently close relationship with the recommendations and rulings and the declared measure taken to comply.

II. Application of the CVA With Respect to the Criminal Charges

3. In addition to being limited to “measures taken to comply,” a panel’s terms of reference in a proceeding under Article 21.5 are set forth in Articles 7.1 and 6.2 of the DSU. Under Article 7.1, the panel’s terms of reference are generally “[t]o examine . . . the matter referred to the DSB” by the complainant in its panel request. Under Article 6.2, the “matter” consists of the “specific measures at issue” and “a brief summary of the legal basis of the complaint.”

4. In turn, the panel’s terms of reference are to examine the “specific measures at issue” set out in the complainant’s panel request, as they exist at the time of panel establishment. Neither the DSU nor the CVA establishes a “ripeness” doctrine as articulated by Thailand. If a measure is within a panel’s terms of reference, the panel’s mandate is to examine the measure as it existed at the time of panel establishment and to make findings with respect to that measure.

5. In addition, pursuant to Article 19.1 of the DSU, a panel is required to make a recommendation where it has found a measure within its terms of reference to be inconsistent with the relevant Member’s obligations. Article 19.1 of the DSU states, in part, “Where a panel . . . concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”

6. The Panel’s task regarding the Philippines’ claims under the CVA with respect to the criminal charges is, therefore, to examine whether the charges, as they existed at the time of the Panel’s establishment, are inconsistent with the provisions asserted. If an inconsistency is found, the DSU requires the Panel to make a recommendation with respect to the measure.

7. The Philippines claims that the criminal charges are inconsistent with Articles 1.1 and 1.2(a) of the CVA. These articles establish that the primary basis of valuation is the transaction value. An analysis of whether the criminal charges are inconsistent with Articles 1.1 and 1.2(a) should focus on whether the charges reflect a failure to accept the transaction value as the value of goods for the purposes of levying ad valorem customs duties on imported goods. If the Panel finds that such a failure occurred, it should assess whether the customs administration had grounds for considering that the relationship influenced the price and whether it communicated those grounds to the importer and provided the importer with a reasonable opportunity to respond.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

8. The recommendations and rulings of the DSB are naturally the starting point for assessing compliance with those recommendations and rulings. With respect to the criminal charges, the relevant question for purposes of the Panel's terms of reference in this Article 21.5 proceeding is whether the charges may be subject to a proceeding whose scope is limited under the DSU to resolving disagreement as to the consistency or existence of measures taken to comply with those recommendations and rulings. The valuation of entries imported at one point in time does not necessarily have a relationship – much less a close relationship – with the valuation of any other entries, or to DSB recommendations and rulings issued later in time that cover subsequent entries. To find that the charges fall within the scope of an Article 21.5 proceeding by virtue of a close relationship with the recommendations and rulings and a declared measure taken to comply, the Panel must find that a close relationship exists.

9. With respect to the November 2012 Board of Appeals ruling, under Articles 7.1 and 6.2 of the DSU, the task of the Panel is to conduct an objective assessment as to whether the ruling is inconsistent with the provisions of the CVA asserted. The CVA does not set forth a “standard of review,” and Article 11 of the DSU does not call for the Panel to conduct a *de novo* review of the Board of Appeals ruling. The United States expects that the Panel’s assessment of whether the specific steps taken by the authority satisfied the obligations set forth in Articles 1.1 and 1.2 of the CVA will depend on the facts surrounding the ruling, including, in light of the Interpretative Notes, the Board’s efforts to obtain information from the importer, the information regarding the transaction before the Board, and the reasoning provided for its determination.

**EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES TO THE PANEL’S QUESTIONS TO
THIRD PARTIES**

GENERAL

10. There is no provision in the DSU that establishes a requirement that a compliance panel follow legal interpretations of the original panel or of the Appellate Body in reports adopted by the DSB. Under the structure of the WTO Agreement (Article IX:2) and the DSU (Article 3.9), it is only through appropriate action by the Ministerial Conference and the General Council that this Panel would be “legally bound” to follow such an authoritative legal interpretation.

11. In *Chile – Price Band (Article 21.5 – Argentina)* and *US – Tuna II (Article 21.5 – Mexico)*, the Appellate Body noted that Article 21.5 proceedings “form part of a continuum,” such that “due cognizance” must be accorded to the DSB’s recommendations and rulings in the original proceeding. In this regard, it is useful to bear in mind that the DSB recommendations and rulings in the original proceedings play an important role in evaluating compliance. They

inform a Member's understanding of how to bring its measure into compliance with its WTO obligations.

12. Under the DSU, the scope of proceedings under Article 21.5 is more limited than the scope of original panel proceedings. Given that valuation is conducted for all imports, on a case-by-case basis, the Panel will need to carefully consider how the criminal charges relate to the original recommendations and rulings in this context.

13. In addition, the DSU requires the complainant to show that the content of the measure identified, as it exists at the time of panel establishment, is inconsistent with the obligation asserted. If the identified measure, as it exists at panel establishment, consists of charges or allegations, the complainant must show how those charges or allegations are inconsistent with the provisions at issue in order to prevail on its claims.

CRIMINAL CHARGES

14. The CVA itself does not exclude criminal or penal actions from the scope of its commitments. The question of whether a challenged measure is inconsistent with a particular CVA obligation depends on whether that measure, as it exists at panel establishment, is inconsistent with that obligation, as interpreted under customary rules of interpretation.

15. Articles 1.1 and 1.2(a) of the CVA obligate a WTO Member to accept the transaction value, and not to reject the transaction value on the sole ground that the buyer and seller are related. These obligations are not limited to particular entities within a Member's government. Moreover, nothing in the CVA suggests that these obligations do not apply with respect to valuation in cases where the importer has committed fraud. A Member may seek and apply

penalties in such a case, but it must follow the requirements of the CVA in determining the value of the goods. Improper valuation is not a permissible response to customs fraud.

16. With respect to the applicability of Article XX of the GATT 1994 to claims under the CVA, the United States is not aware that this issue has arisen in a previous dispute. Both parties to this dispute have presented arguments regarding the merits of the Article XX defenses asserted by Thailand. As such, the Panel may not need to reach this question in order to resolve this dispute, but could proceed to analyze, on an *arguendo* basis, the defenses presented by Thailand.

BOA RULING

17. Customs valuation is a transaction-specific process. The specific steps taken by the customs authority in examining the circumstances of sale will depend on the circumstances of the transaction at issue.

18. However, the discretion afforded with respect to valuation under the CVA is not unlimited. The CVA clearly establishes the transaction value as the primary basis for valuation. It further provides that, even when the buyer and seller are related, the customs value shall be accepted, provided that the transaction value is acceptable under Article 1.2. The Interpretative Notes make clear that the customs authority need not examine the relationship in every case, but rather when it has “doubts” about the acceptability of the price. In those cases, Article 1.2(a) requires an examination of the circumstances of sale, and also requires, if the customs administration has grounds for considering the relationship influenced the price, the customs authority to “communicate its grounds to the importer” and give the importer “a reasonable opportunity to respond.”