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importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

- (i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;
- (ii) the customs value of identical or similar goods as determined under the provisions of Article 5;
- (iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

1.2 Text of interpretative note to Article 1

Note to Article 1

Price Actually Paid or Payable

1. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.

2. Activities undertaken by the buyer on the buyer's own account, other than those for which an adjustment is provided in Article 8, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the customs value.

3. The customs value shall not include the following charges or costs¹, provided that they are distinguished from the price actually paid or payable for the imported goods:

- (a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;
- (b) the cost of transport after importation;
- (c) duties and taxes of the country of importation.

4. The price actually paid or payable refers to the price for the imported goods (r)-1 a.7 ()021.48 0 Td

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Among restrictions which would not render a price actually paid or payable unacceptable are restrictions which do not substantially affect the value of the goods. An example of such restrictions would be the case where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year.

Paragraph 1(b)

1. If the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued, the transaction value shall not be acceptable for customs purposes. Some examples of this include:

- (a) the seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities;
- (b) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;
- (c) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that the seller will receive a specified quantity of the finished goods.

2. However, conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value. For example, the fact that the buyer furnishes the seller with engineering and plans undertaken in the country of importation shall not result in rejection of the transaction value for the purposes of Article 1. Likewise, if the buyer undertakes on the buyer's own account, even though by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of the customs value nor shall such activities result in rejection of the transaction value.

Paragraph 2

1. Paragraphs 2(a) and 2(b) provide different means of establishing the acceptability of a transaction value.

2. Paragraph 2(a) provides that where the buyer and the seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the customs value provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the customs administration have no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For example, the customs administration may have previously examined the relationship, or it may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.

3. Where the customs administration is unable to accept the transaction value without further inquiry, it should give the importer an opportunity to supply such further detailed information as may be necessary to enable it to examine the circumstances surrounding the sale. In this context, the customs administration should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organize their

example, 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, this would demonstrate that the price had not been influenced.

4. Paragraph 2(b) provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a "test" value previously accepted by the customs administration and is therefore acceptable under the provisions of Article 1. Where a test under paragraph 2(b) is met, it is not necessary to examine the question of influence under paragraph 2(a). If the customs administration has already sufficient information to be satisfied, without further detailed inquiries, that one of the tests provided in paragraph 2(b) has been met, there is no reason for it to require the importer to demonstrate that the test can be met. In paragraph 2(b) the term "unrelated buyers" means buyers who are not related to the seller in any particular case.

Paragraph 2(b)

A number of factors must be taken into consideration in determining whether one value "closely approximates" to another value. These factors include the nature of the imported goods, the

because the fact that the buyer and seller are related should not in itself be grounds for regarding the transaction value as unacceptable;

- The customs authority shall examine the circumstances of the sale in the light of the information provided by the importer or otherwise and communicate to the importer the grounds for preliminarily considering that the relationship influenced the price;
- The customs authority gives the importer a reasonable opportunity to respond. Given the opportunity, the importer submits further information; and
- The customs authority makes a final decision on whether to accept the transaction value.

Based on the procedural steps required in the customs authorities' examination of the circumstances of the sale as above, we can infer that the temporal scope of an examination under Article 1.2(a) begins when a customs authority's doubts on the validity of the transaction value trigger the need for an examination of the acceptability of the transaction value, and ends when the customs authority makes a final deci

examine the circumstances surrounding the sale'. The text of paragraph 3 of the Interpretative Note to Article 1.2(a) therefore makes it clear that the responsibility imposed on importers for providing sufficient information is directly linked to the objective of *enabling* the customs authorities to examine the circumstances of the sale.'

...

In sum, we consider that the customs authorities and importers have respective responsibilities under Article 1.2(a). The customs authorities must ensure that importers be given a reasonable opportunity to provide information that would indicate that the relationship did not influence the price. Importers are responsible for providing information that would enable the customs authority to examine and assess the circumstances of sale so as to determine the acceptability of the transaction value. Provided with such information, the customs authorities must conduct an 'examination' of the circumstance of sale, which would require an active, critical review and consideration of the information before them."¹¹

7. In reaching this conclusion, the Panel in *Thailand – Cigarettes (Philippines)* also referred to the Appellate Body's analysis in *US – Wheat Gluten* of the nature of the investigation to be conducted by the competent authorities in the context of the Agreement on Safeguards. The Panel recalled the Appellate Body's statement that the Agreement on Safeguards envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities.¹²

previous paragraph. Without informing the importer of the basis for its consideration that the information provided up until that stage of the process did not establish the validity of the transaction value, the importer would not have been able to effectively, if at all, respond to the authority's consideration. This would further hinder the ability of the customs authorities to properly examine the circumstances of sale under Article 1.2(a).

Furthermore, Thai Customs' explanation for the final determination of the final customs value for the entries at issue is contained in its letter dated 12 April 2007 and

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institutional framework of a 'customs administration' in the narrow sense of the term."²⁴

13. The Panel observed that, in this case, there was evidence on the record of repeated exchanges between the Department of Special Investigation (DSI) and Phillip Morris Thailand Limited (PMTL) specially concerning the CK-21A forms. In this light, the Panel rejected the Philippines' assertion 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."²⁵ The Panel stated that the wording of Article 1.2(a), third sentence, does not sup(l)]T] Tc 01.027 a 4 (w)10.6sSlc

to further respond to the customs authority's 'grounds' for considering that the relationship influenced the price, the 'explanation' to be provided after the valuation process is completed must therefore include the assessment of all relevant information, including that provided by the importer as a response to the customs authority's communication of its grounds regarding its consideration.

Moreover, we consider that the right of the importer to have a reasonable opportunity to respond to the customs authority's grounds for its consideration under Article 1.2(a) provides contextual basis for the term 'grounds'. As the Philippines suggests, in order for the importer to have a reasonable opportunity to respond to the customs authorities' consideration, particularly if the customs authority considers that there is insufficient information, 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. In this regard, we do not find it necessary or useful for us 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. We do agree, however, with the Philippines that without knowing the reasons for the authority's consideration in relation to the specific evidence before it, the importer would not be in the position to effectively 'respond', for example, by further elaborating on the relevance of the evidence it has already submitted and presenting additional information. It would be desirable if a customs authority could, to the extent possible, inform the importer of the kind(s) of additional factual information that it considers may prove useful in further assessing the acceptability of the transaction value. It is difficult to conceive any other way in which the importer can have a reasonable opportunity to respond to the customs authorities' consideration that the relationship did influence the price."³⁰

16. In *Thailand - Cigarettes (Philippines)*, the importer provided Thai Customs with certain information and data to establish the acceptability of the transaction value. Given these factual circumstances, the Panel in *Thailand – Cigarettes (Philippines)* found that Thai Customs' grounds as provided to the importer (that the importer and the seller are related parties ... and the importer has yet to prove if the said relationship influences the customs value determination or not) did not satisfy the obligation under Article 1.2(a) to communicate the grounds for its consideration.³¹ The Panel considered that "to the extent that Thai Customs was presented with 4 s

