



# Undervaluation Disputes at the WTO

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# Undervaluation . Disputes at the WTO

- **DS366: Colombia — Indicative Prices and Restrictions on Ports of Entry**
  - Colombia – Ports of Entry.
- **DS371: Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines**
  - Thailand – Cigarettes (Philippines).

# 1. Colombia – Ports of Entry (1/5)

- Facing significant ongoing problems with under-invoicing and smuggling in relation to certain textiles, apparel and footwear classifiable under HS Chapters 50 to 64 of Colombia's Tariff Schedule, with particular emphasis placed on those arriving from the CFZ (Colon Free Zone) and Panama, Colombia enacted customs regulations on their importation.
  - The Colombian Unidad de Información y Analisis Financiero (UIAF) had established links between money-laundering, contraband and under-invoicing in Colombia arising from the introduction of goods into Colombia purchased in the CFZ with illicit US currency. The United Nations, International Monetary Fund and other Member countries had also assessed the relationship between the CFZ and the Colombian Black Market Peso Exchange, a trade-based laundering mechanism.
- According to those regulations, importers declaring a value below the “indicative prices” had 5 days to “correct” their customs declaration to set their value at the indicative price level and pay the corresponding amount of customs duties. Otherwise importers will need to reship the goods (within a period of one month) or the goods will be considered “legally abandoned”.
  - **Indicative price:** a reference price established by administrative act for use **as a control mechanism** on the declared f.o.b. value of imported goods. Indicative prices are applied according to the type of goods and are calculated based on the average production costs of the imported goods, when available, or otherwise, on the lowest price actually negotiated or offered for importation of the good into Colombia.

# 1. Colombia – Ports of Entry (2/5)

- If the customs declaration is corrected and the duties are paid accordingly, the goods will be released. Then the documentation is sent to the Audit Unit for subsequent control.
  - In that subsequent control a value study is carried out to determine the customs value of the goods. If the value determined is below the indicative price, the difference is repaid to the importer (there is no time limit for determination nor for repayment). If the value determined is higher than the indicative price, an additional amount of duty is determined and the importer is required to pay it.

# 1. Colombia – Ports of Entry (3/5)

- Colombia claimed that the customs value was only determined in the framework of the subsequent control, while the initial indicative prices were only a tool to set the amount of a cash deposit guarantee, not a proper “customs value”. Therefore, customs valuation rules cannot apply to the “indicative prices”.
  - “Customs valuation involves the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties” (7.83).
  - Colombia’s claim is dismissed by the Panel, taking into account many elements of Colombia’s customs legislation. That legislation called it “payment” (not guarantee) and no other “guarantee” was allowed in this case, contrary to the general rule; the Colombian legislation did not allow cash deposits as a type of guarantee; subsequent control was not carried out systematically (for many entries the indicative prices were final); in the scarce cases in which a lower value was determined in the subsequent control, it was on the request of importers and repayment took about 2 years; the repayment is regarded in Colombian law as of “excessive taxes paid”.

# 1. Colombia – Ports of Entry (4/5)

- Once the Panel finds that the indicative prices set a threshold for the customs value proper (not for a “guarantee”), the panel finds that such legislation is in breach of the WTO Agreement on customs valuation.
  - It is in breach “as such” of the preference for the transaction value method and for the hierarchical and sequential order among the customs valuation methods.
  - “national customs authorities are required to **apply the various customs valuation methods** laid down in Articles 1, 2, 3, 5 and 6 of the Customs Valuation Agreement **on a case-by-case basis, so as to reflect the particular conditions of the sale of the product in question**. The Panel considers that, inasmuch as the customs values for subject goods are established on a fixed basis for broad categories of products without any examination of the specific circumstances surrounding the transaction at issue, indicative prices do not reflect any of the methodologies set out in the referred provisions” (7.142).
  - It is also in breach “as such” of art. 7.2(b) and (f) of the Customs Valuation Code (in the context of the fallback method, value cannot be determined on the basis of a system which provides for the acceptance for customs purposes of the higher of two alternative values; nor in minimum customs values).



# 1. Colombia – Ports of Entry (5/5)

- **VAT and National Treatment.** There was also a claim against Colombia's VAT on imports, as the tax base refers to the customs value as its main component. Once determined that the customs value is artificially increased as a result of the imposition of indicative prices, that also impacts VAT's tax base and, therefore, it is in breach of GATT art. III (National Treatment Clause), since the tax base for domestic transactions is based on the transaction price.
  - The Panel found that such breach would only result from the fact that the VAT legislation refers to the customs value; once Colombia addresses the breach found in its customs valuation legislation, the VAT legislation would be automatically corrected.
- On 20 May 2009, the DSB adopted the panel report.

## 2. Thailand – Cigarettes (Philippines) (1)

- This dispute concerns a series of inter-related customs and internal tax measures taken by Thailand regarding cigarettes imported into Thailand from the Philippines by Philip Morris Thailand (PM), that allegedly serve to protect the interests of the State-owned monopoly producer of cigarettes, TTM, and which are characterized by a lack of transparency that deprives the importer of the most basic information regarding the regulatory treatment of its goods.
  - High Ministry and Customs officers were, simultaneously, members of the Board at TTM!
- **Chronic delays in decision-making.** Administrative appeals had not been decided after more than 7 years.
  - Alleged breach of Art. X.3(a) and (b) GATT.
- Thailand rejected transaction value arguing that the price between related parties (PM Philippines > PM Thailand) was unacceptable. And determined a deductive value instead.
  - It was an administrative practice, not established in a legal provision. The Panel found that the Philippines had not provided evidence it was a unwritten rule.



## 2. Thailand – Cigarettes (Philippines) (2)

- According to the Panel, “Article 1.2(a) imposes an obligation on customs authorities to “examine” the circumstances of the sale” (7.148). That exam is necessary “when there are *doubts* about the acceptability of the price” (7.150).
  - Customs shall examine the circumstances of the sale in the light of the information provided by the importer or otherwise and must then communicate to the importer the grounds for preliminarily considering that the relationship influenced the price, giving the importer a reasonable opportunity to respond.
  - “The ordinary meaning of the term **“examine”** signifies that the customs authorities must ***carefully consider, investigate and inquire into*** the information provided by importers concerning the circumstances of the transaction” (...) “Given that the transaction value should normally form the basis of a valuation, any situation giving rise to a reason(s) for questioning the transaction value would ***naturally demand the customs authorities' critical consideration of, inquiry into, and investigation of, the relevant situation***” (7.159).
  - “the principal responsibility of providing relevant information that may show the acceptability of the transaction value, in accordance with the method under either Article 1.2(a) or 1.2(b), rests upon the importer” (...) “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***”.

## 2. Thailand – Cigarettes (Philippines) (3)

- Recalling the analysis of the AB in US- Wheat Gluten, the Panel observes that **"competent authorities have an *independent* duty of investigation and that they cannot 'remain passive in the face of possible short-comings in the evidence submitted, and views expressed, by the *interested parties*.'" (7.162; Compare with ECJ EURO2004!!!!)**
- And insists, "the word "examine" also suggests **"a proper degree of activity** on the part of the [customs authorities] because authorities charged with conducting an inquiry or a study ... **must actively seek out pertinent information**" (...) "the customs authority must clearly **indicate to the importer how it evaluates** the information submitted by the importer, including the insufficiency of the information submitted and, if necessary and feasible, any further particular type of information that may help them assess the validity of the transaction value. This must, in our view, be carried out **at the *communication of grounds stage*** (...) whereby the customs authority will explain the grounds for considering preliminarily that the relationship influenced the price so as to give a reasonable opportunity for the importer to respond" (p. 7.164).
- "although not explicitly spelled out in the text of Article 1.2(a), we consider that the **customs authorities' obligation to communicate its evaluation of the evidence submitted** as part of its "grounds" is inherent in the meaning and the context of the term "examine". Otherwise, the importer would not be able to effectively "enable" the customs administration to examine the circumstances of the sale" (7.165).

## 2. Thailand – Cigarettes (Philippines) (4)

- In sum, “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**” (7.171).
- Thai Customs rejected transaction value without providing any grounds for rejection, other than the parties were related and “and it cannot be proven whether the relationship has an influence on the determination of customs values or not” (7.191) > This is not a proper communication of the grounds for rejection of TV (7.222 and 7.223).
- “In conclusion, **we find that Thai Customs failed to examine the circumstances of the sale** with respect of the entries at issue within the meaning of Article 1.2(a). Consequently, **Thailand acted inconsistently with Articles 1.1 and 1.2(a)** in rejecting the transaction value of the concerned entries” (7.195).

## 2. Thailand – Cigarettes (Philippines) (5)

### – Article 16 CVC.

- **“Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer’s goods was determined”.**
- The Panel considers “that the explanation under Article 16 must be understood to **include** in its scope **the reason for rejecting the transaction value as well as the basis for the valuation method used**” (7.237). “the **explanation to be provided under Article 16** of the Customs Valuation Agreement **must be sufficient to make clear and give details of how the customs value** of the importer's goods was determined, including the **basis for rejecting the transaction value and other valuation methods** that sequentially precede the method actually used by the customs authorities” (7.240).
- “For the foregoing reasons, **we find that Thai Customs failed to provide an explanation** as to how the customs value of the importer's goods was determined inconsistently with Thailand's obligations under Article 16” (7.266).

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**Thanks for your attention!**

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