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

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SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by Thailand. In this submission, the United States will present its views on the proper legal interpretation of Article 15.1(a) of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* ("Customs Valuation Agreement"), as well as on Thailand's appeal regarding "ripeness" under Article 11 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. As set forth below, nothing in the customary rules of interpretation of public international law, nor the Customs Valuation Agreement, suggests that Article 15.1(a) should be interpreted narrowly. As the United States will explain, a determination of the customs value that should have been declared, used as the basis for an action alleging that the declared value was fraudulent, provides the value on which duties should have been collected, and can be characterized as having been made "for the purposes of levying" customs duties. The Customs Valuation Agreement imposes obligations on WTO Members, and a Member cannot evade those obligations by characterizing valuation as criminal enforcement.

3. The United States will then address Thailand's appeal regarding "ripeness." The United States will explain that, to the extent that a WTO Member considers that a panel erred in finding that a measure as it existed at the time of panel establishment is inconsistent with a covered agreement, the issue properly on appeal would not be the panel's interpretation or application of Article 11 of the DSU. Rather, the relevant issue for appeal would be the panel's interpretation or application of the particular obligations with which an inconsistency was found. The United States does not view Article 11 as imposing an obligation on a panel subject to appellate review.

II. THAILAND'S CLAIM OF ERROR REGARDING ARTICLE 15.1(A) OF THE CUSTOMS VALUATION AGREEMENT

4. In its report, the Panel rejected Thailand's argument that the Customs Valuation Agreement does not apply to one of the measures at issue, the criminal charges. Thailand argued that the charges were not subject to the Customs Valuation Agreement because the charges were issued by a prosecutor as opposed to the customs administration, allege only that the declared value was not the actual price and identify a benchmark for potential fines, will not result in the levying of customs duties on the goods at issue, and include an element of intent to defraud.[2]

5. The Panel rejected Thailand's assertion that the Customs Valuation Agreement does not apply to the charges because they were issued by the prosecutor, noting that the Customs Valuation Agreement itself does not include text limiting its application only to certain parts of a Member's government.[3]

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[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 299 words, and this U.S. third participant submission (not including the text of the executive summary) contains 3,445 words (including footnotes).
[2] Panel Report, paras. 7.632, 7.649, 7.665.
[3] Panel Report, paras. 6.638, 6.644.

6. The Panel further rejected Thailand's argument that the charges do not reflect a customs valuation determination, because they allege only that the declared value was not the actual price and identify a benchmark for potential fines.[4] The Panel found that the charges constitute a customs valuation because they allege that the importer declared a "false price," contrary to the "actual price;" specify the "actual price" and the basis for determining that price; and compare the two prices, and identify "underdeclared" duties based on the comparison.[5]

7. Further, in response to Thailand's assertion that the charges are outside the scope of the Customs Valuation Agreement because the charges would not result in the levying of customs duties on imported goods, as this "'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,'"[6] the Panel found that "customs duties" within the meaning of the Customs Valuation Agreement "are not necessarily 'levied on the border', either in physical or temporal terms."[7] Rather, the Panel stated that it understood 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."[8]

8. Finally, the Panel rejected Thailand's argument that the inclusion of an element to defraud under the charges places the charges outside the scope of the Customs Valuation Agreement.[9] The Panel considered that this intent element is separate from the valuation aspect of the charges.[10]

9. On appeal, Thailand claims that the Panel erred in finding the charges to be a "customs valuation" within the scope of Article 15.1(a) of the Customs Valuation Agreement.[11] Thailand argues that Article 15.1(a) limits the scope of the Customs Valuation Agreement "to valuation of imported goods used for no purpose other than the imposition and collection of *ad valorem* customs duties."[12] Thailand submits in its appeal, as it argued before the Panel, that the charges result in the imposition of fines as opposed to customs duties and include an element of intent to defraud.[13]

10. Article 15.1(a) 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." Articles 1 through 7 of the CVA establish a sequential hierarchy of methods for determining the customs value.

[4] Panel Report, paras. 6.648-6.649.
[5] Panel Report, paras. 7.654, 7.661.
[6] Panel Report, para. 7.668 (quoting Thailand's first written submission, para. 6.26).
[7] Panel Report, para. 7.670.
[8] Panel Report, para. 6.669.
[9] Panel Report, para. 7.683.
[10] Panel Report, para. 7.683.
[11] Thailand's Appellant Submission, paras. 2.38, 2.68-2.69.
[12] Thailand's Appellant Submission, para. 2.58.
[13] Thailand's Appellant Submission, paras. 2.9, 2.28.

11. Article 1.1 establishes the transaction value as the primary basis for valuation, and provides that "[t]he customs value shall be the transaction value, that is the price actually paid or payable for the goods," except under certain specified circumstances.

12. 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, in such cases, "the circumstances of sale shall be examined" and "the transaction value shall be accepted provided that the relationship did not influence the price."

13. If, and only if – after taking the necessary procedural steps – the transaction value is determined not to be acceptable, does the authority proceed to the valuation methodologies set forth in Articles 2 through 7. The CVA makes clear that recourse to the method set forth in each of those Articles is available only when the valuation cannot be determined by the methods in the preceding Articles.

14. As just described, the text of the Customs Valuation Agreement generally imposes obligations on WTO Members. It does not distinguish between valuation conducted by one part of a Member's government, as opposed to another.[14] Nor does it distinguish between valuation conducted for transactions involving fraud, as opposed to legitimate transactions.

15. As such, the key interpretative question presented with respect to the consistency of a measure with the Customs Valuation Agreement is whether that measure reflects a determination of customs value, and if so whether that valuation is consistent with the obligations set forth in that agreement.

16. In challenging the Panel's conclusion that the charges at issue in this dispute fall within the scope of the Customs Valuation Agreement, Thailand argues that the term "levying" in Article 15.1(a) "must be construed narrowly to cover measures that concern the collection of a duty or a tax."[15] Thailand submits that a determination of the customs duties due falls within the meaning of Article 15.1(a) "*only to the extent that* this determination is directly connected to the collection of those *ad valorem* duties."[16] It appears that Thailand further submits that Article 15.1(a) only covers determinations to the extent the duty amount calculated is actually collected.[17]

17. Under the customary rules of interpretation of public international law, as referenced in Article 3.2 of the DSU, "[a] treaty shall be interpreted in good faith in accordance with the

[14] As the Panel noted, "[t]he absence of any scope and coverage provision in the CVA weighs heavily against an interpretation that would restrict the scope and coverage of the provisions therein to a narrow subset of government officials." Panel Report, para. 6.638.
[15] Thailand's Appellant Submission, para. 2.48.
[16] Thailand's Appellant Submission, para. 2.49.
[17] Thailand's Appellant Submission, paras. 2.55, 2.71.

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[18]

18. Nothing in these rules, nor in the text of the Customs Valuation Agreement itself, mandates an interpretation of Article 15.1(a) that is "narrow" as opposed to "broad." Likewise, the United States does not understand the panel in the *Colombia – Ports of Entry* dispute to have examined in the abstract to what extent a measure must be "connected" to the collection of duties in order to constitute a determination of customs value within the meaning of the Customs Valuation Agreement, or to have considered that Article 15.1(a) must be construed "narrowly."[19]

19. As noted above, Article 15.1(a) 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." The ordinary meaning of the term "levy" is "[r]aise (contributions, taxes) or impose (a rate, toll, fee, etc.) as a levy," or "[r]aise a sum of money by legal execution or process."[20] Article 15.1(a) does not use the term "levying" in isolation; rather, it defines the customs value as the value "for the purposes of levying" duties.

20. As noted above, under Article 1.1 of the Customs Valuation Agreement, the transaction value is the basis for customs valuation except in specified circumstances. As such, a determination of the value that should have been declared, used as the basis for an action alleging that the declared value was fraudulent, provides the value on which duties should have been collected (and implies that duties were lost). Such a determination can therefore be properly characterized as having been made "for the purposes of levying," that is, imposing, customs duties. Even under Thailand's "narrow" interpretation of Article 15.1(a), the identification of a customs value as the value other than the declared value would reflect a determination that a Member was entitled to collect duties on the basis of that value,[21] and therefore appear to be "directly connected" to the collection of duties.

21. Use of the term "payment" in Articles 11 and 13 of the Customs Valuation Agreement does not support an interpretation of Article 15.1(a) as limited to determinations for the sole purpose of calculating the amount of customs duties that must be and are collected.[22] As used in Article 11.1, the reference to "any other person [besides the importer] liable for payment of the duty" delineates the persons who shall have the right to appeal a determination of customs value. Article 13 provides that a WTO Member shall permit goods to be withdrawn from customs if the determination of the customs value is delayed, but may require a "sufficient guarantee . . . covering the ultimate payment of customs duties for which the goods may be liable." Neither of

[18] *Vienna Convention on the Laws of Treaties*, Article 31.
[19] *Colombia – Ports of Entry (Panel)*, paras. 7.79, 7.87, 7.101, 7.129.
[20] The New Shorter Oxford English Dictionary, 3d ed. 1993, vol. 1, at p. 1574 (Definitions 1, 2(b)).
[21] *See* Panel Report, para. 7.669 ("The Public Prosecutor's determination that the amount of the *ad valorem* customs duties that PMTL paid was less than the amount of *ad valorem* customs duties that should have been *collected* from PTML, in the context of an allegation that PTML declared a false price in order to evade the customs duties owed, suffices to establish that the Charges value goods for the purposes of collecting *ad valorem* customs duties on imported goods.").
[22] Thailand's Appellant Submission, para. 2.55.

these provisions purports to define Article 15.1(a) in a way that differs from its ordinary meaning.

22. To the extent that Thailand argues that the imposition of penalties is not subject to WTO disciplines, or that a WTO Member may misvalue goods as long as it seeks only to impose penalties, and not duties, based on that misvaluation,[23] the United States disagrees. As the Panel correctly noted, a WTO Member cannot evade its valuation obligations by simply characterizing undervaluation as "fraud" and efforts to ensure that a certain amount of duties are declared and collected as a "penalty."[24]

23. Moreover, as noted above, the obligations of the Customs Valuation Agreement are obligations of Members, and do not exclude criminal organs within a Member's government. Members may take actions to address customs fraud – but WTO-inconsistent customs valuation is neither an appropriate nor a necessary response to customs fraud. A charge of fraud, or imposition of penalties for customs fraud, premised on the customs value must be based on correct valuation.[25]

III. THAILAND'S CLAIM OF ERROR WITH REGARD TO THE PANEL'S ANALYSIS OF "RIPENESS"

24. In its report, the Panel rejected Thailand's claim that the Panel was precluded from examining the criminal charges on the basis of "ripeness."

25. The Panel found, correctly, that the covered agreements do not provide for a doctrine of "ripeness."[26] The Panel also found that the charges were a measure within the meaning of Article 6.2.[27]

26. However, in analyzing Thailand's "ripeness" arguments, the Panel further examined whether the charges could be analyzed separately from subsequent criminal proceedings,[28] whether the charges were a "determination" within the meaning of the Customs Valuation Agreement,[29] and whether it could make findings on the charges without engaging in speculation as to the future.[30] The Panel concluded that the answer to each of these inquiries was yes.

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[23] Thailand's Appellant Submission, paras. 2.54, 2.71.
[24] Panel Report, para. 7.671; *see also* para. 7.642.
[25] Among other things, Thailand attempts to rely upon an incomplete excerpt of U.S. customs law in support of its argument. The United States notes that no U.S. measure is at issue in this dispute. However, to the extent that Thailand is arguing that U.S. law supports an interpretation of the Customs Valuation Agreement under which a Member may use improper customs value as the basis for a penalty, the United States disagrees.
[26] Panel Report, paras. 7.569, 7.577.
[27] Panel Report, para. 7.569. *See also* Panel Report, para. 5.752 ("[C]onducting an analysis in terms of so-called 'ripeness' has the potential to obscure the more precise and individualized legal standards established in the text of the covered agreements.")
[28] Panel Report, paras. 7.576-7.584.
[29] Panel Report, paras. 7.585-7.597.
[30] Panel Report, paras. 7.598-7.605.

27. On appeal, the United States understands Thailand to argue that the Panel committed legal error in concluding that it was not precluded from considering the WTO-consistency of the charges based on a "ripeness doctrine."[31] In particular, Thailand argues that the Panel failed to conduct an objective assessment, as set forth under Article 11 of the DSU, because the Panel "did not have sufficient information to determine whether WTO-inconsistent conduct had taken place" with respect to the charges.[32]

28. However, it does not appear that Thailand claims that the Panel committed legal error in interpreting the specific provisions of the Customs Valuation Agreement at issue to apply to the charges, notwithstanding what Thailand characterizes as the "unripe" nature of the measure.

29. A panel's terms of reference in a proceeding under Article 21.5 of the DSU, in addition to being limited to "measures taken to comply," 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 "and to make such findings as will assist the DSB" in making recommendations.[33] Under Article 6.2, the "matter" consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint."[34]

30. 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."[35]

31. If a measure is within a panel's terms of reference, the panel's mandate under the DSU is to examine the measure as it existed at the time of panel establishment and to make those findings with respect to that measure that will assist the DSB in making recommendations. Article 11 of the DSU reinforces this conclusion. In particular, Article 11 provides 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, and "make such other findings as will assist the DSB in making the recommendations…."

32. The "unripe" nature of a measure might inform the examination of the consistency of the measure at issue with the obligations asserted. For example, the "unripe" nature of a measure might mean that the precise content of the measure at the time of the panel request does not

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[31] Thailand's Notification of Appeal, p. 2.
[32] Thailand's Appellant Submission, para. 3.26; *see also* paras. 3.28, 3.29.
[33] 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.
[34] *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 (Article 21.5 – EC) (AB)*, para. 59.
[35] *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).

reflect conduct inconsistent with the covered agreement at issue. If the identified measure – as it exists at the time of 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. However, the "unripe" nature of a measure does not preclude examination of that measure by a panel at all, provided it is within the panel's terms of reference.

33. As such, to the extent that a WTO Member considers that a panel erred in finding that a measure as it existed at the time of panel establishment is inconsistent with a covered agreement, the issue properly on appeal would not be the panel's interpretation or application of Article 11 of the DSU, as Thailand suggests.[36] Rather, the relevant issue for appeal would be the panel's interpretation or application of the particular obligations with which an inconsistency was found. As the United States has recently noted in meetings of the Dispute Settlement Body, Article 11 describes the "function of panels." In Article 11, the operative phrase is "should make an objective assessment of the matter before it," rather than the obligatory "shall make."[37] Accordingly, the United States does not view Article 11 as imposing an obligation on a panel subject to appellate review.

IV. CONCLUSION

34. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.

[36] Thailand's Notification of Appeal, p. 2; Thailand's Appellant Submission, paras. 3.20, 3.24.
[37] WT/DSB/M/417, para. 4.5 (statement of the United States) (observing that Members had chosen to use the verb "should" in 21 instances in the DSU and the verb "shall" in 259 instances).