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1 GENERAL

1.1 Concept of customs valuation

1. In *Colombia – Ports of Entry*, the parties focused their arguments relating to Colombia's use of indicative prices on a series of factual determinations concerning the actual nature and functioning of indicative prices within Colombia's customs procedures. Panama considered that the

2. The Panel in that dispute further elaborated on the meaning of customs valuation in the context of its analysis of indicative prices used by Colombia:

"In the Panel's view, the two central aspects within the concept of customs valuation are (i) the *value* of the goods, which is used (ii) for the purposes of *levying ad valorem* customs duties.

The first question is whether the indicative prices set by Colombia represent the '*value of the goods*'. In light of the ordinary meaning of customs valuation, indicative prices whenever higher than the declared value reflect the 'value of the goods' imported into Colombia. Accordingly, the question arises whether the value assigned to goods entering Colombia is used for the purposes of levying customs duties. The Pane t25 () (2 (t).7 (t)

same dispute had not addressed the meaning of the term "customs administration" in the CVA, since it had disagreed with Thailand's view that the CVA obligations invoked by the Philippines apply only to those state organs that are part of the "customs administration".⁶ Similarly, the second compliance Panel did not consider it pertinent to go further in defining the term "customs administration" in the context of the CVA, and agreed with the first compliance panel's finding that "the substantive CVA obligations at issue apply to any organ of the state that makes a 'customs valuation' determination irrespective of whether that organ forms part of the 'customs administration'."⁷

5. The Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines II) stated that, although the WCO Secretariat's view might assist a panel in the interpretation of certain terms, the precise interpretation of the notion of "customs administration" would not alter the Panel's conclusion or analysis in this case, and thus, it is not necessary to consider the definition of "Customs" in the Revised Kyoto Convention, nor the WCO Letter.⁸ The Panel further considered that to find that the substantive obligations in the CVA apply to some state organs but not to others would result in "opening the door for Members to evade their CVA obligations", and "it would conflict with the CVA's preambular objectives."⁹ In this light, the second compliance Panel in this dispute rejected Thailand's argument that the CVA is inapplicable to the 2002-2003 Charges, because they were criminal charges, issued by the Public Prosecutor, which is not part of the "customs administration". The Panel thereby concluded:

"Based on the foregoing, the Panel finds that the obligations in Articles 1.1, 1.2(a), second sentence, and the relevant custom valuation rules in Articles 2 to 7 apply to any organ of the state that makes a 'customs valuation' determination. ... Having reached that conclusion, the Panel again finds it unnecessary to reach any definitive conclusion on the scope of the term 'customs administration' in the context of the CVA."¹⁰

1.2.2

individual case".¹⁵ On this basis, the Panel concluded that "the Charges constitute a 'determination' for purposes of the CVA".¹⁶

1.3 Standard of review

1.3.1 General

8. In *Thailand – Cigarettes (Philippines)*, the Panel set out that an objective assessment under Article 11 of the DSU was the proper standard for its review of the complainants' claims under the Customs Valuation Agreement. The Panel further elaborated that the objective assessment must be understood in the light of the relevant obligations of the substantive agreement at issue.¹⁷ As for the claims under the Customs Valuation Agreement, the Panel therefore observed that its objective assessment must be understood in the light of the relevant obligations under the Customs Valuation Agreement, particularly the grounds and explanations to be provided by the customs authority at the time of determination pursuant to Articles 1.2(a), 7.3 and 1

"[T]he precise standard applicable to a panel's review of a claim, and in particular to the factual aspects of a claim, depends on whether the panel must conduct an analysis of the facts as the first trier of facts or as a reviewer of factual determinations made by domestic authorities. We understand this distinction to be based on the nature of the specific obligations under the particular provision of a given WTO-covered agreement. ...

The Philippines' claim under Articles 1.1 and 1.2(a) of the Customs Valuation Agreement that Thai Customs improperly rejected the declared transaction values of the subject entries of cigarettes, requires us to make an objective assessment of whether Thai Customs examined the circumstances of the s

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1.4 Reliance on information provided by the exporting country's authorities

14. The Panel in *Thailand – Cigarettes (Philippines II)* addressed the Thai authorities' reliance on the pricing and cost information reported by the producer and seller of the cigarettes at issue, Philip Morris (PM) Indonesia, to Indonesian tax authorities in the CKM).L(e)s)hTE3 (TE3 . Td[.]inT(a,)3 (o)-2.3D11

24. The Panel in *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)* held that "the provision of a valuation dispute guarantee must be requested, by definition, before the final value of the goods has been clarified in accordance with the valuation methods established"⁴².

25. In *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)* the Panel held that "the provision of a valuation dispute guarantee must be requested, by definition, before the final value of the goods has been clarified in accordance with the valuation methods established"⁴².

GATT 1994, and the *Agreement on Safeguards* provides that it clarifies and reinforces the disciplines of GATT 1994, specifically those of Article XIX."⁴⁶

29. In considering GATT Article XX and its applicability to the Customs Valuation Agreement, the Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)* found that "[g]iven the limited scope and reach of the obligations in the CVA, we see no reason why authorities pursuing the legitimate regulatory purpose of identifying or combatting customs fraud would need to deviate from the system of customs valuation established in the CVA, so as to require recourse to Article XX of the GATT 1994. For these reasons, we do not agree with the premise that there is no 'inherent balance' in the CVA, such that 'the only way to ensure this balance is respected is for Article XX of the GATT 1994 to be available'".⁴⁷

30. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, the Panel found that "the drafters would not have intended for another layer of general exceptions in Article XX of the GATT 1994 to apply," and considered the specific provisions of Article 7.1 and 7.2 as a further example of the inherent balance in the CVA.⁴⁸ The Panel then stated that:

"[I]nterpolating the general exceptions in Article XX of the GATT into the CVA would be inconsistent with the object and purpose of the CVA."⁴⁹