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

(DS371)

THIRD PARTY SUBMISSION OF

THE UNITED STATES

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I. Introduction

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* ("Customs Valuation Agreement" or "CVA") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) that are relevant to the Philippines' claims in *Thailand – Cigarettes (Article 21.5 – Philippines)* (DS371).

2. The United States notes at the outset its strong interest in implementation of the CVA. As the Panel recognized in the original proceeding in this dispute, the primacy of the transaction value in customs valuation is clear from the text of the CVA.[1] Improper valuation – for example, based on the use of reference or minimum prices, or on the conflation of valuation with transfer pricing for tax purposes – not only raises concerns under the CVA, but can also undermine the benefits of Members' market access commitments. This should be of concern to all WTO Members. By providing predictability and transparency in the valuation process, implementation of the valuation commitments in the CVA offers opportunities for reducing corruption as well as facilitating trade.

3. The United States takes no position on the merits of the Philippines' claims in this dispute, nor on the facts in dispute. However, in light of its systemic interest in interpretation of the CVA and of the DSU, the United States would like to address two specific issues relating to the issue of whether the criminal charges are within the scope of this proceeding: (1) the application of the CVA to the criminal charges, in light of a panel's terms of reference under Article 21.5 of the DSU; and (2) the scope of "measures taken to comply" for purposes of an Article 21.5 proceeding.[2]

4. The United States also provides comments on the amicus submission provided by the U.S.-ASEAN Business Council, the United States Council for International Business, the National Association of Manufacturers of the United States of America, and the National Foreign Trade Council, in light of the May 17, 2017, communication from the Panel.

[1] *See Thailand – Cigarettes (Panel)*, para. 7.145; *see also* the Philippines' First Written Submission, paras. 70, 557.

[2] In addition, the United States notes Thailand's argument that the Philippines is precluded from challenging the charges in this Article 21.5 proceeding in light of the claim made, but not pursued, in the original proceeding as to the investigation into the declared value of imports from the Philippines. While the United States takes no position as to whether the Philippines is precluded from challenging the charges on this basis, the United States agrees that a party in an Article 21.5 proceeding is ordinarily precluded from making arguments that it could have raised in the original proceeding, but did not. *See, e.g., US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211. The parties also appear in agreement on this point. *See, e.g.*, the Philippines' First Written Submission, paras. 697-698; Thailand's Rebuttal Submission on the Preliminary Ruling Request, paras. 2.14-2.16. The United States further agrees that, as suggested by Thailand, if the Panel finds that the Philippines is precluded from making a claim regarding the criminal charges on this basis it need not reach the remaining issues regarding the charges. *See* Thailand's Rebuttal Submission on the Preliminary Ruling Request, para. 3.4.

II. The Philippines' Claims Regarding the Criminal Charges Under the CVA

5. In this dispute, the Philippines argues that measures taken by Thailand to comply with recommendations and rulings of the Dispute Settlement Body (DSB) in *Thailand – Cigarettes (Philippines)* are inconsistent with certain provisions of the Customs Valuation Agreement and the *General Agreement on Tariffs and Trade 1994* (GATT 1994). The United States focuses in this submission on issues presented by one of the Philippines' claims, in particular, its challenge regarding certain criminal charges against an importer and certain of its employees. In those charges Thailand's Public Prosecutor has alleged that the declared transaction values for 272 entries of cigarettes between July 2003 and June 2006 are "false" prices ("the criminal charges").

6. In the original proceeding, the Philippines challenged Thailand's valuation of a number of individual entries from 2006 and 2007 as inconsistent with various provisions of the CVA, among other claims.[3] The Panel made a number of findings of inconsistency with respect to Thailand's valuation of these entries, including that the rejection of the declared transaction value was inconsistent with Articles 1.1 and 1.2 of the CVA.[4]

7. The Philippines also claimed in its panel request in the original proceeding that Thailand was conducting an investigation into the declared customs value of imports from the Philippines, in a manner that was unreasonable and inconsistent with Articles X:3(a) and X:3(b) of the GATT 1994, but apparently did not pursue that claim.[5]

8. In this proceeding under Article 21.5 of the DSU, among other claims, the Philippines asserts that the criminal charges are a measure taken to comply, and are inconsistent with a number of provisions of the CVA.[6] The Philippines argues that the criminal charges are a measure taken to comply because they have a "close nexus" with the DSB's recommendations and rulings, and with a declared measure taken to comply, in particular, a September 2012 ruling

[3] *See* Request for Establishment of a Panel by the Philippines, WT/DS371/3, paras. 12-15.

[4] *See Thailand – Cigarettes (Philippines) (Panel)*, para. 8.2. The Panel also found, with respect to the valuation of those entries, that Thailand acted inconsistently with Article 1.2(a) of the CVA by failing to communicate the "grounds" for considering that the relationship between the buyer and seller influenced the price, with Article 16 by failing to provide an adequate explanation of how it determined the customs values, with Article 7.1 by improperly assessing the deductive value of the imports at issue, with Article 7.3 by failing to properly inform the importer of the customs value determined under Article 7 and the method used to determine the value, and with Article 10 by disclosing confidential information in the media. These findings were not appealed, and the panel report, as modified by the Appellate Body, was adopted on July 15, 2011.

[5] *See* Request for Establishment of a Panel by the Philippines, WT/DS371/3, paras. 7, 11; Request for a Preliminary Ruling by Thailand, para. 2.4; the Philippines' First Written Submission, paras. 692, 712.

[6] *See* Recourse to Article 21.5 of the DSU by the Philippines, Request for the Establishment of a Panel, WT/DS371/18, paras. 12-14.

by Thailand's Board of Appeals with respect to the valuation of entries that the Panel had found inconsistent with Thailand's obligations.[7]

A. Interpretation of Article 21.5 of the DSU

9. Article 21.5 of the DSU provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." Article 21.5 panel proceedings therefore 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 panel proceeding must show either that such a measure does not exist, or that it is inconsistent with one of the covered agreements.

10. In addition to being limited to "measures taken to comply," a panel's terms of reference in a proceeding under Article 21.5 of the DSU are set forth in Articles 7.1 and 6.2 of the DSU. Under Article 7.1, when the DSB establishes a panel, the panel's terms of reference are generally "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request.[8] Under Article 6.2, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[9]

11. In turn, the panel's terms of reference are to examine "the specific measures at issue" set out in in the complainant's panel request, as they exist at the time of panel establishment. As the Appellate Body noted in *EC – Selected Customs Matters*, a panel's review should "focus[] on these legal instruments as they existed . . . at the time of establishment of the panel."[10]

12. Article 11 of the DSU reinforces this conclusion, providing that "a panel 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 ("[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request).

13. With respect to the panel's recommendation, Article 19.1 sets out in mandatory terms that, where a panel "concludes that a measure is inconsistent with a covered agreement, it *shall*

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[7] *See* the Philippines' First Written Submission, paras. 551-55; Rebuttal Submission on the Preliminary Ruling Request, para. 47.

[8] The DSB referred "the matter raised by the Philippines in document WT/DS371/18" to the Panel with "standard terms of reference" at its meeting on July 21, 2016.

[9] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 201 ("As in original dispute settlement proceedings, the 'matter' in proceedings brought pursuant to Article 21.5 of the DSU consists of two elements: the specific measures at issue and the legal basis of the complaint (that is, the claims)."); *see also US – FSC II (Article 21.5 – EC) (AB)*, para. 59.

[10] *EC – Selected Customs Matters (AB)*, para. 187. As the Appellate Body recalled, "The 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 must be measures that are in existence at the time of the establishment of the panel." *Ibid.* at para. 184 (quoting *EC – Chicken Cuts (AB)*, para. 156).

recommend that the Member concerned bring *the measure* into conformity with that agreement."[11] Thus, pursuant to Article 19.1, 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.

14. The burden of proof in an Article 21.5 proceeding is the same as that in an original proceeding.[12] That is, the complaining party must establish a *prima facie* case, by presenting arguments and evidence sufficient to justify a presumption that its claim is correct. The responding party must then present arguments and evidence to counter that presumption.

15. Under this legal standard, to prevail with respect to its claims in this Article 21.5 proceeding that the criminal charges are inconsistent with various provisions of the CVA, the Philippines must show that the criminal charges are "measures taken to comply" that, as they existed at the time of the Panel's establishment, are inconsistent with the provision asserted. In light of the legal standard for the Panel's terms of reference, below the United States provides its views regarding: (1) the application of the CVA with respect to the criminal charges; and (2) the scope of "measures taken to comply" for purposes of an Article 21.5 proceeding. As previously noted, while the United States has a systemic interest in the interpretation and application of the CVA, the United States takes no position as to the merits of the Philippines' claims, nor as to the facts in dispute.

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

16. Thailand and the Philippines appear to agree that the criminal charges identified by the Philippines are a "measure" within the meaning of Article 6.2 of the DSU.[13] However, Thailand argues that the Philippines' claims regarding the criminal charges are not "ripe" for the Panel and that the Panel must decline to address those claims.[14] In particular, Thailand asserts that a "doctrine of ripeness," under which "a tribunal cannot adjudicate a claim ahead of its time," exists in common law and civil law as well as in the international context, and is reflected in Articles 11, 3.4, 3.7, and 19.1 of the DSU and in various WTO dispute settlement reports.[15] Thailand further asserts that the Panel may not make a recommendation, and in turn may not make a finding, with respect to an unripe measure.[16] The Philippines argues that the criminal

[11] Emphasis added.

[12] *See, e.g., Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("[T]he burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence. . . .Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.").

[13] *See* Thailand's Second Written Submission, paras. 3.131-3.133; the Philippines' Second Written Submission, paras. 427-430.

[14] *See* Thailand's First Written Submission, para. 6.48; Second Written Submission, paras. 3.134, 3.157.

[15] *See* Thailand's First Written Submission, paras. 6.50-6.71; Second Written Submission, paras. 3.135-3.151.

[16] *See* Thailand's First Written Submission, paras. 6.66-6.67; Second Written Submission, paras. 3.132-3.134.

charges are a "measure" as described under Article 6.2 of the DSU and within the terms of reference under Article 7.1 of the DSU, and that the Panel is in turn required to examine those charges.[17]

17. As explained above, whether a measure is challenged under a provision of the CVA or another WTO agreement, the DSU requires a complainant to show that the identified measure – as it exists at the time of panel establishment – is inconsistent with the obligation asserted. Neither the DSU, nor the CVA, establishes a "ripeness doctrine" as articulated by Thailand. Rather, 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. While the "unripe" nature of a measure might inform the examination of the consistency of the measure at issue with the obligations asserted – for example, by indicating that the precise content of the measure at the time of the panel request does not (yet) reflect conduct inconsistent with the covered agreement – the nature of a measure in that respect does not preclude examination of that measure by a panel at all, provided it is within the panel's terms of reference.

18. Similarly, the "unripe" nature of a measure does not preclude a panel from making a recommendation with respect to the measure in the event the panel finds it to be inconsistent with a Member's obligations. As noted above, 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." Thus, contrary to Thailand's argument, Article 19.1 of the DSU does not support a conclusion that a Panel may not make a recommendation with respect to a measure that is not "ripe," or, as Thailand appears to define it, a measure "capable of being brought into conformity" with a Member's obligations.[18] If the Panel agrees with Thailand that the measure challenged by the Philippines is a "hypothetical future measure[]"[19]– i.e., that the measure did not in fact exist at the time of panel establishment – then the question of whether a recommendation should be made does not arise, as no inconsistency can be found with respect to a measure that does not exist.

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

[17] *See* the Philippines' Second Written Submission, paras. 427-430.

[18] Thailand's Second Written Submission, para. 3.143; First Written Submission, paras. 6.66-6.67.

[19] *See* Thailand's First Written Submission, para. 6.81; *see also* Second Written Submission, paras. 3.16, 3.166-3.167, 3.171.

20. Specifically, 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.

21. Article 15(a)(1) of the CVA defines the "customs value of imported goods" as "the value of goods for the purposes of levying ad valorem duties of customs on imported goods." Under Article 1.1 of the CVA, "[T]he customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods," except under certain specified circumstances.

22. Article 1.2(a) provides that, in determining whether the transaction value is acceptable for purposes of Article 1.1, the "transaction value shall be accepted provided that the relationship did not influence the price," and that "the fact that the buyer and seller are related . . . shall not in itself be grounds for regarding the transaction value as unacceptable." In those cases where the buyer and seller are related and the customs administration has "doubts" about the acceptability of the transaction value, the customs administration shall examine the circumstances of sale.[20] Also under Article 1.2(a), if "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."

23. Thus, under the CVA, a WTO Member is obligated to accept the transaction value as the customs value for imported goods unless it has a sufficient basis ("grounds") for concluding that the relationship between the buyer and seller influenced the price.[21] An analysis of whether the criminal charges are inconsistent with Articles 1.1 and 1.2(a), as asserted by the Philippines, should focus on whether the criminal 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 go on to assess whether the customs administration had grounds for considering that the relationship influenced the price and whether it communicated these grounds to the importer and provided the importer with a reasonable opportunity to respond.

24. The United States understands, based on the parties' submissions, that Thai customs officials accepted the transaction value of the imports at issue.[22] The United States further understands that the criminal charges challenged by the Philippines in this Article 21.5 proceeding consist of allegations that the importer has acted inconsistently with Thailand's

[20] Customs Valuation Agreement, Article 1.2(a); Annex I, Note to Article 1, Paragraph 2, para. 2; *see also Thailand – Cigarettes (Philippines) (Panel)*, para. 7.148.

[21] As the Panel explained in the original proceeding, "As explicitly stipulated in Article 1.2(a) . . . the mere fact that than importer is related to an exporter is not sufficient in itself for a customs administration to reject the transaction value. Article 1.2(a) requires the customs administration to examine the circumstances of sale in a related-party transaction. Consequently, it follows that Thai Customs was under an obligation to explain why it decided to reject the transaction value, including the basis for considering that the relationship influenced the price, after it had examined the circumstances of the sale. *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.189; *see also* paras. 7.148, 7.182, 7.200.

[22] *See* Thailand's First Written Submission, para. 6.35; the Philippines' First Written Submission, para. 495.

Customs Act by under-declaring those transaction values,[23] and that these allegations are subject to further proceedings in Thailand's Criminal Court.[24] Specifically, in the criminal charges, the Thai Public Prosecutor has alleged a violation of a provision of Thailand's Customs Act that criminalizes the avoidance or attempted avoidance of the payment of customs tax or of any duties, based on a declaration of a false price for imported goods.[25]

25. The parties disagree as to the nature of a comparison included in the criminal charges between the transaction value for the entries subject to the charges and the purchase prices of a duty-free retailer. While Thailand suggests the comparison reflects a benchmark for the computation of fines,[26] the Philippines argues it is a determination that the declared price was not the actual price.[27] In addition, with respect to the potential outcome of the criminal charges, the parties appear to agree that the criminal proceeding might give rise to fines, but dispute whether the penalties might also include ad valorem duties, calculated based on what the Thai Criminal Court determines to be the correct price in the context of the criminal prosecution.[28]

26. The United States submits that the Panel must consider carefully, in light of the facts presented, whether the criminal charges (as opposed to any potential outcome of the charges) constitute a failure to accept the transaction value as the customs value for imported goods. This is not because criminal actions necessarily fall within or outside the scope of CVA commitments, as the parties appear to suggest at certain points in their respective submissions.[29] The text of the CVA does not exclude a measure from its disciplines on the basis that it is characterized as criminal in nature.[30] Rather, this reflects the fact that, under the DSU, if the identified measure – as it exists at the time of panel establishment – consists of charges of unlawful conduct, the

[23] *See* Thailand's First Written Submission, paras. 6.7, 6.12, 6.74; Second Written Submission, para. 3.84; the Philippines' First Written Submission, paras. 515-516.
[24] *See* Thailand's First Written Submission, paras. 6.7-6.11, 6.76; the Philippines' First Written Submission, paras. 522-524.

[25] *See* Thailand's First Written Submission, paras. 6.12, 6.33; Second Written Submission, para. 3.84; the Philippines' First Written Submission, para. 515 (citing The Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English Translation) (Exhibit PHL-1-B)).

[26] *See* Thailand's First Written Submission, para. 6.40.

[27] *See* the Philippines' First Written Submission, paras. 467-469, 517; Second Written Submission, paras. 591-599.

[28] *See* Thailand's First Written Submission, paras. 6.40-6.41; Second Written Submission, paras. 3.108-3.125; the Philippines' First Written Submission, paras. 518-519; Second Written Submission, paras. 586-589, 611-612.

[29] *See, e.g.*, Thailand's First Written Submission, paras. 6.20-6.31; Second Written Submission, paras. 3.69-3.76, 3.89; the Philippines' Second Written Submission, para. 609.

[30] At the same time, the United States does not consider that the scope of CVA commitments "necessarily includes action taken to enforce the payment of the correct amount [of][*sic*] those duties, based on the customs value." The Philippines' Second Written Submission, para. 609. The consistency of a particular measure, including one characterized as criminal under a Member's domestic law, with the CVA would be determined on a case-by-case basis. Nonetheless, the nature of a measure (including whether it is an exercise of criminal enforcement) might inform the analysis of whether it is inconsistent with a particular provision of the CVA.

complainant is required to show how those charges are inconsistent with the CVA provisions at issue in order to prevail on its claims.

27. If the Panel determines that the criminal charges are a failure to accept the transaction value, as asserted by the Philippines, it should then examine whether those criminal charges are inconsistent with the CVA provisions at issue, including the clear obligation to accept the transaction value, absent grounds for considering that the relationship influenced the price.

C. Scope of "Measures Taken to Comply" Under Article 21.5

28. In addition to disputing whether the criminal charges are "ripe" for examination by the Panel, Thailand and the Philippines dispute whether the charges are a "measure taken to comply" within the meaning of Article 21.5. The Philippines argues that the criminal charges are a measure taken to comply because they have a "particularly close nexus" with the DSB's recommendations and rulings and a declared measure taken to comply (the Board of Appeal's September 2012 ruling regarding the entries for which the Panel found the valuation was inconsistent with various provisions of the CVA).[31] Thailand argues that the similarities identified by the Philippines between the criminal charges, the DSB's recommendations and rulings, and the declared measure taken to comply do not establish a sufficient nexus.[32]

29. As explained above, the scope of an Article 21.5 proceeding is more limited than that of an original panel proceeding, in that a panel's terms of reference under Article 21.5 are limited to "measures taken to comply," that is, "measures taken in the direction of, or for the purpose of achieving, compliance."[33] 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. As the Appellate Body has recognized, the scope of an Article 21.5 proceeding extends not only to acts taken to comply, but also to measures that should have been taken to comply with the DSB's recommendations and rulings.[34]

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[31] *See* the Philippines' First Written Submission, paras. 551-555; Second Written Submission, paras. 477-516. *See also* Status Report by Thailand, WT/DS371/15/Add.5 (Sept. 18, 2012), p. 2 ("Thailand's Board of Appeals for customs determinations has issued its determination in the appeal of the customs valuation of the specific entries of merchandise listed in the Philippines' request for the establishment of a panel.") (cited by Thailand's First Written Submission, para. 2.13; Rebuttal Submission on the Preliminary Ruling Request, paras. 3.21, 3.25; the Philippines' First Written Submission, para. 497).

[32] *See* Thailand's Second Written Submission, paras. 3.44-3.62.

[33] *US – Softwood Lumber IV (Canada) (Article 21.5) (AB)*, para. 66 (emphasis omitted).

[34] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 202 (quoting *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 36).

30. In addition, a measure that is not itself a measure taken to comply, but which has a "particularly close relationship"[35] or "sufficiently close nexus"[36] to a declared measure taken to comply and to the DSB's recommendations and rulings, may fall within a panel's terms of reference. The Appellate Body has stated that "[d]etermining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures."[37]

31. Among other findings, the Panel in the original proceeding in this dispute found that Thailand's rejection of the importer's declared transaction values for the entries at issue was inconsistent with Articles 1.1 and 1.2 of the CVA, and the DSB recommended that Thailand bring the measure into conformity with its obligations. Thailand suggests that because the findings by the Panel in the original proceeding in this dispute concerned only these specific entries, these findings do not cover any potential future assessment of customs valuation with respect to other entries.[38]

32. The United States does not understand Thailand's compliance obligations to be necessarily limited to the valuation of the entries at issue in the original proceeding. As noted above, the scope of an Article 21.5 proceeding may include measures that undermine or negate compliance.

33. That said, the question before the Panel in this proceeding with respect to the criminal charges is not whether "any" future assessment of customs valuation with respect to other entries is a measure taken to comply. Rather, the question is whether the criminal charges challenged by the Philippines are a measure taken to comply with the DSB's recommendation that Thailand bring its measure (the rejection of the declared transaction values) into conformity.

34. As both parties recognize, the timing of a measure is not dispositive as to whether it may be the subject of an Article 21.5 proceeding.[39] However, as explained by the Appellate Body, "measures taken to comply with recommendations and rulings of the DSB ordinarily post-date the adoption of the recommendations and rulings."[40] In some cases, "the fact that the alleged 'closely connected' measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between the measure and a Member's implementation obligations."[41]

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[35] *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US) (AB)*, para. 245; *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77.

[36] *See US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.

[37] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77.

[38] *See* Thailand's Rebuttal Submission on the Preliminary Ruling Request, para. 3.36.

[39] *See* Thailand's Rebuttal Submission on the Preliminary Ruling Request, para. 3.16; the Philippines' Second Written Submission, para. 473 (quoting *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 224).

[40] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 222.

[41] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.

35. In discussing the question of timing in their written submissions, both parties focus on the timing of the criminal charges, which post-date the recommendations and rulings and the declared measure taken to comply, while Thailand also notes that the investigation began before the adoption of the DSB's recommendations and rulings.[42]

36. The United States understands that, in addition, the criminal charges are allegations as to a set of specific customs entries that pre-date not only the recommendations and rulings and the declared measure taken to comply identified by the Philippines, but also the entries that were specifically the subject of those recommendations and rulings and declared measure taken to comply. In particular, the DSB's recommendations and rulings relate to specific entries cleared between August 2006 and September 2007.[43] The criminal charges, which are the result of an investigation that began in 2006,[44] relate to entries cleared between July 2003 to June 2006,[45] although the Philippines asserts that some of the entries at issue in the original proceeding were included in the investigation that gave rise to the charges but were ultimately excluded following intervention by the importer.[46]

37. The United States submits that the Panel should consider the timing of the entries in the criminal charges vis-à-vis the timing of the 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. While 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 measures taken to comply with such recommendations and rulings as a general matter, consideration of the respective timing of the sets of entries in this dispute depends on the facts presented.

38. With respect to the effects of the criminal charges, the United States understands that the customs authority accepted the transaction value for the entries subject to the criminal charges. The United States notes a potentially troubling inconsistency between a Member accepting the

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[42] *See* Thailand's Rebuttal Submission on the Preliminary Ruling Request, paras. 3.29-3.30; the Philippines' Second Written Submission, paras. 479-480.

[43] *See Thailand – Cigarettes (Panel)*, paras. 7.77, 8.2, 8.8; *see also* Request for Establishment of a Panel by the Philippines, WT/DS/371/3, para. 13. The United States notes that these entries appear to have landing dates between June 11, 2006, and September 10, 2007, with clearing dates between August 15, 2006, and September 12, 2007. *See* Request for Establishment of a Panel by the Philippines, WT/DS371/3; the Philippines' First Written Submission, para. 23. The dates provided with respect to the entries subject to the criminal charges appear to relate to date of clearance.

[44] *See* Request for Establishment of a Panel, Recourse to Article 21.5 of the DSU by the Philippines, WT/DS371/18, para. 11; *see also* Thailand's Rebuttal Submission on the Preliminary Ruling Request, para. 3.30.

[45] *See* Request for Establishment of a Panel, Recourse to Article 21.5 of the DSU by the Philippines, WT/DS371/18, para. 12; *see also* the Philippines' First Written Submission, para. 468; The Criminal Court, Charges, Case Black No. Or. 185/2559, 18 January 2016 (English Translation) (Exhibit PHL-1-B), para. 2; Thailand's Rebuttal Submission on the Preliminary Ruling Request, para. 3.33.

[46] *See* the Philippines' Rebuttal Submission on the Preliminary Ruling Request, para. 41; Second Written Submission, paras. 497-498.

transaction value for certain imports, on the one hand, while seeking criminal penalties on the basis of those values being falsely undervalued, on the other, as appears to be the case here.

39. As noted above, the CVA imposes a number of obligations with respect to the determination of the customs value for imported goods. At the same time, a measure that is not itself a determination of customs value, but which has only a hypothetical or speculative impact on the valuation of imported goods, would be difficult to characterize as a measure taken to comply with a recommendation and ruling to bring valuation determinations into conformity with valuation obligations. As such, the Panel's examination of whether the criminal charges involve a determination of the customs value of imported goods as a factual matter, discussed above in the context of whether the charges are "ripe" for dispute settlement and fall within the scope of application of the CVA, should also inform the Panel's consideration of whether the charges are a measure taken to comply within the scope of Article 21.5 of the DSU.

III. Amicus Submission

40. Finally, the United States addresses the May 12, 2017, amicus submission by the U.S.-ASEAN Business Council, the United States Council for International Business, the National Association of Manufacturers of the United States of America, and the National Foreign Trade Council, in light of the Panel's May 17, 2017, communication inviting the third parties to comment on this submission.

41. The United States has reviewed the amicus submission and notes that it reflects that the United States has repeatedly conveyed concerns regarding a range of customs valuation issues, in the WTO and in other fora, consistent with the U.S. interest in transparent, sound, and WTO-consistent valuation practices discussed above. The United States notes that the amicus submission in addition reflects the significant practical importance for traders of consistency with the procedures for customs valuation set forth in the CVA.

IV. Conclusion

42. The United States appreciates the opportunity to comment on the issues in this proceeding, and hopes that its comments will be useful to the Panel.