

**THAILAND – CUSTOMS AND FISCAL MEASURES ON  
CIGARETTES FROM THE PHILIPPINES**

*Report of the Panel*



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<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769

<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439, adopted 7 November 1989, BISD 36S/345.
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Shrimp</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, 2821
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
<i>US – Stainless Steel (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, 1295
<i>US – Stainless Steel (Mexico)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R
<i>US – Steel Safeguards</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R, and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, 3273
<i>US – Tobacco</i>	GATT Panel Report, <i>United States Measures Affecting the Importation, Internal Sale and Use of Tobacco</i> , DS44/R, adopted 4 October 1994, BISD 41S/131.
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417

<i>US – Zeroing (EC)</i> <i>(Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
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## TABLE OF ABBREVIATIONS

Abbreviation	Description
ACC	Appeals Consideration Committee, now the Board of Appeals
AFTA	Association of South East Asian Nations (ASEAN) Free Trade Agreement
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ASEAN	Association of South-East Asian Nations
B	baht
BoA	Thai Board of Appeals within the Ministry of Finance
CEPT	Common Effective Preferential Tariff
c.i.f.	cost, insurance and freight
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Customs Value Decision	Decision Regarding Cases where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value
CVA	Customs Valuation Agreement
DDG	Deputy Director-General
DG	Director-General
DG Customs	Director-General of Customs
DG Excise	Director-General of Excise
DG Revenue	Director-General of Revenue
DG Treasury	Director-General of Treasury
DSB	Dispute Settlement Body
DSI	Department of Special Investigations
DSU	Dispute Settlement Understanding
Duty-Paid c.i.f. Price	c.i.f. prices of the cut tobacco or tobacco plus duties on imports
FY	financial year
GAAP	generally accepted accounting principles

Abbreviation	Description
GATT 1994	General Agreement on Tariffs and Trade 1994
GM	gross margin
MFN	Most Favoured Nation
MRSP	Maximum Retail Selling Price
OFAC	U.S. Office of Foreign Assets Control
PG&E	Profit and General Expenses
PMI	Philip Morris International Inc.
PM Philippines	Philip Morris Philippines Manufacturing Inc.
PM Thailand	The Thailand branch office of Philip Morris (Thailand) Limited
PMTL	The Thailand branch office of Philip Morris (Thailand) Limited
PWC	PricewaterhouseCoopers
RPT	Reasonable Period of Time
RRSP	Recommended Retail Selling Price
RSP	Retail Selling Price
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Thai Customs	The Customs Department of the Kingdom of Thailand
TNS Market Study	Taylor Nelson Sofres Market Study
TTM	Thailand Tobacco Monopoly
TTM officials	Thailand Tobacco Monopoly Board of Directors
TV	transaction value
VAT	Value Added Tax
Vienna Convention	Vienna Convention on the Law of Treaties
WCO	World Customs Organization
WTO Agreement	Marrakesh Agreement Establishing the WTO

## I. INTRODUCTION

### A. COMPLAINT OF THE PHILIPPINES

1.1 On 7 February 2008, the Philippines requested consultations with Thailand pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Article 19 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the "Customs Valuation Agreement") with respect to the measures and claims set out below.<sup>1</sup>

1.2 Consultations were held on 23 April 2008 and on 9 September 2008, but failed to produce a mutually agreed solution.

### B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 On 29 September 2008, the Philippines requested the establishment of a panel. At its meeting on 17 November 2008, the Dispute Settlement Body ("DSB") established a panel in accordance with Article 6 of the DSU (WT/DSB/M/259), with standard terms of reference, to examine the matter referred to the DSB by the Philippines in document WT/DS371/3.

1.4 The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Philippines in document WT/DS371/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 16 February 2009, the parties agreed to the following composition of the Panel:<sup>2</sup>

Chairman: Mr Roberto Carvalho de Azevedo

Members: Mr Richard Gottlieb  
Mr Alvaro Hansen

1.6 Australia, China, the European Union<sup>3</sup>, India, Chinese Taipei and the United States have reserved their rights to participate in the Panel proceedings as a third party.

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<sup>1</sup> WT/DS371/1 of 12 February 2008.

<sup>2</sup> WT/DS371/4 of 17 February 2009.

<sup>3</sup> On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community. The third party submission in this case dated 18 May 2009 and statement at the third party session on 11 June 2009 were made by the delegation of the European Communities. On 8 January 2010, the European Union requested that in its report, the Panel change instances of "European Communities" to "European Union", and instances of "EC" to "EU", except for prior case titles and quotations.

C. PANEL PROCEEDINGS

1.7 The Panel held the first substantive meeting with the parties on 10 and 12 June 2009. The session with the third parties took place on 11 June 2009. The second substantive meeting with the parties was held on 4-6 November 2009.

1.8 On 16 December 2009, the Panel issued the descriptive part of its Panel Report. The Panel issued its Interim Panel Report to the parties on 30 June 2010. The Panel issued its Final Report to the parties on 4 August 2010.

**II. FACTUAL ASPECTS**

A. THE MEASURES AT ISSUE

2.1 This dispute concerns Thailand's customs and fiscal measures on cigarettes imported from the Philippines.

2.2 The Philippines identified the following as the measures at issue in this dispute:

(a) Measures pertaining to customs valuation:

- the general rule and/or methodology providing for the systematic rejection of transaction value and the systematic use of a deductive valuation method;
- individual determinations made by Thai Customs for entries of cigarettes exported from the Philippines and entered between 4 August 2006 and 19 March 2008, including:
  - the Notices of Assessment for the entries listed in Annex I to the Philippines' request for the establishment of a panel; and
  - the assessment of value for purposes of setting the guarantee or cash deposit at the time of entry for the entries listed in Annex II to the Philippines' request for the establishment of a panel;
- Customs Act, B.E. 2469<sup>4</sup> (1926), including all amendments;
- Ministerial Regulation No. 132 B.E. 2543 (1990) issued under authority of the Customs Act B.E. 2469 (1926) and the amending Ministerial Regulation No. 145 B.E. 2547 (2004) and Ministerial Regulation No. 146 B.E. 2550 (2007);
- Notification No. 23/2549 (2006) of Thai Customs, containing guidelines on customs valuation;
- Customs Regulation No. 2/2550 (2007) Re: amendment of the Customs Formalities and Guidelines Code B.E. 2544 (2001) re: Customs formalities to prevent Customs value duty evasion, and amendment of Customs Department Regulation No. 14/2549 (2006) re: Guideline for Fixing of Customs Value;

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<sup>4</sup> The "B.E." year number designates the year in the Buddhist calendar. The year number in parentheses designates the corresponding year A.D.

- Customs Regulation No. 14/2549 (2006), re Guideline for Fixing of Customs Value, as amended by Customs Regulation No. 2/2550 (2007);
  - Customs Notification No. 29/2549 (2006) Procedure in requesting duty fee assessment; and
  - any amendments, implementing measures, or other related measures.
- (b) Measures pertaining to Thailand's Value-Added Tax ("VAT") regime:
- Sections 79/5, 81, 82/7, 88, 88/2, 88/5, 88/6, 89(4), and 89/1 of the Revenue Code of Thailand;
  - Section 23 of the Tobacco Act B.E. 2509 (1966);
  - Royal Decree, issued under the Revenue Code, Governing the Reduction of the Value Added Tax Rates (No. 479), B.E. 2551 (2008);
  - Royal Decree issued under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (1991);
  - Order of the Revenue Department No. Por 85/2542 (1999);
  - Notification of the Director-General of the Revenue Department on VAT (No. 10);
  - MRSP Notices issued by the Director-General for Excise. The currently applicable MRSPs are set out in the Notice B.E. 2550 (2007) of 29 August 2007 (for domestic products) and in the Notice B.E. 2551 (2008) of 19 August 2008 (for imported products); and
  - any amendments, implementing measures, or other related measures.
- (c) Thailand's VAT-related requirements on wholesale and retail sellers of cigarettes that are contained in the following measures:
- Sections 81 and 82/7 of the Thai Revenue Code;
  - Royal Decree issued under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (1991);
  - Order of Revenue Department Por 85/2542; and
  - any amendments, implementing measures, or other related measures.
- (d) Measures pertaining to Thailand's other fiscal measures:
- Thailand's excise tax regime operated through the following measures:
    - the Tobacco Act B.E. 2509 (1966), Sections 5, 5 ter, and 5 quinquies;

- Notices of Director-General for Excise, setting out the ex factory prices. The currently applicable ex factory prices are set out in the Notice B.E. 2550 (2007) of 29 August 2007; and
  - any amendments, implementing measures, or other related measures.
- Thailand's health tax regime operated through the following measures:
  - the Health Promotion and Foundation Act, B.E. 2544 (2001), in particular Sections 11, 12, and 13 thereof; and
  - any amendments, implementing measures or other related measures.
- Thailand's television tax regime operated through the following measures:
  - the Thai Public Broadcasting Service Act 2551 (2008), in particular Sections 12, 13, and 14 thereof; and
  - any amendments, implementing measures, or other related measures.
- (e) Thailand's administration of its customs and fiscal measures as listed in (a)-(d) above
- (f) Thailand's administration of its legal provisions pertaining to guarantees, including the following:
  - the provisions of the Customs Act B.E. 2469 (1926) (as amended) in respect of guarantees (specifically, Sections 112, 112 bis, 112 ter, and 112 quater);
  - Customs Regulation No. 2/2550 (2007) Guideline to determine customs price valuation; and
  - any amendments, implementing measures, or other related measures.
- (g) An investigation by Thailand's Department of Special Investigation ("DSI") of the Thailand branch office of Philip Morris (Thailand) ("PM Thailand") in relation to the declared customs value of imports from the Philippines
- (h) Undue delay in Thailand's administrative decision making:
  - delays in decision making by the Board of Appeals ("BoA"), which operates under Section 112 sexies to Section 112 undevicies of the Customs Act; and
  - failure to meet the 90-day deadline set in Thai law in Section 45 of the Administrative Procedure Act B.E. 2539 (1996) for administrative decisions in appeals against the maximum retail selling prices ("MRSPs") set by the Thai Excise Department.
- (i) Failure to provide for judicial or administrative review of the customs authorities' decisions relating to the imposition and collection of guarantees, pending the issuance of a notice of assessment, covering the customs duties and excise, health and television taxes that may become payable

**B. PROCEDURAL HISTORY**

**1. Additional procedures for the protection of business confidential information ("BCI" procedures)**

2.3 On 19 February 2009, the Philippines submitted a letter to the Panel requesting it to establish special procedures to protect BCI. In the Annex to this letter, the Philippines proposed a draft of suggested BCI procedures. Following an exchange of views on issues relating to BCI procedures at the organizational meeting held on 25 February 2009, the parties submitted their comments in writing on 27 February 2009. Thailand also provided the Panel with its own draft of suggested BCI procedures on the same day. The Philippines submitted, on 2 March 2009, its comments on Thailand's written comments of 27 February 2009. In response, Thailand provided additional comments on the Philippines' comments on 3 March 2009. On the same day, the Philippines made further comments on Thailand's comments of 3 March 2009. Having considered, *inter alia*, the draft versions of the BCI procedures submitted by the parties, their comments on each other's draft BCI procedures and the BCI procedures adopted in previous disputes, the Panel adopted additional working procedures concerning BCI on 11 March 2009. These procedures are set forth in Annex A-1.

2.4 In accordance with paragraph 2 of the BCI procedures, on 16 March 2009, the parties submitted Approved Persons lists to the Panel and the other party. In the absence of objection from the parties to the designation of an individual, included in the list submitted by the other party, as an Approved Person, the Panel designated these individuals as Approved Persons on 18 March 2009.

**2. Amicus curiae briefs**

2.5 On 27 March 2009, the Panel received a request from a private entity wishing to submit information to the Panel with regard to this dispute. On 17 April 2009, the Panel responded by requesting that such amicus curiae briefs be addressed directly to the parties and third parties to the dispute. Upon receiving such briefs, the parties and third parties would decide whether and how to use such briefs and/or any information contained therein in their submissions and arguments to the Panel in these proceedings.

**3. The Philippines' request to the Panel to seek certain documents from Thailand pursuant to Article 13 of the DSU**

2.6 The Philippines requested in its first written submission<sup>5</sup> that, pursuant to Article 13 of the DSU, the Panel seek certain documents from Thailand to facilitate the Panel's objective assessment of the claims, arguments and evidence before it. The Panel informed the parties on 1 April 2009 of its decision to render its ruling in this regard after it has had an opportunity to review Thailand's first written submission. Thailand noted at the first substantive meeting with the Panel, that some of the documents on the Philippines' document list had already been submitted by the parties as part of their first written submissions. Thailand further provided the Panel with a number of other documents on the Philippines' list as part of its first oral statement. Further, Thailand also commented on the relevance of several other documents on the Philippines' list. During the first substantive meeting, the Panel asked the Philippines to clarify the remaining documents on its list and any other additional documents that it still considered necessary for the Panel to seek from Thailand. The Philippines submitted an updated list of documents on 15 June 2009.

2.7 The Panel considered the parties' views on the documents/information requested by the Philippines in the light of the matters presented in this dispute. Pursuant to the authority vested in panels under Article 13.1 of the DSU, the Panel sent a letter on 24 August 2009, requesting the parties

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<sup>5</sup> The Philippines' first written submission, paras. 685-713.

to submit certain documents/information as indicated in the Annex to the letter. The parties submitted the requested documents/information on 4 September 2009. Pursuant to these submissions, comments were received from the Philippines on 16 September 2009 and from Thailand on 25 September 2009.

### **III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

#### **A. THE PHILIPPINES**

##### **3.1 The Philippines requests that the Panel find that:**

- (a) with respect to the administration of customs and fiscal rules, Thailand violates:
  - Article X:3(a) of the GATT 1994 because persons responsible for administering Thailand's customs and tax rules are officers of Thailand Tobacco Monopoly ("TTM");
  - Articles X:3(a) and X:3(b) of the GATT 1994 because of delays in its administrative decision-making, particularly undue delays in the BoA's decision-making; and
  - Article X:3(b) of the GATT 1994 because Thailand provides no legal mechanism whatsoever for the administrative or judicial review of decisions taken by Thai Customs to collect guarantees for customs duties and internal taxes potentially due of the finally assessed customs value.
- (b) with respect to customs valuation issues, Thailand violates:
  - Articles 1.1 and 1.2 of the Customs Valuation Agreement by maintaining and applying a general rule requiring the rejection of transaction value;
  - Articles 1.1 and 1.2 of the Customs Valuation Agreement by improperly rejecting PM Thailand's declared transaction values for [[xx.xxx.xx]] entries;
  - Article 1.2(a) of the Customs Valuation Agreement by failing to communicate "grounds" before rejecting transaction value;
  - Article 16 of the Customs Valuation Agreement by failing to provide an adequate explanation as to how the customs value was determined;
  - if the Panel finds that Thailand valued PM Thailand's goods under Article 7 of the Customs Valuation Agreement:
    - Thailand improperly applied Article 5 of the Customs Valuation Agreement by declining to use that provision for impermissible reasons;
    - Thailand violated Article 7.1 of the Customs Valuation Agreement by improperly incorrectly assessing the deductive value of PM Thailand's transactions, specifically by failing to deduct three claimed items and by deducting incorrect amounts for VAT and excise tax for certain transactions; and



- Thailand violated Article 7.3 of the Customs Valuation Agreement by failing to inform PM Thailand in writing of the customs value determined under Article 7 and the method used to determine such value;
  - if the Panel finds that Thailand valued PM Thailand's goods under Article 5 of the Customs Valuation Agreement, Thailand violated Article 5 of the Customs Valuation Agreement by improperly incorrectly assessing the deductive value of PM Thailand's transactions; and
  - Article 10 of the Customs Valuation Agreement by disclosing in the Thai media confidential customs valuation information provided by PM Thailand to Thai Customs.
- (c) with respect to VAT, Thailand violates:
- Article X:1 of the GATT 1994 by failing to publish the methodology and data that it uses to determine the tax base for VAT, *i.e.*, the government-fixed MRSP;
  - Article III:2 of the GATT 1994 by imposing a higher VAT burden on imported products than on like domestic products as a result of the level of the MRSPs;
  - Article III:2 of the GATT 1994 by exempting resales of domestic cigarettes from VAT liability;
  - Article III:4 of the GATT 1994 by imposing more onerous administrative requirements for VAT in connection with the resale of imported cigarettes; and
  - Article X:3(a) of the GATT 1994 by failing to administer the VAT system in a uniform, reasonable and impartial manner.
- (d) with respect to excise, health and television taxes, Thailand violates:
- Article X:1 of the GATT 1994 by failing to publish the methodology and data that it uses to determine the excise tax base for domestic cigarettes, *i.e.*, the government-fixed ex factory price;
  - Article X:1 of the GATT 1994 by failing to publish laws and regulations governing the release of guarantees for potential liability for health, excise and television taxes; and
  - Article X:3(a) of the GATT 1994 by failing to administer the excise, health and television taxes in a manner that is uniform, reasonable and impartial.

3.2 The Philippines requests that the Panel recommend that Thailand bring its measures found to be WTO-inconsistent into conformity with its WTO obligations.

#### B. THAILAND

3.3 Thailand requests the Panel to find that with respect to the measures within the Panel's terms of reference, the Philippines has failed to establish that Thailand has acted inconsistently with its obligations under any of the provisions of the covered agreements cited by the Philippines.

3.4 Thailand notes that this dispute is unusual in that the Philippines is complaining about individual completed acts (including, *inter alia*, the valuation of the [[xx.xxx.xx]] entries listed in the panel request, the alleged breach of Article 10 of the Customs Valuation Agreement, and the use of guarantee values in determining superseded MRSPs allegedly in breach of Article X:3(a)), rather than measures that have ongoing effect as of the date of establishment of the Panel.<sup>6</sup> In the event that the Panel makes findings that Thailand has acted inconsistently with its WTO obligations with respect to any of these completed acts, the Panel should, consistent with the guidance provided by prior panels and the Appellate Body,<sup>7</sup> refrain from making recommendations with respect to those completed acts.

#### IV. ARGUMENTS OF THE PARTIES

4.1 The arguments presented by the parties in their written submissions and oral statements are reflected below.<sup>8</sup>

##### A. EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE PHILIPPINES

###### 1. Introduction

4.2 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 PM Thailand. These customs and tax measures have been both formulated and applied by Thailand in ways that serve to protect the interests of the State-owned monopoly producer of cigarettes, TTM. In addition to protecting TTM's domestic cigarettes, these measures are characterized by a lack of transparency that deprives the importer of the most basic information regarding the regulatory treatment of its goods, and also by chronic delays in decision-making.

4.3 The Philippines in no way questions Thailand's prerogative to regulate its domestic cigarettes market, including through health measures, and labelling and advertising restrictions. No such regulations or policies are at issue in this dispute.

###### 2. Thailand violates Article X:3(a) of the GATT 1994 by failing to administer its customs and internal tax rules in a "reasonable" and "impartial" manner

(a) The dual role of TTM Officials as Senior Thai Government Officials is inconsistent with Article X:3(a) of the GATT 1994

4.4 Thailand violates Article X:3(a) because of pervasive institutional and personal links between the Government of Thailand and TTM, which is a "State Enterprise" under Thai law. Since at least 1995, persons responsible for managing TTM's commercial activities as members of the TTM Board of Directors, have also held senior government positions in the Ministry of Finance as Director-General ("DG") of Customs, DG Excise and DG Revenue.

4.5 These individuals have been responsible for administering the customs and tax rules to which imported and TTM's own cigarettes are subject. Through their governmental functions, these individuals: improperly rejected PM Thailand's declared transaction values; imposed non-reviewable guarantee values; substituted PM Thailand's transaction values with higher assessed customs values; subjected imported cigarettes to discriminatory VAT treatment; levied excise, health and television

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<sup>6</sup> Exhibit THA-36.

<sup>7</sup> E.g., Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.363, 7.393, 7.419; Appellate Body Report, *US – Certain EC Products*, paras. 81 and 129.

<sup>8</sup> The summaries of the parties' arguments are based on the executive summaries submitted by the parties to the Panel. Footnotes in this section are those of the parties.

taxes on a tax basis that is inconsistent with the prescribed tax basis and that is without foundation in Thai law; systematically failed to meet basic transparency requirements, failing to publish rules governing decision-making and explanations for decisions in relation to the customs and tax measures; and systematically delayed decision-making.

4.6 Even in the context of a public monopoly, this involves an unacceptable conflict of interest. By definition, the TTM officials' public powers profoundly influence the relative competitive situation of domestic and imported cigarettes. Yet, the officials in question, as part of the domestic producer's senior management, have incentives, including personal financial incentives – and, moreover, are *obliged* by Thai law – to promote the domestic producer's interests, maximizing its market share, revenues, and profits. Furthermore, the Minister of Finance himself has made public statements that TTM should be protected to prevent imported cigarettes from eroding TTM's market position and expressed concerns that PM Thailand's brands would "snatch all of TTM's share if the volume of imports is not reduced".<sup>9</sup>

4.7 The dual role of senior Government officials as senior TTM executives constitutes "unreasonable" and "partial" administration of Thailand's customs and tax laws under Article X:3(a). *First*, it is not "reasonable" – "appropriate" or "suitable" – or "impartial" to vest government officials that are TTM Directors with decision-making power over imported and domestic cigarettes, and over domestic producers and importers of these goods. Doing so creates an "inherent danger"<sup>10</sup> that the TTM Directors could use their governmental powers in a manner that confers a competitive advantage on their own company, TTM, and its products. By any standard, such administration is neither "reasonable" nor "impartial", as confirmed by the panel report in *Argentina – Hides and Leather*.

4.8 *Second*, Thailand's administration of its customs and tax laws is unreasonable and partial because, in their capacity as government officials, TTM Directors have access to BCI provided by PM Thailand in connection with the importation of cigarettes. Wearing a government "hat", the TTM officials are vested with the power to request and, indeed, routinely request, sensitive BCI from their competitors. This state of affairs creates an unacceptable risk – an "inherent danger"<sup>11</sup> – that TTM could derive an unfair advantage from information that should not be in TTM's hands. The situation in this dispute is, again, similar to the situation in *Argentina – Hides and Leather*.

(b) Thailand violates Articles X:3(a) and X:3(b) of the GATT 1994 because of undue delays in the BoA's administrative decision-making

4.9 Thailand has failed to ensure that administrative appeals against customs valuation decisions are resolved promptly, as required by Articles X:3(a) and X:3(b) of the GATT 1994. Administrative appeals filed by PM Thailand to the BoA between March 2002 and March 2003 have still not been resolved, more than seven years later. It is not "reasonable" within the meaning of Article X:3(a) to fail to decide customs valuation appeals for a period of six to seven years, thereby leaving an importer without a prompt remedy against decisions taken by the customs authority. These delays are especially unreasonable given that the BoA has not convened for over a year to consider PM Thailand's appeals. Moreover, these delays are inconsistent with Article X:3(b), which requires a WTO Member to maintain "tribunals or procedures" to ensure "*prompt review and correction* of administrative action relating to customs matters" (emphasis added). By any standard, a process in which *the first administrative step* towards the "review and correction" of valuation decisions lasts for more than six years is not "prompt".

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<sup>9</sup> "Thanong presses to raise tax on imported cigarettes", Khao Hun, 31 August 2006. Exhibit PHL-1.

<sup>10</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.100.

<sup>11</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.100.

- (c) Thailand fails to respect Article X:3(b) because no mechanism exists under Thai law for the review of guarantee values

4.10 Thailand fails to respect Article X:3(b) of the GATT 1994 because it provides no legal mechanism whatsoever for the administrative or judicial review of decisions taken by Thai Customs to collect guarantees for customs duties and internal taxes potentially due on the finally assessed customs value. Article X:3(b) requires a WTO Member to maintain "tribunals or procedures" to ensure "prompt review and correction of administrative action relating to customs matters". Under Thai law, an importer is unable to seek *any* "review and correction" of the imposition of guarantee values, let alone a prompt "review and correction". Therefore, Thailand violates Article X:3(b) of the GATT 1994.

### **3. Thailand violates numerous provisions of the Customs Valuation Agreement**

- (a) Thailand acted inconsistently with Articles 1.1 and 1.2 of the Customs Valuation Agreement by improperly rejecting PM Thailand's declared transaction values for a number of entries

- (i) *Thailand violated Article 1.1 by improperly rejecting PM Thailand's transaction values as the basis for customs values*

4.11 Thailand acknowledged that PM Thailand's declared transaction values were the "price paid or payable".<sup>12</sup> However, Thailand rejected PM Thailand's declared transaction value for two reasons, namely because: (1) the importer and exporter are related; and, (2) another, unspecified importer imports "the same type of goods" at "3 – 4 times" the value of PM Thailand's declared transaction value.

4.12 Article 1 of the Customs Valuation Agreement provides that the customs value is, in principle, the transaction value declared by an importer. An authority may disregard the transaction value, and apply other valuation methods under the Customs Valuation Agreement, only if a valid basis is available to do so. Neither of the two reasons relied on by Thailand provides such a valid basis.

4.13 Thailand's first reason – that the importer and exporter are related – is expressly excluded in Article 1.2(a) as the sole reason for rejecting transaction value. Thus, the existence of a relationship between the buyer (PM Thailand) and the seller (Philip Morris Philippines Manufacturing Inc ["PM Philippines"]) is not, in itself, a legitimate ground for rejecting declared transaction values. Moreover, this relationship has been known to the Thai authorities for a number of years before Thailand began rejecting PM Thailand's declared transaction values.

4.14 Thailand's second reason – that another, unspecified importer imports "the same type of goods" at "3-4 times" higher prices – is also flawed. The price declared by one importer cannot, in itself, be the grounds for rejecting the declared transaction value of another importer. Thailand's reliance on this benchmark is also logically inconsistent, because Thailand relied on the other operator's prices to reject PM Thailand's declared transaction value, but then assessed PM Thailand's customs value at a much lower value than the other operator's prices.

4.15 The Philippines believes that the unspecified "[o]ther importer" is a duty-free operator. However, the purchase prices of the operator at issue are not a permissible benchmark because this operator: does not import goods into the Thai customs territory; is exempt from internal taxes, which

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<sup>12</sup> Minutes of Meeting "Re Prescription of Import Prices of Cigarettes for Solving the Problem regarding Prescription of Cigarette Prices According to the Policy of the Ministry of Finance," dated 14 March 2007 – Annex 8 to Thai Government Submission in Thai Central Tax Court Case. Exhibit PHL-74.

influences the selling price to the duty-free operator; and, is in a very different position in the value chain than PM Thailand. Importantly, an Opinion by the World Customs Organization, requested by Thailand itself before it began rejecting PM Thailand's declared transaction values in August 2006, confirms that values declared by a duty-paid importer and a duty-free operator are not comparable, without extensive adjustments. Thailand did not perform any such adjustments.

- (ii) *Thailand violated Article 1.2(a) because it failed to inform PM Thailand of the grounds for considering that the relationship between PM Philippines and PM Thailand influenced the price*

4.16 Thailand failed to comply with its duty under Article 1.2(a) of the Customs Valuation Agreement to communicate the "grounds" for considering that the relationship between PM Thailand and PM Philippines influenced the price. First, Thailand failed to communicate adequate grounds. As previously explained, Thailand's stated grounds for rejecting the declared transaction values are inconsistent with Article 1.1. The communication of WTO-inconsistent grounds for doubting transaction values cannot satisfy the requirement under Article 1.2(a).

4.17 Second, when Thailand provided a statement in December 2006 to PM Thailand why it was doubting the declared transaction value, it failed to state that PM Thailand's prices were 3-4 times lower than the prices declared by another operator. There is evidence showing that Thailand relied on the other operator's prices in doubting PM Thailand's transaction values before December 2006. Nonetheless, Thailand informed PM Thailand of that ground only 5 months later, in April 2007.

4.18 Third, Thailand failed to inform PM Thailand of its doubts in a timely fashion. Thai Customs began rejecting transaction values on 4 August 2006, and PM Thailand requested a statement of grounds on 8 August 2006. Thailand did not respond to that request until 19 December 2006, i.e., four-and-a-half months later. During this extended period, PM Thailand was required to provide onerous bank and cash guarantees, and had no opportunity to defend its declared transaction value. Thus, for almost two thirds of the time that Thailand took to assess PM Thailand's customs values, PM Thailand was given no indication as to why its declared transaction values were being rejected. During this time, PM Thailand was deprived of any opportunity to respond effectively to the authority's concerns and to inform its decision-making process.

- (iii) *Thailand violated Article 16 of the Customs Valuation Agreement by not providing an adequate explanation of its customs value determination for entries at issue*

4.19 Thailand's 12 April 2007 letter also violated Article 16 of the Customs Valuation Agreement. First, Thailand failed to explain adequately why it rejected PM Thailand's declared transaction values. Thailand's stated ground was that PM Thailand and PM Philippines are related, but it did not explain how this relationship allegedly influenced the price between the parties. Moreover, Thailand's one-sentence reference to imports from another importer "with 3-4 times price difference" is vague and unclear, and failed to explain: who that "importer" is; from where it imports its goods; why its prices serve as an indicator of what PM Thailand declared transaction values should be; and what adjustments, if any, were made for that comparison.

4.20 In addition, the other "importer" appears to be a duty-free operator. PM Thailand informed Thailand in August 2006 that a comparison of its prices with those of a duty-free operator was not relevant or appropriate. In its April 2007 communication, Thailand failed to explain, in the light of that comment, why it nevertheless considered that the prices of a duty-free operator were pertinent. Thailand also failed to explain why the "3-4 times" higher values of the other operator served as a benchmark to reject PM Thailand's transaction values, but not as a benchmark to assess the customs values.

4.21 Second, the communication's bald reference to the use of a "Fall Back" valuation method, based on a deductive method, failed to explain precisely how and on what basis Thai Customs calculated the assessed values. Third, Thailand also failed to explain why the assessed values are internally inconsistent. Thailand assessed at different values shipments entered at the same time, sometimes on the same day, and under the same circumstances. This erratic and arbitrary decision-making demonstrates the crucial importance of adequate explanations.

(iv) *Thai Customs violated Article 5 of the Customs Valuation Agreement by declining to use a deductive valuation methodology without an adequate reason*

4.22 Assuming that Thailand was entitled to reject PM Thailand's declared transaction values under Article 1 of the Customs Valuation Agreement (quod non), Thailand violated Article 5 of the Customs Valuation Agreement because it had no valid reasons for declining to use the deductive valuation method under this provision. Thailand's reason was that PM Thailand could not submit audited financial statements for 2006. However, Article 5 does not require that the importer's "profits and general expenses" be based on the audited financial statement for the year of importation. Indeed, in an internal government document, Thai Customs stated on 6 March 2007 that PM Thailand's audited financial statement for 2005 – which were available to Thai Customs – provided a reliable statement of profit and general expenses and could be used for valuation purposes. As a result, Thailand violated Article 5 of the Customs Valuation Agreement by failing to value PM Thailand's goods using the deductive method under that provision.

(v) *Thailand violated Article 7 of the Customs Valuation Agreement by failing to apply "reasonable means" to value PM Thailand's cigarettes and instead relying on "arbitrary and fictitious values"*

4.23 Thailand valued PM Thailand's imports using the "Fall Back" method under Article 7 of the Customs Valuation Agreement, although it failed to disclose the specific methodology used. Under Article 7, customs value must be determined using "reasonable means", which requires the use of objective criteria that generate transparent, consistent, and predictable results. Thailand failed to use "reasonable means" in its valuation of PM Thailand's entries as evidenced by its inconsistent and erratic decisions for PM Thailand's entries. Although these entries were made under the same circumstances, Thailand valued the entries differently, including entries that were cleared on the same day.

4.24 Further, Thailand's inconsistent and erratic decision-making demonstrates that Thailand violated Article 7.2(g) by using "arbitrary or fictitious values". For example, in a situation where two entries cleared on the same day, Thailand accepted the transaction value for one of these entries, but rejected it for the other entry, and then assessed a value above the transaction values.

4.25 Thailand also violated Article 7.3 by failing to provide an adequate explanation of the valuation method used. Although Thailand disclosed that it had used a deductive method, Thailand did not disclose: the starting point of the deductive calculations, the nature or amount of the deductions made, the data sources used, and how the deductive method differed from deductive valuation under Article 5.

(vi) *Thailand violated Article 10 of the Customs Valuation Agreement by disclosing in the Thai media confidential customs valuation information provided by PM Thailand*

4.26 During August 2006 and for some weeks thereafter, Thai Government officials repeatedly disclosed to the Thai Press, PM Thailand's declared transaction values. These repeated disclosures of highly confidential information violated Article 10 of the Customs Valuation Agreement, which requires that *all* information which is by nature confidential, or which is provided on a confidential

basis for purposes of customs valuation, be treated as "strictly confidential". Authorities must "not disclose [that information] without the specific permission of the person" providing the information. PM Thailand never authorized the disclosure of this information.

#### **4. Claims pertaining to VAT**

- (a) Thailand violates Article X:1 of the GATT 1994 by not publishing the methodology used to determine the tax base for VAT, i.e., the government-fixed MRSP

4.27 Under Thai law, the tax basis for VAT is a government-fixed MRSP determined for each domestic and imported brand. To comply with Article X:1 of the GATT 1994, and consistent with the *Dominican Republic – Import and Sale of Cigarettes*, Thailand must publish the "essential information" concerning (a) the overall methodology used to determine the MRSPs for each brand; (b) the methodology used to obtain data, including price surveys in Thailand and other countries, and (c) the data relied upon by DG Excise in making its regulations or rulings, including the results of any surveys. Contrary to Article X:1 of the GATT 1994, Thailand has not published laws or regulations addressing any of this information.

- (b) Thailand imposes higher VAT on imported products than on domestic products, thereby violating Article III:2 of the GATT 1994

4.28 Thailand violates Article III:2 of the GATT 1994 because it imposes VAT on imported cigarettes "in excess" of VAT imposed on "like" domestic cigarettes. Imported and domestic cigarettes are "like products" within the meaning of Article III:2 for the following reasons. They have the same essential physical characteristics consisting of a paper tube, a mix of tobacco and additives, and a filter. They have the same "end uses", and Thai consumers treat and perceive imported and domestic brands as substitutable products satisfying the same demand. There is also market-based evidence demonstrating that consumers "switch" between domestic and imported brands. The cigarettes also fall under the same tariff heading, and Thailand makes no regulatory distinctions between different types of manufactured cigarettes.

4.29 Imported cigarettes are taxed "in excess" of domestic cigarettes because MRSPs are higher for imported than for domestic cigarettes. Considering the totality of the Thai cigarette market, over 90 per cent of imported cigarettes have a higher MRSP than over 95 per cent of domestic cigarettes. Excess taxation of imported cigarettes also arises because Thailand established the MRSPs for domestic cigarettes at the level of the retail selling price ("RSP"), whereas the MRSPs for imported cigarettes are typically above the RSP. Because of this "gap" between the MRSP and RSP, imported cigarettes are subject to a higher relative VAT burden than domestic cigarettes.

4.30 Thailand has not published the general rules used to calculate the MRSPs. Nonetheless, the methodology used to calculate the September 2006 and March 2007 MRSPs has been disclosed and involves discrimination prejudicial to imported brands. The methodology involved the addition of a gross margin, which was 250 per cent higher for imported brands (*Marlboro* and *L&M*) than for domestic brands. For these imports, Thailand declined to use the importer's actual gross margin, even though Thai Customs expressly found that this margin was "reliable" and, instead, Thailand constructed a margin based on alleged and undisclosed price surveys. In contrast, for domestic brands, Thailand used TTM's actual gross margin.

- (c) Thailand's *de jure* exemption of resellers of domestic cigarettes from VAT violates Articles III:2 and III:4 of the GATT 1994, because the same exemption is not afforded to resellers of imported cigarettes

4.31 Thailand also violates Article III:2 of the GATT 1994 by exempting resellers of domestic cigarettes from VAT liability but not so exempting resellers of imported cigarettes. Thus, resales of imported products are subject to VAT, whereas resales of domestic products are not. This constitutes less favourable treatment, and excess taxation, of imported products that are "like" domestic products.

4.32 Thailand's exemption from VAT of domestic cigarettes also results in a violation of Article III:4 of the GATT 1994. There are two elements to this violation. First, because resellers of imported cigarettes are liable to pay VAT, they are also subject to VAT-related administrative requirements from which resellers of domestic cigarettes are exempt. These administrative requirements include the requirement to prepare and deliver a tax invoice; to maintain VAT records; and to accept tax audits. These administrative requirements constitute less favourable treatment for imported cigarettes than for domestic cigarettes.

4.33 Second, if a reseller of imported cigarettes wishes to eliminate its VAT liability on resales, it must claim a tax credit for VAT paid by the entity from which it bought the cigarettes. To obtain the tax credit, the reseller is subject to an administrative procedure. Resellers of domestic cigarettes are not subject to VAT, and are therefore not subject to this procedure. Again, this constitutes less favourable treatment for imported cigarettes than for domestic cigarettes.

- (d) Thailand administers the VAT system for one set of MRSPs for imported cigarettes in a manner that is not uniform, reasonable and impartial, as required by Article X:3(a) of the GATT 1994

4.34 Thailand fails to administer its VAT system in a uniform, reasonable and impartial manner, as required by Article X:3(a) of the GATT 1994. The Philippines' claim focuses on the VAT base, i.e., the MRSP. Thailand's administration of the VAT system has not been "uniform", because the MRSP tax base for imported cigarettes has been administered using different criteria and different calculation inputs. Sometimes the calculations have been notional amounts, never actually paid, based on a guarantee value. At other times, the calculations have been actual amounts based on the assessed customs value. The guarantee value and the assessed customs value are legally different and serve different purposes. Thailand's use of these different approaches has had an impact on the level of the tax base and, hence, the tax burden. Because the MRSP lies at the heart of Thailand's VAT system, the calculation of the MRSP using different criteria means that a key component of Thailand's VAT system is not uniformly administered.

4.35 Thailand's administration of the VAT system is also not "reasonable" and "impartial". Specifically, the September 2006 MRSPs evidence unreasonable and partial administration, because Thailand used a guarantee value as the starting-point for the MRSP calculation. This guarantee value was described by Thailand as the "highest rate to which the products would be subject [to customs duties]". It is not "reasonable" within the meaning of Article X:3(a) to use an estimate of the "highest" possible customs value to calculate a definitive tax. Indeed, even in Thai law, the guarantee value is not treated as having a definitive character, and is instead used only to collect guarantees for customs duties, as well as the excise, health and television taxes that may become due following the assessment of the customs value.

4.36 Thailand's administration is also not "reasonable", because the amounts added in the MRSP calculation are purely notional, and not the actual amounts ultimately paid on the basis of the assessed customs value. To the extent that domestic law calls for the tax base to be established by the addition of amounts for customs duties and internal taxes, reasonable administration under Article X:3(a)



precludes the addition of speculative, notional amounts. Moreover, Thailand also engages in "partial" administration, because the starting-point for the MRSP calculation for domestic cigarettes is not based on a "highest" estimated value but is, instead, the actual ex factory prices published in MRSP Notices.

4.37 Finally, Thailand's administration of its VAT system is not "reasonable" because Thailand fails to establish and apply generally applicable criteria for determining the MRSP. Reasonable administration of a tax requires that generally applicable rules be established to regulate the way in which a tax base is determined with respect to subject products. The need for such rules has particular importance in the case of taxes because they impose a direct pecuniary charge on subject persons and goods.

## **5. Claims pertaining to the excise, health, and television taxes**

- (a) Thailand violates Article X:1 of the GATT 1994 by failing to publish the rules regarding the determination of the ex factory price

4.38 Under Thai law, the government-determined ex factory price is the basis for the excise, health and television tax on domestic cigarettes. The determination of ex factory prices falls within the scope of Article X:1, because it is a "regulation" or "administrative ruling" pertaining to "taxes or other charges". Thailand publishes only the amount of the ex factory price, without providing any further information on how that price is determined. However, as the Panel found in *Dominican Republic – Import and Sale of Cigarettes*, Article X:1 requires Thailand to publish the methodologies, formulae and data used to determine the ex factory prices. Because Thailand has not done so, it violates Article X:1.

- (b) Thailand violates Article X:1 by failing to publish laws and regulations governing the release of guarantees for potential liability for health, excise and television taxes

4.39 When Thailand delays the assessment of customs value, an importer may withdraw its cigarettes from customs if it provides guarantees for its potential liability for customs duties, and for excise, health and television tax. The guarantees are based on a guarantee value determined by Thai Customs. If the subsequently assessed customs value is lower than the guarantee value, the importer's liability for customs duty, excise, health and television tax is lower than the guaranteed amount. In that case, as occurred in July 2008, Thailand releases the guarantees to the extent that they exceed the customs duties and taxes payable on the customs value. However, Thailand has published no laws or regulations governing the release of these guarantees. This is contrary to Article X:1 because rules concerning the release of guarantees are "[l]aws" or "regulations" "pertaining to ... the valuation of products for customs purposes", within the meaning of that provision.

- (c) Thailand violates Article X:3(a) of the GATT 1994 by administering its excise, health and television taxes in a non-uniform, unreasonable and partial manner

4.40 Thailand's administration of its excise, health, and television taxes is not uniform, reasonable and impartial, contrary to the requirements of Article X:3(a) of the GATT 1994. Under Thai law, for imported cigarettes, the base for the imposition of these taxes is the assessed customs value plus the applicable customs duties ("Duty-Paid c.i.f. Price"). In some circumstances, however, Thailand administers the taxes using a tax base that is without foundation in Thai law.

4.41 Specifically, in cases where: (1) Thai Customs rejects the declared customs value and assesses a higher value, and subsequently (2) that assessment is reversed and reduced following an administrative or judicial ruling, Thailand does not collect the excise, health and television taxes on the basis of the Duty-Paid c.i.f. Price. Instead, Thailand uses an unlawful tax base to collect the

excise tax, because it collects the tax on the basis of an initial incorrect valuation decision by Thai Customs, which is then revised downwards on appeal. By definition, following administrative or judicial reversal, the authorities' incorrect valuation decision has no basis in Thai law and is not warranted by the facts.

4.42 Thailand's administration is not uniform within the meaning of Article X:3(a), because the excise tax is sometimes administered on the basis of the assessed customs value (where that assessment is correctly made by Thai Customs) and sometimes on the basis of another value that is not the correctly assessed customs value (where Thai Customs has been found to have incorrectly assessed the customs value). Thailand's administration is also not reasonable. As the Panel in *Dominican Republic – Import and Sale of Cigarettes* found, it is not reasonable, under Article X:3(a), to administer a consumption tax using a tax base that has no foundation in domestic law.

4.43 Finally, Thailand's administration of the excise, health and television taxes on imported cigarettes is not impartial, because it lacks even-handedness. In particular, whereas imported cigarettes are sometimes taxed in excess of the lawful tax base, domestic cigarettes are taxed on the basis of the ex factory price, and never taxed in excess of that price.

**6. Request to the Panel to seek specific documents from Thailand pursuant to Article 13 of the DSU**

4.44 The Philippines requests the Panel to exercise its authority to seek 21 specifically identified documents (or categories of documents) from Thailand, pursuant to Article 13 of the DSU. Access to these documents will facilitate the Panel's objective assessment of the arguments and evidence presented by the Philippines

**B. EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THAILAND**

**1. Introduction**

4.45 This executive summary of Thailand's first written submission of 11 May 2009 responds to the claims set out in the Philippines' first written submission of 23 March 2009.

4.46 The Philippines argues at length that Thailand improperly structures its governmental operations, including the state-owned enterprise, TTM, and, as a result, acts inconsistently with its obligations under the WTO Agreements, including under the Customs Valuation Agreement and Article III of the GATT 1994. The real question before this Panel, however, is whether the Philippines has proven that Thailand has applied its customs valuation and domestic taxation laws improperly to cigarettes from the Philippines. This question must be addressed by reference to Thailand's WTO obligations with respect to customs valuation, under the Customs Valuation Agreement, and with respect to national treatment, under Article III of the GATT 1994

**2. Legal argument**

**(a) Claims under the Customs Valuation Agreement**

**(i) *Thai Customs acted consistently with Articles 1.1 and 1.2 of the Customs Valuation Agreement***

Thai Customs had "doubts about the acceptability of the price"

4.47 The Customs Valuation Agreement does not explain or qualify what kind of information constitutes "doubts" about the acceptability of the price. Thai Customs had legitimate doubts about

the acceptability of the transfer price between PM Thailand and PM Philippines as the customs value. These doubts were based on the information that another importer was importing the same Philip Morris brand cigarettes at c.i.f. prices approximately three times PM Thailand's transfer price. Thai Customs communicated these doubts to PM Thailand in August 2006, when it first ceased to accept automatically the transaction value and began to require guarantees on imports of PM Thailand.

PM Thailand failed to establish that the relationship did not influence the price

4.48 The Philippines argues that "the rejection of customs value is based on speculation that the relationship *might* have influenced the price, and it has not been proved otherwise".<sup>13</sup> However, the importer, not the customs administration, bears the burden of establishing that the relationship between buyer and seller did not influence the price. As the WCO informed Thai Customs, "since the acceptance of the transaction value is *prima facie* based on the condition that the buyer and seller are not related, *the burden of proof is generally considered to be on the importer to demonstrate that the transaction value is otherwise acceptable in spite of the fact that the buyer and seller are related*".<sup>14</sup> In addition, in response to the question "is the importer responsible for ensuring that the price has not been influenced by the relationship...?", the WTO Technical Committee stated, "[y]es. When declaring the customs value under the transaction value method the importer has an obligation to ensure to the greatest extent possible that the price is not influenced".<sup>15</sup>

4.49 When Thai Customs communicated its doubts regarding the transfer price to PM Thailand, PM Thailand bore the burden of establishing that the relationship did not influence the price. However, in the period between 4 August 2006, when Thai Customs notified PM Thailand of its doubts as to the acceptability of the transfer price, and 6 March 2007, when Thai Customs met with PM Thailand's representatives to resolve *en bloc* outstanding issues regarding the valuation of PM Thailand's imports, PM Thailand presented no evidence or otherwise took no steps to discharge its burden of proving that the relationship did not influence the price. In addition, even after the 6 March 2007 meeting, PM Thailand failed to establish that the relationship had not influenced the price. For example, in a letter to Thai Customs dated 14 March 2007, PM Thailand asserted that it "negotiates with the exporter in the foreign country on an arm's basis in a manner consistent with the normal practice in the cigarette industry ...".<sup>16</sup> However, PM Thailand offered no supporting evidence whatsoever for this assertion. In these circumstances, Thai Customs could not rely on the transaction value as the basis for customs value for the [[xx.xxx.xx]] entries listed in the Philippines' panel request, because the importer had failed to resolve the doubts about the acceptability of the price.

Because PM Thailand failed to establish that the relationship did not influence the price, Thai Customs properly declined to use the transaction value as the customs value

4.50 PM Thailand failed to establish that its relationship with PM Philippines did not influence the price. Consistently with Articles 1.1 and 1.2 of the Customs Valuation Agreement, Thai Customs did not use the transaction value as the customs value for the [[xx.xxx.xx]] entries listed in the Philippines' panel request. Instead, Thai Customs used the deductive method to determine the customs value. Thus, the grounds on which Thai Customs did not use the transaction value as the customs value were that PM Thailand failed to establish that the relationship did not influence the transfer price. Contrary to the Philippines' argument, Thai Customs did not rely on a comparison between PM Thailand's c.i.f. prices and the c.i.f. prices for duty-free imports as a ground for rejecting the transaction value. The c.i.f. prices for duty-free imports constituted the reason why Thai Customs had *doubts* about the acceptability of the price, but were not the ultimate grounds for not using the

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<sup>13</sup> Philippines' first written submission, para. 227.

<sup>14</sup> Exhibit THA-9, p. 2 (emphasis added).

<sup>15</sup> Technical Committee, Commentary 14.1, para. 16, Exhibit THA-26.

<sup>16</sup> Exhibit THA-28.

transaction value as the customs value. Accordingly, Thai Customs did not act inconsistently with Articles 1.1 or 1.2 of the Customs Valuation Agreement in not using PM Thailand's transfer price as the customs value.

Thai Customs properly informed PM Thailand of the grounds for not using PM Thailand's transfer price as the customs value

4.51 By letters dated 19 December 2006 and 12 April 2007, Thai Customs clearly explained in writing to PM Thailand that the transaction values were not being used as the basis for customs value "because the importer has *yet* to prove if the said relationship influences the customs value determination or not" and "it cannot be proven whether the relationship has an influence on the determination of customs value or not".<sup>17</sup> The minutes of the 6 March 2007 meeting also make clear that Thai Customs acted because the importer "could not prove" that the relationship did not affect the price.<sup>18</sup> In addition, as indicated in the notice of assessment provided in Exhibit THA-15, Thai Customs informed PM Thailand that the entry at issue was being valued pursuant to the "price assessment methodology number 6 deductive value pursuant to the minutes of the meeting dated 6 March". Thus, Thailand acted consistently with Article 1.2 of the Customs Valuation Agreement by informing PM Thailand of the grounds.

(ii) *Thai Customs acted consistently with Article 16 of the Customs Valuation Agreement*

4.52 The Philippines claimed that Thai Customs acted inconsistently with Article 16 of the Customs Valuation Agreement by failing to provide an adequate explanation of the determination of the customs value of the [[xx.xxx.xx]] entries at issue.<sup>19</sup> As noted above with respect to the Philippines' claim under Article 1.2, Thai Customs fully informed PM Thailand of the grounds on which it was acting.

4.53 In addition, Thai Customs fully informed PM Thailand how the customs value was actually determined. In the 12 April 2007 letter, Thai Customs explained that "in the determination of customs values, Method 6, which is the 'fall back' method, using the deductive method, was used (according to the Ministerial Regulation no. 132/2545, Clause 3) under Article 7 of the GATT 1994 ... Please be informed accordingly". In addition, PM Thailand was also provided with a detailed explanation of why the deductive value was used and how it was calculated at the 6 March 2007 meeting, at which it was represented by its accountants.<sup>20</sup>

(iii) *Thai Customs acted consistently with Articles 5 and 7 of the Customs Valuation Agreement in using the deductive method to determine the customs value for PM Thailand's imports*

4.54 Thailand used the "deductive method" under Article 5 of the Customs Valuation Agreement to determine the customs value of PM Thailand's imports. Thailand explained this clearly to PM Thailand at the meeting of 6 March 2007 and in its letter of 12 April 2007.<sup>21</sup> In the minutes of the 6 March 2007 meeting, Thai Customs stated that it was using the deductive value method pursuant to Method 6 of Thai Customs' regulations, which corresponds to the "fall back" method of Article 7,

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<sup>17</sup> See Exhibits PHL-66 and PHL-70.

<sup>18</sup> Exhibit PHL-74, p. 4.

<sup>19</sup> Philippines' first written submission paras. 287-324 and para. 715, third bullet.

<sup>20</sup> Exhibit PHL-74, list of attendees.

<sup>21</sup> See Exhibits PHL-70 and PHL-74.

rather than pursuant to Method 4 of its regulations<sup>22</sup>, which would correspond to Article 5 of the Customs Valuation Agreement.<sup>23</sup>

4.55 Thai Customs considered that its own regulations prevented it from using the deductive value under Article 5 of the Customs Valuation Agreement where current financial information was not available but permitted it to use the deductive value under Method 6 using the most recent available financial information. It is largely irrelevant how that method was described under municipal law<sup>24</sup>; the question is whether the deductive value method actually used by Thai Customs was consistent with Article 5 of the Customs Valuation Agreement. The Philippines argues that Article 5 of the Customs Valuation Agreement does *not* require that the customs administration use company data from the year of importation in determining the deductive value.<sup>25</sup> This means that Thai Customs' determination of the deductive value using the most recent available financial information was consistent with Article 5 of the Customs Valuation Agreement.

4.56 Since this is the only ground on which the Philippines challenges Thai Customs' determination of customs value as inconsistent with Article 5, the Panel should reject the Philippines' claim under that article.<sup>26</sup> Because Thai Customs acted consistently with Article 5 in using the deductive method, the Philippines' claim under Article 7 of the Customs Valuation Agreement is moot.

(b) Claims under Article III of the GATT 1994

4.57 Thailand's VAT system for cigarettes was designed so that Thailand would be able to ensure collection of taxes on all sales of all cigarettes, both domestic and imported, thereby furthering Thailand's revenue and public health objectives with respect to the sale of cigarettes in the Thai market. For these reasons, Thailand decided to use a fixed price for each brand of cigarettes as the tax base for VAT purposes. This fixed price is the MRSP, which is determined and used in the same manner for both domestic and imported brands.

4.58 The Panel's terms of reference with respect to the use of MRSPs as the tax base for VAT are limited to the MRSP notices in effect at the time of the establishment of the Panel, as listed in the Philippines' request for the establishment of a panel. Previous MRSP notices (including those for imported cigarettes in 2006 and 2007) that had been superseded and had ceased to have legal effect as of the date of the establishment of the panel and that were not listed in the panel request are not within the Panel's terms of reference.

(i) *Thailand acted consistently with Article III:2 by using the MRSP as the VAT tax base*

The Philippines has failed to establish that all imported cigarettes and all domestic cigarettes are "like products"

4.59 The Philippines argues that *all* imported cigarettes and *all* domestic cigarettes are "like products" within the meaning of the first sentence of Article III:2.<sup>27</sup> The Philippines does not make the claim that imported and domestic cigarettes are "directly substitutable or competitive" under the second sentence of Article III:2. The concept of "like products" under Article III:2, first sentence, must be distinguished from products that are merely "directly substitutable or competitive". The

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<sup>22</sup> Thailand notes that due to a typographical error, Method 4 was inadvertently referred to as Method 5 in paras. 184-186 of its first written submission.

<sup>23</sup> Exhibit PHL-74, p. 5.

<sup>24</sup> See, e.g. Panel Report, *US – Hot-Rolled Steel*, para. 7.267.

<sup>25</sup> Philippines' first written submission, paras. 342-353.

<sup>26</sup> Philippines' first written submission, para. 359.

<sup>27</sup> Philippines' first written submission, paras. 464-486.

Appellate Body has clarified that the definition of "like products" in Article III:2, first sentence, should be construed narrowly<sup>28</sup>; and only "*perfectly substitutable products*" fall within Article III:2, first sentence".<sup>29</sup>

4.60 There are a total of 19 domestic brands<sup>30</sup> and 86 imported brands<sup>31</sup> in the Thai market. However, the evidence on consumer preferences supplied by the Philippines relates only to three domestic brands and two imported brands. The Philippines has, thus far, failed to supply the evidence on consumers preferences regarding all of these brands necessary to discharge its burden of proof.

4.61 The Philippines' evidence regarding the five "major cigarette brands" consists primarily of data on so-called "switch in" and "switch out" ratios<sup>32</sup>, which are poor indicators of consumer perceptions of substitutability. The switch in and switch out ratios between *Marlboro* and domestic brands also appear to be relatively low. This evidence does not support a finding that the five "major cigarette brands" are "perfectly substitutable" "like products" within the meaning of the first sentence of Article III:2. Also, the fact that there are significant price differences between cigarette brands indicates that all of these brands cannot be deemed to be "like" products.<sup>33</sup> Thus, the Philippines has failed to discharge its burden of proving that all imported cigarettes and all domestic cigarettes are "perfectly substitutable" and, therefore, "like products".

The Philippines has failed to establish that Thailand discriminates against imported cigarettes

4.62 The Philippines claims that imported cigarettes are taxed "in excess" of domestic cigarettes because the MRSPs for virtually all imported cigarettes are above the MRSPs for virtually all domestic cigarettes. However, it does not matter whether the MRSPs of imported cigarettes exceed those of domestic cigarettes. The determination of whether an internal tax discriminates against imported goods within the meaning of Article III:2 depends on whether the tax base for imported and domestic cigarettes is established and applied in a manner that affords protection to domestic cigarettes. The fact that the tax base for some cigarettes may be higher than the tax base for other cigarettes does not reveal anything about whether the tax base is discriminatory within the meaning of Article III:2.

4.63 The Philippines also argues that imported cigarettes are taxed "in excess" of domestic cigarettes because the MRSP for imported brands exceeds the actual retail price while "such gaps have *never* arisen for domestic cigarettes".<sup>34</sup> Actually, the Philippines' evidence does not support this assertion with respect to domestic cigarettes. Even if it did, it would not establish that the MRSPs are established in a discriminatory manner. First, Article III:2 does not prescribe a particular system of internal taxation and it is not inconsistent with Article III:2 to use a fixed price as the VAT tax base. A comparison between the tax base chosen by a Member (e.g., the MRSPs) and a tax base that was *not* chosen by the Member (e.g., the retail price) cannot in itself establish that a Member's tax base is applied inconsistently with Article III:2. Both *ad valorem* and specific taxes (and a mix of the two) are permissible under Article III:2. Thus, the Philippines' argument simply attempts to show that there is a difference between the MRSP and the retail price for one imported brand and not for domestic brands. It is not evidence of discrimination. Finally, *Marlboro* cigarettes are being sold at

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<sup>28</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.

<sup>29</sup> Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118.

<sup>30</sup> See Exhibit PHL-105.

<sup>31</sup> See Exhibit PHL-77.

<sup>32</sup> Philippines' first written submission, para. 477.

<sup>33</sup> To illustrate, imported cigarettes marketed under the brand *Marlboro* have a recommended RSP that is [[xx.xxx.xx]] per cent higher than that of the domestic brand *Wonder* and [[xx.xxx.xx]] per cent higher than that of the domestic brands *Krongthip* and *Falling Rain*. See, Philippines' first written submission, para. 498, table 4.

<sup>34</sup> Philippines' first written submission, para. 499 (emphasis in original).

below the MRSP because PM Thailand took a business decision to do so.<sup>35</sup> The business decisions of private companies cannot give rise to violations by Members of their GATT obligations. Article III:2 does not require Thailand to change its tax base simply because PM Thailand chooses to reduce its prices.

4.64 Finally, the Philippines argues that imported cigarettes are taxed "in excess" of domestic cigarettes because there were differences in the methodologies used to determine the 2006 and 2007 MRSPs. As noted, the MRSPs for 2006 and 2007 (for imported cigarettes) are not within the Panel's terms of reference. For these reasons, the Philippines has failed to make a prima facie case that, under Thailand's VAT system, imported cigarettes are taxed "in excess" of domestic cigarettes within the meaning of Article III:2 of the GATT 1994 and the Panel should reject the Philippines' claims.

4.65 In any case, the MRSPs are calculated in the same manner for both imported and domestic brands. The starting points for imported (the duty paid c.i.f. price) and domestic brands (the ex factory price) are equivalent as each is the price at which the cigarettes are first introduced to the Thai market. The MRSP is initially based on the MRSP proposed by the manufacturer and updated whenever the applicable tax rates are changed, or to reflect changes in the manufacturer's c.i.f. or ex factory price or where the manufacturer proposes a change in the light of market circumstances.<sup>36</sup>

4.66 The Philippines argues that because MRSPs are periodically adjusted, the VAT burden is sometimes increased for imported cigarettes but left unaltered for domestic cigarettes. This is because the MRSPs may be adjusted in response to a request by the manufacturer (of either domestic or imported brands), and is not evidence of any discrimination in the setting of the MRSPs. In these circumstances, nothing in the use of the MRSPs as the tax base in Thailand's chosen VAT system gives rise to discrimination between imported and domestic cigarettes and hence a violation of Article III:2.

(ii) *Thailand acted consistently with Article III:2 of the GATT 1994 with respect to the taxation of resales of cigarettes*

4.67 The Philippines claims that by [allegedly] taxing the resale of imported cigarettes, but not taxing the resale of domestic cigarettes, Thailand acts inconsistently with Article III:2.<sup>37</sup> However, the Philippines has failed to make a prima facie case. As illustrated in Exhibit THA-20, the tax burden on imported and domestic cigarettes is exactly the same. The Philippines' explanations of the Thai VAT system also reach the same conclusion, i.e., that the amount of VAT paid is exactly the same for both imported and domestic cigarettes.<sup>38</sup> In addition, in practice, wholesalers and retailers incur no net VAT liability with respect to resales of *either* imported or domestic cigarettes.<sup>39</sup> Accordingly, the Panel should reject this claim.

(iii) *Thailand acted consistently with Article III:4 of the GATT 1994 with respect to the administrative requirements for its VAT system*

4.68 The Philippines claims that Thailand acts inconsistently with Article III:4 because a reseller of imported cigarettes is subject to administrative requirements that are not imposed on resellers of domestic cigarettes.<sup>40</sup> However, the Philippines has failed to establish that any differences between the reporting requirements modify the conditions of competition in favour of domestic cigarettes or

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<sup>35</sup> See Philippines' first written submission, para. 498, n. 385.

<sup>36</sup> The examples provided in Exhibits THA-19 illustrate how this works with respect to examples based on both domestic and imported brands.

<sup>37</sup> Philippines' first written submission, paras. 517 and 546.

<sup>38</sup> Philippines' first written submission, paras. 529-537.

<sup>39</sup> See Exhibit THA-20.

<sup>40</sup> Philippines' first written submission, para. 553.

results in "less favourable" treatment of imported cigarettes. First, any differences are minimal: wholesalers and retailers are required to include sales of imported cigarettes (as well as all other domestic and imported products subject to VAT) on their monthly VAT return and to maintain tax invoices and input/output reports with respect to sales *subject* to VAT while wholesalers and retailers that deal exclusively in VAT-exempt domestic cigarettes are not required to submit and maintain these documents. However, these wholesalers and retailers must maintain equivalent revenue/expenses reports with respect to sales of domestic cigarettes. In addition, wholesalers and retailers generally buy and sell both domestic and imported cigarettes. Since there are no different chains of distribution with wholesalers and retailers dedicated uniquely to either domestic or imported cigarettes, all wholesalers and retailers are subject to the same administrative requirements.

4.69 The reason for this minor difference in treatment is that because TTM is legally responsible for *all* taxes on the cigarettes they sell and, as a government entity subject to government control and audit, presents no risk of tax underpayment, there is no need to submit resellers to the normal VAT reporting, collection and enforcement mechanisms. Since importers such as PM Thailand are *not* legally responsible for all taxes on their cigarettes, the resellers of those cigarettes present the same risk of underpayment as any other sale of a product – domestic or imported – subject to VAT. The resales of the imported cigarettes are, therefore, subject to the same normal VAT reporting, collection and enforcement mechanisms as other products subject to VAT. The Philippines fails to explain how this difference "modifies the conditions of competition in the relevant market to the detriment of imported products".<sup>41</sup>

4.70 If the Panel considers that the minor differences in reporting requirements for sales of imported and domestic cigarettes modify the conditions of competition to the detriment of imported products, Thailand submits that these differences are justifiable under paragraph (d) and the *chapeau* of Article XX of the GATT 1994. Imported cigarettes are subject to the basic reporting, collection and enforcement mechanisms of Thailand's VAT law. These measures are necessary to secure compliance with VAT law in that it is difficult to see how Thailand could administer its VAT system *without* requiring VAT payers to maintain and submit the requested documents. Given that these measures are applied to all products, imported or domestic, subject to VAT, they are not applied in a manner that constitutes an arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Thailand's VAT reporting requirements represent a minimal level of bureaucracy for *any* tax system and, therefore, fall squarely within the scope of Article XX(d) and the *chapeau* to Article XX.

(c) Claims under Article X of the GATT 1994

(i) *Thailand acted consistently with Article X:3(a) with respect to its ownership of TTM*

4.71 The Philippines asserts that Thailand acts inconsistently with Article X:3(a) because government officials that are TTM directors also have decision-making power over imported and domestic cigarettes.<sup>42</sup> The Philippines argues that this creates an inherent danger that those officials "could use their governmental powers in a manner that confers a competitive advantage on their own company, TTM, and its products".<sup>43</sup> However, Article X:3(a) must be interpreted to address only how Members actually administer their laws and not to address perceptions or risks as to how Members *could* administer their laws.

4.72 The Philippines' claim does not refer to the manner in which Thailand actually administers any of its "laws, regulations, decisions, and rulings". The Philippines' claim relates exclusively to

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<sup>41</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

<sup>42</sup> Philippines' first written submission, paras. 69-87 and para. 714, first bullet.

<sup>43</sup> Philippines' first written submission, para. 79 (emphasis added).



how Thailand could administer its customs laws and regulations rather than to how Thailand actually does so. Moreover, the only evidence provided by the Philippines is two quotes from Thailand's Minister of Finance in the press. These statements are not sufficient evidence to support a claim that Thailand has failed to administer its customs and tax laws in a reasonable and impartial manner under Article X:3(a).

4.73 The Philippines' proposed interpretation of Article X:3(a) to address "risks" of how Members "could" administer their laws would broaden the scope of that provision to impose additional obligations with which Members, including the Philippines, could not possibly comply. Article X:3(a) was intended to address situations in which the risk of improper action by governments became a reality, not to eliminate entirely the possibility of such risk.

4.74 Under Article XVII of the GATT 1994, Thailand enjoys the right to maintain and operate state-owned enterprises such as TTM. Article X:3(a) does not regulate the manner in which Members exercise their sovereign rights with regard to the structure of their state enterprises or, indeed, their customs and excise departments. In this sense, the Philippines' claim is, in effect, an attack on the sovereign right of the Thai government to maintain and operate a state-owned enterprise. The Panel should not read into that provision additional obligations limiting the rights of Members to maintain state enterprises and to decide for themselves how they will exercise control over those enterprises.

4.75 The panel report on *Argentina – Hides and Leather* does not support the Philippines' position. That case involved the presence of private sector individuals at the export clearance process. As that Panel noted, however, the government has a relevant legal interest in the transaction. In addition, that case involved *actual* access to information rather than the *risk* of access. Finally, there are several controls requiring Thai government officials to act consistently with the law in the course of their duties.

(ii) *Thailand acted consistently with Article X:3(a) and X:3(b) with respect to "administrative tribunals for the purpose of prompt review"*

4.76 The Philippines claims that Thailand acted inconsistently with Articles X:3(a) and X:3(b) of the GATT 1994 "because Thailand has failed to ensure that administrative appeals against customs valuation decisions are resolved promptly".<sup>44</sup> However, the Philippines does not explain how the text of Article X:3(a) imposes a specific time limit on the completion of administrative proceedings. Article X:3(a) was not intended to impose absolute deadlines on Members within which to complete such administrative proceedings. Absent any such deadline in Article X:3(a), the Panel should not interpret the term "reasonable" to impose specific deadlines on Members' administrative proceedings where none is prescribed in the text.

4.77 Even if Article X:3(a) could be interpreted to contain standards governing the completion of administrative proceedings, the Philippines has failed to establish that any delays in Thailand's administrative proceedings are "unreasonable" in the context of the time taken by other similarly-situated WTO Members to complete similar proceedings or in the context of the backlog of appeals faced by Thailand following the coming into effect of the Customs Valuation Agreement. Moreover, the Philippines has failed to provide any guidance as to how the Panel should determine what timeframes would be inconsistent with Article X:3 based on any of the methods of interpretation provided in Articles 31 and 32 of the Vienna Convention. Accordingly, the Philippines has failed to establish that the BoA's processing of PM Thailand's appeals is "unreasonable" conduct within the meaning of Article X:3(a).

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<sup>44</sup> Philippines' first written submission, paras. 94-100 and para. 714, second bullet.

4.78 The Philippines also argues that the time taken to process these appeals constitutes a violation of Article X:3(b). However, Article X:3(b) applies only to tribunals or procedures "independent of the agencies entrusted with administrative enforcement".<sup>45</sup> Article X:3(b) does not apply to the BoA as it is not "independent" of Thai Customs.

(iii) *Thailand acted consistently with Article X:3(b) with respect to appeals against the imposition of guarantees*

4.79 The Philippines argues that Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to provide for an appeal against the imposition of guarantees pending the final assessment of duties.<sup>46</sup> However, the Philippines offers no evidence whatsoever in support of its claim, which therefore must be rejected. In fact, Article 42 of Thailand's Act on Establishment of Administrative Court and Administrative Court Procedures, BE 2542 (1999) provides a right to challenge all Thai government administrative actions (as described in Article 9), including orders requiring guarantees. Therefore, contrary to the Philippines' assertion, Thai law provides importers with ways to contest guarantees.

4.80 In any event, Article X:3(b) of the GATT 1994, read in the light of the provisions of the Customs Valuation Agreement, does not confer a right to appeal regarding amounts of guarantees required pending final assessment of customs duties on imports. While Article 11.1 of the Customs Valuation Agreement provides a right to appeal with respect to "a determination of customs value", Article 13 does not contain any provision for an appeal of guarantees similar to that provided in Article 11.

(iv) *Thailand acted consistently with Article X:3(a) in its administration of the VAT system*

4.81 The Philippines claims that Thailand fails to administer its VAT system consistently with Article X:3(a).<sup>47</sup> According to the Philippines, this is inconsistent with Article X:3(a), because the use of different starting points in determining MRSPs in different periods does not constitute uniform, reasonable and impartial administration of the law. This claim is not within the Panel's terms of reference because it is not made in the Philippines' panel request. There is nothing in the Philippines' panel request to suggest that it intended to make a claim under Article X:3 regarding how Thailand calculated the MRSPs. The Philippines has not "plainly connect[ed]" the use of guarantee values to calculate MRSPs with obligations under Article X:3(a) of the GATT 1994 in a manner that "presents the problem clearly".<sup>48</sup> In addition, the factual basis for this claim consists primarily of the September 2006 and March 2007 MRSP notices, which are not within the Panel's terms of reference. Accordingly, the Panel should find that it cannot address this claim because it is not within the Panel's terms of reference. However, even if the Panel were to address this claim, it should find that it lacks legal merit.

4.82 The Philippines claims that Thailand was compelled under Article X:3(a) to use the transaction value as the basis for the MRSP even when Thai Customs had doubts about the transaction value and thus was requiring guarantees from PM Thailand pending final determination of the customs value.

4.83 Article X:3(a) is not intended to limit the discretion of administrative agencies to apply their rules on a case-by-case basis where different entities present different factual circumstances. As the Appellate Body has stated, "[d]ifferent results in the application of a law or provision do not

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<sup>45</sup> Panel Report, *EC – Selected Customs Matters*, footnote 894 (emphasis added).

<sup>46</sup> Philippines' first written submission, paras. 101-113 and para. 714, third bullet.

<sup>47</sup> Philippines' first written submission, paras. 562-611 and para. 716, fourth bullet.

<sup>48</sup> See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

necessarily reflect non-uniform administration of the law itself, but may stem as well from the exercise of discretion in the application of the law or circumstances of the case".<sup>49</sup> The Appellate Body has also noted that "Article X:3(a) of the GATT 1994 does not require uniformity of administrative processes".<sup>50</sup> Accordingly, if the Panel considers this claim, it should find that the Philippines has not established as a matter of either fact or law that Thailand acted inconsistently with Article X:3(a) with respect to the administration of its VAT system.

(v) *Thailand acted consistently with Article X:1 with respect to rules relating to VAT and ex factory prices*

4.84 The Philippines claims that Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to publish the methodology for determining MRSPs<sup>51</sup> and rules regarding the determination of the ex factory price (which are used in the determination of MRSPs).<sup>52</sup> However, the Appellate Body has said that "Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules 'of general application'".<sup>53</sup> For this reason, "the particular treatment accorded to each individual shipment cannot be considered a measure 'of general application' within the meaning of Article X".<sup>54</sup>

4.85 The Philippines argues that Thailand must publish both the "overall methodology" used and "data relied upon" in the determination of the MRSPs and the ex factory price that is used as the basis for the excise, health and television taxes for domestic cigarettes. With respect to the "overall methodology" used to determine the MRSPs, this methodology is stated in the beginning of every published MRSP notice. Regarding the "overall methodology" used to determine the ex factory price, Thailand has published Sections 5ter and 5quater of the Tobacco Act BE 2509 and the *Notice of Tobacco and Chew Tobacco Ex Factory Price* that describe how the ex factory price is to be calculated. Thus, the Philippines' claim that Thailand has not published the "overall methodology" used to determine MRSPs and ex factory prices must be rejected.

4.86 In addition, the Philippines claims that "the published rules and data must enable traders to understand how a particular ex factory price has been established and to verify the calculations underpinning that price"<sup>55</sup> and that Thailand must publish the "methodologies, formulae and data used to determine the MRSPs".<sup>56</sup> However, Article X:1 does not require the publication of company- or transaction-specific determinations such as the determination of a particular ex factory price or the calculation of brand-specific MRSPs. The Philippines' claim with respect to the publication of detailed, company-specific or confidential aspects of these calculations must be rejected.

(vi) *Thailand acted consistently with Article X:1 with respect to rules relating to guarantees*

4.87 The Philippines claims that Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to publish laws or regulations governing the release of guarantees for potential liability for health, excise and television taxes.<sup>57</sup> The release of guarantees is governed by the provisions of the Customs Act governing the final assessment of customs duties (i.e., Sections 112bis and 112quad of the Customs Act). Because the release of guarantees takes place in the context of the final assessment, there is no need for a provision of law other than the provisions governing final

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<sup>49</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 216.

<sup>50</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 227.

<sup>51</sup> Philippines' first written submission, paras. 446-457 and para. 716, first bullet.

<sup>52</sup> Philippines' first written submission, paras. 639-648 and para. 717, first bullet.

<sup>53</sup> Appellate Body Report, *EC – Poultry*, para. 111, citing Panel Report, *EC – Poultry*, para. 269.

<sup>54</sup> Appellate Body Report, *EC – Poultry*, para. 113.

<sup>55</sup> Philippines' first written submission, paras. 646 (emphasis added) and 448.

<sup>56</sup> Philippines' first written submission, para. 448 (emphasis in original).

<sup>57</sup> Philippines' first written submission, paras. 649-653, 717, second bullet.

assessment to address separately the release of guarantees. As the Philippines in effect acknowledges, this is what happens under Thai Customs' practice.

4.88 Article X governs the publication and administration of rules, not the substantive content of the rules themselves.<sup>58</sup> The Philippines fails to identify an existing rule of general application under Thai law that Thailand has failed to publish. Instead, the Philippines argues that Thailand *should* have a rule of general application regarding the release of guarantees and should publish it. The Panel should not permit the Philippines to convert the publication obligation in Article X:1 into an obligation to have particular substantive laws. Accordingly, the Panel should reject the Philippines' claim.

(vii) *Thailand acted consistently with Article X:3 in its administration of the excise, health and television taxes*

4.89 The Philippines claims that Thailand acted inconsistently with Article X:3(a) of the GATT 1994 in its administration of its excise, health, and television taxes<sup>59</sup>, arguing that in cases in which Thai Customs rejects the declared customs value and assesses duties based on a higher c.i.f. value and, subsequently, the customs value is reduced on administrative or judicial appeal, the basis on which the taxes were initially assessed allegedly becomes "unlawful".<sup>60</sup> If the Philippines is arguing that Thailand administers its laws inconsistently with Article X:3(a) simply because the c.i.f. value is sometimes revised, this cannot be a violation of a WTO obligation. In any event, exporters may request refunds whenever the c.i.f. value used as the basis for the excise, health and television taxes is revised downward. The Philippines also argues that the administration of these laws is not "impartial" under Article X:3(a) because while the tax base for imported cigarettes may be revised as part of the customs process, the tax base for domestic cigarettes may not be revised in a similar fashion. However, the Philippines presents no evidence for this claim.

### 3. Conclusion

4.90 Thailand requests the Panel to find that the Philippines has failed to establish that Thailand has acted inconsistently with its obligations under any of the provisions of the covered agreements cited by the Philippines. This dispute is unusual because the Philippines is complaining about individual completed acts (including, *inter alia*, the valuation of the [[xx.xxx.xx]] entries listed in the panel request and the alleged breach of Article 10 of the Customs Valuation Agreement), rather than measures that have ongoing effects as of the date of establishment of the Panel. In the event that the Panel makes findings that Thailand has acted inconsistently with its WTO obligations with respect to any of these completed acts, the Panel should, consistent with the guidance provided by prior panels and the Appellate Body<sup>61</sup>, refrain from making recommendations with respect to those completed acts.

## C. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE PHILIPPINES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

### 1. Conflicting roles of TTM directors violate Article X:3(a)

4.91 Thailand violates Article X:3(a) of the GATT 1994 because senior Thai Government officials administering customs and tax rules for cigarettes are simultaneously Directors of TTM. These

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<sup>58</sup> Appellate Body Report, *EC – Poultry*, para. 115. See, also, Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.400.

<sup>59</sup> Philippines' first written submission, paras. 654-684 and para. 717, third bullet.

<sup>60</sup> Philippines' first written submission, paras. 659-660.

<sup>61</sup> See, e.g., Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.363, 7.393, 7.419; Appellate Body Report, *US – Certain EC Products*, paras. 81 and 129.

positions require them to promote TTM's commercial interests in competition with foreign cigarettes and rewards them with a personal financial bonus based on TTM's performance. Excise Director-General and TTM Chairman Mr. Tamwatin asserted publicly that, *inter alia*, government powers should be exercised to protect TTM by banning imported cigarettes unless prices were raised to the level of the new maximum RSPs announced by his department. Further, Mr. Tamwatin publicly disclosed, in violation of Article X:3(a) and Article 10 of the Customs Valuation Agreement, PM Thailand's confidential declared transaction values.

4.92 This pattern of administration is neither "reasonable" nor "impartial" and could negatively impact the competitive situation of imported cigarettes through higher customs duties and taxes. Article X:3(a) requires that decision-makers have no commercial or personal financial interests in the decisions they are making. Contrary to Thailand's arguments, the manner of structuring and organizing government is the very essence of "administration" under Article X:3(a) as found by the Panel in *Argentina – Hides and Leather*. Thailand also incorrectly claims that Article X:3(a) requires a showing of trade damage; rather, it calls for "an examination of whether there is a *possible impact on the competitive situation* [of imports] due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules".

## **2. Appeal delays violate Articles X:3(a) and X:3(b) of the GATT 1994**

4.93 Thailand also violates Articles X:3(a) and X:3(b) by failing to maintain independent tribunals that promptly review customs decisions. Thailand unreasonably delayed deciding a large number of appeals filed with the BoA, between March 2002 and March 2003. In fact, the last BoA meeting on these appeals occurred in September 2005. These extensive 6-7 year delays establish *prima facie* that Thailand has not satisfied its obligation to maintain procedures that achieve the required goal of "prompt review" under Article X:3(b) consistent with the panel report in *Colombia – Ports of Entry*. And even if the BoA is *not* an independent tribunal within the meaning of Article X:3(b), the claim under Article X:3(b) still stands because of the delay in permitting independent review of an *initial decision*. In that case, these 6-7 year delays and counting in reaching an initial valuation decision capable of being appealed to an independent tribunal is also all the more unreasonable under Article X:3(a).

## **3. Customs Valuation Agreement violations for rejected declared transaction values**

4.94 Thailand rejected validly declared transaction values for a large number of entries without satisfying the conditions of Customs Valuation Agreement Articles 1.1, 1.2, 1.2(a) and 16. Thailand failed to provide sufficient "grounds" under Article 1.2(a) to reject such declared values when it relied on PM Thailand's alleged failure to meet its "burden" to prove that its relationship with PM Philippines did not influence the price of its cigarettes. Further, Thailand's new argument that "PM Thailand *presented no evidence* or otherwise *took no steps* to discharge its burden of proving the relationship did not influence the price" is contradicted by the considerable evidence that PM Thailand provided to Thailand to support its declared transaction values. And even assuming that Thai Customs had legitimate "doubts" about PM Thailand's declared transaction values in August 2006, several factors show that Thai Customs failed to examine the circumstances of sale in violation of Article 1.2(a) of the Customs Valuation Agreement, including the minutes of the 6 March 2007 meeting; an analysis of Thai Customs deductive testing; and Thai Customs acceptance of transaction value for [[xx.xxx.xx]] entries that occurred at or around the same time as entries for which transaction value was rejected.

4.95 The evidence also shows that *prior* to taking a final decision, Thailand failed to inform PM Thailand of its "grounds for considering that the relationship influenced the price", as required by Article 1.2(a). Contrary to Thailand's arguments, neither the 12 April 2007 letter nor the minutes (which were never given in writing) provided the required notice of such grounds enabling

PM Thailand to respond. The authority's finding that the burden of proof had not been satisfied does not qualify as "grounds" under Article 1.2(a). Instead, the "grounds" must address the specific facts and evidence before the authority, and explain the deficiencies the authority has found to exist in the evidence. Moreover, the Philippines disputes Thailand's assertion that PM Thailand was represented at the 6 March 2007 meeting. Finally, the evidence shows that, after taking a final decision, Thailand did not provide PM Thailand with an "explanation in writing ... as to how the customs value of the importer's goods was determined", or provide a sufficiently detailed and reasoned explanation of its final decision to permit the importer to understand how and why the authority determined the assessed customs values, as required by Article 16 of the Customs Valuation Agreement.

#### **4. Thailand's violations of Articles 5 and 7 of the Customs Valuation Agreement**

4.96 Having rejected the transaction values, Thailand violated Articles 5 and/or 7 of the Customs Valuation Agreement. Although Thailand argues that it used Article 5 to value PM Thailand's goods, the evidence suggests it used Article 7. If Thailand used Article 5, it violated that provision by failing to deduct: sales allowances, internal transportation costs, and amounts paid for the Provincial Tax. If Thailand used Article 7, it violated Article 5 by failing to use that provision when it should have, and also Article 7.1 because it failed to assess the customs value using "reasonable means".

#### **5. Thailand's violation of Article X:3(b) of the GATT 1994**

4.97 Thailand violates Article X:3(b) of the GATT 1994 because, under Thai law, an importer is not afforded a right to appeal a decision by Thai Customs imposing a "guarantee value" on imported goods. The order imposing a guarantee is a final and complete action relating to customs matters, and has an immediate impact on the competitive situation and market access for imports. Thai judicial decisions, legal opinions from experts in Thai law, and scholarly writings, establish that an importer has no independent right to seek review of *orders imposing a guarantee value*.

#### **6. Article X:1 claims pertaining to VAT**

4.98 Thailand violates Article X:1 of the GATT 1994 by not publishing the calculation methodology and data used to calculate MRSPs, which serve as the tax base. The Philippines takes issue with evidence submitted by Thailand on the calculation of MRSPs.

4.99 MRSP notices are administrative rulings of general application within the meaning of Article X:1 because they establish prospective rules governing the maximum price and VAT paid on future cigarettes sales. The protection of confidential data under Article X:1 does not provide an excuse for not publishing *non-confidential* data constituting an "essential element" of an administrative ruling.

#### **7. Thailand violates Article III:2 of the GATT 1994**

4.100 The evidence demonstrates that *all* domestic and imported cigarettes in Thailand are "like" products based on evidence of physical characteristics; end uses; consumers' tastes and preferences; and tariff classification. Further, all cigarettes are subject to identical regulatory treatment. The evidence of consumers switching between differently priced cigarette brands, predominantly in response to price changes, shows the products are substitutable. The evidence also shows a strong correlation between changes in consumer demand for domestic and imported brands, and changes in the prices of these brands. This confirms that all cigarettes are "like".

4.101 Discrimination within the meaning of Article III:2 exists because imported cigarettes bear a higher tax burden than like domestic cigarettes due to the Thai Government's decision to fix a higher *tax* base for imports coupled with the *same* tax rate. Further, the Thai Government systematically

values imports higher than the market, while systematically valuing domestic products at the market level. The MRSP calculation methodology discriminates in favour of domestic products because it systematically adds a higher amount for marketing costs of imported products.

4.102 Additionally, Thai law exempts resellers of domestic cigarettes from VAT, but does not so exempt resellers of imported cigarettes. Such *de jure* discrimination against imports is not a "*basic feature* of any VAT system", as Thailand argues, but rather is a text-book case of discrimination under Article III:2, first sentence.

## **8. Thailand violates Article III:4 of the GATT 1994**

4.103 Thailand imposes more onerous administrative requirements in connection with resales of imported cigarettes than with resales of domestic cigarettes. This is because resales of imported cigarettes are subject to VAT, whereas resales of domestic cigarettes are not. An expert legal opinion confirms the more onerous requirements imposed on imported cigarettes than domestic cigarettes which, if not met, results in the denial of tax credits for VAT paid on imported cigarettes and penalties. Finally, Thailand has offered no valid justification under Article XX(d) for this discriminatory VAT exemption or lesser reporting requirements for domestic cigarettes.

## **9. Thailand's VAT system violates Article X:3(a) of the GATT 1994**

4.104 There is no basis for Thailand's procedural claim under Article 6.2 of the DSU concerning the Philippines' panel request. There was no obligation for the Philippines to explain why various VAT measures are administered contrary to Article X:3(a). Consistent with Appellate Body jurisprudence, such a statement is not required by Article 6.2 as it sets out an argument, and not a measure or claim.

4.105 Thailand fails to administer VAT in a uniform, reasonable and impartial manner. Its alternative use of both the assessed customs value and a guarantee value as the starting point for the MRSP calculation results in non-uniform administration. Thailand's use of a guarantee value, which is a provisional estimate of potential liability for customs duties, is not a "reasonable" basis for calculating a *definitive* MRSP tax base. Under this approach, a guarantee value is treated as having a definitive character that is inconsistent with its provisional legal status. Further, Thailand's failure to calculate the MRSPs using generally applicable criteria set forth in domestic law is also unreasonable. Finally, Thailand's calculation of the MRSP using guarantee values, and notional customs duties and internal taxes, results in partial administration. Evidence demonstrates that imported cigarettes alone are subject to an MRSP calculated using a *provisional* value as the starting-point for the calculation.

## **10. Failure to publish basis for ex factory price violates Article X:1**

4.106 Thailand violated Article X:1 of the GATT 1994 by failing to publish the methodology and data used to calculate the ex factory price – the tax base for domestic cigarettes under the excise, health and television taxes. The remarkably consistent determinations of TTM's ex factory prices over the past eight years highlights the need for, and impact of, Thailand's failure to publish the rules.

4.107 Thailand also violates Article X:1 by failing to publish rules governing the release of guarantees collected for excise, health and television taxes. Expert testimony confirms, as a matter of Thai law, that the provisions of the Customs Act cited by Thailand do not include rules and procedures on the release of guarantees. Thus, although Thailand argues that "guarantees are to be refunded", it has failed to publish rules addressing the basic procedural questions surrounding a refund.

4.108 Thailand violates Article X:3(a) of the GATT 1994 because, where the customs value initially assessed by Thai Customs is reduced on appeal, Thailand engages in (a) non-uniform administration

by using *two different* tax bases with respect to the *same goods*: sometimes the *correct* duty-paid c.i.f. price and sometimes an amount based on an *incorrect customs valuation*; (b) unreasonable administration by collecting taxes using an incorrect customs value as a tax base, which is without foundation in Thai law; and (c) partial administration by administering the excise, health and television taxes with respect to imported cigarettes on an inflated basis that has no foundation in Thai law; in contrast, domestic cigarettes are never taxed on a base in excess of the ex factory price.

4.109 The expert legal opinions explain that the legal provisions cited by Thailand do not afford importers a right to secure a refund of excise, health and television tax where the tax base is reduced, as Thailand alleges. They note that the Tobacco Act, which imposes the excise tax, also provides no such right. Further, no published rules set forth procedures governing an excise tax refund. The statutory right to a refund of health and television tax is contingent on a refund of excise tax, and there are also no procedures for refunds of these taxes. Thailand's defence is, therefore, not supported by the facts.

## **11. Requested fact-finding under Article 13 of the DSU**

4.110 The Philippines reiterates its request that the Panel seek information listed in paragraph 712 of its first written submission pursuant to Article 13 of the DSU.

### **D. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THAILAND AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

#### **1. Introduction**

4.111 Thailand questions the extent to which dispute settlement proceedings may be fruitful to address issues that, in effect, have already been resolved. To the extent that the Philippines had concerns regarding actions taken in the past by Thailand, those concerns had been resolved by the time the Philippines requested the establishment of a panel. For example, Thai Customs has used PM Thailand's declared entered values as the customs value since September 2007, well over a year before the request for the establishment of a panel. Similarly, to the extent that the Philippines' claims regarding the MRSPs are based on the MRSPs for 2006 and 2007, those MRSPs were revised and replaced before the panel request.

#### **2. Claims under the Customs Valuation Agreement**

4.112 In resolving the claims under the Customs Valuation Agreement, the Panel will need to address the question of which party, the importer (in this case, a major multinational corporation) or the customs administration bears the burden of establishing the reliability of a transfer price as the basis for the customs value. The text of the Customs Valuation Agreement and, indeed, supplemental sources such as the WTO Technical Committee on Customs Valuation make clear that when doubts arise, this burden lies with the importer. As Thailand explained in its first submission, in this case, the importer failed to discharge that burden.

4.113 The importer's failure to discharge its burden means that the customs administration is no longer required to accept the transaction value as the customs value. In addition, this failure may affect the kind of information that is before the customs administration and can be relied on to determine the customs value under the alternative methodologies provided for in the Customs Valuation Agreement. In considering how a customs administration must proceed when a multinational corporation fails to discharge its burden of establishing that its transaction value is reliable, the Panel should ensure that it does not adopt interpretations that would limit the right of Members' customs administrations to seek and obtain information from importers or that would



provide importers with incentives not to cooperate with customs administrations in resolving doubts about the reliability of a transfer price as the customs value.

### **3. Claims under Article III of the GATT 1994**

4.114 Thailand uses the same methodology to establish the VAT tax base for both domestic and imported cigarettes. Because there is no discrimination against imports inherent in that methodology, Thailand cannot be found to be acting inconsistently with Article III:2 as long as the methodology is applied even-handedly to both domestic and imported products. Moreover, the Philippines bears the burden of proving that that methodology is not applied even-handedly and in a manner such as to discriminate against imports. In its first submission, the Philippines did not discharge this burden. The Philippines' core argument was that the MRSPs are discriminatory because the MRSP for *Marlboro* cigarettes was greater than the actual retail price of those cigarettes. This does not show that the methodology for determining MRSPs is applied in a discriminatory manner. Thailand is not required under Article III:2 to use the actual selling price of the cigarettes as the tax base. And Thailand is not required to *reduce* the tax base simply because PM Thailand – or even a wholesaler or retailer – makes a business decision to sell PM cigarettes at prices below the MRSP.

4.115 The MRSPs for both domestic and imported cigarettes are based initially on the manufacturer's own recommended retail price for each brand. Thus, the determination of the MRSP is necessarily a company-specific and, indeed, brand-specific determination. The MRSPs are updated to reflect changes in any of the tax rates applicable to cigarettes, changes in the c.i.f. or ex factory price, or other requests for changes by the manufacturer. This system is not in any way discriminatory. The mere fact that PM Thailand would like to reduce its tax liability and is not able to do so does not constitute discrimination against imported products or a *prima facie* case of a violation of Article III:2.

### **4. Claims under Article X of the GATT 1994**

#### **(a) Article X:3 claim relating to TTM's Board of Directors**

4.116 Article X:3 does not regulate the manner in which Members exercise their sovereign rights with regard to the structure of their state enterprises. Moreover, the Philippines' claim appears to be based entirely on the *risk* of how Thailand might administer its laws, rather than the actual administration as contemplated under Article X:3(a). Even assuming that the scope of Article X:3 should be expanded to cover the *risk* of improper administration, the factual basis of the Philippines' claim remains vague and unsubstantiated. For example, the Philippines alleges a conflict of interest because two officials of the Revenue and Excise Departments currently serve on the board of TTM, but fails to show that either official has any responsibility in the course of their duties in the Revenue or Excise Departments for determining the tax bases or customs values for imported cigarettes. In fact, neither Mrs. Sirisaengtaksin, who works for the Revenue Department and is currently seconded to the Bureau of the Permanent Secretary of the Ministry of Finance, nor Mr. Keesiri, who works at the Excise Department, has any direct responsibility for tax policy affecting imported cigarettes.

#### **(b) Article X:3 claim relating to appeals**

4.117 The Philippines claims that Thailand acts inconsistently with Articles X:3(a) and X:3(b) of the GATT 1994 because [[xx.xxx.xx]] appeals filed by PM Thailand before the BoA have not been resolved promptly. In accepting Article X:3, Members of the WTO hardly anticipated that Articles X:3(a) and X:3(b) would be interpreted to require them to conclude internal administrative processes "promptly" and, therefore, to reallocate resources away from other priorities to meet deadlines derived from Article X:3. In any event, these appeals have not been resolved in part

because PM Thailand has presented revised data relating to these appeals that must be reviewed for accuracy and sufficiency.

- (c) Article X:3 claims relating to the uniform administration of VAT, excise, health and television tax laws

4.118 Both of the Philippines' claims under Article X:3(a) regarding non-uniform administration of Thailand's VAT laws<sup>62</sup> and its excise, television and health taxes<sup>63</sup> are outside the Panel's terms of reference. The Philippines' panel request contains no mention of a failure to administer laws and regulations "uniformly". In addition, both of these claims are based on the unworkable premise that WTO Members can *never* change their administrative policies. This premise could be interpreted to mean that in order to achieve "uniform" administration, Thailand should stick with its approach in the period September 2006 to March 2007 of using guarantee values to calculate MRSPs.

4.119 The Philippines also claims that by using guarantee values to calculate the September 2006 MRSPs, Thailand failed to administer its laws reasonably and impartially within the meaning of Article X:3(a).<sup>64</sup> Here again, the Philippines' interpretation is unworkable. Administrators do not operate in situations of perfect and complete information and, therefore, must be able to use reasonable estimates or proxy information when they have valid grounds to doubt the reliability of information on which they would normally rely. Article X:3(a) should not be interpreted to prevent Members from making reasonable decisions in this manner.

4.120 The Philippines argues that Thailand must administer its laws through "transparent, objective and generally applicable criteria"<sup>65</sup>, that it must create "generally applicable rules"<sup>66</sup> and that "[a]bsent such rules, the administration of the tax cannot be justified under the rule of law".<sup>67</sup> Thailand has explained that the MRSPs are determined according to generally-applicable criteria. Accordingly, the Philippines' claim lacks the requisite factual basis. Also, Article X:3 is not intended to prevent governments from conferring discretion on relevant officials to administer the laws. Many WTO Members choose to implement their laws and policies through the conferral of discretion on administrative agencies and officers rather than through the adoption of explicit rules that attempt to address every possible contingency. Article X:3(a) should not be interpreted so as to make this method of administration GATT-inconsistent.

4.121 The Philippines also claims that Thailand violates Article X:3(a) because, in the event that the originally-assessed c.i.f. value is later revised on appeal, the tax base for the excise, television and health taxes would become retroactively incorrect.<sup>68</sup> The Philippines has not provided any evidence indicating that in the circumstances to which it refers in paragraph 659 of its first written submission, Thai officials *actually did* or *would* collect excise, health and television taxes using a tax base that is "unlawful"<sup>69</sup> and "has no basis"<sup>70</sup> as a matter of Thai domestic law. To the extent that the Philippines is complaining about what may occur in the event that duty assessments are revised in the future, the Philippines' claim is not ripe and cannot be addressed by the Panel. Even if the factual basis of this claim were clear, it would not suffice to establish a breach of WTO law. Article X:3(a) should not be

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<sup>62</sup> Philippines' first written submission, paras. 580-594

<sup>63</sup> Philippines' first written submission, paras. 663-671.

<sup>64</sup> Philippines' first written submission, paras. 605-610.

<sup>65</sup> Philippines' first written submission, para. 605.

<sup>66</sup> Philippines' first written submission, para. 608.

<sup>67</sup> Philippines' first written submission, para. 609.

<sup>68</sup> Philippines' first written submission, paras. 672-683.

<sup>69</sup> Philippines' first written submission, para. 659.

<sup>70</sup> Philippines' first written submission, para. 660.

interpreted in a manner that converts every failure to comply with domestic law into a breach of WTO law.<sup>71</sup>

4.122 Also, as a matter of fact, Thai law provides for refunds of overpaid excise, television and health taxes, although PM Thailand appears never to have requested such refunds from the Excise Department. The Philippines has not explained how Article X:3(a) compels WTO Members to create mechanisms to refund indirect taxes. Several Members refuse to grant refunds of indirect taxes that would confer windfall benefits on producers and sellers that have already collected the larger tax amount from their consumers and, therefore, have not suffered any loss. Article X:3 should not be interpreted to impose an obligation on Members to grant such windfall gains.

(d) Article X:1 claims

4.123 Thailand considers that the general methodologies for MRSPs have been published. Thailand also notes that the last sentence of Article X:1 clarifies that there is no obligation to disclose confidential information. The data used to determine MRSPs and ex factory prices are clearly confidential. The laws or regulations governing the release of guarantees collected by Customs have also been published, and the Philippines has not explained precisely which existing laws and regulations relating to this matter remain unpublished.

## **5. Claims relating to completed acts and expired measures**

4.124 Many of the Philippines' claims relate to completed acts and measures that no longer exist.<sup>72</sup> This raises the question of whether the Panel can make recommendations with respect to these claims. These expired measures and past acts include the valuation and assessment of duties with respect to the [[xx.xxx.xx]] entries listed in the panel request, the setting of MRSPs for 2006, and the alleged violation of Article 10 of the Customs Valuation Agreement. A list of the relevant claims is set out in Exhibit THA-36.

4.125 Under Article 19.1 of the DSU, 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. The Panel cannot issue recommendations pursuant to Article 19.1 that Thailand bring expired measures or completed acts into conformity with the covered agreements. As the Appellate Body has clarified, it amounts to legal error for a panel to make an Article 19.1 recommendation with respect to measures which no longer exist.<sup>73</sup> Following the Appellate Body's guidance, numerous panels have refrained from making Article 19.1 recommendations regarding measures that are no longer in force.<sup>74</sup> This rule applies with equal force to "measures" that consisted of individual, completed governmental acts.

4.126 By adopting Articles 19.1 and 21.3 of the DSU, WTO Members accepted that they would not have to undo past actions in response to a finding of violation of the covered agreements and are required only to cease the WTO-inconsistent conduct by the end of the reasonable period of time for implementation. For this reason, remedies under the DSU are generally described as being

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<sup>71</sup> See Panel Report, *US – Stainless Steel (Korea)*, para. 6.50.

<sup>72</sup> See Thailand's first written submission, para. 335.

<sup>73</sup> Appellate Body Report, *US – Certain EC Products*, para. 81; Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 479.

<sup>74</sup> See, e.g., Panel Report, *Chile – Price Band System*, para.8.3; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 8.3; Panel Report, *Turkey – Rice*, para. 8.4; Panel Report, *US – Stainless Steel (Mexico)*, para. 8.3.

"prospective", rather than retrospective, in nature.<sup>75</sup> It would serve no purpose to allow a WTO Member to obtain recommendations from panels with respect to past and consummated actions.

4.127 Because the conduct on which the relevant claims of the Philippines, as listed in Exhibit THA-36, are based took place entirely in the past and has ceased or been completed, in the event that the Panel were to find violations with respect to these claims, there would be nothing further that Thailand could do in order to achieve compliance with its WTO obligations. The Panel should not issue recommendations under Article 19.1 of the DSU that Thailand bring itself "into conformity" with its WTO obligations with respect to any of the claims listed in Exhibit THA-36.

4.128 In addition, because the Panel cannot make any recommendations with respect to the claims listed in Exhibit THA-36, it is not clear whether any purpose at all is served by making *findings* regarding these claims. Panels have a responsibility to prevent the WTO's dispute settlement procedures from being used to obtain purely declaratory judgments or to address matters that are completely moot by the time the panel is established. The Panel should decline to make findings with respect to the claims listed in Exhibit THA-36 that would serve no clear purpose and would not contribute to the resolution of any current and concrete dispute between the Philippines and Thailand regarding these matters.

## **6. Claim under Article 10 of the Customs Valuation Agreement**

4.129 Regarding the Philippines' claim under Article 10 of the Customs Valuation Agreement, Thailand is still studying this claim and reserves the right to provide further information at a later date. This claim is one of those relating to past completed acts discussed above and listed in Exhibit THA-36. The Panel should not make recommendations with respect to this claim and, in the circumstances, Thailand questions whether there is any purpose to be served in making any findings with respect to this claim.

## **7. Request for documents**

4.130 In paragraph 712 of its first written submission, the Philippines requested the Panel to seek certain documents or categories of documents. Thailand's first written submission contained most of the documents and categories of documents referred to by the Philippines. Two of the documents requested by the Philippines were actually provided by the Philippines itself in its first submission. These were item 6, Memorandum 0519/1605, dated 14 March 2007, which was the cover memo for the minutes of the 6 March 2007 meeting, and item 9, the minutes of that meeting. Both of these documents were attached as Exhibit PHL-74 to the Philippines' first written submission. Thailand notes that those minutes were revised and re-circulated one week later, on 21 March 2007. The revised minutes, which Thailand now submits as Exhibit THA-37, make clear that the customs value for the [[xx.xxx.xx]] entries listed in the Philippines' panel request was determined using the deductive value method in accordance with Article 5 of the Customs Valuation Agreement.

4.131 Thailand has reviewed the Philippines' list to see whether there were any remaining listed documents that might assist the Panel. Accordingly, Thailand is submitting as Exhibit THA-38 the documents referred to in items 1 and 8 of the Philippines' list. Item 1 contains instructions for customs officers to act carefully in making customs valuation determinations and item 8 relates to the approval of the amounts of guarantees used for PM Thailand's imports. Several other documents on the Philippines' list, including items 2-5, relate to products other than cigarettes and have no relevance to this case. Thailand will, of course, be happy to provide any other information the Panel considers necessary.

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<sup>75</sup> See, e.g., Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 494. See also Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.

E. EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE PHILIPPINES

**1. Violation of Article X:3(a) of the GATT 1994 because of dual role of TTM directors**

4.132 Thailand violates Article X:3(a) through the act of vesting governmental power to apply Thai customs and tax rules concerning domestic and imported cigarettes in individuals who simultaneously serve as Directors of TTM and as senior officials in DG Excise, DG Customs, and DG Revenue. This pattern of administration is an act that, in and of itself, creates an inherent conflict of interest and constitutes partial and unreasonable administration, contrary to Article X:3(a).

4.133 In administering Thai customs and tax rules, these Thai Government officials are responsible for, *inter alia*, assessing the customs value of imported cigarettes and fixing the tax base for VAT, excise, health, and television taxes. As a matter of fact, TTM Directors have been directly involved in the application of Thai customs and tax measures to cigarettes, *inter alia*, by signing the orders imposing decisions, and by participating in and supervising the decision-making process. Their decisions, therefore, have a considerable influence on the tax burden of imported and domestic cigarettes and, as a result, the relative competitive situation of these cigarettes. The TTM Directors also have access to BCI regarding imported cigarettes.

4.134 In fulfilling their role as TTM Directors, the same Thai Government officials have a financial incentive and legal obligation to maximize TTM's competitive advantage and to "make any decision for the utmost benefit of" TTM. In making such decisions, they can rely on BCI about TTM's competitors, available to them because of their role in the Thai Government.

4.135 The manner of structuring and organizing government is the very essence of "administration" under Article X:3(a), as found by the Panel in *Argentina – Hides and Leather*. In this dispute, the Philippines has provided quantitative and qualitative evidence of the unreasonable and impartial pattern of administration, as well as of acts by individuals serving both as TTM Directors and Thai Governmental officials resulting in unreasonable and impartial administration. Thailand also mischaracterizes the decision in *Argentina – Hides and Leather* in arguing that the partiality and unreasonableness in its administration must be balanced against safeguards adopted to avoid abuses. In fact, the safeguards asserted by Thailand neither remedy the conflict of interest facing Thai Government officials simultaneously serving on the Board of TTM, nor prevent abuses such as the inappropriate flow of importers' BCI to the domestic industry.

**2. Claims pertaining to customs valuation**

**(a) Standard of review with respect to customs valuation decisions**

4.136 In reviewing a series of Thai customs valuation decisions under the Customs Valuation Agreement, the Panel must make an objective assessment of the facts, and apply the appropriate standard of review. The appropriate standard of review is neither *de novo* review, nor total deference. Instead, panels are required to conduct a critical review of a national authority's determination to see whether the authority explained how the facts support its decision. In reviewing an authority's decision to reject transaction value, a panel cannot simply accept the authority's conclusion that the importer failed to show that the relationship between buyer and seller did not affect the price, nor can a panel decide for itself, on a *de novo* basis, whether the transaction value should be accepted. Instead, a panel must review whether the authority has provided an objective and coherent explanation as to how it complied with its WTO obligations, and how the underlying facts support its decision.

- (b) Violation of Articles 1.1 and 1.2 of the Customs Valuation Agreement by maintaining and applying a general rule requiring the rejection of transaction value

4.137 Thailand violates Articles 1.1 and 1.2 by maintaining and applying, from 4 August 2006 until 19 March 2008, a general rule regarding the rejection of transaction value, consisting of (1) the systematic refusal, at the time of importation, to accept transaction value for entries of imported cigarettes, with the collection of guarantees as a condition for allowing customs clearance; and, (2) the systematic valuation of imported cigarettes using the deductive valuation methodology, instead of transaction value, at the time of final assessment.

4.138 By maintaining such a general rule, Thailand violated the obligation to use "transaction value" as the "primary basis for customs value", provided for in Article 1.1 and paragraph 1 of the General Introductory Commentary of the Customs Valuation Agreement. A WTO Member may depart from its primary valuation obligation solely in the circumstances set forth in paragraphs (a) to (d) of Article 1.1. Under Article 1.1(d), where the buyer and seller are related, the customs value "shall be" the transaction value, "provided" that the transaction value is acceptable under Article 1.2. Article 1.2(a) provides that the "fact" that the parties are related is insufficient "grounds" to reject the transaction value. In such a case, the customs authority must examine the circumstances of sale to establish whether other "facts", besides the relationship, demonstrate that the relationship influenced the price. Thailand's general rule violates Articles 1.1 and 1.2 by providing for the systematic rejection of transaction value without examination of the circumstances of sales.

- (c) Violation of Articles 1.1 and 1.2 of the Customs Valuation Agreement by improperly rejecting PM Thailand's declared transaction values in [[xx.xxx.xx]] transactions

4.139 Thailand violates Articles 1.1 and 1.2 by rejecting PM Thailand's declared transaction values for [[xx.xxx.xx]] entries, without: (1) examining the circumstances of sale; and, (2) identifying adequate grounds, other than the relationship, warranting the rejection of transaction value.

4.140 The Philippines' claim that Thailand failed to examine the circumstances of sales is supported by: (1) the minutes of the 6 March 2007 meeting; (2) Thailand's failure to examine PM Thailand's evidence, including annual filings with deductive calculations showing that the declared transaction values enabled it to earn a sufficient amount to cover its usual costs and profits, and an amount for costs and profits similar to the amount earned by similarly-situated distributors in transactions with unrelated suppliers; (3) Thailand's failure to seek information concerning PM Philippines' costs and profits – information which PM Thailand had identified as being relevant if Thai Customs were to apply a cost-plus testing methodology under Article 1.2(a); (4) Thailand's incoherent and arbitrary deductive methodology to test the declared transaction values for all of PM Thailand's transactions throughout 2006 and 2007; and, (5) Thai Customs' acceptance of the transaction values for [[xx.xxx.xx]] entries in March and September 2007 highlights the arbitrariness of the rejection of transaction values for other entries occurring at the same time.

4.141 Thailand makes certain rebuttal arguments. On issue (1), Thailand's argument that the minutes address sales in 2003 is contradicted by the express terms of the minutes, which state that Thai Customs did not examine the circumstances of sale with respect to entries "since 1 August 2006". On issue (2), Thailand's *ex post* argument is that PM Thailand's calculations were not in the proper form and not supported by other evidence. However, Thai Customs never informed PM Thailand of these points, and never gave PM Thailand an opportunity to respond to them, contrary to Article 1.2(a). In any event, the calculations were in the proper form and PM Thailand could have provided additional support upon request. On issue (5), the Philippines provides documentary evidence to counter Thailand's argument that [[xx.xxx.xx]] of the entries never occurred; and it shows that Thailand's asserted clearance date for the other [[xx.xxx.xx]] entries was just three days before an entry for which Thailand rejected the transaction value.

4.142 Thailand also violated Articles 1.1 and 1.2 by rejecting PM Thailand's declared transaction values without valid reasons, as evidenced by Thai Customs' letter of 12 April 2007, which informed PM Thailand of Thai Customs' decision to reject transaction value. The letter states two invalid grounds of rejection and evidences Thai Customs' failure to critically examine all of the relevant evidence. First, the "fact" that "another importer" purchases cigarettes at a higher price than PM Thailand is not a valid ground for considering that the relationship between PM Thailand and PM Philippines influenced the price because, for a variety of reasons, the prices of the other party are not comparable. During these panel proceedings, Thailand has accepted that this first "ground" for rejecting transaction value was flawed, and not relied upon by Thai Customs.

4.143 Second, Thai Customs' statement that PM Thailand has not proven whether the relationship had influenced the price is not a "ground" for rejecting transaction value because: (1) the Customs Valuation Agreement does not establish a legal presumption and burden of proof against the transaction value; (2) even if doubts could trigger a presumption and burden of proof against the transaction value, the doubts must be reasonable at the time when the alleged burden of proof is invoked as the basis to reject transaction value, which was not the case here; and, (3) even if a burden of proof on the importer were to apply, the customs authority should explain its decision rejecting transaction value, and why the submitted evidence was insufficient to allow the importer to meet its burden of proof, which Thai Customs failed to do.

- (d) Violation of Article 1.2(a) of the Customs Valuation Agreement by failing to communicate "grounds" before rejecting transaction value

4.144 Thailand violated Article 1.2(a) by failing to inform PM Thailand of its "grounds for considering that the relationship influenced the price" prior to Thai Customs' final decision to reject transaction value. PM Thailand submitted evidence that allowed Thai Customs to establish that the transaction values enabled PM Thailand: (1) to earn a sufficient amount to cover its usual costs and profits; (2) to earn an amount for costs and profits similar to the amount earned by unrelated distributors.

4.145 Under Article 1.2(a), Thailand was obliged to communicate the objective facts that supported Thai Customs' conclusions on the burden of proof in the light of this evidence. Such communication would have offered PM Thailand "a reasonable opportunity to respond" to the customs authority's dissatisfaction with the evidence. Absent an explanation, PM Thailand is deprived of a reasonable opportunity to address whatever deficiencies the authority perceived in the evidence.

4.146 Contrary to Thailand's assertion, Thai Customs' 19 December 2006 letter failed to inform PM Thailand of the grounds for considering that the relationship influenced the price. An unexplained, unsubstantiated, and conclusory statement that PM Thailand failed to meet its burden of proof does not satisfy the requirement to communicate "grounds". Until prompted by the Panel, Thailand had never communicated its reasons for disregarding the evidence submitted by PM Thailand.

- (e) Violation of Article 16 of the Customs Valuation Agreement by failing to provide an adequate explanation as to how the customs value was determined

4.147 Thailand violated Article 16 by failing to provide PM Thailand with an "explanation in writing ... as to how the customs value of the importer's good was determined" in its final assessment decision. Under Article 16, Thailand is required to explain why it rejected the declared transaction value, and to provide a sufficiently detailed and reasoned explanation permitting the importer to understand how and why the authority determined the assessed customs value.

4.148 Thailand failed to explain the objective basis for rejecting transaction value and how it proceeded in valuing PM Thailand's goods. Without an explanation of how the authority reached its decision, importers and foreign governments are unable to exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement, and domestic courts and WTO panels are deprived of a basis to review the authority's decisions.

4.149 Contrary to Thailand's assertion, the 12 April 2007 letter does not sufficiently explain the basis for Thai Customs' rejection of the declared transaction values because it contains an unexplained statement that the burden of proof was not met. Furthermore, this letter does not explain how Thai Customs determined the assessed customs values, because, for example, it does not reveal the starting point of the deductive calculation allegedly used by Thai Customs, the specific elements and amounts deducted; the sources of the data used; and other supporting calculations for the assessed values. The minutes of the 6 March meeting also failed to satisfy the requirement under Article 16 because they were insufficiently detailed.

- (f) Violation of Articles 5 and/or Article 7 of the Customs Valuation Agreement by incorrectly assessing the deductive value of PM Thailand's [[xx.xxx.xx]] transactions

4.150 The Philippines' primary claim is that, if the Panel finds that Thailand used Article 7 to value PM Thailand's goods, Thailand improperly declined to use Article 5 for impermissible reasons, i.e., a lack of contemporaneous financial information, and improperly applied Article 7.1 because Thai Customs failed to make deductions for sales allowances, internal transportation costs, and Provincial taxes. Thailand admits that PM Thailand claimed deductions for sales allowances and Provincial taxes, but contests that the information available to Thai Customs justified a deduction for either amount. With respect to the deduction for internal transportation costs, Thailand disputes that PM Thailand claimed such a deduction, and also contends that the available evidence did not support the deduction. A proper deduction of these three items would have resulted in significantly lower customs values than the values applied by Thai Customs.

4.151 PM Thailand submitted all information required to make the requested deductions. Although Thai Customs requested additional information on certain issues, it requested no such information regarding sales allowances and Provincial taxes, suggesting that Thai Customs was satisfied that it had all necessary supporting information available to make these deductions.

4.152 Before this Panel, Thailand now makes certain *ex post* arguments regarding the sufficiency of the information PM Thailand provided. If Thai Customs had raised these concerns at the time of its valuation, PM Thailand easily could have responded to them. The criticisms focus on information on sales allowances and Provincial taxes provided with PM Thailand's letter of 7 March 2007. However, the information with this letter responded to requests regarding the greatest aggregate quantity ("GAQ") sales price, and not sales allowances and Provincial taxes. Again, if Thai Customs had requested additional information on sales allowances and Provincial taxes, PM Thailand would have provided it. Indeed, on 12 March 2007, PM Thailand provided information to the BoA on Provincial taxes paid in 2002.

4.153 With respect to internal transportation costs, Thailand incorrectly argues that PM Thailand did not claim a deduction for these costs, overlooking that each of PM Thailand's annual filings for financial years 2003, 2004, 2005 and 2006 included a deduction for either inland freight or domestic transportation. Even if PM Thailand's letter of 21 February 2007 did not mention transportation costs, Thai Customs was put on notice that deductions for such items were required, and, in doubt, could have requested further information in its letter of 27 February 2007.

4.154 Thailand argues that PM Thailand should have provided information to show that the claimed deductions were made in connection with the sales on which the GAQ price was based. However,



Article 5 permits a deduction for the amounts "usually" incurred on sales in general, not least because the transaction being valued is not the GAQ sale. It is also the approach adopted by the BoA in its decisions on the 2000-2002 appeals. In any event, if Thai Customs insisted on information showing the deductions to be made from the sales on which the GAQ price was based, it was required to request this information.

4.155 With respect to the alleged significance of PM Thailand's letter of 7 March 2007, Thailand's arguments on the meeting of 6 March 2007 show that, by 6 March, Thai Customs had already finalized its deductive calculation. Thus, before the 7 March letter arrived, Thailand had already decided not to deduct sales allowances, internal transportation costs, and Provincial taxes. As a result, the sufficiency of the information submitted by PM Thailand in its 7 March letter was not the decisive factor in Thai Customs' decision.

4.156 If the Panel finds that Thailand used Article 7 to value PM Thailand's goods, Thailand acted contrary to Article 7.3 by failing to inform PM Thailand in writing "of the customs value determined under the provision of this Article and the method used to determine such value".

4.157 Alternatively, if the Panel finds that Thailand used Article 5 to value PM Thailand's goods, Thailand violated Article 5 because it failed to make the required deductions for sales allowances, internal transportation costs, and Provincial taxes. The arguments in support of the Philippines' alternative claim are the same as the arguments in support of its primary claim under Article 7 because the methodology and elements in a deductive calculation under Articles 5 and 7 do not, in principle, differ.

(g) Violation of Article 10 of the Customs Valuation Agreement by disclosing business confidential data

4.158 Thailand violated Article 10 because Thai Government officials disclosed PM Thailand's business confidential data, in particular its declared transaction value and import volumes. PM Thailand never gave "specific permission" to the Thai Government to allow such disclosure and repeatedly opposed the disclosures. As a result, the Philippines has made a *prima facie* case of a violation of Article 10.

### **3. Violation of Article X:3(b) of the GATT 1994 by failing to provide a right to challenge guarantees**

4.159 Thailand violates Article X:3(b) by failing to provide for a right to seek the prompt review and correction of administrative action by Thai Customs to impose guarantees on imported goods. Pursuant to Article X:3(b), Thailand is obliged to provide, *inter alia*, for the prompt review and correction by an independent tribunal of guarantee orders, which are administrative actions relating to customs matters. An order imposing a guarantee is a complete and final legal act that is conceptually distinct from the final assessment of customs value. It imposes a definitive guarantee, and its imposition is the culmination of an administrative process to establish the appropriate level of the guarantee and, as such, is "the final manifestation of the application of a law in a particular case".

4.160 The obligation to furnish a guarantee is linked to, though conceptually distinct from, the obligation to pay duties. A guarantee establishes an immediate legal obligation to furnish cash or security, and thus imposes an immediate financial burden on importers, producing also immediate repercussions on market access and competitive opportunities. Allowing a challenge to an assessed customs value cannot repair the harm caused in the interim by a guarantee, and may undermine competitive opportunities. The severity of a guarantee may even completely exclude imported goods from the market or delay clearance. This underscores the need to provide for an independent right to challenge a guarantee. Under Thailand's interpretation, market access would be permanently lost as a

result of the guarantee, because the guarantee order could only be challenged as part of a challenge against the final assessed customs value. If no final assessment follows, the importer would be stripped of any opportunity to challenge the guarantee.

4.161 The Philippines also submits that Thailand is mistaken in its understanding of the relationship between Article X:3(b), on the one hand, and the Anti-Dumping Agreement and the Customs Valuation Agreement, on the other hand. First, guarantees collected in anti-dumping cases may be challenged under Article X:3(b), and the WTO proceedings initiated by Thailand in *US – Shrimp (Thailand)* confirm that a WTO Member can challenge a guarantee order at the WTO. The domestic law of WTO Members should likewise provide for a right to challenge guarantees. Second, Article 11 of the Customs Valuation Agreement, which provides for a right to appeal against "a determination of customs value", and Article X:3(b) of the GATT 1994 can be applied together in a harmonious fashion, which is consistent with the Interpretative Note to Annex 1A and settled WTO law.

4.162 Furthermore, obliging WTO Members to provide a right of appeal against a guarantee order would neither interfere with a Member's right to collect a guarantee pending the assessment of the customs value, nor would it interfere with the responsibility of customs authorities to determine customs value.

#### **4. Claims pertaining to VAT**

- (a) Violation of Article X:1 of the GATT 1994 by failing to publish the methodology and data used to determine and revise MRSPs

4.163 Thailand violates Article X:1 by failing to publish the methodology and data used to determine the MRSPs, which is the base for VAT. The Philippines has demonstrated that none of the key features of Thailand's MRSP methodology, as described by Thailand, has been published. These elements are: (1) "the primary source for the MRSPs is the manufacturer's recommended retail price" ("RRSP"); (2) DG Excise reviews the proposed MRSP/RRSP to decide whether to accept it as the MRSP; (3) DG Excise "normally" revises MRSPs following tax changes impacting the MRSP; (4) when MRSPs are revised, DG Excise calculates a new MRSP adding: (a) the ex factory/c.i.f. price; (b) the latest tax amounts; and (c) marketing costs, which are "derived from information provided by the manufacturers themselves".

4.164 Thailand also violates Article X:1 by failing to publish any data that forms an integral or essential element of the determination of specific MRSPs. As the Panel in *Dominican Republic – Import and Sale of Cigarettes* stated, Article X has a due process objective and the "essential elements" or "essential parts" of an administrative ruling must be published. This interpretation is consistent with the text of Article X:1, requiring publication "in such a manner as to enable governments and traders to become acquainted with them", and gives effect to the transparency obligations in Article X:1. In this dispute, Thailand should have published the price surveys it relied on to determine the marketing costs for imported brands in 2006 and 2007. It could also have published indexed data, to protect the confidential character of certain information.

- (b) Violation of Article III:2 of the GATT 1994 by taxing imported cigarettes in excess of like domestic goods as a result of the MRSP levels

4.165 Thailand violates Article III:2 by imposing a VAT on imported cigarettes "in excess" of VAT imposed on like domestic cigarettes.

4.166 The Philippines has demonstrated that all domestic and imported cigarettes are like. This evidence pertains to physical characteristics, end uses, consumers' tastes and preferences, tariff

classification, and identical regulatory treatment. So far, Thailand has not put forward argument or evidence to dispute the Philippines' overall assessment, based on the evidence as a whole.

4.167 Thailand incorrectly requires that the Panel perform 1,634 separate comparisons between each domestic and imported brand to establish likeness on a brand-by-brand basis. This approach lacks support in the text of Article III:2 or the case law. Thailand also misinterprets the Appellate Body report in *Canada – Periodicals*. In that report, the Appellate Body did not establish perfect substitutability as the decisive legal standard under Article III:2, first sentence, as Thailand alleges. Instead, it merely explained that perfectly substitutable products fall within the scope of Article III:2, first sentence.

4.168 Even if the Panel were to find that not all imported and domestic cigarettes are like, the Philippines maintains that imported and domestic cigarettes within a particular price segment are like. Although price is not a decisive criterion in establishing likeness, the Philippines has demonstrated likeness within price segments.

4.169 Thailand imposes VAT on imported cigarettes in excess of VAT imposed on like domestic cigarettes because (1) the MRSPs for imported cigarettes are higher than for like domestic cigarettes, and (2) the MRSPs for imported cigarettes are systematically higher than the RRSPs for imported cigarettes, whereas the MRSPs for like domestic cigarettes are systemically equal to the RRSPs. Thus, the tax burden on imports is higher in absolute terms and also higher relative to the retail price.

4.170 Thailand has attempted to offer an explanation for the excess tax burden imposed on imported cigarettes. The essence of this explanation is that DG Excise is not responsible for the level of the MRSP, because the MRSP is based on information provided by the importer. However, the facts contradict this explanation. Among others, the evidence shows that the MRSPs for *Marlboro* and *L&M* have systematically been higher than they would have been if based on PM Thailand's information.

4.171 Thailand is also mistaken in arguing that the key question before the Panel is whether the design, structure, and architecture of the measure discriminate against imported cigarettes. The Philippines' claim in this dispute is brought under the first sentence of Article III:2. Under that sentence, the issue is whether imported products are subject to any taxation "in excess" of the tax applied to like domestic products.

(c) Violation of Article III:2 of the GATT 1994 by exempting resales of domestic cigarettes from VAT liability

4.172 Thailand violates Article III:2 because it exempts resales of domestic cigarettes from VAT, but grants no such exemption to resales of like imported cigarettes. Thailand does not dispute this different fiscal treatment but responds that resellers of imported cigarettes can offset their additional VAT liability with a tax credit, leaving a zero "net" liability.

4.173 Thailand's defence fails. First, Thailand's compliance with Article III:2 cannot depend on private parties' action. The fact that a reseller of imported cigarettes is given an opportunity to mitigate the impact of a discriminatory tax through a tax credit does not cure the discriminatory character of Thailand's VAT regime. Second, the tax credit granted to resellers of imported cigarettes will not always match perfectly their tax liability. A reseller may incur a "net" liability of greater than zero if the volume of cigarettes sold in a given month exceeds the volume of cigarettes bought in that month. Even if in certain months the tax credit might exceed the tax liability, it is well established in the case law that more favourable treatment of imported products in some instances does not justify less favourable treatment in other instances. Third, the tax credit is not granted automatically but is subject to legal conditions concerning VAT administrative requirements. The grant of a non-

automatic tax credit cannot ensure equal treatment where domestic cigarettes are automatically subject to no tax liability. This is particularly so because penalties may be imposed on resellers for a failure to comply with the administrative requirements regarding resales of imported cigarettes.

- (d) Violation of Article III:4 of the GATT 1994 by imposing more onerous VAT administrative requirements on resales of imported cigarettes

4.174 Thailand violates Article III:4 by subjecting resales of imported cigarettes to more onerous VAT administrative requirements, set out in Chapter IV of the Thai Revenue Code, than are imposed in connection with resales of like domestic cigarettes. The detailed evidence showing the likeness of imported and domestic cigarettes within the meaning of Article III:2, first sentence, also supports that the products are like for purposes of Article III:4.

4.175 Under Thai law, VAT registrants are subject to different obligations depending on the particular goods or services supplied. Chapter IV includes obligations to prepare and maintain detailed tax invoices, tax input records, tax output records, goods and raw materials records, and alternative records; filing VAT Form Por.Por.30; and accepting an audit process and sanctions in case of non-compliance. None of these requirements apply in connection with resales of domestic cigarettes. This is because Section 3(1) of Royal Decree No. 239 exempts resales of domestic cigarettes from VAT. As a result, pursuant to Section 81/2 of the Revenue Code, wholesalers and retailers are exempt from the administrative requirements in Chapter IV in connection with their resales of domestic cigarettes.

4.176 The more onerous VAT administrative requirements imposed in connection with resales of imported cigarettes "affect" the sale and distribution of cigarettes within the meaning of Article III:4, because they impose regulatory burdens on all selling parties in the distribution chain.

4.177 Thailand fails "to provide equality of competitive conditions for imported products in relation to domestic products" – which is the general thrust of the principle in Article III:4. Thailand's maze of administrative procedures, requirements, and sanctions modifies the conditions of competition by imposing extra hurdles in connection with resales of imported cigarettes. The resulting additional costs and risks must be taken into account by a commercial operator in deciding which cigarettes to supply and promote. Given the regulatory environment, retailers selling only domestic cigarettes – of which there are around 68,000 – have a disincentive to start supplying imported cigarettes, because they would then be subject to additional costs and risks. The Philippines adds that, in an Article III:4 analysis, the Panel need not determine the actual trade and competitive effects of the more onerous VAT administrative burdens.

- (e) Thailand's failed defence under Article XX(d) of the GATT 1994

4.178 Thailand has failed to justify its exemption of resales of domestic cigarettes from the VAT administrative requirements in Chapter IV, under Article XX(d). Thailand has not demonstrated that the *de jure* exemption of resales of domestic cigarettes from VAT administrative requirements is "necessary" to secure compliance with any domestic laws and regulations, WTO-consistent or otherwise.

- (f) Violation of Article X:3(a) of the GATT 1994 by failing to administer its VAT regime in a uniform, reasonable, and impartial manner

4.179 Thailand violates Article X:3(a) by failing to administer its VAT regime in a uniform, reasonable, and impartial manner.

4.180 First, Thailand does not apply its VAT regime on the basis of generally-applicable criteria set forth in Thai law, in particular the determination of the MRSPs. It is unreasonable to administer taxes on an ad hoc, case-by-case basis, without criteria set forth in law. By way of example, in 2006 and 2007, DG Excise decided to calculate (discriminatory) marketing costs for imported cigarettes using an international price survey and by using guarantee values as the starting point for its MRSP calculations for imported cigarettes. These decisions were not grounded in Thai law, but were merely the product of DG Excise's discretion.

4.181 Second, Thailand's use of a guarantee value, and not a customs value, as the starting point for the calculation of MRSPs results in non-uniform and unreasonable administration. The practice of administering VAT through two different starting points lacks uniformity because sometimes actual tax amounts are added based on the actual duty-paid customs values, and sometimes notional amounts based on the guarantee values are added. This also involves unreasonable administration because the notional amounts added for excise, health, and television taxes are "the highest" possible and based on a provisional estimate of potential liability for customs duties. Furthermore, it constitutes partial administration because such notional amounts are added only to the MRSPs for imported cigarettes given that only those cigarettes are subject to provisional guarantee values. The starting point for the MRSPs for domestic cigarettes, by contrast, is the ex factory price. Because provisional guarantees can be collected to preserve the ability to collect taxes, there is no justification for transforming a provisional guarantee into a definitive tax base.

## **5. Claims pertaining to the excise, health, and television tax**

- (a) Violation of Article X:1 of the GATT 1994 by failing to publish the methodology and data used to determine the ex factory price

4.182 Thailand violates Article X:1 by failing to publish the methodology and data used to calculate the ex factory price, which is the tax base for the excise, health, and television taxes imposed on domestic cigarettes and the starting point for the MRSP calculation. The methodology must address the manner by which costs are calculated for purposes of determining the ex factory price, including which costs are included and how costs are allocated, among others, across different brands and business activities. Concerns regarding the confidentiality of data may be met by publishing indexed data.

- (b) Violation of Article X:1 of the GATT 1994 by failing to publish rules concerning the release of guarantees for excise, health, and television taxes

4.183 Thailand violates Article X:1 by failing to publish rules concerning the release of guarantees collected to cover potential liability for excise, health, and television taxes. Thailand has asserted that, as a general matter, guarantees are released. However, it has failed to publish rules addressing the basic procedural questions surrounding the release of a guarantee, such as: to which authority an importer can apply for a guarantee release and within what deadline; what documents are required to obtain such release; how and when the authority communicates its decision; how the guarantees are released; whether interest is payable on cash guarantees; and, which Thai courts have jurisdiction to hear appeals regarding the release of guarantees.

- (c) Violation of Article X:3(a) of the GATT 1994 by failing to administer the excise, health, and television taxes in a uniform, reasonable, and impartial manner

4.184 Thailand violates Article X:3(a) by failing, in some circumstances, to use a tax base for the excise, health, and television taxes that has a basis in Thai law. Under Thai law, the tax base for the excise tax on imported cigarettes is the duty-paid c.i.f. price; the health and television taxes are a percentage of the excise tax payable. Thailand does not rely on this tax base for imported cigarettes

if the customs value assessed by Thai Customs is reduced on appeal. In that event, the incorrectly assessed customs value serves as the tax base.

4.185 Such administration is non-uniform because the taxes are administered using two different tax bases for the same goods: sometimes the correct customs value and sometimes an incorrect customs value. Such administration is also unreasonable because it has no basis in Thai law. Finally, it is partial because Thailand only collects taxes using an incorrect customs value for imported, and not domestic, cigarettes.

4.186 Thailand's WTO-inconsistent administration is not rendered WTO-consistent by an alleged right to seek a refund, because it is not reasonable to subject importers to an additional procedure to secure a refund of a tax imposed on a base that has already been found to be improper. In any event, Thailand merely alleges that a refund is available. It has not provided evidence of the legal basis for that right in Thai law. The opinions of two Thai legal experts confirm the lack of such right under Thai law.

**6. Violation of Articles X:3(b) and X:3(a) of the GATT 1994 because of undue delays in the BoA's decision-making**

4.187 Thailand violates Article X:3(b) by failing to maintain procedures for the prompt review and correction of customs decision by the BoA. So far, the BoA has taken more than seven years, and counting, to resolve [[xx.xxx.xx]] appeals filed by PM Thailand regarding entries landed in 2002. The considerable delays are caused by the BoA's own tardiness in administering the appeals, and not PM Thailand, which has consistently responded promptly to the BoA's requests for information.

4.188 Even if the BoA is not an independent tribunal within the meaning of Article X:3(b), as Thailand alleges, the claim under Article X:3(b) stands because Thailand prevents the prompt review and correction of Thai Customs' decision by an independent tribunal by interjecting a very slow review process by a non-independent agency between Thai Customs' decision and the independent tribunal.

4.189 Thailand also violates Article X:3(a) because the delays of more than seven years in the BoA's decision-making give rise to unreasonable administration. The duration of the process gives rise to administration that is not appropriate or suitable to the circumstances. The Philippines rejects the view that the word "reasonable" in Article X:3(a) imposes no obligations whatsoever on the duration of the administrative process. Thailand has not explained why the drafters would attach importance to "prompt review" of administrative decisions in Article X:3(b) but impose no disciplines on the time taken to reach the initial decision.

**F. EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THAILAND**

**1. Introduction**

4.190 This executive summary of Thailand's rebuttal submission of 20 July 2009 responds to the arguments put forward by the Philippines in its first written submission of 23 March 2009, its opening statement at the first meeting of the Panel with the parties on 10 June 2009 and in its responses to the Panel's questions, submitted on 1 July 2009.

## 2. Legal argument

### (a) Standard of review

4.191 The correct standard of review means that Thai Customs' determinations must be reviewed only in the light of the evidence provided by PM Thailand at the time at which Thai Customs made the determinations at issue in this review.

### (b) Claims under the Customs Valuation Agreement

4.192 The Philippines' claims under the Customs Valuation Agreement can be summarised in two simple propositions: first, Thai Customs should not have inquired into PM Thailand's transaction values and, second, when it did, Thai Customs should have accepted the transaction values. Based on the evidence and argument now before the Panel, neither of these propositions can be sustained.

#### (i) *Thai Customs acted consistently with Articles 1.1 and 1.2(a) of the Customs Valuation Agreement in rejecting the transaction value for the [[xx.xxx.xx]] entries at issue*

The obligation under Article 1.1 to use the transaction value is dependent on it being established that the relationship between buyer and seller did not influence the price

4.193 The use of the transaction value is legally dependent on the proviso in Article 1.1(d) and the second sentence of Article 1.2(a) being satisfied. Thus, the transaction value shall be accepted *only* "provided the relationship [between buyer and seller] did not influence the price".

Thai Customs acted consistently with Article 1.2(a) with respect to its "doubts" regarding the reliability of the transaction value

4.194 Paragraph 2 of the Interpretative Note to Article 1.2(a) provides that an examination of the circumstances of sale and the reliability of the transfer price "will only be required where there are doubts about the acceptability of the price".

The legal standard governing "doubts"

4.195 The Customs Valuation Agreement does not define or limit the quality or quantity of "doubts" that the customs administration must have in order to initiate an examination of the reliability of the transfer price. The reason why the term "doubts" as used in Article 1.2(a) and its Interpretative Note is not qualified by a standard such as "reasonable" is that the purpose of the "doubts" is, at first, simply to initiate an examination of whether the relationship between the buyer and the seller influenced the price, as happened in this case.

4.196 Under the *Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value* (the "Decision"), the customs administration need have "reasonable" doubts only when, under the second sentence of paragraph 1 of the Decision, "if, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may [reject the transaction value]". Thus, under the Decision, the doubts need only be "reasonable" at the time of a final decision to reject the transaction value.

PM Thailand did not provide any evidence to dispel Thai Customs' doubts

4.197 PM Thailand did not provide any evidence to dispel the doubts generated by the difference of over 300 per cent between the c.i.f. prices for PM Thailand's imports and imports by another importer.

4.198 It is a fact that another importer was bringing *Marlboro* cigarettes into Thailand at c.i.f. Bangkok prices more than three times PM Thailand's c.i.f. prices. This objectively-grounded fact (Exhibit THA-7) clearly raises a doubt as to whether PM Thailand's c.i.f. prices were affected by the relationship between buyer and seller.

4.199 Merely pointing out that there are some differences between the circumstances of sale for two different sales that affects price comparability between the two does not establish that doubts based on a price difference of over 300 per cent are "groundless". Any differences in circumstances of sale might have accounted for only, for example, half of the price difference between the other importer and PM Thailand, which would still leave legitimate doubts as to whether PM Thailand's price was at arm's length. But PM Thailand provided no information or proof in this regard and, therefore, did not dispel the doubts that had arisen or otherwise satisfied the proviso in Article 1.2(a).

Thai Customs fulfilled the obligation in Article 1.2(a) that the "circumstances surrounding the sale shall be examined"

The nature of the obligation to examine the circumstances surrounding the sale

4.200 The customs administration's examination of the circumstances of sale must be based on a *claim* and *allegations* by the importer. It is for the importer, not the customs administration, to decide by what means it wishes to establish that the relationship did not influence the price. This is because the importer, not the customs administration, possesses the necessary information and evidence to enable the importer to select its preferred method of establishing that the relationship did not influence the price. Once the importer makes its claim, the importer bears the burden of proof with respect to evidence relating to that claim.

4.201 If the burden were on the customs administration to establish that the relationship influenced the price, the customs administration would have to collect evidence regarding *all* of the methods contemplated in Article 1.2(a) and the Interpretative Notes. This would be a completely unworkable burden to place on the customs administration and would have repercussions for Members' practices far beyond this case.

How Thai Customs examined the circumstances surrounding the sales at issue

4.202 In the circumstances summarised below, Thai Customs fully complied with its obligations under Article 1.2(a) of the Customs Valuation Agreement in initiating and conducting its examination of the circumstances of sale and, ultimately, in rejecting the transaction value for the [[xx.xxx.xx]] entries at issue in this case:

- Thai Customs had doubts regarding the reliability of those doubts and notified PM Thailand that additional information was required.
- Between August 2006 and mid-February 2007, PM Thailand provided no new or additional information to establish that the relationship did not influence the price other than to rely on its past [[xx.xxx.xx]] filings.
- The [[xx.xxx.xx]] filings did not provide a deductive value calculation or provide any supporting evidence for the GAQ price and other adjustments referred to therein.
- To the extent that the [[xx.xxx.xx]] filings advanced a "cost plus" approach, they did not provide information regarding the *seller's* (i.e., PM Philippines') cost plus profits.



- Information about the *importer's* profits on the resale does not establish the reliability of the transfer price between exporter and related importer (though it may be one element in the deductive value calculation).
- When Thai Customs wrote to PM Thailand on 19 December 2006, it had no evidence before it to establish the reliability of the transfer price.
- After PM Thailand indicated in its letter of 5 February 2007 that it wanted the valuation expedited, Thai Customs continued its examination of the circumstances surrounding these sales.
- Thai Customs sought and received information from PM Thailand in extensive correspondence, phone calls, and meetings between 16 February and 6 March 2007.
- This information was used to determine deductive values for the entries at issue that were ultimately used to arrive at the customs value for these entries.

Thai Customs properly communicated the "grounds for considering that the relationship influenced the price"

4.203 Article 1.2(a) of the Customs Valuation Agreement means that the customs administration must give the importer preliminary notice if it considers that the proviso in the second sentence of Article 1.2(a) has not been met. This notice must be provided in writing and an opportunity to respond must be given before final valuation takes place. Thai Customs provided this written notice when it informed PM Thailand on 19 December 2006 that it had "yet to prove" that the relationship did not influence the price.

4.204 Thailand disagrees with the Philippines' interpretation that the term "grounds" is limited to the factual basis on which the customs administration acts. It would make no sense that the customs administration would not be required to inform the importer how that factual basis provided a sufficient legal basis for the customs administration to act. Furthermore, contrary to the Philippines' argument, the absence of evidence also constitutes a *factual* basis on which the customs administration may act. A notification that the factual record does not contain sufficient evidence clearly communicates information regarding the "information or otherwise" on which the customs administration is considering rejecting the transaction value.

4.205 PM Thailand's response on 5 February 2007 to the notification by Thai Customs on 19 December 2006 makes clear that the importer was fully informed and that its due process requirements were fully respected.

It was not established that "the relationship did not influence the price"

4.206 PM Thailand failed to discharge its burden to establish that the relationship between itself and PM Philippines did not influence the transfer price between the two. In these circumstances, Thai Customs properly concluded that the proviso in the second sentence of Article 1.2(a) had not been met and PM Thailand had failed to establish that its relationship with PM Philippines did not influence the price. Accordingly, Thai Customs' decision to reject the transaction value was fully consistent with the obligations in Articles 1.1 and 1.2 of the Customs Valuation Agreement.

(ii) *Thai Customs acted consistently with Articles 5 and 7 of the Customs Valuation Agreement*

4.207 For the reasons explained in paragraphs 75-86 of Thailand's answers to the Panel's questions, Thailand's calculation of the deductive value was fully consistent with Article 5 of the Customs

Valuation Agreement. As a deductive value calculation, its WTO-consistency should be determined by reference to Article 5 rather than Article 7 of the Customs Valuation Agreement.

(iii) *Thai Customs acted consistently with Article 16 in providing an explanation of how the customs value was determined*

4.208 As Thailand explained in paragraphs 172-178 of its first submission, Thai Customs provided a written explanation in its letter of 12 April 2007 that the customs value had been determined "using the deductive method". In addition, Thailand explained that PM Thailand was provided with a detailed explanation of why and how the deductive value was used at the 6 March 2007 meeting (see Exhibits THA-64 and THA-65).

4.209 Anti-dumping/CVD investigations are far more complex investigations than a customs valuation determination and it is to be expected that the standards for explaining anti-dumping or CVD determinations would be much higher than the standards governing explanations of customs valuation determinations.

(iv) *The release of guarantees for the [[xx.xxx.xx]] entries*

4.210 Given that the Philippines has not made a claim with respect to the release of these guarantees, and that PM Thailand has never raised this issue with Thai Customs in an effort to reconcile the figures in question, there is no reason why the Panel should dedicate its time to this issue. Once PM Thailand is sure of its figures, Thai Customs would be happy to discuss with the company any outstanding issues it may have regarding the release of guarantees.

(c) Claims under Article III of the GATT 1994

(i) *Thailand acted consistently with Article III:2 of the GATT 1994 in using the MRSPs as the tax base for its VAT system*

Like product issues

4.211 The Philippines must establish that every possible pair of imported and domestic cigarette brands is "perfectly substitutable". The Philippines has not provided evidence establishing that consumers perceive *all* of these pairs of brands to be "perfect substitutes". The evidence regarding consumer switching behaviour in the study submitted as Exhibit PHL-111a does not cover all brands and is of limited value. Moreover, significant price differences between particular pairs of imported and domestic brands undermine any conclusion that these pairs of brands are perfect substitutes. The evidence submitted in Exhibits PHL-148 and PHL-149 is of limited value because it does not establish relevant elasticities of demand and substitution for particular brands of imported and domestic cigarettes.

4.212 In any event, the key issue in this case is not whether particular cigarettes are fully substitutable, but whether Thailand's system of determining the tax base for VAT is applied in a manner that discriminates against imported cigarettes within the meaning of Article III:2.

The use of the MRSPs as the tax base for cigarettes does not result in imported cigarettes being taxed "in excess" of domestic cigarettes

4.213 Article III:2 does not require that all imported cigarettes must bear the same absolute tax amount as all domestic cigarettes. This would imply that both price-based and *ad valorem* tax systems would be *per se* inconsistent with Article III:2 of the GATT 1994. To the contrary, Members are free to use both fixed price systems and *ad valorem* systems of internal taxation. Moreover, under

Article III:2 a comparison between the fixed price and the actual retail price cannot be used to establish discrimination. If a difference between the fixed price and the retail price was sufficient to establish discrimination, Members would, in effect, be compelled to use the actual retail price as the tax base.

4.214 The proper test of whether Thailand's use of the MRSPs as the tax base for its VAT system is inconsistent with Article III:2 is whether Thai Excise determines the MRSPs in the same manner for both domestic and imported cigarettes. As Thailand has previously explained, the same methodology is used to establish MRSPs for both domestic and imported cigarettes. The Philippines has yet to make a prima facie case that Thai Excise establishes the MRSPs differently for imported and domestic cigarettes or applies the methodology described above in a manner that affords protection to domestic cigarettes.

4.215 The evidence before the Panel shows that the starting point for the determination of the MRSP is the manufacturer's recommended retail price and that Thai Excise does not independently determine the "marketing cost" element of the MRSP. It also shows that exactly the same methodology is used for domestic and imported cigarettes. Furthermore, the fact that PM Thailand and other importers were able to request and receive a change in the MRSPs for their brands shows that there is no basis for the Philippines to argue that there has "never been a transparent way for an importer to provide information for the authority's decision-making process" or that PM Thailand was not "encouraged ... to provide input into the MRSP determination process". Thailand notes that the methodology used to arrive at the MRSPs in the 2006-2007 notices was very different from the methodology used before and after that period, on which the Panel must rule. Accordingly, Thailand urges the Panel to take care to ensure that its rulings with respect to the MRSP methodology before it are based on evidence relating to the methodology applied during the time of establishment of the Panel and not on evidence relating to a different MRSP methodology that is not within the Panel's terms of reference.

(ii) *Thailand acted consistently with Article III:2 of the GATT 1994 with respect to the taxation of resales of cigarettes*

4.216 As Thailand explained in paragraphs 241-244 of its first submission, the amount of VAT paid by the ultimate consumer on a pack of imported cigarettes and a pack of domestic cigarettes is exactly the same and is not affected by any difference in the VAT reporting requirements for imported and domestic cigarettes.

4.217 The Philippines now argues that the issue is whether the tax burden "imposed on like imported products exceeds the tax burden imposed on like domestic products *at any point in the distribution chain*". There is no support for this interpretation in the text of Article III:2. The emphasis in Article III:2 is on the taxes imposed on the product, without any reference to different points in the distribution chain. The context provided by Article II:2(a) and Ad Article III of the GATT 1994 also supports this reading of Article III:2. Moreover, as a practical matter, the Philippines' argument would mean that all VAT systems are WTO-inconsistent because it is inevitable that under VAT systems the tax burden will vary at different points in the distribution chain, so that at some point the imported product may pay more tax than the domestic product (or vice versa).

(iii) *Thailand acted consistently with Article III:4 of the GATT 1994 with respect to the administrative requirements for its VAT system*

4.218 While the Philippines argues that the different administrative requirements for resales of imported cigarettes imposed additional regulatory burdens on these sales that are not imposed on resales of domestic cigarettes, the Philippines ignores that (i) wholesalers and retailers of domestic

cigarettes that are VAT-registrants are subject to exactly the same regulatory requirements as wholesalers and retailers of imported cigarettes that are VAT-registrants; (ii) any wholesalers and retailers of imported cigarettes that are *not* VAT-registrants are subject to the same regulatory burdens as wholesalers and retailers of domestic cigarettes that are *not* VAT-registrants; and (iii) for every regulatory burden imposed on VAT-registered wholesalers and retailers of imported cigarettes, there is an equivalent regulatory burden imposed on any wholesalers and retailers of domestic cigarettes that are not VAT-registrants.

4.219 There is no compelling evidence before the Panel indicating that these different administrative requirements create significant incentives for retailers or wholesalers to stock only domestic cigarettes. The only evidence submitted by the Philippines is an opinion by a tax lawyer, Mr. Veraphong, that the reporting and book-keeping requirements for resellers of imported cigarettes are "more onerous"<sup>76</sup> than those imposed on resellers of domestic cigarettes. Much of this analysis amounts to a restatement of the differences in the reporting requirements imposed on VAT-registrants and non-VAT registrants without any further explanation of how these differences give rise to incentives not to stock imported cigarettes. Moreover, the analysis relies on alleged differences in penalties for non-compliance with applicable reporting requirements.<sup>77</sup> Thailand does not accept that Mr. Veraphong's analysis of penalties is complete or accurate. More importantly, Thailand does not understand the Philippines to have advanced a claim that any differences in the penalties applicable to wholesalers and retailers that are VAT-registrants under Thai law when compared to those applicable wholesalers and retailers that are not VAT-registrants would give rise to a violation of Article III:4 of the GATT 1994.

4.220 In addition, Thailand contends that to the extent that the regulatory requirements for imported cigarettes constitute less favourable treatment, those requirements are justified under Article XX(d) of the GATT 1994. As Thailand explained in more detail in its answers to the Panel's questions, Thailand's VAT system, including the system of monthly input/output tax reporting, is similar to that used by many other WTO Members.<sup>78</sup> Accordingly, these reporting requirements are necessary, as that term has been interpreted by the Appellate Body in *Brazil – Retreaded Tyres*, for the enforcement of Thailand's VAT system.

(d) Claims under Article X of the GATT 1994

(i) *Thailand acted consistently with Article X:3 with respect to the composition of the TTM Board*

4.221 The issue before this Panel is whether dual roles of governmental officials that create potential conflicts of interest constitute *in and of themselves* "unreasonable" or "partial" administration within the meaning of Article X:3(a) of the GATT 1994.

4.222 As Thailand has explained<sup>79</sup>, situations of dual roles and potential conflicts of interest *are not in and of themselves* sufficient to demonstrate inconsistency with Article X:3(a). Jurisprudence confirms that a complainant must demonstrate a number of *additional* elements for a violation of Article X:3(a), including: (i) qualitative evidence of particular unreasonable or impartial acts by the relevant public officials;<sup>80</sup> (ii) evidence that there are inadequate safeguards to ensure against unreasonable or impartial administration by those officials;<sup>81</sup> and (iii) evidence that the dual role of

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<sup>76</sup> See Veraphong Affidavit, Exhibit PHL-182, paras. 15.1-15.2.

<sup>77</sup> See Veraphong Affidavit, Exhibit PHL-182, para. 15.2, items 1, 2, and 5.

<sup>78</sup> Thailand's answers to the Panel's questions, paras. 146-153.

<sup>79</sup> Thailand's answers to the Panel's questions, paras. 202-207.

<sup>80</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 219.

<sup>81</sup> Panel Report, *Argentina – Hides and Leather*, paras. 11.99 and 11.86.

the government officials is irrelevant for the administration of the legislation at issue.<sup>82</sup> There are sound policy reasons for these additional elements. To prohibit all *potential* administrative actions flowing from officials in such circumstances would reverse the presumption of good faith implementation of the discretion vested in the executive branches of government when implementing WTO obligations. Furthermore, if the mere fact of public officials having dual roles or supervising authority over competing interests was sufficient to establish a violation of Article X:3(a), the regulatory capacity of governments would be severely curtailed.

4.223 In this case, the Philippines has not met its burden of proving these three additional elements. In fact, the Philippines has not provided any solid evidence of a pattern of TTM Directors simultaneously making customs or fiscal determinations regarding imported cigarettes.

The Philippines has failed to show unreasonable or partial acts

4.224 The Philippines concedes that it is not able to provide evidence that "specific decisions taken by TTM Directors in their capacity as government officials have actually been motivated by bias".<sup>83</sup> The Philippines merely re-submits its evidence that some TTM Directors have simultaneously been employees of the Ministry of Finance.<sup>84</sup> This evidence fails to satisfy the requirement of qualitative evidence of particular unreasonable or impartial acts by the relevant public officials.

The Philippines has failed to demonstrate inadequate safeguards

4.225 Thailand submits that any risk of partial administration of customs and tax laws by government officials is mitigated by significant statutory safeguards governing the conduct of Thailand's public officials (e.g., Thai Civil Service Act and Thai Criminal Code). Where government officials are involved in the wrongful, dishonest, or inadequate exercise of their functions they shall be subject to imprisonment (of one to ten years) and/or fines (of between two thousand and twenty thousand baht).<sup>85</sup> The Philippines argues that paragraph 2.6.2 of the *Ethical and Moral Guidebook for Executives and Employees of Thailand Tobacco Monopoly* would take precedence over these statutory civil and criminal obligations and sanctions.<sup>86</sup> Thailand disputes the interpretation of the guidebook given by the Philippines, which, furthermore was issued by the Human Resources Department of TTM and has no legal status.

The Philippines has failed to demonstrate that the presence of government officials on the board of TTM is irrelevant

4.226 The involvement of government officials in the administration of customs valuation and tax laws is *relevant*. There are also legitimate reasons why individuals from these departments might be appointed to the TTM Board to ensure that *TTM itself* complies efficiently with Thai tax and customs laws.

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<sup>82</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.86.

<sup>83</sup> Philippines' answers to the Panel's questions, paras. 460, 462 and 463.

<sup>84</sup> Philippines' answers to the Panel's questions, para. 460.

<sup>85</sup> Thailand's first written submission, para. 274.

<sup>86</sup> Philippines' answers to the Panel's questions, paras. 437-439.

- (ii) *Thailand acted consistently with Articles X:3(a) and X:3(b) with respect to the conduct of appeals of customs valuation determinations*

Thailand's conduct of these appeals is "reasonable" within the meaning of Article X:3(a)

4.227 The parties agree that the determination of what is "reasonable" requires an analysis of all relevant circumstances surrounding the administration at issue, including "whether the undecided appeals can be distinguished from those already decided".<sup>87</sup>

4.228 Thailand considers that there are several distinguishing factors between the resolved and unresolved appeals. First, the [[xx.xxx.xx]] appeals that remain under consideration relate to entries of *Marlboro* cigarettes landed in the year 2002. Thus, all [[xx.xxx.xx]] appeals relating to entries landed in the years 2000 and 2001 have been addressed. Second, PM Thailand requested, by letter dated 15 December 2005, that the BoA's determinations for the [[xx.xxx.xx]] ongoing appeals be based on revised profit and general expense inputs resulting in information exchange between the BoA and PM Thailand through to mid-2007. Third, PM Thailand subsequently requested, in July 2007, that its appeals lodged in 2006 and 2007 be prioritised over the [[xx.xxx.xx]] ongoing appeals.<sup>88</sup> These extenuating circumstances explain why these appeals have not yet been completed.

Article X:3(b) does not impose obligations regarding the completion of particular appeals

4.229 The parties disagree on the scope of the legal obligation in Article X:3(b). Thailand submits that Article X:3(b), unlike Article X:3(a), does *not* set standards governing individual instances of review of administrative action. Instead, Article X:3(b) contains only an obligation to create an institutional or procedural framework. In this context, Thailand notes that the Philippines has presented no evidence of delays in processing appeals other than the [[xx.xxx.xx]] appeals (which remain pending due to extenuating circumstances). In fact, the BoA has ruled on [[xx.xxx.xx]] of the [[xx.xxx.xx]] appeals lodged by PM Thailand between 2000 and 2002.

4.230 Furthermore, the [[xx.xxx.xx]] ongoing appeals do not fall within the scope of application of Article X:3(b) as the BoA is not a tribunal or procedure "*independent* of the agencies entrusted with administrative enforcement". Section 112 sexies and septies of the Customs Act confirm that the BoA includes representatives of and is staffed by the same administrative agency – Thai Customs – whose decisions are the subject of review.

4.231 Even if Article X:3(b) applied to the BoA, for the same reasons explained above with respect to the Philippines's claim under Article X:3(a), in the particular circumstances of this case, the BoA's administration of the [[xx.xxx.xx]] appeals lodged by PM Thailand's for entries landed in 2002 is not inconsistent with Article X:3(b).

- (iii) *Thailand acted consistently with Article X:3(b) with respect to appeals against the imposition of guarantees*

4.232 Thailand is not under an obligation to provide for appeals against the imposition of guarantee values because a decision by a customs official to require a guarantee is not an "administrative action relating to customs matters" within the meaning of Article X:3(b) of the GATT 1994. This is because guarantees have only a "provisional legal status" and requiring a guarantee does not constitute separate administrative action affecting the rights and obligations of importers.

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<sup>87</sup> European Communities' third party written submission, para. 62.

<sup>88</sup> Thailand provided a detailed explanation of the evidence relating to these extenuating circumstances in its answers to the Panel's questions, paras. 221-225.

4.233 Even assuming that Thailand has to provide for the review of decisions requiring guarantees, Article X:3(b) neither mandates that this review be instantaneous nor prohibits it from being conditioned on the exhaustion of internal procedures. Contrary to the Philippines' arguments, Article X:3(b) does not contain any language requiring WTO Members to confer "independent and immediate" rights to challenge all administrative action relating to customs matters. The Philippines appears to accept that, under Thai law, importers *can* seek independent judicial review of orders requiring guarantees by the Tax Court *after* exhausting internal procedures. Thus, Thailand complies with the requirements of Article X:3(b).

- (iv) *Thailand acted consistently with Article X:3(a) in its administration of the VAT system and its excise, television and health taxes*

Generally-applicable criteria to calculate MRSPs

4.234 Contrary, to the Philippines' assertion, Article X:3(a) does not require Members to adopt generally applicable rules that attempt to address every possible contingency in advance; instead they are free to rely on discretion to administer their laws and regulations. It is perfectly "reasonable" for Members to administer their laws through the conferral of discretion on administrative agencies.

4.235 In any case, even assuming that Article X:3(a) contains a requirement to administer laws and regulations using "generally applicable criteria", Thailand has complied with this requirement. MRSPs are determined according to generally-applicable criteria.

Use of guarantee value data to calculate MRSPs for *Marlboro* and *L&M*

4.236 Thailand responds to the three claims advanced by the Philippines as follows:

4.237 The use of different data sources to calculate the c.i.f. price component of MRSPs does not amount to *non-uniform* administration because the difference can be explained by reference to differences in the circumstances of the case. In September 2006 Customs had legitimate doubts about the reliability of PM Thailand's declared values and Thai Excise had to resort to estimates; by August 2008 Customs was satisfied that PM Thailand's declared values were reliable and, at that point in time, Thai Excise utilised the declared/assessed values.

4.238 The use of guarantee values in September 2006 was *reasonable* given the legitimate doubts expressed by Thai Customs regarding the reliability of PM Thailand's declared values and the absence of any credible alternative. The fact that the guarantee values were based on a BoA ruling and were not much higher than the declared or eventually assessed values also indicates that the actions of Thai Customs were not unreasonable.

4.239 The use of estimates was impartial because the Philippines has not established that Thai Excise would not use estimates to calculate the ex factory price component of MRSPs for domestic brands if there were any doubts about the reliability of figures furnished by TTM.

Tax bases used to assess excise, television and health taxes

4.240 Thailand contests the Philippines' factual assertions that excise, television and health taxes have been or will be collected by Thai officials in contravention of existing Thai laws. The Philippines has not submitted any evidence in support of its assertions that Thai Excise has used "unlawful" tax bases to assess excise, television and health taxes. The Philippines bears the burden of proof on this matter and has failed to discharge its burden. Accordingly, the Philippines' claims must be rejected.

4.241 Furthermore, even assuming that Thai officials somehow act inconsistently with Thai law when they levy excise, television and health taxes, it does not follow that this gives rise to a breach of Article X:3(a) of the GATT 1994. Article X:3(a) cannot be used to convert every failure by domestic authorities to comply with domestic laws into breaches of international law. Article X:3(a) does not impose an overarching requirement on WTO Members to ensure that their administrative actions remain based on applicable domestic laws.

- (v) *Thailand acted consistently with Article X:1 with respect to the publication of rules and data relating to VAT, ex factory prices and the release of guarantees*

The overall MRSP calculation methodology and data used to calculate MRSPs

4.242 From August 2007 onwards, Thailand has published the overall MRSP calculation methodology in the preamble to all MRSP notices issued by the Excise Department. This description enables governments and traders to become acquainted with the methodology used by Thai Excise. Contrary to the Philippines' assertions, this description adequately explains the manner in which the VAT amount and the marketing margin are calculated – at least sufficiently clearly that PM Thailand and other importers are regularly able to request changes in their MRSPs.

4.243 Thailand is not under an obligation to publish data utilised to calculate MRSPs because this material is not a law, regulation, judicial decision or administrative ruling of general application within the meaning of Article X:1 of the GATT 1994, or, alternatively this material is not an "essential element" of any relevant law, regulation, judicial decision or administrative ruling of general application. Concerning the data used in MRSP calculations for *imported cigarettes*, Thailand cannot publish this material because publication would result in the disclosure of confidential information.

Ex-factory price calculation methodology and data used to calculate ex factory prices for TTM Brands

4.244 Ex-factory price determinations are *not* "administrative rulings of general application". The relevant ex factory price determination applies to a *single* entity – TTM – and is used to set tax bases for excise, health and television taxes paid by this *single* entity. Accordingly, the ex factory price calculation methodology is not a measure of general application. In the event that the Panel accepts that ex factory prices have general application, then publication of data used in arriving at these prices is not required because (i) this data falls outside the scope of Article X:1 of the GATT 1994, and (ii) publication of this data would result in the disclosure of confidential information.

Rules relating to the release of guarantees

4.245 The starting point of the analysis under Article X:1 must be the identification by the complainant of an existing rule of general application that the respondent has failed to publish. In this case, the Philippines has failed to identify any existing instrument or set of instruments relating to the release of guarantees made effective by Thailand that Thailand has failed to publish.

- (e) Issues relating to the Panel's terms of reference

- (i) *The Philippines' claim under the Customs Valuation Agreement regarding a "general rule or methodology"*

4.246 In its response to the Panel's question 1, the Philippines attempts to resuscitate its claim that Thai Customs had a "general rule and/or methodology" regarding the rejecting of transaction values for PM Thailand's imports. The Panel should not rule on this claim because (i) the Philippines has



failed to establish that a "general rule and/or methodology" existed as that term is understood in WTO jurisprudence; (ii) even if the general rule alleged by the Philippines ever existed, it is clear that it had expired, at the latest, in September 2007 – long before the establishment of the Panel; and (iii) there is no need for the Panel to rule on this claim in order to resolve the dispute before it.

(ii) *The Philippines' claims regarding expired measures and completed acts*

4.247 Thailand urges the Panel to consider carefully (i) whether each of the Philippines' claims identified in Exhibit THA-36 are properly within its terms of reference such that the Panel can rule on those claims; (ii) whether and to what extent it is appropriate or useful for the Panel to rule on claims that relate either to expired measures or completed acts; and (iii) whether the Panel is permitted under Article 19.1 of the DSU to make recommendations with respect to such claims.

(iii) *The Philippines' claims under Article X:3(a) regarding Thailand's administration of its VAT system and the excise, television and health taxes*

4.248 The Philippines makes two separate requests for findings and seven claims under Article X:3(a) of the GATT 1994 regarding the manner in which Thailand administers its VAT regime and its excise, television and health taxes. None of these claims is described in the Philippines' panel request in a manner that suffices to present the relevant problems clearly because (i) the Philippines fails to "plainly connect" the absence of generally applicable criteria to calculate MRSPs, the use of guarantee values to calculate MRSPs, or the utilisation of unlawful tax bases to assess excise, television and health taxes with Thailand's obligations under Article X:3(a) of the GATT 1994, and (ii) the panel request does not contain any reference to claims that Thailand administers the VAT measures and the excise, television and health tax measures in a *non-uniform* manner.

G. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THE PHILIPPINES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

**1. Article X:3(a) claim relating to the role of TTM Directors**

4.249 Thailand violates Article X:3(a) by vesting governmental authority to apply Thai customs and tax measures concerning domestic and imported cigarettes in government officials simultaneously serving as TTM Directors, which results in partial and unreasonable administration of these measures. As government officials, these individuals are charged with administering Thai customs and tax measures for domestic and imported cigarettes. As TTM Directors, they have a duty and financial incentive – in the form of significant bonuses – to advance TTM's competitive interests. The act of vesting authority to apply Thai customs and tax measures in this manner is an act of administration, distinct from additional acts such as the adoption of discriminatory MRSPs. TTM Directors are not subject to an effective safeguard, explicitly provided in the Thai Civil Service Act, prohibiting government officials from being a manager or managing director in a company. Thailand's other safeguards have proven ineffective in practice and have not prevented the disclosure of highly sensitive BCI to TTM Directors and acts of partial and unreasonable administration.

**2. Thailand violated the Customs Valuation Agreement in rejecting PM Thailand's declared transaction values and in determining higher deductive values**

(a) Articles 1.1 and 1.2: general rule requiring rejection of transaction value

4.250 Thailand has not rebutted the Philippines' prima facie claim regarding the existence of a general rule requiring the rejection of transaction value. In addition to five pieces of evidence already submitted, the Philippines can now also rely on a series of memoranda, submitted by Thailand in

response to the Panel's Article 13 DSU request, confirming that, in August 2006, Thailand adopted a general rule providing for the rejection of transaction value without examination of the circumstances of sale, and for the use of a deductive value as the minimum or reference price irrespective of particular circumstances. This general rule applied to importers of cigarettes and alcoholic beverages, and was not company-specific. Even if the rule is company-specific, a panel has jurisdiction to consider a rule or norm prescribing that a particular company will be subjected to specific regulatory treatment on a general and prospective basis.

4.251 The general rule falls within the Panel's terms of reference and may be the subject of findings and recommendations. It has not expired and continues to have effects through the [[xx.xxx.xx]] valuation decisions, taken pursuant to the rule, that are pending before the BoA. Even if the Panel were to find that the general rule has fully expired, it may make findings regarding expired measures.

(b) Articles 1.1 and 1.2: improper rejection of PM Thailand's declared transaction values in [[xx.xxx.xx]] entries

4.252 Thailand violated Articles 1.1 and 1.2 by rejecting PM Thailand's declared transaction values in [[xx.xxx.xx]] transactions, without (1) examining the circumstances of sale, and (2) valid grounds, other than the relationship between the buyer and seller.

4.253 The Philippines has advanced five pieces of evidence, showing that no examination of the circumstances of sale occurred and that Thailand did not examine the relevant evidence, such as deductive calculations, submitted by PM Thailand. Thailand has responded with contradictory *ex post* reasons for why PM Thailand's evidence was inadequate; it has yet to provide evidence showing that Thai Customs ever examined PM Thailand's evidence. In fact, the minutes of the 6 March 2007 meeting expressly state that Thai Customs did not examine the circumstances of sale. Thai Customs' explanation of its determination, in the 12 April 2007 letter, also does not reveal an examination of PM Thailand's evidence. Thailand now argues, *ex post*, that it did not use deductive testing in the relevant period. However, the evidence before the Panel shows that Thai Customs used deductive values as minimum test prices for the 2006 and 2007 entries at issue; when transaction value was below the deductive test value, it was rejected without a proper examination of the circumstances of sale. Thai Customs also failed to examine PM Thailand's gross margin evidence. This evidence allowed Thai Customs to compare the gross margins earned by PM Thailand with the gross margins of similarly-situated distributors in transactions with unrelated suppliers. Thailand has advanced contradictory reasons for not addressing that evidence. At the relevant time, however, Thai Customs never communicated that its grounds for doubting the transaction value included concerns over the gross margin data for unrelated distributors. Thailand also argues, *ex post*, that at that time Thai Customs was only required to examine "new" evidence, and not other evidence, such as the gross margin evidence that PM Thailand previously submitted, and resubmitted after 4 August 2006. However, an authority must examine any evidence, unless it has previously rejected it. Moreover, alleged and unspecified telephone conversations and meetings, without a documentary record, are insufficient, under the Customs Valuation Agreement, to establish that the circumstances of sale were examined.

4.254 Thailand also violated Articles 1.1 and 1.2 by failing to provide valid grounds for rejecting transaction value. With respect to the first fact mentioned in the letter of 12 April 2007, Thailand has expressly stated in these proceedings that Thai Customs did not rely on a comparison between [[xx.xxx.xx]] (hereafter: "Importer A") prices and PM Thailand's prices.<sup>89</sup> At the relevant time, PM Thailand explained why these prices were incomparable, and Thai Customs did not ask it to account further for the differences between these incomparable prices. With respect to the second fact, also mentioned in the 12 April letter, the Philippines submits that a WTO Member cannot evade

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<sup>89</sup> Thailand's first written submission, para. 165.

its primary valuation obligation with a bald statement that the burden of proof was not met, without also explaining why the evidence submitted was deficient.

(c) Article 1.2(a): communication of "grounds" before rejecting transaction value

4.255 Thailand violated Article 1.2(a) by failing to communicate grounds for considering that the relationship influenced the price before rejecting transaction value. A communication of solely the legal conclusion that PM Thailand "had 'yet to prove' that the relationship did not influence the price" is insufficient to communicate the factual "grounds" for the authority's conclusion, and deprives the importer of a "reasonable opportunity to respond" to those "grounds".

(d) Article 16: adequate explanation of how customs value was determined

4.256 Thailand violated Article 16 by failing to provide PM Thailand with a written and sufficiently reasoned explanation, enabling the importer to understand how and why the authority rejected transaction value and determined the assessed customs value. Neither the 12 April letter nor the minutes of the 6 March meeting provide an adequate explanation of Thai Customs' determination because they rely on an improper comparison with Importer A's prices (upon which Thailand alleges Thai Customs did not rely) and a bald, unsubstantiated statement that the burden of proof was not met.

(e) Articles 5 and/or 7: incorrect assessment of deductive value of PM Thailand's [[xx.xxx.xx]] transactions

4.257 Thailand violated Article 5 by determining, for impermissible reasons, that it could not value PM Thailand's goods using that provision, and/or Article 7 by incorrectly assessing the deductive value of PM Thailand's [[xx.xxx.xx]] entries. Thailand now admits that it deducted incorrect amounts for excise tax, causing inflated customs value, and VAT for certain entries. The fact that PM Thailand may have benefited from the deduction of an incorrect VAT amount does not render Thailand's actions WTO-consistent.

(f) Article 10: disclosure of business confidential data

4.258 Thailand violated Article 10 by disclosing BCI. Thailand accepts that c.i.f. prices for imported cigarettes are BCI, and that their disclosure would prejudice legitimate commercial interest of importers of cigarettes.

### **3. Thailand violates Article X:3(b) of the GATT 1994 by failing to provide a right to challenge guarantees**

4.259 Thailand violates Article X:3(b) by failing to provide an unconditional right to appeal a guarantee order, independently from the final notice of assessment. A guarantee order is a complete and final act that is distinct from the final assessment, and is administrative action in the sense of Article X:3(b). Making the review of a guarantee conditional on the existence of final assessment of customs value risks depriving importers of any review of a guarantee, inflicting on them immediate financial harm. An unconditional right to review of a guarantee is also needed in cases where the guarantee excludes market access entirely, in which case there is no assessed customs value.

### **4. GATT 1994 claims pertaining to VAT**

(a) Article X:1: publication of methodology and data used to determine MRSPs

4.260 Thailand violates Article X:1 by failing to publish the overall methodology used to establish and revise MRSPs. Contrary to Thailand's argument, individual MRSP notices do not provide

adequate publication of the MRSP methodology, nor do they explain the methodology that Thailand described before this Panel. PM Thailand complained about this lack of transparency in its ongoing internal appeals against three MRSP notices. With respect to the December 2005 MRSP, Thailand now argues that the "marketing costs", one of the elements in the calculation, are not "calculated" but instead "derived" from the latest MRSP proposed by the importer. The available evidence and calculations relating to the December 2005 marketing costs, which were applied again in the 2008 and 2009 MRSPs, contradict Thailand's explanation. In fact, Thailand's contradictory explanations regarding the December 2005 MRSPs serve to emphasize the urgent need for published rules.

4.261 Thailand also violates Article X:1 by failing to publish data, in indexed format where needed, used to calculate MRSPs. Timely publication of essential data underlying the MRSPs would prevent errors from infecting the tax base, allow traders and foreign governments to review MRSP calculations, and ensure that calculation disputes can be addressed immediately at the domestic level. The repeated errors in the calculations submitted by Thailand to the Panel demonstrate the need for publication of the data underlying the MRSPs.

(b) Article III:2, first sentence: excess taxation of imported cigarettes, as a result of the MRSP

4.262 The MRSP Notices of 7 December 2005, 18 September 2006, 30 March 2007, 29 August 2007, and 19 August 2008 fall within the Panel's terms of reference because they were identified in the Panel Request as "MRSP Notices [in the plural] issued by the Director-General for Excise" and the Philippines indicated that the dispute concerned MRSP Notices from the past "two and a half years". The earlier MRSP Notices have not ceased to have effects; but, in any event, an expired and superseded measure is covered by Article 6.2 of the DSU, as shown in *EC – Bananas III* (21.5) and *US – Zeroing (Japan)* (21.5).

4.263 The Philippines has already demonstrated that all domestic and imported cigarettes are like, through evidence pertaining to physical characteristics, end uses, consumers' tastes and preferences, tariff classification, and regulatory treatment. Thailand has submitted neither argument nor evidence disputing the Philippines' assessment. Thailand's argument that the Panel must make 1,634 comparisons between different brands of imported and domestic cigarettes is not supported by the text of Article III:2 or the case law.

4.264 Thailand's objections to the Philippines' evidence measuring behavioural changes resulting from relative price movements are unfounded. First, surveys of consumer opinion provide helpful evidence of consumers' tastes and preferences, and were previously relied on by the Panel in *Japan – Alcoholic Beverages*. Second, the fact that the evidence does not show calculations for 1,634 separate elasticities of substitution and income-compensated cross-price elasticities of demand is irrelevant.

4.265 Thailand imposes VAT on imported cigarettes in excess of VAT imposed on domestic cigarettes, because (1) the MRSPs for imported cigarettes are systematically higher than for like domestic cigarettes; and, (2) the MRSPs for imported cigarettes are systematically higher than the RRSPs for imported cigarettes, whereas the MRSPs for like domestic cigarettes are systematically equal to the RRSPs. A table in each of PM Thailand's three internal appeals against the 2006-2007 MRSPs shows that (1) MRSPs for all 13 major imported brands were higher than the MRSPs for the three major domestic brands, and (2) a sizeable gap between the MRSP and RRSP exists for only imported brands. The evidence before the Panel shows that since December 2005, the MRSPs have been consistently higher than they would have been if based on PM Thailand's information, and have been consistently higher for imported brands than for like domestic brands, resulting in a gap between the retail price and the MRSP for imported, but not domestic, brands.

(c) Article III:2, first sentence: *de jure* exemption of resales of domestic cigarettes from VAT

4.266 Thailand also violates Article III:2, first sentence, by *de jure* exempting resales of domestic cigarettes from VAT while subjecting resales of imported cigarettes to VAT and a non-automatic, conditional tax credit. Thailand applies different VAT systems to domestic and imported cigarettes. It applies a single stage VAT system to domestic cigarettes, involving a *de jure* VAT exemption of resales of domestic cigarettes. In that system, only TTM is VAT-liable, and VAT is due on sales at only one stage of the distribution chain. In contrast, a multi-stage VAT system applies to resales of imported cigarettes, whereby VAT is due at each of the multiple stages in the distribution chain of imported cigarettes.

4.267 Although Thailand argues that the additional VAT liability can be offset by a tax credit, a Member cannot rely on action by a private party to mitigate the effects of a discriminatory tax. Also, the tax credit is subject to conditions, and not granted automatically as Thailand alleges.

(d) Article III:4: more onerous VAT administrative burdens on resales of imported cigarettes

4.268 Thailand violates Article III:4 by subjecting resales of imported cigarettes to the VAT administrative requirements set out in Chapter IV of the Thai Revenue Code, while exempting resales of domestic cigarettes from those requirements. The Philippines has submitted expert statements supporting its claim. Thailand's argument that resales of domestic cigarettes are, nevertheless, subject to income tax administrative requirements, which it claims are "exactly the same" as the VAT administrative requirements, fails because Thai law also *de jure* exempts income earned by resellers of TTM cigarettes from income tax.

(e) Article X:3(a): administration of VAT regime

4.269 The Panel has jurisdiction to consider the Philippines' claim under Article X:3(a) because the measures being administered, and the relevant legal provision, were identified and connected in the Panel Request.

4.270 Thailand violates Article X:3(a) by using a guarantee value as the starting point for calculating MRSPs. Thailand effectively converts a provisional guarantee into a definitive tax base, which is neither reasonable nor uniform administration. Such administration is also partial because Thai law does not authorize DG Excise to issue a provisional ex factory price, whereas an express power exists to issue a provisional guarantee value. The Philippines further objects to a definitive tax that is based on the highest estimated guarantee value.

4.271 Thailand also administers its VAT system in an unreasonable fashion by failing to base its MRSP calculations on generally-applicable criteria set forth in domestic law. The Philippines has shown, and Thailand has admitted, that MRSPs are calculated on an ad hoc basis, without criteria set forth in law, allowing DG Excise to add, since December 2005, marketing costs that have not been based on the importer's information. This is contrary to the objectives underlying Article X:3(a). Moreover, Thailand's methodology used to calculate the 2006 marketing costs, which involved giving arbitrary and differing weights to different retail prices in different countries, is also unreasonable – especially in the light of the fact that MRSPs calculated for domestic brands during the same period were based on TTM's information.

## **5. Claims pertaining to the excise, health, and television taxes**

- (a) Article X:1: publication of methodology and data used to determine the ex factory price

4.272 Thailand violates Article X:1 by failing to publish the methodology and data, indexed if necessary, used to determine the ex factory prices. This methodology is a ruling establishing "principle or criteria applicable in future cases", affecting an unidentified number of economic operators. First, the ex factory price constitutes the tax base for the excise, health, and television taxes, and, therefore, affects the taxes and prices paid by all purchasers of domestic cigarettes. Second, the ex factory price is the starting point for calculating MRSPs for domestic brands, and, therefore, applies generally to all of TTM's VAT-liable sales.

- (b) Article X:1: publication of rules concerning the release of guarantees for excise, health, and television taxes

4.273 Thailand violates Article X:1 by failing to publish rules concerning the release of guarantees collected to cover the potential liability for excise, health, and television taxes. Neither the Customs Act, nor statutes imposing these taxes, provide rules on the release of guarantees for these internal taxes. Thailand's assertion that it has not adopted general rules concerning the release of guarantees is contradicted by its description before this Panel of a "departmental practice" governing the release of guarantees, applied "routinely" and "[i]n the overwhelming majority of cases ... without incident". The Philippines urges the Panel to consider the circumstances surrounding the tardy release date of the health tax guarantees for [[xx.xxx.xx]] entries, occurring between 18 August 2006 and 16 February 2007, in objectively assessing its claim that published rules are needed to protect importers.

- (c) Article X:3(a): administration of the excise, health, and television taxes

4.274 The Panel has jurisdiction, on the same grounds as those described in paragraph 21 with respect to the Article X:3(a) VAT claim, to consider the Philippines' claim that Thailand violates Article X:3(a) by failing to administer the excise, health, and television taxes in a uniform, reasonable, and impartial manner. If the assessed customs value is reduced, following a successful appeal against Thai Customs' valuation, Thailand refunds the excess customs duties collected but does not refund the excess excise, health, and television taxes, which are based on the initial assessed customs value plus customs duties. It is not reasonable to administer these three taxes on the basis of a customs value that, as here, was found to be incorrect by a domestic court or tribunal, and that does not reflect the statutory tax base. Finally, it is also partial administration to impose tax on the basis of an incorrect customs value, because this administration affects imported, but not domestic, cigarettes.

- (d) Articles X:3(b) and X:3(a): undue delays in the BoA's decision-making

4.275 Thailand violates Articles X:3(b) and X:3(a) by failing, after more than seven years, to resolve [[xx.xxx.xx]] appeals brought by PM Thailand. This delay is not justified by PM Thailand's request that the BoA use a revised P&GE ratio for these [[xx.xxx.xx]] appeals. The issue of whether to adjust the audited P&GE ratio to account for Thai Customs' higher assessed customs value has been resolved in each of the four previous BoA rulings regarding hundreds of entries from 2000-2002: the BoA decided to adjust the company-wide P&GE ratio by treating the extra customs duties and taxes paid on the uplifted customs value as income. As shown in Exhibit PHL-251, for all entries from April 2000 to December 2002, the BoA uniformly used a single, adjusted company-wide P&GE ratio of [[xx.xxx.xx]] per cent. In these circumstances, PM Thailand's request from June 2004 for an adjustment to the audited P&GE involved the BoA pursuing a consistent approach, without requiring it to re-start its analysis. Instead, it is the BoA that indicated, at a meeting on 28 September 2005, that it would depart from its previous rulings; any attendant delay caused by that decision is attributable solely to the BoA.

H. EXECUTIVE SUMMARY OF THE ORAL STATEMENT BY THAILAND AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. Claims under the Customs Valuation Agreement

4.276 The Panel must *not* conduct a *de novo* review: it "cannot conduct a new inquiry into the facts to decide for itself what conclusions it would have reached; nor can it substitute its own judgment for that of a domestic authority. ... In a WTO customs valuation dispute, a panel's role is, therefore, *not* to conduct a new examination into the facts, and to decide for itself the proper valuation of the goods."<sup>90</sup> The Appellate Body has said that a panel "has to put itself in the place of [the customs administration] at the time that it makes its determination".<sup>91</sup> The Philippines has failed to show that *any* of Thailand's arguments before the Panel are *ex post* in that they differ from the grounds on which Thai Customs acted. The Philippines seeks to use the concept of *ex post* justification – which is not found in the DSU – to read into the Customs Valuation Agreement procedural obligations similar to those in the trade remedy agreements, even though there are significant differences between the everyday process of customs valuation and the extraordinary remedy of anti-dumping measures.<sup>92</sup> Even if the Panel agrees that some of Thailand's arguments are *ex post*, the Panel would not be able to rule that the determination was substantively inconsistent with the Customs Valuation Agreement. The Panel could rule only that Thai Customs had failed to provide a reasoned explanation of its actions.

4.277 Thai Customs had "doubts" within the meaning of Article 1.2(a) and its interpretative notes.<sup>93</sup> There is no requirement that the customs administration must either justify its doubts or even notify the importer of the nature of the doubts.<sup>94</sup> There is no requirement that the subsequent examination of the circumstances of sale must focus on the nature of the original doubts. PM Thailand did not "dispel" the doubts in this case.<sup>95</sup>

4.278 The evidence presented by PM Thailand did not establish that the relationship between PM Philippines and PM Thailand did not influence the price between the two. The importer bears the burden of proof on this.<sup>96</sup> The [[xx.xxx.xx]] evidence addresses only the relationship between PM Thailand and its resellers in Thailand and says nothing about the relationship between PM Thailand and its affiliated supplier, PM Philippines. The amount of profit made by the importer on its resale does not establish that the price at which the importer bought from the related exporter was at arm's length.<sup>97</sup> The fact that the profit ratio falls within certain ranges also does not establish that the price paid was at arm's length. Also, the source and probative value of the profit ranges relied on by PM Thailand are too vague to be reliable. In March 2007, PM Thailand expressly requested Thai Customs to use a "deductive method" "in testing the acceptance of the imported value".<sup>98</sup> It was therefore reasonable for Thai Customs to use the deductive method, as proposed by PM Thailand and as "akin" to the method in the [[xx.xxx.xx]].

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<sup>90</sup> Philippines' second written submission, para. 58 (emphasis in original).

<sup>91</sup> Appellate Body Report, *US – Cotton Yarn*, para. 78.

<sup>92</sup> See Thailand's second written submission, paras. 116-118; Thailand's answers to the Panel's questions, paras. 14-16.

<sup>93</sup> See Thailand's first written submission, paras 130-134; Thailand's second written submission, paras. 23-35.

<sup>94</sup> See Thailand's first written submission, para. 134; Thailand's second written submission, paras. 26-30.

<sup>95</sup> See Thailand's second written submission, paras. 31-35.

<sup>96</sup> See Thailand's first written submission, paras. 135-139; Thailand's answers to the Panel's questions, paras. 4-8; Thailand's second written submission, paras. 39-47.

<sup>97</sup> See Thailand's second written submission, para. 63; Thailand's answers to the Panel's questions, para. 44.

<sup>98</sup> PM Thailand letter to Thai Customs, 6 March 2007, Exhibit THA-92, p. 1.

4.279 Thai Customs provided the necessary notification of the grounds to consider that the relationship between PM Philippines and PM Thailand influenced the price in its 19 December 2006 letter.<sup>99</sup> Subsequent correspondence also makes clear that PM Thailand was fully informed as to the basis on which Thai Customs was acting and its opportunities to provide additional information.<sup>100</sup>

4.280 Thai Customs' examination of the circumstances of these sales was also consistent with the requirements of the Customs Valuation Agreement. This examination was a "process of consultation" including the following events: (i) Oral communication on 15 February 2007<sup>101</sup>; (ii) 16 February letter from PM Thailand to Thai Customs<sup>102</sup>; (iii) Request for information preceding 21 February 2007 letter<sup>103</sup>; (iv) 21 February 2007 letter from PM Thailand to Thai Customs<sup>104</sup>; (v) 26 February 2007 letter from Thai Customs to PM Thailand's accountants<sup>105</sup>; (vi) 27 February 2007 letter from Thai Customs to PM Thailand<sup>106</sup>; (vii) 2 March 2007 letter from Thai Customs to PM Thailand<sup>107</sup>; (viii) 2 March 2007 letter from Thai Customs to PM Thailand's accountants<sup>108</sup>; (ix) Thai Customs' meeting with PM Thailand's accountants, 2 March 2007; (x) Meeting of 6 March 2007; (xi) 6 March 2007 letter<sup>109</sup>; and (xii) 7 March 2007 letter.<sup>110</sup>

4.281 The 6 March 2007 meeting was *part* of the examination of these sales, requested by the importer, and *part* of the process of consultation. When the Panel "has [p]ut itself in the place of [Thai Customs] at the time that it makes its determination"<sup>111</sup> it should conclude that Thai Customs acted reasonably by valuing PM Thailand's entries using precisely the approach requested by the company in its letter of 5 February 2007. Article 6 of the Customs Valuation Agreement provides that Members cannot compel persons in other countries to provide information for the purposes of determining customs value under that Article suggesting that the customs administration is not *required* to seek information from foreign sources in determining customs value even under other methods. Moreover, when Thai Customs asked PM Thailand for information regarding the costs incurred by PM Philippines, PM Thailand expressly told Thai Customs to use the deductive method instead.<sup>112</sup>

4.282 Thai Customs fully examined the circumstances of sale in the light of the evidence presented by PM Thailand and found that: (i) there was *no* evidence provided regarding the circumstances of sale such as how PM Thailand and PM Philippines negotiated their prices; (ii) the [[xx.xxx.xx]] method did *not* provide the customs administration with any basis to conclude that the price between PM Philippines and PM Thailand was at arm's length, and (iii) even when viewed as "akin" to a deductive value, the evidence did *not* establish that the related transfer price was at arm's length. Accordingly, the Panel should find that Thai Customs reasonably determined that the transaction value was not acceptable for the reasons stated in Articles 1.1(d) and 1.2(a) of the Customs Valuation Agreement.

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<sup>99</sup> See Thailand's second written submission, paras. 93-107; Thailand's first written submission, paras. 167 *et seq.*

<sup>100</sup> See, *e.g.*, PM Thailand's letter dated 21 February 2007, Exhibit THA-39B.

<sup>101</sup> Exhibit PHL-137B ("we wish to confirm our advice yesterday ...").

<sup>102</sup> Exhibit PHL-137B.

<sup>103</sup> Exhibit THA-39B ("our company has been informed ...").

<sup>104</sup> Exhibit THA-39.

<sup>105</sup> Exhibit THA-10.

<sup>106</sup> Exhibit THA-11.

<sup>107</sup> Exhibit THA-12 (Ref. 0519/540).

<sup>108</sup> Exhibit THA-12 (Ref. 0519/539).

<sup>109</sup> Exhibit THA-92.

<sup>110</sup> Exhibit PHL-169.

<sup>111</sup> Appellate Body Report, *US – Cotton Yarn*, para. 78.

<sup>112</sup> PM Thailand letter to Thai Customs, 6 March 2007, Exhibit THA-92, p. 2.



4.283 With respect to the deductive value calculation, discounts, rebates and similar price adjustments are not expenses, but instead form part of the price itself. Articles 5.1(a)(i)-(iii) of the Customs Valuation Agreement do not require discounts to be deducted on the basis of "usual" amounts. Deductions are required only for discounts that are tied to the particular unit price for the GAQ sale. Provincial taxes are deductible "*if included in the resale price on which the [deductive value] is based*".<sup>113</sup> PM Thailand made no claims for a deduction for transportation costs. Accordingly, Thai Customs properly calculated the deductive value.

4.284 The customs administration is not required to continue to make repeated requests for information as part of its examination of the circumstances of sale. Even under the Anti-Dumping Agreement, the respondent does not have a right to unlimited opportunities to present additional data.<sup>114</sup>

4.285 Thai Customs provided a written explanation of how the customs value was determined in its 12 April 2007 letter and by means of the minutes of the 6 March 2007 meeting, which were provided to PM Thailand and referred to in at least one of the notices of assessment for these entries.<sup>115</sup> Thai Customs acted reasonably and consistently with the Customs Valuation Agreement in rejecting the declared value and using the deductive method to value these entries in accordance with Articles 1.1(d) and 1.2 of the Customs Valuation Agreement.

## **2. Claims under Article III of the GATT 1994**

### **(a) Claim under Article III:2 with respect to the setting of MRSPs**

4.286 The key issue is whether the tax base – the MRSPs – is established in the same manner for imported and domestic cigarettes.<sup>116</sup> The 2006 and 2007 MRSPs were not included in the Philippines' panel request and are not within the Panel's terms of reference.<sup>117</sup> Instead, this dispute concerns the 2008 and 2009 MRSP notices and there is no evidence showing that those MRSPs were established in a manner that discriminated against imported cigarettes. Rather, the evidence is clear that the 2008 and 2009 MRSPs were set using the same methodology for both domestic and imported cigarettes and that the importers that actually made company-specific requests for changes in their MRSPs relating to those notices were treated in the same manner as domestic producers.

### **(b) Claim under Article III:2 regarding VAT on resellers**

4.287 VAT is a tax on consumers, who pay exactly the same tax on imported and domestic cigarettes.<sup>118</sup> The key issue is that the total tax on the imported and domestic product is the same, not whether the tax is collected uniformly from different merchants at each stage of the distribution process.

4.288 The Philippines' claim also fails because: (i) a reseller never pays more VAT on imported cigarettes than on domestic cigarettes; (ii) a reseller always obtains an input tax credit on its purchases of cigarettes before it incurs the obligation to pay output tax on its sales of cigarettes; and (iii), resellers can use VAT paid on their purchases of services and equipment to increase their offset

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<sup>113</sup> Exhibit PHL-206, p. 223, para. 743.

<sup>114</sup> See, e.g., Panel Report, *Korea – Certain Paper*, para. 7.85.

<sup>115</sup> See Thailand's first written submission, paras. 172-178; Thailand's second written submission, paras. 113-119.

<sup>116</sup> See Thailand's second written submission, paras. 134-135.

<sup>117</sup> See Thailand's first written submission, paras. 194-203; Thailand's answers to the Panel's questions, paras. 243-245; Thailand's second written submission, paras. 144-145.

<sup>118</sup> See Thailand's second written submission, paras. 156-161; Exhibit THA-61.

against VAT output tax payable on sales of imported cigarettes.<sup>119</sup> If the Philippines' argument were accepted, Members would not be able to use VAT systems based on input/output tax offsets, because such systems inevitably result in different taxes being collected at different points in the distribution process.<sup>120</sup>

(c) Claim under Article III:4 regarding VAT forms

4.289 The requirement to file a Por.Por.30 depends on the entity's total sales, not on whether it sells imported or domestic cigarettes. Thailand attaches as Exhibit THA-89 samples of Por.Por.30s submitted by TTM and by a convenience store that show amounts for both VAT and VAT-exempt sales. Furthermore, the Revenue Department's Instruction No. Paw. 86/2542, published in 1999, regarding the types of documents required for VAT compliance, makes clear that sales receipts may double as tax invoices, thereby avoiding duplication of requirements under the Accounting Acts and the Revenue Code (Exhibit THA-90, clause 6). In accordance with this instruction, many companies produce a single document that serves as a receipt and a tax invoice.

### 3. Claims under Article X of the GATT 1994

(a) Article X:3 claim relating to TTM's Board of Directors

4.290 A complainant must show *actual acts* of partial or unreasonable administration in order to prove a violation of Article X:3(a). The Philippines concedes that it is not able to provide evidence that "specific decisions taken by TTM Directors in their capacity as government officials have actually been motivated by bias."<sup>121</sup> Press reports of alleged "statements of intent by the conflicted individuals to protect the domestic producer"<sup>122</sup> do not constitute acts of unreasonable or partial administration. A claim under Article X:3(a) generally requires evidence of "a pattern of decision-making".<sup>123</sup> In this case, the *sole alleged act*, the disclosure of confidential declared values to the Thai press in 2006<sup>124</sup>, has not had a significant impact on the overall administration of the Thai Customs Code. Specific statutory safeguards prevent such a result.<sup>125</sup>

4.291 Even if Article X:3(a) were read to regulate how governments structure their administrative processes, rather than how they actually administer their laws and regulations, the Philippines' claims must fail. An "administrative structure" whereby government officials are simultaneously on the TTM Board does not "compromise all" or "taint the entirety" of the government's administration in individual cases.<sup>126</sup>

4.292 As a matter of fact, Thai law contains strict statutory safeguards, which take priority over the TTM Guidebook and which protect against improper administration of Thai law by government officials serving on the TTM Board.<sup>127</sup> Financial incentives for TTM Directors are modest, based as much on attendance at meetings as profits<sup>128</sup>, and calibrated to ensure that Directors act consistently with those statutory controls. This case therefore differs from *Argentina – Hides and Leather*, in

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<sup>119</sup> See Thailand's answers to the Panel's questions, paras. 159-160.

<sup>120</sup> See Thailand's second written submission, paras. 150-155.

<sup>121</sup> See Philippines' answers to the Panel's questions, paras. 460, 462 and 463. Also, Philippines' second written submission, para. 25.

<sup>122</sup> Philippines' second written submission, para. 28.

<sup>123</sup> Panel Report, *US – Hot-Rolled Steel*, WT/DS184/R, para. 7.268.

<sup>124</sup> Philippines' answers to the Panel's questions, paras. 469-470.

<sup>125</sup> Exhibit THA-85.

<sup>126</sup> Philippines' second written submission, paras. 23 and 26.

<sup>127</sup> Thai Civil Service Act and Criminal Code.

<sup>128</sup> Thailand's second written submission, footnote 171; see also Exhibit THA-3, pages 44-45, and Exhibits PHL-6 and PHL-7.

which there were no controls on the treatment of confidential information available to private industry representatives present at export inspections.<sup>129</sup>

- (b) Article X:3 claims relating to the BoA's treatment of appeals on *Marlboro* cigarettes landed in 2002

4.293 There are three circumstances that justify the BoA's treatment of the pending appeals as "reasonable": (i) the spike in appeals due to Thailand's implementation of new Customs Valuation Agreement disciplines in 2000; (ii) PM Thailand *itself* requested that the BoA use new information regarding P&GE ratios into account in those appeals (by letters dated 15 December 2005 and 12 March 2007); and (iii) PM Thailand requested that the subsequent appeals be prioritised over the pending appeals. Thailand submits, in addition to the 19 July 2007 letter, a statement confirming that "PM Thailand's company representatives also came to meet our officials and told them, verbally, that they would prefer Thai Customs to prioritise the appeals of the [[xx.xxx.xx]] entries landed in 2006 and 2007 ahead of the appeals of [[xx.xxx.xx]] entries landed in 2002".<sup>130</sup> Since that letter of 19 July 2007, PM Thailand "has not submitted any additional communications to Thai Customs" regarding delays of the appeals of the entries landed in 2002.<sup>131</sup>

4.294 Article X:3(b) does not apply to the BoA as it is not "independent". The context of Article X:3(c) confirms that procedures subject to Article X:3(b) must be "fully and formally independent" of the agency being reviewed. Thailand's BoA is not. It is headed by the Director-General of Customs and has a Customs civil servant as secretary. It is supported by a "team of officers [of the Customs Department] that acts as secretariat".<sup>132</sup> The Sub-Committee for Customs Valuation of the BoA, charged with the "power and responsibility to ... consider the appeal" and to present a "conclusion" to the BoA, is composed entirely of Customs Department officials.<sup>133</sup>

- (c) Claim regarding appeals against the imposition of guarantees

4.295 An administrative decision requiring an importer to furnish a guarantee is not an "administrative action relating to customs matters" within the meaning of Article X:3(b). Under Thai law, importers have unconditional rights to appeal decisions imposing guarantees *directly* to the Thai Tax Court.<sup>134</sup> Article X:3(b) of the GATT 1994 does *not* require that WTO Members provide "immediate and independent" rights of appeal to affected importers.<sup>135</sup> Instead, WTO Members are permitted to impose requirements to await the completion of internal proceedings and the exhaustion of alternative remedies before rights of appeal can be exercised.

- (d) Administration of the VAT system and excise, television and health taxes

4.296 The Philippines argues that a failure to collect refundable guarantees for VAT liability from cigarette sellers is a breach of Article X:3(a).<sup>136</sup> Article X:3(a) requires only that Members' administration of their laws be "reasonable". It is irrelevant that the Philippines may be able to think of a different way of doing things. The relevant question is whether Thai authorities administered Thailand's VAT laws and regulations *irrationally* by utilising guarantee value data to calculate MRSPs. In the light of the doubts regarding the reliability of the declared customs value, it was not

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<sup>129</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.101.

<sup>130</sup> Exhibit THA-87, para. 7.

<sup>131</sup> Exhibit THA-87, para. 8.

<sup>132</sup> Exhibit THA-87, para. 1.

<sup>133</sup> Exhibit THA-88, paras. 2 and 3 (Order of the Appeal Committee No. 1/2552).

<sup>134</sup> Exhibit THA-91, letter from the Attorney General's Office, and Exhibit PHL-183, response to Question 4.1.

<sup>135</sup> Thailand's second written submission, paras. 233-236.

<sup>136</sup> Philippines' second written submission, paras. 507-508.

irrational to use the guarantee values. Also, VAT is a tax on consumption ultimately paid by consumers.<sup>137</sup> Any refund would be due to consumers, not to importers or domestic manufacturers.

## **V. ARGUMENTS OF THE THIRD PARTIES**

### **A. ORAL STATEMENT BY AUSTRALIA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

5.1 Australia did not file a written third party submission in the dispute *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371). Australia did however make an oral statement at the third-party session of the first substantive meeting of the Panel.

#### **1. Introduction**

5.2 Chair, Members of the Panel, parties and third parties, Australia welcomes this opportunity to present its oral statement today. As a general remark, Australia considers that where customs duties are applied by WTO Members, the security and predictability of the multilateral trading system is contingent upon the correct application of the WTO Customs Valuation Agreement. Central to the Customs Valuation Agreement is the importance of transparency in determining the customs valuation methodology used by the customs authorities of WTO Members.

5.3 In our statement, Australia will address the following issues:

- The obligation to maintain transparency in determining the methodology used to arrive at a customs value;
- Australia's practice in the event of doubt on declared customs valuations; and
- The Philippines claims under Article III:2 of the GATT 1994.

#### **2. Transparency issues in customs valuation**

5.4 It is apparent that the *complainant* and respondent in this case have divergent views on the obligations of importers and customs authorities to communicate with each other, as provided for in the Customs Valuation Agreement. This is nowhere more evident than in their respective positions when grounds exist to doubt the declared value claimed by an importer where the buyer and seller are 'related' for the purposes of Customs Valuation Agreement Article 1(d). Australia recalls that it is not contested that PM Thailand and PM Philippines are 'related' within the meaning of the Customs Valuation Agreement.<sup>138</sup>

5.5 Australia considers full transparency should be provided in such cases to prove that the relationship between the importer and the seller has not influenced the price. In Australia's view, the importer can only effectively attempt to prove that its relationship with the seller has not influenced the price *if* the customs authority fully communicates its doubts to the importer in writing. It is only then that the importer can meaningfully 'respond' to those doubts as provided for in Article 1.2(a) of the Customs Valuation Agreement. This response should also be provided in writing. Australia agrees with the European Union in its written submission that it is only after the customs authority has examined the 'relevant aspects of the transaction ... in order to determine whether the relationship influenced the price' that customs authorities can properly reject the declared value and consider

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<sup>137</sup> Thailand's second written submission, paras. 156-159.

<sup>138</sup> Australia understands PM Thailand and PM Philippines are 'related' pursuant to Article 15.4(f) of the Customs Valuation Agreement. See footnote 86 to first written submission of the Philippines.

alternative customs valuation methods.<sup>139</sup> In order to ensure full transparency, if the importer requests the grounds for rejecting the customs value in writing the customs authority should provide it even though the Customs Valuation Agreement does not require it to do so.

5.6 Australia therefore considers that Article 1.2(a) of the Customs Valuation Agreement establishes a clear obligation on the customs authority to communicate its grounds that the relationship between the importer and the seller has influenced the price. In addition, if an importer requests the grounds for considering that the relationship influenced the price in writing, the failure to communicate these grounds in writing would be inconsistent with this Article.

5.7 A further provision in the Customs Valuation Agreement relevant to transparency and communication is Article 16. Article 16 contains an obligation on the customs authorities of the importing country to provide an explanation in writing as to how the importer's goods were valued whenever the importer makes a request in writing for this information. This obligation applies irrespective of which valuation method is used.

### **3. Australia's practice in case of doubt regarding declared transaction values**

5.8 In the light of what I have just said, it may assist the Panel for Australia to spend a moment to outline its practice in the application of Australian law giving effect to the Customs Valuation Agreement, in situations where the transaction value may have been influenced by the relationship between the buyer and seller. Firstly, a written notice is sent to the buyer outlining the Australian Customs' concerns. This notice will include the view that the relationship may have affected the price rendering the Australian Customs unable to use the transaction value method. The buyer is then invited to respond and provide sufficient evidence to satisfy Australian Customs that the relationship has not affected the price. A period of no less than 28 days is provided for a response.

5.9 If Australian Customs is satisfied that the information provided has established that the relationship has not affected the price, then the declared transaction value is applied. However, if Australian Customs is not satisfied with the explanation or no reply is received, the transaction value method is held to be inapplicable and an alternate method is used following the requisite sequence in the Customs Valuation Agreement.<sup>140</sup> Australian Customs will then convey this determination in writing to the importer and secondly, when a new customs valuation is determined, this methodology is also provided in writing to the importer.

### **4. The Philippines' claims under Article III:2 of the GATT 1994**

5.10 Australia will now address the Philippines' claims under Article III:2 of the GATT 1994. In order for the Philippines to establish that Thailand has acted inconsistently with Article III:2, it must demonstrate that Thailand subjected imported cigarettes to a tax 'in excess of' that applied to 'like domestic products.' In the present case, it appears likely that domestic and imported cigarettes are 'like products' within the meaning of Article III:2. Further, Australia notes Thailand acknowledges that this "*may*" be the case.<sup>141</sup> However, Australia recognises the need for the Panel to undertake a thorough analysis on this point.

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<sup>139</sup> Third party written submission of the European Communities, para. 36.

<sup>140</sup> As noted by the Panel in *Colombia – Ports of Entry*, paras. 7.136-7.142, where the customs value cannot be determined under the provisions of Article 1 of the Customs Valuation Agreement, the Customs Valuation Agreement provides a set of procedures that are to be applied to determine this value. Under the Customs Valuation Agreement, customs authorities are to apply sequentially Article 1 through Article 7 in order to determine a customs valuation.

<sup>141</sup> Australia recalls the statement of Thailand that it "does not dispute that particular pairs of imported and domestic cigarettes *may* be like products ...", Thailand's first written submission, para. 221.

5.11 As established by the Appellate Body in *Japan – Alcoholic Beverages II*<sup>142</sup>, the Panel must then determine whether dissimilar taxation has been applied so as to afford protection to domestic products. This may be done through an analysis of "the design, the architecture, and the revealing structure of a measure".<sup>143</sup>

5.12 Australia understands that Thailand applies VAT that is proportional to the retail sales price of goods. While VAT is normally payable on the actual retail sale price of goods, for both domestic and imported cigarettes, the VAT tax base is the MRSP which is set by the Thai Government.<sup>144</sup> This VAT-MRSP value is therefore fixed and is payable independently of the actual sale price. Thailand states that 'the VAT burden on the domestic and imported *product* is the same' (emphasis in original).<sup>145</sup>

5.13 As this absolute VAT-MRSP value is fixed, the effective or marginal VAT rate increases as a percentage when imported or domestic cigarettes are sold at prices below the MRSP. The factual question before the Panel is therefore whether the design, architecture or structure of the tax measure operates so as to afford protection to domestic products. That is, does the evidence show that the tax burden on imported cigarettes is higher because they are more often sold at prices below the MRSP.

5.14 While Australia understands that imported cigarettes are commonly sold below their MRSP<sup>146</sup>, the Philippines claim that the retail price for domestic cigarettes had '*never*' been below the MRSP for the three year period prior to this dispute.<sup>147</sup> If this factual situation is found to be the case by the Panel, then the marginal VAT rate may, on occasion, be higher for imported cigarettes than that for domestic cigarettes and thus may constitute an internal tax 'in excess of those applied ... to like domestic products'.<sup>148</sup> Australia notes that Thailand claims in its first written submission that Exhibit PHL-127 shows exceptions to this assertion.<sup>149</sup> In the view of Australia this, in itself, does not invalidate the claims of the Philippines.

5.15 As a final point, Australia recalls that there is no prohibition that would prevent Thailand from regulating the sale price of particular products. However, where a Member opts to set a sale price, it must ensure that it does not apply measures to imported or domestic products so as to afford protection to domestic production contrary to Article III of the GATT 1994.

## 5. Conclusion

5.16 Australia would like to thank the Panel for the opportunity to provide its views in this case. This dispute has highlighted the importance of transparency in the application of the Customs Valuation Agreement, which, when applied correctly, is an integral part in the maintenance of security and predictability of the multilateral trading system.

### B. THIRD PARTY SUBMISSION BY CHINA

5.17 China did not file a written third party submission in the dispute *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371). China reserved its right but did not

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<sup>142</sup> Appellate Body in *Japan – Alcoholic Beverages II*, p. 29, cited in the Thailand's first written submission, paras. 206-207.

<sup>143</sup> Ibid.

<sup>144</sup> Thailand's first written submission, paras. 97-101.

<sup>145</sup> Thailand's first written submission, para. 100.

<sup>146</sup> Philippines' first written submission, see para. 459 and paras. 493-498.

<sup>147</sup> Philippines' first written submission, para. 499.

<sup>148</sup> Article III:2 of the GATT 1994.

<sup>149</sup> Thailand's first written submission, para. 227.

make a statement at the third party hearing, nor did it file responses to the Panel's questions following that hearing.

C. THIRD PARTY SUBMISSION BY THE EUROPEAN UNION

1. Introduction

5.18 Whilst not taking a final position on the specific facts of this case, the European Union will provide its views on the legal claims advanced by the parties to the dispute.

2. Claims under the Customs Valuation Agreement

5.19 The European Union understands that in its first written submission the Philippines makes a series of substantive and procedural claims under the Customs Valuation Agreement with respect to the assessment of customs value by Thai Customs for a particular number of entries of *Marlboro* and *L&M* cigarettes imported into Thailand from the Philippines and cleared between 11 August 2006 and 13 September 2007. In this respect, even if the Philippines does not expressly request a finding against Thailand's general practice or methodology providing for the systemic rejection of transaction values and the imposition of higher pre-determined values "as such", in the European Union's view, a finding that Thailand failed to comply with the Customs Valuation Agreement with respect to the assessment of customs value of the entries concerned ("as applied" claims) would also cover a finding against Thailand's general rule or methodology to disregard declared transaction values in similar circumstances.

5.20 The Customs Valuation Agreement is one of the multilateral agreements on trade in goods contained in Annex 1A of the WTO Agreement. Thus, the Customs Valuation Agreement, a covered agreement, must be interpreted in the light of the customary rules of interpretation of public international law, as required by Article 3.2 of the DSU. The European Union observes that, following these interpretative principles, the Customs Valuation Agreement primarily sets out that the basis for valuation of imported goods for customs purposes is the transaction value of the goods being valued.

5.21 More importantly, the Customs Valuation Agreement also establishes a sequential order for the application of alternative customs valuation methods. The text, context and purpose of the Customs Valuation Agreement confirm that there is a hierarchy which WTO Members must respect when applying methods of customs valuation to other Members' imports. The transaction value is the first method for customs valuation which WTO Members must apply. Whenever the conditions are such that the customs value cannot be determined under the transaction value method, Articles 2 to 7 of the Customs Valuation Agreement provide for alternative customs valuation methods which may be applicable, but always respecting the sequential order therein.

5.22 In cases of related importers, Article 1.2 of the Customs Valuation Agreement provides for criteria to assess customs values and contains different means of establishing the acceptability of declared transaction values (*i.e.*, the influence test and the referenced values test). It is only through these criteria and means that a customs authority can accept or reject declared transaction values. Indeed, both the relevance of transaction values as the preferred customs valuation method and the sequencing order of other customs valuation methods provided by the Customs Valuation Agreement indicate that, in order to move down to the next method, the first alternative should be explored thoroughly. In the European Union's view, this calls for a strict interpretation of the conditions contained in Article 1 of the Customs Valuation Agreement before having recourse to other customs valuation methods.

5.23 The key issue in examining the declared transaction value of related importers is whether the relationship between the seller and the related buyer influenced the transaction price (*i.e.*, influence test) rather than the accuracy or reality of the declared price. This is the central inquiry on which customs authorities should focus and the basis for rejecting the declared transaction price of related importers. Customs authorities do not need to examine the particularities of all transactions. However, 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. Thus, the European Union considers that customs authorities are entitled to request further information from the importer to examine the circumstances surrounding the sale. This may occur as part of the normal process to obtain customs clearance or in any other context of customs administration procedures.

5.24 If in the light of information provided by the importer following that initial inquiry or "otherwise" the customs administration has "grounds" for considering that the relationship influenced the transaction price, such information or "grounds" must be communicated to the related importer, which should be given reasonable opportunity to respond and demonstrate that such a relationship has not affected the transaction price. In the European Union's view, Article 1.2(a) of the Customs Valuation Agreement does not limit the source or type of information which may trigger a further inquiry by the customs authorities as to whether the relationship between the seller and the related importer influenced the transaction price. The term "otherwise" is general enough to support the conclusion that customs authorities may proceed to a further inquiry in cases of higher declared transaction values by unrelated importers with respect to the same product from the same seller.

5.25 The purpose of the exchange between the customs authorities and the related importer in the context of that inquiry is to examine the circumstances surrounding the sale and clarify whether the transaction price has, or has not, been influenced by the relationship with the seller. In this exercise, the customs authorities communicate its reasons for considering that the relationship has influenced the transaction price, whereas the related importer has to show that such a relationship has not affected the transaction price. Only if following an inquiry into the circumstances surrounding the sale it results that the relationship between the buyer and the related importer has influenced the transaction price, customs authorities can reject the declared value and move on to other customs valuation methods. However, where it can be shown that the buyer and seller, although related under the provisions of Article 15 of the Customs Valuation Agreement, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship.

5.26 As an alternative to examining whether the relationship between the seller and the related buyer influenced the declared transaction price, Article 1.2(b) of the Customs Valuation Agreement states that the related importer may show that the declared transaction value is acceptable if such a value "closely approximates" to other referenced values at or about the same time. In comparing the declared transaction value with the other values, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8. If the declared transaction value closely approximates to those values, then the declared transaction price should be considered as acceptable, and the influence test cannot serve as the basis for rejecting the declared transaction value.

5.27 Consequently, without entering into the facts of this case, the European Union agrees with the Philippines that the rejection by the customs authorities of a WTO Member of declared transaction values of related importers must respect the conditions warranting such a rejection as provided in Articles 1.1 and 1.2 of the Customs Valuation Agreement.

5.28 Finally, the European Union considers that the relevance of transaction values as the preferred customs valuation method and the sequencing order of the other customs valuation methods provided



by the Customs Valuation Agreement once more imply that, when the customs authorities reject the transaction value and determine the customs value on another basis, such explanation should include: the reasons for rejecting the transaction value; the reasons for using a particular valuation method; how the value has been calculated pursuant to that method; and the reasons for not using any other valuation method prior to the one effectively used following the sequencing order of Articles 2 to 7 of the Customs Valuation Agreement.

### **3. Claims under Articles III:2 and III:4 of the GATT 1994**

5.29 As regards the claims made under Article III of the GATT 1994, Thailand raises a preliminary issue concerning the references made by the Philippines to MRSP's notices for imported cigarettes for 2006 and 2007 to support its claim against the MRSP's calculation methodology. On this point, the European Union observes that the Panel Request contains a reference to "any amendments (...) or other measures related to [the MRSP Notices expressly mentioned therein]", which related to the years 2007 and 2008. Consequently, the broad scope of the Panel Request would suggest that the Philippines intended to cover other notices and used them, at least, as evidence of the methodology used in this case. Furthermore, as the Appellate Body found in *US – Upland Cotton*, measures which expired before the request for establishment of the panel can also be measures at issue in the sense of Article 6.2 of the DSU and, thus, form part of the terms of reference of a panel. In this respect, it should not be excluded that an expired measure could be the subject of an appropriately worded recommendation or suggestion.

5.30 On the substance of the claims concerning Article III:2 of the GATT 1994, the European Union understands that the core of the Philippines' claims under Article III:2 relates to the calculation of the MRSP under Article 23 of the Tobacco Act of Thailand. This calculation is also one of the subject matters of the Philippines' claims under Article X:1 of the GATT 1994 for the alleged failure to publish promptly trade regulations of general application. In the absence of the precise published basis for the calculation of the MRSP at least with regard to the entries subject to this case, the Philippines has attempted to provide evidence that the basis of calculation is discriminatory at least in relation to the imports of PM Thailand and at least during a given period. However, the European Union points out that the Panel's examination of the claims made under Article X:1 of the GATT 1994 may reveal facts that may be relevant for its analysis of the claims made under Article III:2. Therefore, the Panel may consider it appropriate to examine the claims made under Article X:1 before those made under Article III:2 of the GATT 1994.

5.31 In the present case, it would appear that imported cigarettes can generally be considered as like products to Thai cigarettes within the meaning of the first sentence of Article III:2 of the GATT 1994. Provided that this is the case, the key issue would be to determine whether the taxes applied on imported cigarettes are "in excess of" those applied to domestic cigarettes. It would appear to the European Union that the Philippines has limited its claims under Article III:2 of the GATT 1994 to certain specific imports by PM Thailand. Indeed, the situation would seem to be analogous to the situation examined by the Panel in *Dominican Republic – Import and Sale of Cigarettes* where, after the examination of detailed evidence, it was concluded that there was evidence to indicate that during a given period imported and domestic cigarettes were not taxed on the same basis with the result that certain imported cigarettes were taxed in excess to the rates applied to domestic cigarettes. To what extent this has been the case in the present challenge requires a careful analysis by the Panel taking into account all the facts and evidence presented.

5.32 In addition, the Philippines claims that Thailand violated Articles III:2 and III:4 of the GATT 1994 by exempting resellers of domestic cigarettes from VAT liability, whereas resellers of imported cigarettes continue to be subject to VAT and related administrative requirements. In contrast, Thailand maintains that, in practice, imported cigarettes are treated exactly the same since wholesalers and retailers do not have to pay any VAT on sales of imported cigarettes. While not

entering into the facts of this case, the European Union considers that an exemption to pay VAT exclusively granted to resellers and resales of domestic cigarettes would imply that imported cigarettes are "subject to an internal tax ... of any kind in excess of those applied ... to like domestic products" contrary to the first sentence of Article III:2 of the GATT 1994. On this point, our analysis does not extend to Article III:4 of the GATT 1994 because in the view of the European Union the latter is purely consequential to the alleged violation of Article III:2.

5.33 Finally, the European Union would also like to draw the Panel's attention to the recent panel report in *Colombia – Ports of Entry*. On the basis of the analysis by the Panel in that case, the European Union considers that, insofar as the MRSP for imposing VAT, the Excise tax, the Health tax and the Television tax are calculated on the basis of customs values determined contrary to the provisions of the Customs Valuation Agreement, the basis for taxing imported products would not be compatible with Thailand's obligations under Article III:2 of the GATT 1994 to the extent such basis would be higher than the declared transaction value.

5.34 Finally, as regards Thailand's claim that any differences in the treatment of imported and domestic cigarettes can be justified under Article XX(d) of the GATT 1994, the European Union points the Panel towards the analysis of the "necessity" of the measure as carried out by the Appellate Body in *Brazil – Retreaded Tyres* and invites the Panel to apply that analysis to the facts of this case in order to examine whether the measure adopted by Thailand is justified according to Article XX(d) of the GATT 1994.

#### **4. Claims under Article X of the GATT 1994**

5.35 As regards the claims concerning the publication of trade regulations under Article X:1 of the GATT 1994, without entering into the specific facts of the case, the European Union emphasises the importance of the obligations contained in Article X:1 of the GATT 1994. In the European Union's view, the Panel's analysis should concentrate on examining whether the relevant rules in question are indeed "laws, regulations, judicial decisions and administrative rulings of general application" (emphasis added). If that is the case and if Thailand has failed to publish them promptly, there would necessarily be a violation of Article X:1 of the GATT 1994.

5.36 As regards the Philippines' claims under Article X:3(a) of the GATT 1994, the European Communities notes that the Panel in *Argentina – Hides and Leather* observed that the three requirements in Article X:3(a) – namely "uniformity", "reasonableness" and "impartiality" – are legally independent in that "[c]ustoms laws regulations and rules must satisfy each of the three standards". The European Union agrees with this interpretation. Thus, a claim under Article X:3(a) and its legal assessment by a panel must identify which of the three requirements is at stake in relation to the facts that are presented as evidence of a breach thereof. It may well be that in a given situation the same or interrelated facts are relevant in relation to one or more of three requirements. In this respect, the European Union would like to point to the established case law according to which the covered agreements that are more specific to the matter before the Panel should be considered first. In the European Union's view, the same logic applies between legally independent requirements contained within the same provision of the same covered agreement. The European Union invites the Panel to carefully distinguish between the requirements and their analysis under the facts of the case.

5.37 On the Philippines' claims concerning Article X:3(b) of the GATT 1994 dealing with the prompt review and correction of administrative action, the European Union agrees with the Philippines that the length of time that an appeal takes in a given case is an important factor to be taken into account for the purposes of examining that appeal in the light of the word "prompt" in Article X:3(b) of the GATT 1994. Although the European Union cautions the Panel to impose a clear cut numerical limit for what could be considered as "prompt review and correction" under the provision, an appeal in the first instance that remains to be decided after six-seven years since being

lodged would appear not to fulfil the requirements of the Article X:3(b), absent very good reasons justifying the length of time. However, in addition to the mere time an appeal takes, the European Union observes that the term "prompt review" is followed by "and correction". In the European Union's view, this appears to allow also consideration relating to the intensity of the review and correction process. In other words, in case the facts and evidence demonstrate that a given appeal is actively examined, the mere overall length of time taken should not be exhaustive of what is covered by the requirement of "prompt review and correction" under Article X:3(b) of the GATT 1994.

5.38 Moreover, the European Union agrees with the Philippines that decisions on the imposition of guarantee values comes within the scope of the notion "administrative action relating to customs matters".

## **5. Request pursuant to Article 13 of the DSU**

5.39 The European Union observes that the Philippines has requested that the Panel seeks certain documents in the possession of Thailand pursuant to Article 13 of the DSU. With respect to each document, the Philippines has explained in detail the relevance for the Panel to obtain such documents to carry out a proper examination of all claims. In this respect, the European Union would like to make the following comments.

5.40 The discretion granted to panels under Article 13 of the DSU is modulated by the obligation to make "an objective assessment of the matter" pursuant to Article 11 of the DSU. Thus, the Panel should request the information it deems necessary to fully examine the matter before it. In the European Union's view, where there is a refusal to reply to any request for information made by the panel, such a panel may draw inferences from this behaviour. More generally, where assertions of a complaining party could be confirmed or refuted by the defending party providing information that is available to it, but the defending party declines to do so, a panel can legitimately presume these assertions to be true. In other words, an invitation to draw such inferences can be part of the making of a prima facie case by a complaining party.

### **D. THIRD PARTY SUBMISSION BY INDIA**

5.41 India did not file a written third party submission in the dispute *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371). India reserved its right but did not make a statement at the third party hearing, nor did it file responses to the Panel's questions following that hearing.

### **E. ORAL STATEMENT BY CHINESE TAIPEI AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

5.42 Chinese Taipei did not file a written third party submission in the dispute *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371). Chinese Taipei did however make an oral statement at the third-party session of the first substantive meeting of the Panel.

## **1. Introduction**

5.43 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter referred to as "Chinese Taipei"), as a third party in this proceeding, would like to thank the Panel for the opportunity to present its views in this dispute. Chinese Taipei makes this oral statement because of its systemic interests in the interpretation of relevant provisions in the GATT 1994, in particular, its Article III:2.

5.44 While not taking a final position on specific factual issues in this dispute, Chinese Taipei would like to provide its views on the issue of whether an internal tax applied on imported products is

in excess of those on like domestic products calculated on certain tax bases is subject to interpretation within the wording of Article III:2 of the GATT 1994. Chinese Taipei hopes that this submission will help determine whether, in the present dispute, the internal duty, or the internal charges, are being imposed in excess of those on like domestic products.

## **2. Legal standard under the first sentence of Article III:2 of the GATT 1994**

### **(a) The structure and the limits of the first sentence of Article III:2 of the GATT 1994**

5.45 The first sentence of Article III:2 of the GATT 1994 provides that: "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products". To examine whether a contested measure is consistent with this requirement, well-established WTO jurisprudence requires the application of a two-tier test.

5.46 In the first tier, one must examine whether the imported and domestic products at issue are like products. In the second tier, it must be determined whether the imported products are taxed in excess of like domestic products. If, and only if, both questions are answered in the affirmative, has there been a violation of the first sentence of Article III:2.<sup>150</sup> Compared with the second sentence of Article III:2, the first sentence of Article III:2 can be satisfied by applying the two-tier test aforementioned. As such, this passage does not require the claimant to demonstrate that the measures at issue aim at affording protection for domestic production.<sup>151</sup>

### **(b) Like products**

5.47 According to the Appellate Body in *Japan – Alcoholic Beverage II*, the criteria for determining "likeness" between an imported and a domestic product may include the product's end use, consumer tastes and habits (which vary from country to country), the product's properties, nature and quality (including the actual price of the product), and tariff classification.<sup>152</sup> Appropriate criteria are selected on a case-by-case basis and such criterion would eventually determine whether the measure at issue constitutes a violation.<sup>153</sup>

### **(c) In excess of those applied**

5.48 In the same dispute, the Appellate Body also ruled that even the smallest amount of excess is too much. The Appellate Body specifically ruled that "the prohibition of discriminatory taxes in Article III:2, first sentence, is [neither] conditional on a 'trade effect test' nor is it qualified by a *de minimis* standard".<sup>154</sup>

5.49 Moreover, on the judgment of whether other internal taxes or charges are applied in excess of those applied to like domestic products, first sentence of the Article III:2 requires a comparison of actual tax burdens rather than merely nominal tax burdens. Even in situations where imported and

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<sup>150</sup> Appellate Body Report, *Canada – Periodicals*, p. 20; *see also* Appellate Body Report, *Japan – Alcoholic Beverage II*, p. 18-19.

<sup>151</sup> Thailand asserts that the Philippines shall demonstrate that the measures involved afford protection for domestic industries, *see* Thailand's first written submission, para. 205.

<sup>152</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.

<sup>153</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.

<sup>154</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23.

like domestic products are subject to identical tax rates, it is possible that actual tax burdens are heavier on imported products.<sup>155</sup>

**3. Examining the operation of Thai VAT under the first sentence of Article III:2 of the GATT 1994**

(a) Whether imported cigarettes and domestic cigarettes are like products

5.50 In this dispute, all imported and domestic cigarettes comprise a paper tube containing a mix of tobacco and additives and a filter: a physical likeness. In addition, since the opening of the Thai tobacco market in 1991, imported cigarettes have gradually built up their market share. The market share of domestically produced Thai cigarettes has simultaneously eroded. The fact that the market share has transferred from one product to the other demonstrates the interchangeability or "likeness" between the products insofar as consumer tastes and habits are concerned.<sup>156</sup> It also follows that all imported and domestic cigarettes share identical end-uses on the Thai market. Moreover, imported and domestic cigarettes are both classified under the same heading within the Customs Tariff of Thailand.<sup>157</sup> Thus, in this dispute, imported and domestic cigarettes are like products when interpreted through the lens of the GATT 1994 Article III:2, first sentence.

(b) Whether imported cigarettes are taxed in excess of domestic cigarettes under Thai VAT

5.51 We now turn towards examining whether the Thai government taxes imported cigarettes in excess of like domestic products. To begin with, an internal tax has two major components: a tax rate and a tax base. When determining whether imported products are taxed in excess of like domestic products, it is necessary to examine both the tax rate and the tax base.

5.52 Secondly, Chinese Taipei is of the view that the primary object and purpose of Article III:2 is to prohibit discrimination against imported products. An investigation of discrimination first requires a comparison of actual tax burdens. Even if imported and like domestic products are subject to identical tax rates, actual tax burdens on imported products can still be heavier if a different method is used to compute the tax base.

5.53 In this dispute, it must be determined whether the VAT that Thailand imposes on imported cigarettes is in excess of the tax imposed on domestic cigarettes. Whereas the MRSP serves as a standard of determining the tax base for the Thai VAT, it is necessary to go a step further and examine how Thailand determines MRSPs for individual brands themselves.

5.54 In the present case, Thailand has not published the methodologies, formulae, price surveys, or the data used to calculate MRSPs for domestic and imported cigarettes. Given that MRSPs are used in calculating VAT tax bases, one would assume that Thailand uses the same methodologies to compute MRSPs of both imported and domestic cigarettes. Otherwise, Thailand would have to justify its compliance with Article III:2, first sentence.

5.55 Having stated the above, we wish to note that Article III:2, first sentence, does not dictate how Members impose internal taxes on products, so long as the applications of the internal taxes does not afford less favourable treatment to imported cigarettes. Members are free to prescribe the kinds of taxes, elements and parameters used to compute the tax base, as well as whatever methodologies employed to determine tax rates and to levy taxes, as long as such differentiated taxation methods do not result in discriminatory taxation inconsistent with the relevant WTO rules.

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<sup>155</sup> Panel Report, *Argentina – Hide and Leather*, paras. 11.182-11.183.

<sup>156</sup> Philippines' first written submission, para. 472.

<sup>157</sup> Heading 2402.20.90, see Harmonized Tariff Schedule of Thailand, Chapter 24.

5.56 It is difficult to prove the existence of discrimination against imported cigarettes by merely comparing tax bases of imported and domestic cigarettes since the tax bases are not always the same.

5.57 For example, the Thai MRSPs for imported cigarettes are based on the customs value (including maritime transportation cost), customs duties, health taxes, excise taxes, television taxes, and marketing costs (including selling expenses and profits). The Thai MRSPs for domestic cigarettes, by contrast, involve neither maritime transportation costs, nor customs duties. Domestic MRSPs reflect only the ex factory price before calculation of marketing costs and other taxes. Thus, the MRSPs for imported and domestic cigarettes are subject to different parameters.

5.58 Given the fact that Thai MRSPs are unilaterally and artificially determined by Thai government, it seems reasonable that Thailand bears the burden to prove that the Thai VAT does not impose an internal tax burden on imported cigarettes heavier than that imposed on like domestic ones. Thailand has to explain the value gap between MRSPs and retail prices on imported cigarettes, and prove that this gap is not the result of a discriminatory application of MRSPs. In particular, Thailand must clarify how it determines the marketing costs, including selling expenses and profits, imbedded in MRSPs.

#### **4. Conclusion**

5.59 In conclusion, Chinese Taipei would like to highlight the relevant aspects of the scope and certain limits under the first sentence of Article III:2 of the GATT 1994. As an internal tax is generated from two components: a tax rate and a tax base, it follows that the comparison of tax bases falls within the scope of Article III:2, first sentence. In addition, Article III:2 is limited to prohibiting Members from treating imported products less favourably than like domestic products. It does not aim at intervening in Member's internal fiscal matters. Members are free to pursue their own domestic policy through the imposition of internal taxes or charges, so long as they do not do so in a manner inconsistent with relevant provisions of the WTO covered agreements, in particular, the first sentence of Article III:2 of the GATT 1994.

5.60 Mr. Chairman and distinguished Members of the Panel, we thank you again for the opportunity to present our view in this dispute.

#### **F. ORAL STATEMENT BY THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

5.61 The United States did not file a written third party submission in the dispute *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371). The United States did however make an oral statement at the third-party session of the first substantive meeting of the Panel

##### **1. Introduction**

5.62 The United States appreciates the opportunity to present this oral statement as a third party in these proceedings. We recognize that a number of issues in this dispute are factual in nature, and the United States takes no position on the measures at issue. The United States does, however, have a substantial interest in the interpretation of provisions in the covered agreements raised in this dispute and would like to comment in particular on certain issues regarding the Customs Valuation Agreement and Article X of the GATT 1994.

5.63 The United States would first like to address four specific issues relating to the Customs Valuation Agreement: (1) the approach to related-party transactions under Article 1.2 of the Customs Valuation Agreement; (2) the application of the deductive value method under Article 5; (3) the importance of the obligations to protect confidential information under Article 10; and, (4) the

references made by the parties to a letter from the World Customs Organization Secretariat. The United States would then like to address whether Article X:3(b) of the GATT 1994 requires a Member to maintain tribunals or procedures for the review and correction of guarantees. Finally, the United States would like to comment briefly on the scope of the Panel's terms of reference in this dispute.

## **2. Article 1.2 of the Customs Valuation Agreement**

5.64 The United States is concerned by certain statements in Thailand's first written submission regarding the responsibilities of a customs authority examining a related party transaction. By way of background, the United States notes that the determination of customs value is a transaction-specific process.

5.65 The Customs Valuation Agreement sets forth a specific sequence of methods of valuation that customs authorities must follow. The Customs Valuation Agreement clearly establishes the transaction value as the primary basis for valuation. Article 1 of the Customs Valuation Agreement provides, "The customs value of imported goods *shall be* the transaction value, that is the price actually paid or payable ..." (emphasis added), except under certain specified circumstances.

5.66 Article 1 provides further that, even where the buyer and seller are related, the customs value shall be the transaction value, provided that the transaction value is acceptable under Article 1.2. Article 1.2(a) explicitly states: "the fact that the buyer and the seller are related ... shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price".

5.67 Article 1.2(a) must be "read and applied in conjunction with"<sup>158</sup> the Interpretive Notes to Article 1. Those notes make clear that a customs authority need not examine the relationship between the buyer and seller in every case.<sup>159</sup> The customs valuation process typically begins when the importer presents a declaration. In most cases, the customs authority accepts the value submitted in the declaration. In other cases, where the buyer and seller are related and the customs authority has "doubts" about the acceptability of the price, the customs authority may conduct an examination into the relationship between the buyer and the seller.<sup>160</sup>

5.68 Where the buyer and seller are related and the customs authority considers that further inquiry is necessary, as just noted, Article 1.2(a) provides that the customs authority shall examine the circumstances of the sale. Article 1.2(a) provides further that if the customs authority "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". These "grounds" must be communicated in writing if the importer so requests.

5.69 In the light of this background, the United States generally agrees with Thailand<sup>161</sup> that the "doubts" that give rise to further inquiry by the customs authority, and the "grounds" on which the customs authority bases its conclusion that the relationship between the buyer and seller influenced the price, are distinct concepts. However, the United States is concerned by certain statements in Thailand's first written submission – such as that the "importer [must] *establish* that the relationship did *not* influence the price"<sup>162</sup> – and in the April 12, 2007, response of Thailand's customs authority to

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<sup>158</sup> Customs Valuation Agreement, Article 14.

<sup>159</sup> Customs Valuation Agreement, Annex I, Note to Article 1, para. 2.

<sup>160</sup> Customs Valuation Agreement, Annex I, Note to Article 1, para. 2.

<sup>161</sup> Thailand's first written submission, paras. 146, 165.

<sup>162</sup> Thailand's first written submission, para. 142 (emphasis added).

the importer that "it cannot be proven whether the relationship has an influence on the determination of customs value or not".<sup>163</sup> The United States wishes to emphasize that the relevant inquiry for the Panel under Article 1.2(a) is whether "the customs administration ha[d] grounds for considering that the relationship influenced the price".

5.70 Bearing in mind that Article 1.2(a) provides that "the transaction value shall be accepted provided that the relationship did not influence the price," and that "the fact that the buyer and the seller are related ... shall not in itself be grounds for regarding the transaction value as unacceptable," a customs authority is obligated to accept the transaction value unless it has "grounds" – in other words, a sufficient reason or reasons<sup>164</sup> – for concluding that the relationship influenced the price. While the United States takes no position on whether all of the facts before Thailand's customs authority constituted "grounds" for rejecting transaction value, the United States would note that the language in the customs authority's 12 April 2007, response<sup>165</sup> calls into question of whether the authority identified any grounds to reach its conclusion or in fact applied the correct standard. The failure by an importer to prove a negative, specifically to prove that the relationship did not influence the price, does not relieve the customs authority of its obligation to accept the transaction value unless it has grounds for considering that the relationship influenced the price. As noted in Article 1.2(a), after considering the information provided by the importer or otherwise, it is incumbent on the customs authority to have grounds for not accepting transaction value and to communicate those grounds to the importer.

### **3. Article 5 of the Customs Valuation Agreement**

5.71 If, after undertaking all of the necessary steps, the customs authority determines that the transaction value is not acceptable, the customs authority must follow the sequence of valuation methods set forth in the Customs Valuation Agreement in determining the final customs value.

5.72 Where valuation is not possible under Article 2 or 3, the Customs Valuation Agreement dictates that the customs authority next proceed to the deductive value method set forth in Article 5 (unless the importer requests that the valuation method of Article 6 be applied). Article 5 provides that the value of imported goods shall be based on the unit price of identical or similar imported goods sold in the country of importation in the condition as imported in the greatest aggregate quantity, or the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity in the country of importation, subject to certain specified deductions, including "the additions usually made for profit and general expenses".

5.73 If valuation is not possible under Article 5 of the Customs Valuation Agreement, the customs authority must proceed to the computed value method set forth in Article 6 (unless the importer has requested that the order of Articles 5 and 6 be reversed). If valuation is not possible under Article 6, then the customs authority may use the last valuation method in the sequence set forth in the Customs Valuation Agreement, found in Article 7.

5.74 Paragraphs 184 through 187 of Thailand's first written submission indicate that Thailand's customs authority applied the deductive method under the method corresponding to Article 7 in its domestic law, rather than Article 5, because the importer had not provided audited financial statements for the year of importation. However, the United States agrees with the Philippines (as set forth in paragraph 338 of the Philippines' first written submission) that Article 5 of the Customs

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<sup>163</sup> Exhibit PHL 70-B; Thailand's first written submission, paras. 168-69.

<sup>164</sup> See *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4<sup>th</sup> ed.), Volume 1, p. 1150, meaning 6b; (Exhibit US-1).

<sup>165</sup> Exhibit PHL 70-B; Thailand's first written submission, paras. 168-69.



Valuation Agreement does not permit a WTO Member to make the use of the method set out in that article contingent on the submission of audited financial statements from the year of importation.

#### **4. Article 10 of the Customs Valuation Agreement**

5.75 With respect to the claims brought by the Philippines under Article 10 of the Customs Valuation Agreement, the United States does not express a view as to whether officials in Thailand in fact provided information to the press that was by its nature confidential or provided on a confidential basis. However, the United States considers that the obligations of Article 10 are an important element supporting the entire customs valuation system, as a failure to protect confidential information may prevent customs authorities from obtaining proprietary information that is critical to making the valuation decision, particularly in related party transactions.

#### **5. Letter from the WCO Secretariat**

5.76 The United States notes that both the Philippines and Thailand have cited a letter from the World Customs Organization Secretariat in presenting their respective positions. Specifically, the Philippines argues that this letter contradicted what the Philippines characterizes as one of Thailand's justifications for rejecting transaction value.<sup>166</sup> Thailand explains, in contrast, that Thailand's customs authority determined that it would be appropriate to make further inquiries into the relationship between the buyer and the seller "in the light of" the letter from the WCO Secretariat.<sup>167</sup> The United States appreciates the work of the WCO, including its cooperation with the WTO. However, the United States submits that the relevant inquiry in this dispute is whether Thailand complied with the obligations of the Customs Valuation Agreement, not to what extent Thailand acted consistently with a letter from the WCO Secretariat.

#### **6. Article X of the GATT 1994**

5.77 The United States would now like to turn to an issue relating to the GATT 1994. In particular, we would like to comment on the question of whether Article X:3(b) of the GATT 1994 requires a Member to maintain tribunals or procedures for the review and correction of guarantees imposed in accordance with Article 13 of the Customs Valuation Agreement.

5.78 Article X:3(b) requires each contracting party to maintain "judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters".

5.79 The United States is aware that the parties dispute, as a factual matter, whether Thailand in fact provides for an appeal of guarantee values, and, again, the United States does not take a position with respect to the facts in dispute. However, Thailand's suggestion<sup>168</sup> that the lack of any reference to an appeal in Article 13 of the Customs Valuation Agreement with respect to guarantees means that Members have no obligation to provide such an appeal merits comment.

5.80 The United States does not agree that the absence of a reference to an appeal in Article 13 of the Customs Valuation Agreement resolves the question of whether Article X:3(b) of the GATT 1994 requires such appeals. The relevant inquiry under Article X:3(b) is whether the determination of the amount of the guarantee is within the scope of the term "administrative action related to customs matters," and, if so, whether a Member has provided tribunals or procedures for the prompt review and correction of that action.

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<sup>166</sup> Philippines' first written submission, paras. 247-51.

<sup>167</sup> Thailand's first written submission, para. 39.

<sup>168</sup> Thailand's first written submission, paras. 299-300.

5.81 In support of its argument that Article X:3(b) of the GATT 1994 does not apply to the determination of guarantee values, Thailand contrasts the lack of any reference to an appeal in Article 13 in the Customs Valuation Agreement with the explicit obligation in Article 11 to provide for an appeal of the "determination of customs value".<sup>169</sup> It is true that the only decision as to which the Customs Valuation Agreement explicitly requires Members to provide the right to appeal is the determination of customs value. The language of Article X:3(b) of the GATT 1994 is not so limited, however. The meaning of "administrative actions related to customs matters" should not be equated with "a determination of customs value".

## **7. Terms of reference**

5.82 Finally, the United States notes that the request by the Philippines for the establishment of a Panel in this dispute identifies one of the measures at issue as "the general rule and/or methodology providing for the systematic rejection of transaction value, and the imposition of a higher pre-determined value, including any calculation methodology underpinning the pre-determined value, applicable at the time of entry as well as at the time of final assessment".<sup>170</sup> The United States notes that when bringing a challenge against an unwritten measure, a complaining party must clearly establish, through arguments and supporting evidence, both the existence of the alleged measure, and its precise content.<sup>171</sup> The United States does not express a view as to whether, in either its first written submission or its first oral statement to the Panel (which, of course, the United States has not seen), the Philippines has done so. However, such a methodology would appear to be within the Panel's terms of reference.

5.83 Mr. Chairman, members of the Panel, this concludes the oral statement of the United States. Thank you for your attention, and we hope that the comments provided by the United States will prove to be useful to the Panel.

## **VI. INTERIM REVIEW**

6.1 On 30 June 2010, the Panel submitted its Interim Panel Report to the parties. On 14 July 2010, the Philippines and Thailand submitted written requests for review of precise aspects of the Interim Panel Report. The Philippines requested, on the same day, an interim review meeting with the Panel regarding its decision not to make a recommendation on the September 2006 MRSP, the March 2007 MRSP and the August 2007 MRSP Notices. The Philippines' written comments of 14 July 2010 also included its specific views on the Panel's decision in this regard. The Panel granted the Philippines' request for an interim review meeting and provided Thailand an opportunity to provide its written comments on this specific issue prior to the interim review meeting. On 19 July 2010, Thailand submitted its written comments on the Philippines' comments on the Panel's decision not to make a recommendation with respect to the concerned MRSP Notices. The Panel held an interim review meeting on 20 July 2010 to exclusively address the question whether the Panel should make a recommendation with respect to these MRSP Notices. On 21 July 2010, the Philippines and Thailand submitted written comments on each others' requests for interim review on the issues other than the question addressed at the interim review meeting.

6.2 In accordance with Article 15.3 of the DSU, this section of the Panel's report sets out the Panel's response to the arguments made at the interim review stage, providing explanations where necessary. The Panel has modified aspects of its report in the light of the parties' comments where it considered these appropriate, as explained below. The Panel has also made certain technical and editorial corrections and revisions to the Interim Panel Report for the purposes of clarity and

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<sup>169</sup> Thailand's first written submission, paras. 299-300.

<sup>170</sup> Request for the Establishment of a panel by the Philippines, WT/DS371/3, para. 13.

<sup>171</sup> Appellate Body Report, *US – Zeroing (EC)*, paras. 196-198.

accuracy. References to sections, paragraph numbers and footnotes in this section relate to the Interim Panel Report, except as otherwise noted.

A. THE PANEL'S FINDINGS AND RECOMMENDATIONS

1. Paragraph 8.8 of the Interim Panel Report – the Philippines' comments

6.3 Regarding the September 2006, March 2007 and August 2007 MRSP Notices, although agreeing with the Panel's finding that these MRSP Notices have been superseded by subsequent Notices, the **Philippines** disagrees with the Panel's conclusion that these measures thus have expired and ceased to exist for purposes of Article 19.1 of the DSU.<sup>172</sup> It also contests that it agreed to this understanding during the proceedings.<sup>173</sup> On the contrary, the Philippines argues that these MRSPs continue to exist and therefore requests that the Panel recommend Thailand to bring them into conformity.<sup>174</sup>

6.4 The Philippines contends that "for purposes of Article 19.1 of the DSU, the case-law shows that a measure that is no longer in force, for example, because it has been superseded or replaced, may continue to 'exist' ... , if the respondent Member will take further action in relation to the measure or if the measure will otherwise continue to have effects in domestic law".<sup>175</sup> The Philippines refers to the panel rulings in *EC – Commercial Vessels* and *India – Autos* to underline its position that only when measures have "ceased to have an effect", there is no obligation to bring them into conformity.<sup>176</sup>

6.5 First, the Philippines argues that the three MRSP Notices at issue are still in existence because they are being challenged in domestic legal proceedings. To explain its stance, the Philippines refers to the Appellate Body report in *US – Zeroing (Article 21.5 – Japan)*, which concerned "administrative reviews that superseded each other, similar to the way in which the MRSP Notices do" and these reviews had been "challenged in domestic legal proceedings, which effectively prolonged the existence of the reviews".<sup>177</sup> In that case, the Appellate Body clarified that any WTO-inconsistent action taken in relation to a measure found to be WTO-inconsistent "must cease by the end of the reasonable period of time".<sup>178</sup> Subsequently, the Philippines explains that the August 2007 MRSP Notice first continues to exist through Thai administrative proceedings in which DG Excise "must still take action to decide whether to insist upon enforcement of the discriminatory Notice or to correct the discrimination" and that second, the Notice also continues to exist because Thai courts "may also be called upon to take action in relation to the measure".<sup>179</sup> In addition, the September 2006 and March 2007 MRSP Notices continue to exist through Thai judicial proceedings in which "Thailand's judiciary must rule whether the two WTO-inconsistent measures may be enforced given that they involve, *inter alia*, unlawful discrimination against cigarettes imported from the Philippines".<sup>180</sup>

6.6 Hence, according to the Philippines, since Thailand still has to decide on the final tax base of the WTO-inconsistent measures, "*the tax base continues to have effects on the financial burden to be imposed* [and] [s]o long as the final tax base is undecided, the measure still exists". Therefore, the Philippines wants the Panel to make a recommendation regarding the three MRSP Notices, since a recommendation would ensure that "if the final tax base is decided after the end of the [reasonable

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<sup>172</sup> Philippines' comments on the Interim Panel Report, paras. 94-97.

<sup>173</sup> Philippines' comments on the Interim Panel Report, paras. 96.

<sup>174</sup> Philippines' comments on the Interim Panel Report, para. 98.

<sup>175</sup> Philippines' comments on the Interim Panel Report, para. 99.

<sup>176</sup> Philippines' comments on the Interim Panel Report, paras. 100-101.

<sup>177</sup> Philippines' comments on the Interim Panel Report, paras. 102-104.

<sup>178</sup> Philippines' comments on the Interim Panel Report, para. 103, referencing Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 160.

<sup>179</sup> Philippines' comments on the Interim Panel Report, para. 106.

<sup>180</sup> Philippines' comments on the Interim Panel Report, paras. 106 and 109 and Annex C.

period of time], [Thailand] cannot continue violating WTO law by giving *continued effect* to a WTO-inconsistent *tax base*".<sup>181</sup>

6.7 Second, the Philippines contends that the Panel should make a recommendation regarding the three MRSP Notices, because MRSP Notices are "replacement measures": they are replaced by a subsequent measure that has "very similar substantive characteristics". According to panels and the Appellate Body in some of the zeroing cases it was stated that such replacement measures can be regarded as forming part of the same dispute.<sup>182</sup> In addition, in its opening statement at the interim review meeting, the Philippines explained that the MRSP Notices form a "chain of inter-connected measures" that are part of a single dispute, and that therefore implementation obligations assumed in relation to one measure in the chain impose similar obligations in relation to subsequent measures.<sup>183</sup>

6.8 Consequently, the Philippines requests the Panel to make a recommendation regarding the three MRSP Notices at issue, to ensure that if, after the reasonable period of time, Thailand has not terminated its WTO-inconsistent measures, the Philippines can resort to compliance procedures under Articles 21 and 22 of the DSU.<sup>184</sup>

6.9 **Thailand** argues that the September 2006, March 2007 and August 2007 MRSP Notices have been superseded and are no longer used to assess or collect VAT on sales of imported cigarettes, hence they ceased to exist.<sup>185</sup> Consequently, under Article 19.1 of the DSU, the Panel cannot make recommendations in relation to measures that no longer exist.<sup>186</sup> The right to make a recommendation under Article 19.1 of the DSU should not be used to create a retrospective remedy that is not otherwise available under the DSU.<sup>187</sup>

6.10 Regarding the domestic legal/administrative proceedings, Thailand first states that these proceedings are not within the Panel's terms of reference and, therefore, cannot themselves be the subject of recommendations by the Panel.<sup>188</sup> Second, Thailand claims that the Philippines misinterprets the zeroing jurisprudence and explains that the main issue in those cases was whether the implementation obligation also applied to imports that had entered the United States before the end of the reasonable period of time ("RPT"), but for which duties had not been finally assessed ("liquidated") by the end of the RPT. The United States claimed that challenges of the duties in domestic proceedings delayed the liquidation of these duties, and that therefore these should not be taken into account in checking whether the implementation obligation had been fulfilled. The Appellate Body found that the implementation obligation applied to entries for which liquidation took place after the end of the RPT, regardless of when the calculation of the dumping margin took place. According to Thailand, therefore, "continuing effects" were found in that case because "*liquidation of entries at WTO-inconsistent rates would continue after the end of the RPT, not because the measure had been challenged in domestic proceedings*" (italics in original). This can be contrasted to the case

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<sup>181</sup> Philippines' opening statement at the interim review meeting, para. 5; comments on the Interim Panel Report, paras. 107 and 110; answer to Panel question No. 9 at the interim review meeting; concluding remarks at the interim review meeting.

<sup>182</sup> Philippines' comments on the Interim Panel Report, paras. 114-115, referring to Appellate Body report on *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 160; Panel Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 7.148-7.149 and 7.154; Panel Report, *US – Continued Zeroing*, para. 7.28, upheld by the Appellate Body report, para. 236.

<sup>183</sup> Philippines' opening statement at the interim review meeting, para. 13; answer to Panel question Nos. 3 and 4 at the interim review meeting.

<sup>184</sup> Philippines' answer to Panel question Nos. 1, 4 and 9 at the interim review meeting; concluding remarks at the interim review meeting.

<sup>185</sup> Thailand's comments on issues for the interim review meeting, para. 8.

<sup>186</sup> Thailand's comments on issues for the interim review meeting, para. 6.

<sup>187</sup> Thailand's comments on issues for the interim review meeting, para. 25.

<sup>188</sup> Thailand's comments on issues for the interim review meeting, para. 8.

at hand in which the three MRSPs will never be used again to collect VAT and hence there is no such continuing effect.<sup>189</sup>

6.11 Moreover, Thailand explains that the scope of the administrative proceeding regarding the August 2007 MRSP Notice was limited to a request from PM Thailand to DG Excise to amend the August 2007 MRSP and to provide details on its calculation. Since the August 2007 MRSP Notice has been superseded by the August 2008 MRSP Notice, the remedy sought by PM Thailand was granted and there is no remaining action to be taken by Thailand regarding this measure. The mere possibility that importers may have recourse to domestic court proceedings "at some indeterminate point in the future" cannot change Thailand's implementation obligations with respect to this MRSP Notice.<sup>190</sup> Regarding the September 2006 and March 2007 MRSP Notices, Thailand states that the Philippines has failed to show that the existence of these domestic court proceedings gives rise to "anything like the situation in the zeroing cases". To the contrary, the remedies sought in these appeals were originally limited to a request for revocation of the Notices. The Philippines' new and untimely evidence regarding the appeal of these proceedings<sup>191</sup> before the Thai Supreme Court does not explain how these proceedings could serve to delay the application of these MRSP Notices until after the Panel's ruling or the end of the reasonable period of time in this case. Moreover, if the Supreme Court would rule that these MRSP Notices should indeed be revoked, PM Thailand will have to start a different procedure before DG Revenue to seek a refund. Thailand believes it is unlikely that PM Thailand will be able to obtain this refund.<sup>192</sup>

6.12 In relation to the Philippines' argument that the MRSP Notices form a chain of interconnected measures, Thailand puts forward that in the zeroing cases there was one single anti-dumping order under which several administrative reviews took place that were thus interconnected, while in this case there is no connection between the collection of VAT on particular sales from MRSP Notice to MRSP Notice: they do not form part of the same proceeding, they are not subject to collective review, and they do not form part of the same continuum of events. If the Philippines' reasoning was followed, all VAT and classification decisions would form a chain.<sup>193</sup>

6.13 As indicated in paragraph 7.563 of the Interim Panel Report, the **Panel** found that the September 2006, the March 2007, and the August 2007 MRSP Notices were inconsistent with Thailand's obligations under Article III:2, first sentence of the GATT 1994. We decided, however, not to make a recommendation with respect to these MRSP Notices as they had already ceased to exist at the time of the establishment of the Panel. This decision is set out in paragraph 8.8 of the Interim Panel Report.<sup>194</sup>

6.14 The Philippines requests in its interim review comments that, pursuant to Article 19.1 of the DSU, the Panel recommend that these Notices be brought into conformity with the obligations under the first sentence of Article III:2 of the GATT 1994. In making this request, the Philippines argues

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<sup>189</sup> Thailand's comments on issues for the interim review meeting, paras. 9-11.

<sup>190</sup> Thailand's comments on issues for the interim review meeting, paras. 36-39.

<sup>191</sup> In paras. 48-51 of its written comments of 19 July 2010, Thailand refers to para. 15 of the Panel's working procedures in which it is provided that all evidence other than rebuttal evidence, was to be provided "to the Panel no later than the first substantive meeting, except with respect to factual evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by each other". Subsequently, Thailand explains that Annex C of the Philippines' comments on the Interim Panel Report contains new evidence, which the Panel therefore should not take into account at this stage of the proceedings.

<sup>192</sup> Thailand's comments on issues for the interim review meeting, para. 46; answer to Panel question No. 6 at the interim review meeting.

<sup>193</sup> Thailand's comments on issues for the interim review meeting, para. 17; answer to Panel question No. 4 at the interim review meeting.

<sup>194</sup> The Philippines does not dispute that the December 2005 MRSP Notice has expired and ceased to exist for the purposes of Article 19.1 of the DSU.

that a measure that is no longer in force because, for example, it has been superseded or replaced, may still continue to exist for purposes of Article 19.1 of the DSU if the respondent Member takes further action in relation to the measure later on, or if the measure will otherwise continue to have effects in domestic law. Thailand also does not argue, in our understanding, that a panel should never make a recommendation with respect to a measure that was superseded or replaced. Thailand appears to agree that in determining whether a panel must make a recommendation with respect to such a measure, the legal standard to be applied is whether the measure continues to exist after it has been superseded or replaced. The parties' disagreement therefore lies in the application of that principle to the factual circumstances of this case, namely whether the concerned MRSPs must be considered as continuing to exist for purposes of Article 19.1 of the DSU.

6.15 In paragraphs 7.42-7.43, 7.46-7.47, 7.62-7.66 of the Interim Panel Report, we addressed issues relating to the panels' *examination* of the measures which had been completed before or have expired at the time of the establishment of a panel. Although the parties do not take issue with the Panel's conclusion that the so-called expired and/or completed measures may still be subject to panels' examination and rulings depending on the factual circumstances in each case, they have differing views on whether panels also must make a recommendation pursuant to Article 19.1 of the DSU with respect to such expired measures. Although a measure can normally be considered to have ceased to exist if it has been superseded or replaced by a subsequent measure or reaching the end of the period of effect, we consider that the measure's expiration in such circumstances would not in itself make it automatically fall outside the scope of panels' obligation to make a recommendation under Article 19.1. As the Philippines submits, there may be situations where despite the expiry nature of a measure, it must still be brought into compliance to the extent that the measure continues to exist by being subject to a further action by the responding Member or by continuing to have effects on the concerned imported goods.

6.16 Before turning to the specific factual situation presented in this case based on our understanding of the nature of the panels' obligation under Article 19.1 as set out in the previous paragraph, we will first address the premise of the Philippines' position. The Philippines' request for the Panel's recommendation with respect to the three MRSP Notices found inconsistent with Article III:2 of the GATT 1994, appears to be based on the premise that the Philippines *needs* recommendations to pursue compliance proceedings, if necessary, under, *inter alia*, Articles 21.5 and 22.6 of the DSU as, in the absence of a recommendation under Article 19.1 of the DSU, the Philippines' right to pursue compliance proceedings under Articles 21.5 and 22 would be undermined. The Philippines submits that only recommendations by the DSB would impose positive obligations in relation to the subject measures.<sup>195</sup>

6.17 We do not however find any language in the relevant provisions of Articles 21 and 22 of the DSU indicating that an implementing Member's compliance obligation arises only from panels' *recommendations*. Rather, most of the provisions relating to compliance obligations under Articles 21 and 22 of the DSU refer to both recommendations and *rulings*.<sup>196</sup> For example, Article 21.1 provides, "prompt compliance with *recommendations or rulings* of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". In our view, the scope of the compliance requirement under these provisions is therefore broader than just "recommendations". In any event, it is difficult to envision a situation where the Philippines will *a priori* be precluded from resorting to the compliance proceedings with respect to any future action taken by Thailand if it can be shown that such action is related to the Panel's findings on the inconsistency of the concerned MRSP Notices with Thailand's obligations under Article III:2 of the GATT 1994. As noted in paragraphs 7.42 and 7.43 of the Interim Panel Report, previous panels considered it necessary and important to make findings even with respect to measures that have expired at the time of making

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<sup>195</sup> Philippines' response at the interim review meeting.

<sup>196</sup> See also Articles 21.3, 21.5, 21.6, and 22.2 of the DSU.

such findings in certain situations. Among those are situations where a measure was still impairing benefits accruing to a complaining Member or situations where there remained the prospect of reintroduction of the measure, and thus making findings with respect to expired measures would contribute to resolving a particular dispute. If only recommendations were to guarantee the complaining Member's right, as granted under the DSU, to seek compliance proceedings, there would be no meaning in even making *findings* for expired measures, which has not been the view of the Appellate Body and previous panels.<sup>197</sup> We also do not believe that such an understanding would serve the spirit and purpose of the WTO dispute settlement mechanism.

6.18 Specifically in the factual context of the current dispute, the Philippines' position that these MRSPs continue to exist even though they have been superseded by subsequent MRSP Notices rests on two lines of arguments: first, the concerned MRSP Notices are all subject to ongoing domestic proceedings in which Thai executive and judicial authorities will take action in relation to them; and, second, to the extent that existing MRSPs continue to be replaced by new MRSPs under Thai law, which according to the Philippines are a chain of closely connected, succeeding MRSP measures, Thailand's obligation under Article III:2 of the GATT 1994, as clarified by the Panel with respect to the September 2006 and the March and August 2007 MRSPs, should equally extend to those future MRSPs through the Panel's recommendation.<sup>198</sup> We will evaluate these two lines of arguments in turn.

6.19 First, we examine whether the domestic proceedings in which the three MRSP Notices at issue are being reviewed can be considered as the Thai government action affecting these Notices.<sup>199</sup> The factual aspect of the current proceedings pending before both DG Excise and the Thai Supreme Court are described in paragraph 6.5 above. The Philippines submits that the concerned MRSP Notices continue to exist because they are subject to these ongoing domestic proceedings in which Thai executive and judicial authorities will *take action* in relation to them.<sup>200</sup> In its oral statement at the interim review meeting, the Philippines explained that the types of actions to be taken by different branches of the Thai government included the following actions: (i) deciding whether to continue enforcing the discriminatory tax base and, possibly, (ii) establishing a new tax base, and (iii) granting a refund.<sup>201</sup>

6.20 We do not consider that the Philippines' description of the so-called future actions yet to be taken by the Thai government, however, correctly reflects the exact status of the concerned MRSP Notices. For example, the Philippines states that Thailand still has to decide the *final* tax base, which we understand refers to the concerned MRSPs, because of the domestic proceedings in which the concerned MRSPs are being challenged. As the Philippines confirmed at the interim review meeting, however, Thai Excise had completed the collection of the VAT amount for imported cigarettes, calculated based on the concerned MRSPs, until new MRSPs came into effect in August 2008. The September 2006 and the March and August 2007 MRSP Notices therefore no longer form the tax base for the imported cigarettes at issue. Further, even if these MRSPs were found inconsistent by domestic review authorities, it is not clearly shown to us that such findings will necessarily lead to a revocation of the concerned MRSPs and/or a refund of any excess VAT paid based on those MRSPs.

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<sup>197</sup> Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, paras. 261-273; Panel Report, *EC – Commercial Vessels*, para. 8.4; Panel Report, *Columbia – Ports of Entry*, paras. 7.45-7.54.

<sup>198</sup> Philippines' interim comments of 14 July 2010, para. 105; response to Panel question at the interim review meeting.

<sup>199</sup> In framing the issue before us as above, we are not questioning the understanding, as clarified by the Appellate Body, that government actions also cover those of domestic judicial bodies. Our question pertains to whether the subject government actions, the domestic executive as well as judicial proceedings in this case, are making the measures at issue continue to have effects.

<sup>200</sup> Philippines' interim comments of 14 July 2010, paras. 105, 106 and 109.

<sup>201</sup> Philippines' oral statement at the interim review meeting, paras. 2 and 10.

In these circumstances, we cannot agree with the Philippines' description that the MRSPs at issue are not enforced yet and did not form the final tax base for the VAT for the imported cigarettes at issue.

6.21 In this connection, the Philippines heavily relies on the Appellate Body's statements in *US – Zeroing (Article 21.5 – Japan)* to support its position. We consider, however, that the factual circumstances of that dispute must be distinguished from those in the present dispute. As Thailand explains, in *US – Zeroing (Article 21.5 – Japan)*, the issue was whether the implementation obligation also applied to imports that had entered the United States before the end of the reasonable period of time, but for which the anti-dumping duties had not been finally assessed and collected ("liquidated") by the end of the reasonable period of time due to the injunction imposed by the domestic court on the liquidation of the anti-dumping duties. The Appellate Body in that dispute found that the implementation obligation *did* apply to those imports because their *liquidation (final assessment)* took place after the end of the reasonable period of time. The Appellate Body's finding in that case, therefore, provides guidance that an important factor in determining the point in time when a government action can be considered as completed is the *final assessment and collection* of the anti-dumping duties, which include the original determination of the dumping margin and the rulings by a domestic review body, if such a review is warranted under the domestic law, on the adequacy of the original determination.

6.22 In contrast to such factual circumstances, in the present dispute, Thai Excise had completed not only the calculation, but also the *collection* of VAT based on the MRSPs at issue. To that extent, we do not consider that the Appellate Body's reasoning in *US – Zeroing (Article 21.5 – Japan)*, as relied upon by the Philippines, can be equally applied to the situation in our case.<sup>202</sup> Furthermore, as noted earlier, it is not clear to us whether the MRSPs, once determined, can be re-determined in the same sense as the anti-dumping duties or customs valuation determinations may be re-determined. We understand that once MRSP Notices are issued, cigarette importers and TTM may request for new MRSPs.<sup>203</sup> In our view, however, a request for new MRSPs cannot be equated to a proceeding in which duties or customs values are challenged for re-determination. The main difference, in our view, can be found in that as for anti-dumping duties and customs values, a concerned Member government must take action, be it re-determination and/or refund, with respect to such duties and customs values if they were found by domestic review bodies to have been incorrectly determined. This feature is also related to the nature of obligations under the relevant WTO Agreements such as the Anti-dumping Agreement and the Customs Valuation Agreement.<sup>204</sup> With respect to the MRSPs at issue, however, it seems uncertain at best whether an importer would be able to have the expired MRSPs re-determined and/or to recover a refund for any excess tax paid because of an incorrectly determined tax base (MRSPs). Thailand submits that even if the Thai Supreme Court were to rule that these MRSP Notices should be revoked, PM Thailand will have to start a different procedure before DG Revenue to seek a refund. In any event, Thailand believes it is unlikely that PM Thailand will be able to obtain this refund. In these circumstances, we are not convinced by the Philippines' argument that the concerned MRSP Notices are subject to further actions by the Thai government.

6.23 The Philippines further submits that MRSP Notices form a chain of inter-connected measures that are part of a single dispute, under which implementation obligations assumed in relation to one measure in the chain impose similar obligations in relation to subsequent measures. As we laid out in paragraphs 7.459-7.468 of the Interim Panel Report, DG Excise determines MRSPs based on its so-called general methodology, as described by Thailand in this proceeding. We understand that the expired MRSPs may be considered to be connected to the current and subsequent MRSPs to the

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<sup>202</sup> Philippines' comments on the Interim Panel Report, para. 103, referencing Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 160.

<sup>203</sup> See para. 7.469.

<sup>204</sup> See Article 11.2 of the Anti-Dumping Agreement and Article 11 of the Customs Valuation Agreement.



extent that the same methodology continues to be applied to the determination of MRSPs for the imported cigarettes at issue. We also note the Philippines' argument that the Appellate Body's guidance in the zeroing cases that replacement measures with similar substantive characteristics can be regarded as forming part of the same dispute can equally apply to this case. In the Philippines' view, MRSP Notices are replaced by a subsequent measure that has "very similar substantive characteristics".

6.24 We do not agree, however, that MRSP Notices are necessarily comparable to anti-dumping orders in the context of the zeroing cases. As Thailand points out, the subject measure in the zeroing cases was one single anti-dumping order pursuant to which several inter-connected administrative reviews took place. In the case of MRSP determinations, DG Excise replaces existing MRSPs by new ones either when there is a change to any of the components of the MRSP (including tax rates) or upon request from an importer. We therefore consider that the link between successive MRSP determinations is not similar to the link observed between a series of anti-dumping duties which stem from one single anti-dumping order.

6.25 Having said this, however, we are mindful of the particular nature of the general methodology used in determining MRSPs. Specifically, we note that, in its calculation of new MRSPs, DG Excise generally refers back to the amount of "marketing costs" included in the latest MRSP or in the MRSP previously requested by the domestic manufacturer or the importer.<sup>205</sup> Thus, we cannot eliminate the possibility that specific aspects of the MRSPs at issue in this dispute, which were found to render these MRSPs inconsistent with Thailand's obligation under Article III:2, would continue to have effects on future determinations of MRSPs for imported cigarettes. We note the panel's observation in *EC – Commercial Vessels* that "the notion of a measure that no longer 'exists' is not always straightforward". That panel then concluded that as it could not determine with certainty whether and to what extent it would be possible for subsidies to continue to be provided pursuant to applications made before the expiry of those schemes, its recommendation did not apply to the subsidy schemes that have expired, except *to the extent* that those schemes continued to be operational. Following the guidance by the panel in *EC – Commercial Vessels* and in the light of the particular circumstances in this dispute, we have modified the conclusion in paragraph 8.8 to reflect our considerations above.

## **2. Customs valuation determinations as "completed acts" (paragraphs 7.40-7.51) – Thailand's comments**

6.26 **Thailand** requests review of certain aspects of paragraphs 7.40-7.51 of the Interim Panel Report, because (i) it does not accurately reflect Thailand's arguments and (ii) it does not fully address the arguments with respect to whether, or in what circumstances, the Panel should make recommendations with respect to completed customs valuation determinations.<sup>206</sup>

6.27 With respect to the first reason, Thailand submits that the Panel incorrectly states in paragraph 7.41 that Thailand argued that it should not "rule" with respect to the [[xx.xxx.xx]] entries listed in the Philippines' request. Thailand only requests that the Panel revise the final sentence of paragraph 7.41 to state that "Thailand takes the position that the Panel should not make recommendations with respect to the claims relating to these entries".

6.28 Regarding the second reason, Thailand states that in paragraphs 7.40-7.51 the Panel focuses on the issue of whether it may make findings regarding the [[xx.xxx.xx]] entries at issue, but does not separately address whether it would be appropriate to also make recommendations. In paragraph 7.51, however, the Panel concludes, without any further explanation, that it will make recommendations regarding these entries. Therefore, Thailand requests the Panel to revise these

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<sup>205</sup> Interim Panel Report, paras. 7.465 and 7.494-7.499.

<sup>206</sup> Thailand's comments on the Interim Panel Report, para. 3.

paragraphs and to explain whether and why it considers it appropriate to make recommendations regarding customs valuation determinations (in general).<sup>207</sup>

6.29 Regarding the issue whether or not the Panel should make a recommendation, Thailand puts forward an argument that there is a difference between "completed acts" that give rise to ongoing "measures" within the meaning of Articles 3.3 and 6.2 of the DSU (such as the measures at issue in *Chile – Price Band System*), and "completed acts" that do not give rise to an ongoing measure, such as the valuation and assessment of customs duties in this case. The customs duties and other internal taxes have been finally assessed and paid with respect to the [[xx.xxx.xx]] entries at issue before the establishment of the Panel. Hence the Panel has not specified a factual basis on which these entries can be characterised as having continuing effects that may be relevant for the Panel to make recommendations with respect to them.<sup>208</sup>

6.30 The Panel's failure to explain why it considers it appropriate to make recommendations could be interpreted to mean that the Panel considers that *all* customs valuation determinations that have been completed could be subject to recommendations in dispute settlement proceedings. In that case, Members could be retrospectively required to revise these determinations with respect to which all domestic legal proceedings had been completed long before the establishment of a panel. Therefore, Thailand requests the Panel to explain why it considered it appropriate to make recommendations with respect to the customs valuation determinations for the [[xx.xxx.xx]] entries at issue.<sup>209</sup>

6.31 The **Philippines** points out that this issue is linked to its request on revision of the Panel's analysis of findings and recommendations on the MRSP Notices. It states, as the Panel noted in paragraph 7.46 of its Interim Panel Report, that the issue is *not* whether an act is "completed", but whether a measure found to be inconsistent continues to exist.<sup>210</sup> The Philippines then explains that one way in which a measure can continue to exist is where it is subject to domestic legal proceedings. The Philippines subsequently provides the same explanation as it gave for its arguments on domestic proceedings in respect of the MRSP Notices.

6.32 In addition, the Philippines discusses Thailand's assertion that it would be subject to a *retrospective* remedy if it had to revise measures that were applied to transactions that occurred before the end of the reasonable period of time. The Philippines refers to the Appellate Body statements in *US – Upland Cotton* and *US – Zeroing (Japan) (Article 21.5 – Japan)* to explain that after the end of the reasonable period of time, WTO-inconsistent conduct must cease completely.<sup>211</sup>

6.33 The Philippines agrees with Thailand's request that the Panel clarify the factual circumstances that support its decision to make a recommendation regarding the [[xx.xxx.xx]] entries at issue. However, the Philippines also contests some arguments put forward by Thailand. Specifically, it disagrees with the idea that "all domestic legal proceedings had been completed long before the establishment of a panel".<sup>212</sup> The Philippines points at the fact that it appealed the transaction value of the [[xx.xxx.xx]] entries and that these appeals are still pending before the BoA, a fact that has been recognized by the Panel in its Interim Panel Report.<sup>213</sup> The BoA is reviewing Thai Custom's assessment of the customs value of the [[xx.xxx.xx]] entries and may revise that value. If the BoA

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<sup>207</sup> Thailand's comments on the Interim Panel Report, para. 3.

<sup>208</sup> Thailand's comments on the Interim Panel Report, para. 7.

<sup>209</sup> Thailand's comments on the Interim Panel Report, para. 8.

<sup>210</sup> Philippines' comments on the Interim Panel Report, para. 3.

<sup>211</sup> Philippines' comments on the Interim Panel Report, paras. 11-15.

<sup>212</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 19.

<sup>213</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 19-20, referring to para. 7.92, footnote 281 of the Interim Panel Report.

reduces Thai Custom's valuation, DG Customs grants a refund of excess customs duties and excess payments of excise, health, and television taxes.<sup>214</sup>

6.34 Hence, domestic legal proceedings regarding the [[xx.xxx.xx]] valuation decisions are ongoing and in those proceedings, Thailand is still to take action to determine the final assessed customs value, and to determine "*whether to enforce the WTO-inconsistent measures at issue*" (italics in original). The Philippines contends that these actions in the domestic proceedings will determine the legal effects of the measures at issue, including the customs duties and internal taxes to be paid under the measures, and in these circumstances, the [[xx.xxx.xx]] customs valuation measures have not ceased to exist. Therefore, the Panel must make a recommendation under Article 19.1 of the DSU regarding these measures.<sup>215</sup>

6.35 First, in the light of Thailand's request that Thailand's arguments be revised because they are not correctly reflected in paragraph 7.41, the **Panel** has slightly modified the last sentence of paragraph 7.41 as it deemed appropriate.

6.36 We now address Thailand's second request that the Panel explain why it considered it appropriate to make recommendations, as stated in paragraph 7.51, with respect to the customs valuation determinations for the [[xx.xxx.xx]] entries at issue.

6.37 As the Philippines notes, we find this issue to be closely related to the question we addressed in the previous section regarding whether we must make a recommendation with respect to certain MRSP Notices. First, we agree that in determining whether panels should make a recommendation for expired measures, the applicable legal standard should be the same regardless of the measure at issue. The nature and characteristics of the measure being assessed, however, may lead panels to a different conclusion as to whether to make a recommendation.

6.38 We recall our discussion above that the legal standard in this regard should be whether a measure, despite its expiry nature, continues to exist. There may indeed be different circumstances under which the continuing effect of an expired measure can be found. To that extent, it is not our task here to draw up an exhaustive list of such circumstances. However, as indicated above, we agree, and the parties do not appear to dispute, that an expired measure may be considered as having a continuing existence if that measure is still subject to a government action(s) and/or if it still has an effect(s) on imported goods or on measures currently in force.

6.39 Regarding Thai Customs valuation determinations in respect of the [[xx.xxx.xx]] entries at issue, Thailand underlines the fact that the customs duties and other internal taxes, calculated based on these customs valuation determinations, have been finally assessed and paid prior to the establishment of the Panel. As such, according to Thailand, these determinations constitute completed acts and do not give rise to ongoing measures, which is a fact distinguishable from other measures such as the ones at issue in *Chile – Price Band System*.

6.40 In respect of Thailand's arguments relating to the concerned customs valuation determinations as "completed acts", we consider our discussion in paragraphs 7.40-7.51 of the Interim Panel Report to be sufficient. We agree with Thailand that these customs valuation determinations have been finally assessed and collected by Thai Customs. To such an extent and given that the WTO dispute

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<sup>214</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 22.23, in its explanation the Philippines' points at in [[xx.xxx.xx]] appeals regarding entries in 2000-2003, the BoA reduced the customs value and accordingly DG Customs refunded customs duties. The Philippines also refers to Thailand's answers to Panel question No. 145 and Philippines' question No. 3 in which Thailand acknowledges that excess customs duties and excise, health and television taxes will be refunded after determination of a lower customs value by the BoA.

<sup>215</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 25-26.

settlement system does not generally provide for a retrospective remedy, they are completed acts which cannot practically be brought into compliance.

6.41 However, the Philippines has shown that the pending domestic review proceedings may result in an obligation for the Thai government to revise or re-determine the concerned customs valuation determinations. As described in paragraph 7.92 of the Interim Panel Report, Thai law provides for the right to appeal the customs valuation determinations, first before the BoA and then before the Thai Tax Court. Thus, those determinations must be distinguished from the MRSP Notices that were the subject of our considerations above. As for the MRSP Notices, we were not presented with evidence establishing that a domestic review of a given MRSP determination, either before DG Excise or before the Thai Supreme Court, could result in a revision or re-determination as in the case of customs valuation determinations. In other words, customs valuation determinations challenged by an importer will be subject to specific government actions if they are found to be incorrect by domestic review bodies. We also find support for our understanding in the nature of the obligations under the Customs Valuation Agreement, particularly those in Article 11 of this agreement, which requires Member governments to provide for the right to appeal determinations of the customs value. Hence, this agreement specifically envisages situations where the adequacy of a given customs valuation determination is reviewed by the Member's administrative and judicial authorities. We therefore agree that the ongoing domestic proceedings in relation to the [[xx.xxx.xx]] valuation determinations will determine the legal effects of the measures at issue. This, in our view, renders the customs valuation determinations at issue subject to further actions by the Thai government and consequently to continue to exist for the purposes of Article 19.1 of the DSU.

6.42 In the light of our considerations above, we have decided to maintain our conclusion to make recommendations for Thai Customs' customs valuation determinations with respect to the [[xx.xxx.xx]] entries at issue. We have modified the text of paragraph 7.51 and added a footnote to explain our decision in this regard.

## B. CUSTOMS VALUATION AGREEMENT

### 1. The Panel's analysis of the "substantive aspects" of Thai Customs' application of the deductive value method (paragraphs 7.332-7.382) – Thailand's comments

#### (a) Standard of review for the Panel's evaluation of the Philippines' claim under Article 7 of the Customs Valuation Agreement

6.43 **Thailand** claims that in this section of its analysis, the Panel improperly conducted a *de novo* review of Thai Customs' determination of the deductive value for [[xx.xxx.xx]] entries at issue. By referring to several parts of the Interim Panel Report, Thailand explains that the Panel adopted a standard of review whereby its review was limited to whether Thai Customs provided a reasoned and adequate explanation to support its determination.<sup>216</sup> However, it contends that the Panel did not follow this standard consistently in the Interim Panel Report and that the Panel should have stopped its analysis after its conclusion in paragraph 7.336 of the Interim Panel Report that Thailand "failed to apply the deductive valuation method consistently with Article 7.1". Instead, the Panel continued "for the sake of completeness" to examine *de novo* the information and evidence on the record to determine whether these deductions were warranted. Therefore, Thailand requests that the Panel delete this analysis regarding the "substantive aspect" of the deductive value from the report.<sup>217</sup>

6.44 The **Philippines** does not share Thailand's point of view. Instead, it argues that if the Panel had only examined the procedural aspect of the Philippines' claim on this issue, it would not have

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<sup>216</sup> Thailand's comments on the Interim Panel Report, para. 19.

<sup>217</sup> Thailand's comments on the Interim Panel Report, paras. 15-25.

resolved the dispute.<sup>218</sup> Moreover, the Philippines does not read the Panel's statements as implying that it conducted a *de novo* review. Rather, in the Philippines' view, the Panel properly stated that its role was "limited to determining whether there was an evidentiary basis for Thai Customs' decision – not the Panel's – not to deduct certain items".<sup>219</sup> The analysis put forward by the Panel is an *interpretative framework* on the substantive aspects of the deduction of sales allowances, provincial taxes, and transportation costs, which does not involve any *review* of Thailand's valuation decisions.<sup>220</sup>

6.45 However, to avoid confusion, the Panel could consider incorporating this interpretative framework into an earlier part of its reasoning. In paragraphs 7.332 to 7.336 of its Interim Panel Report, the Panel provides an introductory section to the claims on the deduction of the three items. After drawing a conclusion at the end of the introductory section, the Panel continues with its analysis of the substantive aspects. The Philippines notes that it is unusual for a Panel to reach a conclusion in an introduction and that by moving this conclusion to the end of the section, Thailand's standard of review objection will be taken away. Furthermore, in its analysis of the deduction of the three items, the Panel could make clear that it is reviewing the authority's decision consistently with the standard of review, by adding a phrase "in light of the explanation given by the authority and of the evidence before the authority".<sup>221</sup>

6.46 Finally, the Philippines notes that to make clear that it did hear and examine Thailand's arguments, the Panel might consider addressing Thailand's explanations before the Panel to show that they are without merit. The Philippines suggests that if the Panel's reasoning following paragraph 7.336 is intended to achieve these ends, it expressly state so at the beginning of the section instead of at the end.<sup>222</sup>

6.47 The **Panel** notes that Thailand is correct in stating that the standard of review of this Panel is limited to whether Thai Customs provided a reasoned and adequate explanation to support its determination. We also confirm that no *de novo* review has been conducted. As stated by the Philippines, our analysis consisted of an interpretation of the substantive aspects of the deduction of the three items at issue and not of a review of the evidence to determine ourselves whether these items should have been deducted. Therefore, the Panel declines to delete the paragraphs as requested by Thailand. However, as the Philippines suggests, we have changed the order of the paragraphs at issue and added sentences to clarify the standard of review applied to our relevant analysis contained in paragraphs 7.332-7.382.

(b) Other issues regarding the Panel's analysis of the Philippines' claim under Article 7 of the Customs Valuation Agreement

6.48 **Thailand** argues that if the Panel declines to delete paragraphs 7.332-7.382, it should make several revisions to it.<sup>223</sup> Regarding the Panel's analysis on the deduction of sales allowances, it states that it is unclear what the Panel means with the statement "we are not presented with any evidence that can guide us on the question of whether the amount of sales allowances claimed for a brand of imported cigarettes must match the amount of sales allowances provided in each month to the relevant company at issue" in paragraph 7.370. Thailand claims that the Panel's suggestion that Thai Customs should have been able to adjust the amounts illustrates the dangers inherent in the Panel attempting to

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<sup>218</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 33.

<sup>219</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 35-38, referring to para. 7.313 of the Interim Panel Report.

<sup>220</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 40.

<sup>221</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 42-45.

<sup>222</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 54-56.

<sup>223</sup> Thailand's comments on the Interim Panel Report, para. 26.

conduct a *de novo* review. Second, Thailand does not understand what claim the Panel thinks Thailand put forward when it states: "Thailand, as the party who puts forward this claim, had the burden of proving it with supporting evidence" in the same paragraph.<sup>224</sup>

6.49 Regarding the deduction of provincial taxes, Thailand requests the Panel to clarify to which finding it refers in paragraph 7.376 of the Interim Panel Report. In addition, Thailand notes that a "finding that provincial taxes *payable*, and not merely *paid*", must be deducted does not resolve the factual issues arising in this case. It explains that the evidence in the case did not indicate whether the GAQ price was based on sales for Bangkok or sales to other provinces, or a mix of the two; it did not indicate whether sales to this customer usually included payments for provincial taxes; and it did not allow for a calculation of a precise adjustment for provincial taxes in the event that the GAQ price consisted of a mix of sales on which provincial taxes were and were not payable or usually paid.<sup>225</sup>

6.50 In relation to the transportation costs, Thailand maintains that paragraphs 7.377-7.382 are "simply duplicative" of paragraphs 7.329-7.331 of the Interim Panel Report and should therefore be deleted.<sup>226</sup>

6.51 With respect to the deduction of sales allowances, the **Philippines** notes that in paragraph 7.370 of the Interim Panel Report the Panel expressly states that it is "*unable to examine evidence, because there is none*" (italics in original), and that it is therefore hard to see how the Panel could have conducted a *de novo* review. Instead, the Panel concluded that the authority's determination was WTO-inconsistent because there was "*no basis in the evidence before the authority*" (italics in original) for a refusal to deduct any sales allowances. The Philippines states that the Panel may wish to clarify that its conclusions are based on such an approach.<sup>227</sup>

6.52 Regarding the deduction of provincial taxes, the Philippines states that the Panel does not appear to provide any review of the facts surrounding the authority's decisions. In its comments, Thailand appears to re-argue the substance of the interpretative point. The Philippines urges the Panel to maintain its position, despite Thailand's repetition of its failed arguments.<sup>228</sup>

6.53 The Philippines disagrees with Thailand that paragraphs 7.377-7.382 on the deduction of transportation costs are a duplication of paragraphs 7.329-7.331, as they answer a different legal question.

6.54 Regarding the deduction of sales allowances, the **Panel** has made changes to paragraph 7.370 to clarify the issues put forward by Thailand.

6.55 In respect of provincial taxes, we have modified paragraph 7.376 to further clarify our point in light of Thailand's comments.

6.56 In paragraph 31 of its comments on the Interim Panel Report, Thailand repeats its arguments without making a specific request that for the deduction of provincial taxes, the evidence available, did not provide clear information as to whether the GAQ price was based on sales for Bangkok, which are excluded from provincial taxes; or on sales to provinces; or a mix of the two. First, we observe that these arguments have been reflected in paragraph 7.351 of the Interim Panel Report. We recall that in our analysis of the procedural aspects of the deductive valuation method we concluded that Thai Customs should have requested further information on provincial taxes if it considered the

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<sup>224</sup> Thailand's comments on the Interim Panel Report, paras. 28-29.

<sup>225</sup> Thailand's comments on the Interim Panel Report, paras. 30-31.

<sup>226</sup> Thailand's comments on the Interim Panel Report, paras. 32-33.

<sup>227</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 48-49.

<sup>228</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 50-51.

available information to be insufficient in deciding whether to deduct provincial taxes (and sales allowances).<sup>229</sup> Furthermore, in our analysis of the substantive aspects of the deductive valuation method, we concluded that "provincial taxes *payable* must be deducted if the information shows *usual* payments made for local taxes even if they are not included in the sales price based on which the deductive valuation method will be applied under Article 5".<sup>230</sup> We therefore confirm that it is not necessary to determine whether or not provincial taxes were included in the GAQ price.

6.57 Finally, the Panel does not consider paragraphs 7.377-7.382 on transportation costs to be "simply duplicative" of paragraphs 7.329-7.331, since they answer different legal questions, as pointed out by the Philippines. Paragraphs 7.329-7.331 focus on the procedural aspect of the deductions and answer the question whether Thai Customs properly consulted the importer; while paragraphs 7.377-7.382 address the substantive aspect of the deductions in relation to transportation costs. Therefore, the Panel declines to accept Thailand's request to delete paragraphs 7.377-7.382, but made a slight modification to paragraph 7.384 of the Final Report to clarify this point.

## **2. Aspects of the Panel's analysis of the Philippines' claim under Articles 1.1 and 1.2 (paragraph 7.194) – Thailand's comments**

6.58 **Thailand** disagrees with the Panel's analysis in paragraph 7.194 of the Interim Panel Report and requests that the Panel review the content and the conclusions contained in the paragraph. First, Thailand states that the Panel's analysis is incorrect to the extent that it gives the impression that Thai Customs determined that the transaction value was not acceptable after it received the 5 February 2007 letter. To the contrary, Thailand has argued that rejecting the transaction value and using the deductive value instead was "part of a single process" that included all contacts between the importer and Thai Customs between the date of the 5 February letter and the 6 March letter and meeting.<sup>231</sup> At the end of this process Thai Customs compared the transaction value to the deductive test value and at that point it rejected the transaction value, and not before that time.

6.59 Second, Thailand contends that the Panel's statement reads as if PM Thailand never requested Thai Customs to use a deductive testing methodology. Even if the 5 February letter does not explicitly request the use of this methodology, it must be read in the context of the subsequent exchanges between the importer and Thai Customs. Specifically PM Thailand's 6 March 2007 letter should be taken into account as in this letter "PM Thailand clearly and unambiguously asked Thai Customs to use a deductive testing methodology".<sup>232</sup>

6.60 The **Philippines** does not subscribe to Thailand's point of view. First, it states that the Panel's statement on the 5 February letter is literally quoted from Thailand's answer to Panel question No. 99(3), and thus the Philippines sees no reason to revise passages that have been directly taken from Thailand's response to a specific question.<sup>233</sup> Second, the Philippines disagrees with Thailand's reading of the 6 March 2007 letter. In the letter, PM Thailand states that it is providing information in response to a request by Thai Customs to allow the authority to determine the customs value "correctly", following the "hierarchical order" of the sequential valuation methods set forth in Thai law and indicates that deductive testing may be appropriate in certain circumstances. However, PM Thailand nowhere "requests" that the acceptability of the transaction value be tested exclusively

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<sup>229</sup> Interim Panel Report, para. 7.328.

<sup>230</sup> Interim Panel Report, para. 7.374.

<sup>231</sup> Thailand's comments on the Interim Panel Report, paras. 10-11.

<sup>232</sup> Thailand's comments on the Interim Panel Report, para. 12; Exhibit THA-92.

<sup>233</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 29.

by such testing or that Thailand abandon any effort to conduct a proper examination of the circumstances of sale.<sup>234</sup>

6.61 First, the **Panel** notes that its reproduction of Thailand's statement on the 5 February 2007 letter was not quoted verbatim from Thailand's answer to Panel question No. 99(3). In its answer to that question, Thailand described a process at the end of which Thai Customs decided to reject the transaction value after having compared it to the deductive test value subsequent to the letter and meeting of 6 March 2007. We have revised paragraph 7.194 to correctly reflect Thailand's arguments in this regard.

6.62 Second, regarding the content of the 6 March letter, we understand that in this letter, PM Thailand pointed to the fact that Thai Customs was asking PM Thailand to provide information to be used to calculate the computed value, while the hierarchical order of Ministerial Regulation No. 132/2000 (and of the Customs Valuation Agreement) prescribes that the calculation of a deductive value predates the calculation of a computed value. Hence, we do not consider this as amounting to be a request specifically to use the deductive value instead of the transaction value. Rather, this is a general request to follow the hierarchical order according to which the valuation method to be used should be chosen. While we disagree with Thailand's reading of the letter, we have modified and made additions to paragraph 7.194 to provide a more accurate/complete explanation on the issue.

### 3. The Philippines' comments

(a) Footnote 272, paragraph 7.91

6.63 The **Philippines** requests that the Panel use the name [[xx.xxx.xx]] instead of "Importer A" in footnote 272 of the Interim Panel Report to reflect the Philippines' arguments that [[xx.xxx.xx]] is not technically an importer because its goods transit through duty free areas, and have not formally entered Thailand or been cleared through Thai Customs.<sup>235</sup> **Thailand** is of the opinion that the Panel should "refer to the duty-free importer by name the first time it uses it, following by the notation ("Importer A") and then use the designation 'Importer A' on every following occasions". This would make the reading of the non-BCI version easier according to Thailand.

6.64 The **Panel** has modified footnote 272 as commented by the Philippines because the reference in the footnote to "Importer A" is not entirely correct and also included the Philippines' arguments on [[xx.xxx.xx]] (Importer A) in the footnote. We have changed the other references to [[xx.xxx.xx]] as suggested by Thailand.

(b) Paragraph 7.91

6.65 The **Philippines** requests the Panel to modify its statement in paragraph 7.91 of the Interim Panel Report, as this statement is factually incorrect. It clarifies that on 28 March 2008, Thai Customs started accepting the transaction values as customs values for all new entries. Concerning the [[xx.xxx.xx]] entries made between 13 September 2007 and 19 March 2008 on the other hand, Thai Customs only began accepting the transaction values as the correct customs values on or after 14 July 2008. For these entries however, transaction values had not been accepted at the time of clearance, and guarantee values had been collected in respect of potential customs and fiscal liabilities.

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<sup>234</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 30-31.

<sup>235</sup> Philippines' comments on the Interim Panel Report, paras. 7-10.



Concerning the three entries that cleared on 10 and 13 September 2007, Thai Customs also accepted the transaction values as the correct customs values on or after 14 July 2008.<sup>236</sup>

6.66 **Thailand** proposes that the statement by the Panel in paragraph 7.91 be kept, and that the words "subject to guarantee" be added to explain that, while Thai Customs began accepting the transaction values as the correct customs values for the entries at issue, guarantees had already been collected in relation to these entries.

6.67 As the information provided by the Philippines in its comments on the Interim Panel Report is accurate, the **Panel** has modified paragraph 7.91 of the Interim Panel Report accordingly.

(c) Paragraph 7.158

6.68 The **Philippines** takes issue with the wording of paragraph 7.158 of the Interim Panel Report in which it is stated that "[w]hile not disputing the overall sequence of the procedural steps as described above ...". It states that it agrees with the order of steps set forth in paragraph 7.156, but it "does not agree that a customs authority need not request information from an importer if the authority is unable to accept the transaction value without further enquiry".<sup>237</sup> The Philippines therefore requests that the Panel avoid suggesting that the Philippines agrees with the procedural steps described in paragraphs 7.152-7.156 of the Interim Panel Report.

6.69 **Thailand** does not read paragraph 7.158 or 7.152 as suggesting that "a customs authority need not request information from an importer if the authority is unable to accept the transaction value without further enquiry", and states that no change appears to be warranted.

6.70 The **Panel** considers that, on the contrary to the Philippines' statement, paragraph 7.152 of the report does not state that a customs authority need not request additional information. Instead, it states that the customs authority may "choose to ask the importer to provide information". The third sentence of paragraph 7.158 then reflects the Philippines' view on this issue by stating that "the Philippines' position is that a customs authority is obliged to undertake an active investigative role ...". We have therefore decided to maintain the current paragraphs at issue.

(d) Footnote 390, paragraph 7.184

6.71 The **Philippines** requests the Panel to revise footnote 390 of the Interim Panel Report where the Panel pointed to an inaccurate reference by the Philippines to Thailand's submissions. Seeking to show that Thai Customs had acknowledged a letter by PM Thailand asking Thai Customs to (i) accept the declared values; or (ii) explain in writing why it was not clearing the goods at the declared values, the Philippines referred to paragraph 24 of Thailand's second written submission. The correct reference was paragraph 24 of Thailand's second opening statement. As **Thailand** did not present any objection to this request, the **Panel** has modified footnote 390 of the Interim Panel Report accordingly.

(e) Paragraph 7.193

6.72 The **Philippines** takes issue with the second to last sentence in paragraph 7.193, which states "[t]here may ... between the same parties turn out to be the same". In its first oral statement, the Philippines has noted that the circumstances surrounding transactions in 2002-2003 were very

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<sup>236</sup> Philippines' comments on the Interim Panel Report, paras. 11-16, referring to its first written submission, para. 187.

<sup>237</sup> Philippines' comments on the Interim Panel Report, para. 17, referring to para. 7.152 of the Interim Panel Report.

different from those surrounding transactions in 2006-2007. The Philippines requests the Panel to include a footnote referencing this assertion. **Thailand** did not comment on this issue. The **Panel** has modified the paragraph at issue and included a reference to the Philippines' statement.

(f) Paragraph 7.265

6.73 The **Philippines'** contends that in paragraph 7.265 of the Interim Panel Report, the Panel misinterpreted paragraph 50, footnote 80 of the Philippines' second oral statement. From this footnote, the Panel understood that "the revised minutes were submitted to the Thai Tax Court for the first time in the context of PM Thailand's appeal before the court concerning the September 2006 MRSPs". According to the Philippines, however, in the footnote at issue, it referred to the original version of the minutes and notes that DG Customs sent this version of the Minutes to PWC ABAS. According to the Philippines, Thailand has not provided any documentary evidence to show that the revised version of the Minutes was provided to the Thai Tax Court. Therefore, the Philippines requests that the Panel modify paragraph 7.265 accordingly.<sup>238</sup> **Thailand** did not provide comments on this issue.

6.74 The **Panel** has modified paragraph 7.265 of the Interim Panel Report to correct its mistaken statement about paragraph 50, footnote 80 of the Philippines' second oral statement as pointed out by the Philippines.

(g) Paragraph 7.267

6.75 The **Philippines** requests that the Panel modify the first sentence of paragraph 7.267 to record that the evolution of its arguments occurred as a response to Thailand's changing description of its customs valuation decisions in the revised Minutes that were submitted at the first substantive meeting with the Panel.<sup>239</sup>

6.76 **Thailand** does not object to a change of this sentence. It nonetheless notes that even before the revised minutes were provided to the Panel, Thailand had already argued in its first written submission that regardless of what provision of domestic law was cited, Thai Customs had used a deductive value method within the meaning of Article 5 of the Customs Valuation Agreement.

6.77 The **Panel** agrees that the Philippines changed its arguments because of a change in Thailand's description of its customs valuation decisions, and changed the first sentence of paragraph 7.267 of the Interim Panel Report accordingly.

(h) Paragraph 7.298

6.78 The **Philippines'** states that in regard to Article 7.1 of the CVA, it put forward two claims, only one of which was discussed by the Panel. Therefore, the Philippines requests the Panel to also examine its claim that Thailand acted inconsistently with Article 7.1 of the CVA "by deducting incorrect amounts for VAT and excise tax for certain transactions".<sup>240</sup>

6.79 **Thailand** does not object to this request, but it disagrees with the Philippines assertion that "Thailand 'had not previously disclosed' the calculations of the deductive value for entries in the

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<sup>238</sup> Philippines' comments on the Interim Panel Report, paras. 27-31.

<sup>239</sup> Philippines' comments on the Interim Panel Report, paras. 32-35.

<sup>240</sup> Philippines' comments on the Interim Panel Report, paras. 36-42.

period 1 January 2007 -13 September 2007 prior to its submission of 4 September 2009".<sup>241</sup> Thailand claims that it already put forward those calculations in Exhibit THA-13.

6.80 The **Panel** added a paragraph in Section VII.C.7(c)(iii) of the Report to clarify the Philippines' position in this regard. Regarding Thailand's statement that it already disclosed the calculations for the entries in the period 1 January 2007-13 September 2007 in Exhibit THA-13, the Panel notes that this exhibit covers the calculations for the year 2006 and that Exhibit THA-71, which was submitted on 4 September 2009, covers the calculations for the first half of the year 2007. A factual description to this effect has been added in a footnote to the newly added paragraph 7.304.

(i) Paragraph 7.314

6.81 The **Philippines** requests the Panel to add to the paragraph the argument that Thai Customs knew that PM Thailand had included a deduction for internal transport costs in its annual filings for the years 2003 to 2005, as the Panel also included in paragraph 7.353 of its Interim Panel Report. Moreover, the Philippines' invites the Panel to consider whether a reference to this factor should be included in the Panel's reasoning on this issue in paragraph 7.329. **Thailand** does not comment on this issue.

6.82 The **Panel** has included the argument, as requested by the Philippines, in paragraphs 7.314 and 7.329 and made the necessary modifications.

(j) Paragraph 7.406

6.83 The **Philippines** notes that the Panel has not included a conclusion expressing its findings at the end of its findings under Article 10 of the CVA as in other sections. It requests that the Panel add its conclusion in this regard. **Thailand** has not commented on this issue. The **Panel** has modified the paragraph by adding its conclusion.

C. ARTICLE III:2, FIRST SENTENCE OF THE GATT 1994

1. MRSPs – The Philippines' comments

(a) Paragraph 7.413

6.84 The **Philippines** submits that in its analysis of the August 2008 Notice, the Panel made two mistakes. First, the Panel misinterpreted the Philippines' statement in its comments of 9 November 2009, in which the Philippines stated that in listing the MRSP Notices that form part of these proceedings, the Philippines omitted to include the MRSP Notice of August 2008. As also becomes clear from the text of its comments of 9 November, the Philippines specifically made this statement in connection to its opening statement at the second panel meeting, and hence it only wanted to correct a clerical error and it did not refer to a general omission of the MRSP Notice in its previous submissions.<sup>242</sup>

6.85 Secondly, the Philippines disagrees with the Panel that it "never put forward a claim, not to mention specific arguments, in this proceeding that the 19 August 2008 Notice itself violates Article III:2 until its comments of 9 November 2009".<sup>243</sup> The Philippines contends that during the proceedings, it put forward several arguments and pieces of evidence that underline its claim that the

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<sup>241</sup> Thailand's comments on the Philippines comments on the Interim Panel Report, para. 26, referring to para. 37 of the Philippines' comments on the Interim Panel Report.

<sup>242</sup> Philippines' comments on the Interim Panel Report, paras. 49-55.

<sup>243</sup> Philippines' comments on the Interim Panel Report, para. 57, referring to para. 7.413 of the Interim Panel Report.

Notice is violating Article III:2. In Annexes A and B to its comments, the Philippines has included an overview of all arguments and evidence related to the August 2008 MRSP Notice submitted during the proceedings. In its comments, the Philippines points at the fact that the Notice was expressly identified in its Panel request and subsequently it puts forward the instances in which it made arguments regarding the Notice during the proceedings by referring to its Annexes A and B.<sup>244</sup>

6.86 Based on this information, the Philippines urges the Panel to rule on the Notice, as required by Article 11 of the DSU. Further, it demands that if the Panel denies to rule on the Notice, it includes a reference to all of the paragraphs of the Philippines' submissions and exhibits addressing the August 2008 MRSP Notice as part of its claims under Article III:2 of the GATT 1994. If the Panel does decide to rule on the Notice, the Philippines asks it to make a recommendation for the same reasons as it requests a recommendation on the September 2006, March 2007 and August 2007 MRSP Notices.<sup>245</sup>

6.87 **Thailand** does not respond to the Philippines' first comment that the Panel misinterpreted its statement of 9 November 2009. Regarding the Philippines' second statement that it did provided arguments and evidence regarding the August 2008 MRSP Notice, it puts forward that in its Interim Panel Report, the Panel did not state that the Philippines did not refer to the August 2008 MRSP Notice, instead the Panel concluded that it did not make "specific" arguments or a claim with respect to this Notice.<sup>246</sup> Thailand notes that the examples the Philippines provides appear to be general examples of how Thailand calculated MRSPs, instead of a specific argument on the 2008 one; and secondly all of the arguments referred to by the Philippines seem to relate to the difference between the MRSP and RRSP for this Notice.<sup>247</sup> Therefore, Thailand sees no reason for the Panel to change this paragraph.

6.88 If, nonetheless, the Panel decides to examine the Philippines' claim and arguments regarding the Notice, the Panel should find that the Philippines has failed to establish that Thai Excise acted inconsistently with Article III:2 with respect to that Notice, unless the Panel finds that the evidence establishes that "DG Excise determined the marketing cost component of the MRSP for imported cigarettes in a manner different from the general methodology" for that Notice.<sup>248</sup> Regarding the Philippines' request for a recommendation on the Notice, Thailand requests the Panel to deny to make recommendations for the same reasons as it requested the Panel to not make recommendations regarding the September 2006, March 2007 and August 2007 MRSP Notices.<sup>249</sup>

6.89 Regarding the Philippines' first comment, that the **Panel** misinterpreted its statement of 9 November 2009, the Panel agrees that the Philippines specifically made this statement in connection with its opening statement at the second panel meeting, and not with regard to the panel proceedings as a whole. The Panel has revised the first sentence of paragraph accordingly.

6.90 Second, the Panel disagrees with the Philippines' comment that it did put forward arguments and evidence regarding the August 2008 MRSP Notice. The Panel agrees with Thailand that the examples the Philippines provides appear to be general examples of how Thailand calculated MRSPs, instead of a specific argument on the 2008 one; and secondly all of the arguments referred to by the Philippines seem to relate to the difference between the MRSP and RRSP for this Notice. Consequently, the Panel denies to rule on this MRSP Notice. However, the Panel has modified the

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<sup>244</sup> Philippines' comments on the Interim Panel Report, paras. 57-74.

<sup>245</sup> Philippines' comments on the Interim Panel Report, paras. 75-79.

<sup>246</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, para. 12, referring to para. 7.413 of the Interim Panel Report.

<sup>247</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, para. 13.

<sup>248</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, para. 13.

<sup>249</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, paras. 15-20.

second sentence of paragraph 7.413 to clarify why it deems the Philippines' references to the 2008 MRSP Notice to be insufficient to make a ruling on this Notice. The information provided by the Philippines in Annexes A and B to its interim review comments has been specifically used in this clarification.

(b) The May 2009 MRSP Notice

6.91 The **Philippines** explains that during the proceedings, it requested that the Panel not make findings regarding this measure "because it did not wish to litigate against a moving target", since at that stage "it was not clear how many more replacement MRSP Notices Thailand would adopt during the dispute".<sup>250</sup> The Philippines states that during the proceedings, it submitted expressly that this Notice violates Article III:2. Moreover, the Philippines notes that in its analysis, the Panel has focused on situations where Thailand has been unable to provide an explanation for a gap between the MRSP and RRSP for imported cigarettes, and that such a gap also exists for the May 2009 MRSP for *Marlboro*, and Thailand has been unable to explain this gap.<sup>251</sup>

6.92 In its report, the Panel does not address the parties' arguments regarding the May 2009 MRSP Notice, and the Philippines therefore requests that the Panel does address the Notice.<sup>252</sup> In addition, the Philippines urges the Panel to take into account whether a ruling on this measure is necessary to resolve the dispute, and enable the DSB to make sufficiently precise recommendations and rulings. The Philippines states that the dispute has not been resolved, because the May 2009 MRSP Notice, which is currently in force, violates Article III:2 of the GATT 1994. If the Panel finds that this Notice is indeed inconsistent with Article III:2, the Philippines requests that it makes a recommendation under Article 19.1 of the DSU.<sup>253</sup>

6.93 **Thailand** notes that the request by the Philippines for the Panel to make findings and recommendation regarding the May 2009 MRSP is an extraordinary one. In addition to the parts of the second written submission quoted by the Philippines in its comments, Thailand refers to the parts in which the Philippines states that it "*objects* to a ruling" on the May 2009 MRSP Notice and that "ruling on the 'new' [May 2009] MRSP Notices would not resolve the dispute that properly forms part of the Panel's term of reference".<sup>254</sup> Thailand points at the fact that during the proceedings, the Philippines did not change its point of view until its comments on the Interim Panel Report, and therefore Thailand "fails to see any possible conception of the due process requirements for a panel proceeding that would permit the Panel, at the interim review stage, to rule on a measure with respect to which the complainant never once, ..., requested the Panel to rule on and, ... to which the complainant expressly objected the Panel making a ruling".<sup>255</sup> Furthermore, it argues that at this point in the proceedings, the Panel cannot know what arguments or evidence would have been put forward by either party. Consequently, Thailand urges the Panel to deny the Philippines' request that it makes findings or recommendations regarding the May 2009 MRSP Notice.<sup>256</sup>

6.94 Moreover, Thailand wants to correct the assertion by the Philippines that the Panel focused its analysis on "situations where Thailand has been unable to provide adequate explanation for a gap between the MRSP and RRSP for imported cigarettes". To the contrary, according to the Panel "the

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<sup>250</sup> Philippines' comments on the Interim Panel Report, para. 80.

<sup>251</sup> Philippines' comments on the Interim Panel Report, para. 81.

<sup>252</sup> Philippines' comments on the Interim Panel Report, para. 82.

<sup>253</sup> Philippines' comments on the Interim Panel Report, paras. 83-84.

<sup>254</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, para. 4.

<sup>255</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, para. 7.

<sup>256</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, paras. 7-8.

mere existence" of such a gap was not automatic proof of an inconsistency with the obligation under Article III:2.<sup>257</sup>

6.95 First, the **Panel** notes that the May 2009 MRSP Notice was issued during the course of these proceedings, so after the establishment of this Panel. As the Philippines and Thailand note, during the proceedings, the Philippines specifically requested the Panel *not* to rule on this MRSP Notice, and it did not change its stance until its comments on the Interim Panel Report.<sup>258</sup> The Panel agrees with Thailand that the due process rights of Thailand would not be respected if the Panel were to decide to rule on the May 2009 MRSP Notice only at this stage, since the parties have not been able to put forward substantive arguments and/or evidence regarding this Notice. In particular, given that the May 2009 MRSP Notice did not exist at the time of the establishment of the Panel and came into existence only during the course of this proceeding, the Philippines should have put forward robust arguments if it intended to make a claim with respect to this Notice.

6.96 Further, the Philippines argues that in its analysis, the Panel has focused on situations where Thailand has been unable to provide an explanation for a gap between the MRSP and RRSP for imported cigarettes, and that such a gap also exists for the May 2009 MRSP for *Marlboro*, and Thailand has been unable to explain this gap.<sup>259</sup> As Thailand points out, however, the Philippines' understanding of the Panel's analysis of the Philippines' claim with respect to the concerned MRSPs in this dispute is not correct. As stated in paragraphs 7.488 and 7.489 of the Interim Panel Report, we rather found that "the mere existence" of a gap between the MRSP and RRSP was not automatic proof of an inconsistency with the obligation under Article III:2.<sup>260</sup>

6.97 Therefore, the Panel rejects the request by the Philippines to rule on the May 2009 MRSP Notice. However, we agree that our decision not to examine the May 2009 MRSP Notice still needs to be explained. We have added paragraph 7.420 to reflect our decision in this regard.

## **2. VAT exemption for re-sales of domestic cigarettes (paragraphs 7.629 to 7.634) – Thailand's comments**

6.98 In paragraphs 7.629-7.634 of the Interim Panel Report, the Panel considered whether "input tax credits under the Thai regulations are granted automatically and simultaneously with the obligation to pay output taxes in every case so as not to create even the potential risk of an excess tax for imported cigarettes".<sup>261</sup> The Panel concluded that Thailand's input tax/output tax VAT system for resale of imported cigarettes gave rise to a "potential liability [that] does not exist for domestic cigarette resellers under the Thai law [and] leads to excess taxation for imported cigarettes and consequently a *de jure* violation of the first sentence of Article III:2".<sup>262</sup> Thailand requests review of this section of the Interim Panel Report, for the reasons provided below.

6.99 First, **Thailand** states that while in paragraph 7.631 the Panel notes that resellers must submit a form Por.Por.30 in order to receive an input tax credit<sup>263</sup>, it fails to point out that resellers do not incur the liability for output tax until they file the same form Por.Por.30. Thus, no liability for output tax collected can arise before the time at which the importer applies for and obtains its input tax

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<sup>257</sup> Thailand's comments on the Philippines' comments on the Interim Panel Report, paras. 9-10.

<sup>258</sup> Philippines' second written submission, paras. 431 and 434.

<sup>259</sup> Philippines' comments on the Interim Panel Report, para. 81.

<sup>260</sup> Interim Panel Report, para. 7.488.

<sup>261</sup> Interim Panel Report, para. 7.629.

<sup>262</sup> Interim Panel Report, para. 7.634.

<sup>263</sup> Interim Panel Report, para. 7.631.

credit.<sup>264</sup> Thailand requests that the Panel clarify its description of the system to reflect this factual point correctly.

6.100 Second, Thailand takes issue with the assertion that a "potential risk of excess taxation" as identified by the Panel can give rise to excess taxation on the resale of imported cigarettes. The Panel describes this potential risk as stemming both from the fact that a form has to be filed by resellers of imported cigarettes to apply for VAT credits, and that there are circumstances in which this credit may not be granted. Thailand argues that this risk either does not exist or, alternatively, cannot give rise to a violation of Article III:2.<sup>265</sup> Thailand then puts forward several arguments to support this statement:

6.101 Thailand first asserts that once resellers submit the form Por.Por.30, they have a "right" and are "entitled" to an input tax credit.<sup>266</sup> Consequently, Thailand argues that there can be neither a "risk" of excess taxation compared to the VAT imposed for resale of domestic cigarettes nor a corollary violation of Article III:2, first sentence. Instead, there is, at most, a difference in reporting requirements that ought to be addressed under Article III:4, rather than Article III:2, first sentence.<sup>267</sup>

6.102 Moreover, the essential element of the Panel's finding of a "risk of excess taxation" appears to be the circumstance in which a reseller does not receive a tax credit that it claimed on form Por.Por.30. In its analysis, however, the Panel omits to include Thailand's explanation that this can only happen in circumstances in which the reseller is not able to show that the claimed input tax credit relates to an actual purchase of imported cigarettes.<sup>268</sup> Hence, the evidence regarding the availability of input tax credits for legitimate, documented purchases of imported cigarettes does not support a finding that there is a "risk" that resellers may not obtain a credit with respect to these transactions, and Thailand requests the Panel to revise the Interim Panel Report to reflect Thailand's arguments on this issue.

6.103 Thailand further notes that the Panel seems to suggest that the requirement to file form Por.Por.30 can, in itself, give rise to a violation of Article III:2, first sentence.<sup>269</sup> Since, as explained above, there is no actual risk of losing the tax credit, Thailand sees no basis on which a requirement to file a VAT tax report can, in itself, constitute a violation of Article III:2, first sentence. Instead, this is an issue to be addressed under Article III:4.<sup>270</sup>

6.104 In this context, Thailand notes that the requirement of a private action in the form of filing input/output VAT tax reports to obtain input tax credits against output tax VAT liability is a common feature of many WTO Members' VAT systems. Under these systems, importers risk losing credits if they do not file their input tax credit claims. In its final report, the Panel may wish to clarify whether these VAT systems are consistent with Article III:2, first sentence, under its ruling.

6.105 Finally, Thailand notes that once the Panel finds the reporting requirements to be inconsistent with Article III:4, there appears to be little further purpose to be served by considering these requirements under Article III:2. In these circumstances, it may be appropriate for the Panel to

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<sup>264</sup> Thailand's comments on the Interim Panel Report, para. 38.

<sup>265</sup> Interim Panel Report, para. 7.629.

<sup>266</sup> Thailand's 8 December 2009 comments, para. 75; Interim Panel Report, para. 7.613.

<sup>267</sup> Thailand's comments on the Interim Panel Report, para. 39.

<sup>268</sup> Thailand's comments on the Interim Panel Report, para. 40, referring to its comments of 8 December 2009, paras. 77-83.

<sup>269</sup> Thailand's comments on the Interim Panel Report, para. 42, referring to para. 7.633 of the Interim Panel Report: "... the failure to comply with these obligations will in turn deprive importers of tax credits necessary to offset their VAT liability...".

<sup>270</sup> Thailand's comments on the Interim Panel Report, para. 42.

exercise judicial economy in its final report with respect to the Philippines' claim under Article III:2, first sentence.<sup>271</sup>

6.106 In response to Thailand's request that the Panel clarify in paragraph 7.631 that no VAT liability arises for the resale of imported cigarettes until form Por.Por.30 is filed, the **Philippines** presents two arguments. First, the Philippines underlines that this assertion is contrary to Thai law which states that tax liability for the *sale* of goods arises as a results of acts such as: "the delivery of goods"; "when payment of price becomes due for each payment period"; "when the agent delivers goods to the purchaser"; and so on.<sup>272</sup> Moreover, Section 82/4, para. 1 of the Thai Revenue Code provides that a "registrant shall collect value added tax from a purchaser of goods or a recipient of services at the time the liability to value added tax arises".<sup>273</sup> In other words, under Thai law, VAT liability does not arise when filing a form but at an earlier point in a sales transaction (*e.g.*, upon delivery, payment, or transfer of ownership).<sup>274</sup> Second, Thailand appears to imply that a failure to file form Por.Por.30 would enable the reseller to avoid taxation altogether. The Philippines however notes that such evasion would constitute a breach of Section 83 of the Thai Revenue Code and thereby be sanctioned pursuant to Section 89(2) of the Code with a "penalty ... twice the amount of tax payable or remittable in the tax month".<sup>275</sup> However, the Philippines does not object to a minor change in the wording of paragraph 7.631 to clarify that form Por.Por.30 is also used to request a tax credit.

6.107 Furthermore, concerning Thailand's assertion that a potential risk of excess taxation as identified by the Panel, does not exist or cannot give rise to a violation of Article III:2, first sentence of the GATT 1994<sup>276</sup>, the Philippines contends that the Panel correctly relied on previous Appellate Body and GATT interpretations to the effect that the mere possibility or risk of discriminatory treatment is sufficient to violate Article III:2, first sentence.<sup>277</sup> The Philippines argues that the Panel may support its findings further by citing the panel in *US – Exports Restraints*, which made clear that for a violation of Article III:2, it suffices to show that discrimination will arise in *certain defined circumstances*.<sup>278</sup>

6.108 Subsequently, the Philippines argues that a potential risk of excess taxation for imported cigarettes does exist.<sup>279</sup> To rebut Thailand's argument that there is no excess taxation because resellers of imported cigarettes are "entitled"<sup>280</sup> to a refund, the Philippines argues that the Panel has correctly examined and rejected Thailand's arguments, deciding that a reseller would be taxed in excess if it failed to file the form, or subsequently failed to prove that the purchase took place.<sup>281</sup>

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<sup>271</sup> Thailand's comments on the Interim Panel Report, para. 44.

<sup>272</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 88, referring to several sections of the Thai Revenue Code in Exhibit PHL-94.

<sup>273</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 88, referring to the Thai Revenue Code, Chapter IV, Division 2, Section 82/4, para. 1, Exhibit PHL-94.

<sup>274</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 88.

<sup>275</sup> Philippines' comments on Thailand's comments on the Interim Panel Report para. 89, referring to Exhibit PHL-94.

<sup>276</sup> Philippines' comments on Thailand's comments on the Interim Panel Report paras. 74-76.

<sup>277</sup> Philippines' comments on Thailand's comments on the Interim Panel Report para. 75, referring to paras. 7.622-7.624 of the Interim Panel Report, citing Appellate Body Report, *US – Section 211 Appropriations Act*, Panel Report, *US – Tobacco*, and Panel Report, *US – Section 337 Tariff Act*.

<sup>278</sup> Philippines' comments on Thailand's comments on the Interim Panel Report para. 76, referring to Panel Report, *US – Exports Restraints*, para. 8.78.

<sup>279</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 61.

<sup>280</sup> Interim Panel Report, para. 7.613.

<sup>281</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 62, referring to para. 7.631 of the Interim Panel Report.



6.109 Likewise, according to the Philippines, the Panel correctly rejected Thailand's argument that only the failure of a reseller – a private party – to secure a tax credit can trigger excess taxation. The Panel indeed explained that Thai laws and regulations at issue, rather than solely the action of private parties, gave rise to obligations for resellers of imported cigarettes only. In particular, the Philippines contends that the Panel correctly relied on the Appellate Body's statement in *Korea – Various Measures on Beef* that "the intervention of some element of private choice does not relieve [a WTO Member] of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product".<sup>282</sup> In this vein, the Philippines agrees with the Panel's approach rejecting Thailand's argument that VAT liability imposed on resale of imported cigarettes may be offset by a tax credit so as to be in compliance with Article III:2, first sentence.<sup>283</sup> In addition, the Philippines states that the Panel may want to consider to modify the text of paragraphs 7.633-7.634 to clarify its point even more.

6.110 Moreover, the Philippines states that in paragraph 7.633, the Panel has also answered Thailand's concern that Thailand's VAT exemption system, not the simple requirement to file Por.Por.30, establishes an additional tax liability contrary to Article III:2, first sentence of the GATT 1994.<sup>284</sup>

6.111 Finally, the Philippines states that other WTO Members' VAT systems have no bearing on the WTO-inconsistency of Thailand's *de jure* discriminatory treatment of the resale of imported cigarettes.

6.112 First, regarding Thailand's argument that the Panel failed to point out that resellers do not incur the liability for output tax until they file (the same) form Por.Por.30, the **Panel** notes that its factual description of the imposition of VAT on cigarettes resellers in Thailand is provided in paragraphs 7.573-7.580 and 7.584-7.589 of the Interim Panel Report.<sup>285</sup> Under Thai law, specifically Section 82/7 of Division 6 of the Thai Revenue Code, every VAT registrant cigarette reseller is required to collect VAT from the purchaser in respect of every stage of sale. Accordingly, all cigarette resellers in the distribution chain incur VAT liabilities. Further, when considering the applicable provisions of the Thai Revenue Code,<sup>286</sup> it appears that VAT liability does not arise when filing a form but at an earlier point in a sales transaction.

6.113 We also observed the manner in which a final VAT liability is determined based on the difference between output tax (sale to purchaser) and input tax credit (purchase from reseller) in the paragraphs cited above. In our view, Thailand's argument that resellers do not incur the liability for output tax until they file form Por.Por.30 pertains more to the administrative steps linked to the imposition of VAT for imported cigarette resellers than to the tax liability itself that arises upon the sale of imported cigarettes. To that extent, the Panel agrees with the Philippines that Thailand's argument would appear to imply that no tax liability arises so long as no form is filed. Hence, the Panel does not find that Thai law supports the statement that no liability for output tax collected arises before the importer applies for and obtains its input tax credit by filing form Por.Por.30. However,

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<sup>282</sup> Philippines' comments on Thailand's comments on the Interim Panel Report paras. 66 and 67, referring to para. 7.734 of the Interim Panel Report, and citing Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

<sup>283</sup> Philippines comments on Thailand's comments on the Interim Panel Report para. 68.

<sup>284</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 64-65, referring to para. 7.633 of the Interim Panel Report.

<sup>285</sup> We note that neither party has provided any comments on the Panel's description of the Thai VAT system as set forth in these paragraphs.

<sup>286</sup> Thai Revenue Code, Chapter IV, Division 2, Sections 78 and Division 6, Sections 82/4 and 82/7, Exhibit PHL-94. For example, Section 78(1) of the Revenue Code states that tax liability on the sale of goods arises upon the delivery of the goods.

the Panel accepts that with the same form Por.Por.30, the importer can request for a tax credit. The Panel has changed the text of paragraph 7.631 to clarify this point.

6.114 Second, regarding Thailand's comment that the "potential risk of excess taxation" identified by the Panel either does not exist or, alternatively, cannot give rise to a violation of Article III:2, the Panel is of the opinion that this potential risk does exist and that a potential risk *can* give rise to a violation of Article III:2.

6.115 In relation to "potential risks", as was stated in paragraphs 7.622-7.624 of the Interim Panel Report, the Appellate Body in *US – Section 211 Appropriations Act* and the GATT Panels in *US – Tobacco* and *US – Section 337 Tariff Act* explained that the national treatment obligation assumed under Article III:4 also applies to the *mere possibility of risk* of discriminatory treatment of imported goods, and we considered this finding to be of equal relevance for the national treatment obligation under Article III:2. We therefore confirm our opinion that a potential risk of excess taxation can give rise to excess taxation under Article III:2.<sup>287</sup>

6.116 Regarding the existence of a potential "risk" of excess taxation, Thailand puts forward, that resellers have a "right" or "entitlement" to an input tax credit and therefore no such "risk" exists. The Panel confirms that it did address this specific aspect of Thailand's arguments in its Interim Panel Report. First, in paragraphs 7.613, 7.621 and 7.627 of the Interim Panel Report, the Panel refers to Thailand's argument that when filing form Por.Por.30, a reseller is "entitled" to an input tax refund, however in paragraph 7.631 it makes clear that from the information available, it concludes that the reseller of imported cigarettes is indeed entitled to receive a tax credit, but it will not receive this credit, if it does not submit form Por.Por.30 or if it is not able to prove that the purchase took place despite the submission of the form. Therefore, although a reseller has a "right" to obtain a tax refund, in our view, the reseller will not be able to obtain that refund automatically, without taking any further procedural steps.<sup>288</sup> Second, Thailand claims that in discussing the fact that in certain circumstances the reseller will not receive a tax credit although he submitted form Por.Por.30, the Panel did not address Thailand's explanation that this only happens in cases in which the reseller is not able to prove that the claimed input tax credit relates to an actual purchase of imported cigarettes. The Panel considers that it did specifically address Thailand's explanation in paragraphs 7.633-7.634 of the Interim Panel Report. However, the Panel has clarified the content of these paragraphs by slightly modifying their text.

6.117 Thailand also noted that in paragraph 7.633, the Panel appears to state that the requirement to file the form Por.Por.30 can, in itself, give rise to a violation of Article III:2, first sentence, as it states that "the failure to comply with these obligations will in turn deprive importers of tax credits necessary to offset their VAT liability".<sup>289</sup> We do not agree with Thailand's reading of this paragraph, as the sentence that follows states that this potential liability does not exist for resellers of domestic cigarettes, and it is this difference that establishes the additional liability for resellers of imported cigarettes. Hence, we consider that this issue was correctly addressed under Article III:2, but to clarify our point, we made the necessary amendments to paragraph 7.633.

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<sup>287</sup> Moreover, we agree with the Philippines that our conclusion is also supported by the panel's reasoning in *US – Export Restraint* that a measure is inconsistent with WTO obligations if it "mandates action inconsistent with WTO rules in particular circumstances, even in other circumstances the action might not be inconsistent with WTO rules". In other words, to establish a violation of Article III:2, it suffices if discrimination will arise *in defined circumstances*. In this dispute, discrimination arises in defined circumstances, namely, whenever a reseller of imported cigarettes is unable to secure a tax credit to offset its discriminatory tax liability (Panel report on *US – Export Restraints*, para. 8.78).

<sup>288</sup> See also para. 7.632 of the Interim Panel Report.

<sup>289</sup> Thailand's comments on the Interim Panel Report, para. 42, referring to para. 7.633 of the Panel Report.

6.118 Further, the Panel does not agree with Thailand's statement that the Panel has to clarify whether other WTO Members' VAT systems in which importers risk losing credits if they do not file their input tax credit claims are consistent with Article III:2, first sentence, under its ruling. First, as we explained in paragraph 7.604, we are not stating that the existence of a tax credit system as such is inconsistent with Article III:2 of the GATT, instead what "distinguished the VAT-related measures maintained by Thailand from other so-called normal VAT measures is ... *the VAT exemption accorded to domestic cigarettes only*" (emphasis added). Second, there is no need for the Panel to clarify whether its ruling with respect to Article III:2 of the GATT 1994 in this dispute concerning Thailand's *de jure* discriminatory VAT system applies to other WTO Members' VAT systems for two reasons: first, as a matter of law, the Panel's terms of reference are limited to the measures specified in the Panel Request and the Panel's report is solely binding upon the parties to this dispute. Second, as a matter of fact, the examples of other WTO Member's VAT system have no bearing on the Panel's analysis of Thailand's *de jure* tax exemption, because there is no evidence that any of these Members exempts resale of domestic cigarettes from VAT, while not providing the same exemption for resale of imported cigarettes.<sup>290</sup>

6.119 For these reasons, we consider that a potential risk of excess taxation exists under the Thai VAT system, which can give rise to a violation of Article III:2, first sentence.

6.120 Finally, we consider Thailand's statement that if the Panel finds the reporting requirements to be inconsistent with Article III:4, it might consider exercising judicial economy with respect to the Philippines' claim under Article III:2, first sentence. We note in this respect the statement by the Appellate Body in *Australia – Salmon* that: "[t]he principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute. ... A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members".<sup>291</sup> In the light of the Appellate Body's guidance, we must consider whether separate findings on the Philippines' claims under Article III:2, first sentence and Article III:4 are necessary for the DSB to make sufficiently precise recommendations and rulings, or whether only findings on Article III:4 would be enough. We are of the view that the Philippines' claim under Article III:2 addresses an obligation that is distinguished from that under Article III:4. It also pertains to different aspects of the Thai measures at issue. For example, under Article III:2, what is at issue is whether the VAT exemption on the resale of domestic cigarettes leads to an *excess VAT liability* for the resale of imported cigarettes; while the Philippines' claim under Article III:4 goes to the question of whether the Thai administrative requirements lead to an *additional administrative burden* on resellers of imported cigarettes and consequently less favourable treatment for imported cigarettes. Therefore, we decline to accept Thailand's request that the Panel exercise judicial economy with respect to the Philippines' claim under Article III:2, first sentence.

#### D. ARTICLE III:4, FIRST SENTENCE OF THE GATT 1994 – THAILAND'S COMMENTS

##### 1. Form Por.Por.30 reporting requirements

6.121 In paragraph 7.698 of the Interim Panel Report, the Panel concluded that resellers of imported cigarettes are subject to a heavier administrative burden in respect of the obligation to complete and submit form Por.Por.30 in part because "a supplier who is a VAT registrant need not include

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<sup>290</sup> This argument was made by the Philippines in its comments on Thailand's comments on the Interim Panel Report paras. 77-84, referring to Interim Panel Report, paras. 7.604 and 7.629-7.634, also referring to Section 81(1)(v) of the Thai Revenue Code, Exhibit PHL-94.

<sup>291</sup> Appellate Body Report, *Australia – Salmon*, para. 223.

information on sales of domestic cigarettes in completing form Por.Por.30". Thailand provided its comments on certain aspects of the Panel's analysis and conclusion in this regard. We address them in turn.

- (a) The Panel's reliance on the expert testimony provided in Exhibit PHL-289 for the purpose of its conclusion in paragraph 7.698 of the Interim Panel Report.

6.122 **Thailand** submits that the Panel cannot make an objective and impartial assessment of the facts within the meaning of Article 11 of the DSU based on evidence provided by the Philippines only "at the last opportunity afforded to the parties to submit their views".<sup>292</sup> Thailand therefore requests the Panel not to take into account this evidence. Paragraph 15 of the Panel's working procedures provided that all evidence, other than rebuttal evidence, was to be provided "to the Panel no later than the first substantive meeting, except with respect to factual evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by each other". Thailand points to the Panel's understanding that the expert testimony submitted by the Philippines is the only evidence relating to the alleged change in DG Excise's practice regarding the recording of VAT exempt sales in line 3 of form Por.Por.30. Given also that the Philippines had numerous opportunities to submit this expert testimony<sup>293</sup> earlier in the proceedings, which would have allowed Thailand to timely respond, Thailand argues that its due process rights would be denied if the Panel used this evidence for its determination.<sup>294</sup>

6.123 The **Philippines** does not deny that it has submitted its expert opinion in Exhibit PHL-289 at the latest stage of the proceedings such that Thailand had no further opportunity to respond in this regard. Nonetheless, the Philippines offers a history of Thailand's position regarding form Por.Por.30 throughout the panel proceedings to show two things: first, Thailand's position shifted, as it first considered in its first written submission that "retailers that deal exclusively in VAT-exempt cigarettes are not required to submit and maintain [form Por.Por.30]"<sup>295</sup>, while it later contended that "sales exempted from VAT are reported in line 3 [of Por.Por.30], including sales of domestic cigarettes"<sup>296</sup>; second, the Philippines contends that the Philippines submitted its expert opinion only at the latest stage of the proceeding in order to rebut the 1995 DG Revenue ruling which Thailand submitted only in its written responses to the Panel questions after the second substantive meeting. In this regard the Philippines underlines that Thailand had many opportunities to submit this evidence earlier on, which would have allowed the Philippines to present its rebuttal evidence at an earlier stage too. Thus, Thailand, not the Philippines, is responsible for the late submission of the Philippines' expert opinion. This evidence can therefore be fully taken into account by the Panel.<sup>297</sup>

6.124 The **Panel** notes Thailand's position that the expert opinion provided by the Philippines as Exhibit PHL-289 was submitted at the latest stage of the proceedings (i.e. comments on each other's written responses to the Panel questions after the second substantive meeting), which deprived Thailand of an opportunity to respond. Thailand is thus of the view that this evidence is inadmissible and should not be taken into account by the Panel for the purpose of its analysis and conclusions.

6.125 However, there are no provisions in the DSU or the Panel's Working Procedures that unconditionally preclude the Panel from accepting evidence submitted by a party at the latest stage of the proceedings. Article 11 of the DSU requires the Panel to make an objective assessment of the

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<sup>292</sup> Thailand's comments on the Interim Panel Report, para. 48.

<sup>293</sup> Exhibit PHL-289.

<sup>294</sup> Thailand's comments on the Interim Panel Report, para. 48, referring to Appellate Body Report, *Australia – Salmon*, para. 272.

<sup>295</sup> Thailand's first written submission, para. 258.

<sup>296</sup> Thailand's response to Panel question No. 51.

<sup>297</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 93-95.

matter before it, including an objective assessment of the facts of the case. In this context, the Appellate Body in *Argentina – Textiles and Apparel* stated that "Article 11 of the DSU does not establish time limits for the submission of evidence to a panel."<sup>298</sup> Further, the Appellate Body noted that "the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence".<sup>299</sup>

6.126 For the purpose of the current Panel proceedings, paragraph 15 of the Panel's Working Procedures establishes that all evidence, other than rebuttal evidence, was to be provided to the Panel no later than the first substantive meeting, *except* with respect to factual evidence for purposes of rebuttals, answers to questions or comments on answers provided by each other". Thailand submitted a new piece of evidence, namely the 1995 DG Revenue Ruling as part of its response to the Panel's questions after the second substantive meeting. Each party was subsequently granted the possibility to submit comments on each other's responses pursuant to paragraph 9 of the Panel's Working Procedures. In an attempt to rebut Thailand's argument on the 1995 DG Revenue ruling, the Philippines then submitted the concerned expert opinion.

6.127 We note that the first sentence of this opinion reads "I have been asked to provide an opinion on [the 1995 DG Revenue Ruling]", suggesting that the intended purpose of this evidence was to rebut Thailand's arguments in relation to this ruling. Therefore, to the extent that the Panel's Working Procedures envisaged the submission of evidence at a later stage than the first substantive meeting when it could be characterized as rebuttal evidence, or comments on answers provided by parties, we are of the view that the concerned expert opinion submitted by the Philippines falls within the scope of such evidence.

6.128 In the light of this, and notwithstanding a general preference to receive evidence at an early stage of the panel proceeding rather than at a later or the last stage of the proceeding, we confirm our view that accepting the Philippines' evidence that was provided as part of its comments on Thailand's response to Panel question No. 142 was in accordance with paragraph 15 of the Working Procedures. The Panel therefore declines to accept Thailand's request.

- (b) The Panel's assessment of all the evidence submitted by Thailand for the purpose of its analysis and conclusion in paragraphs 7.694-7.698 of the Interim Panel Report

6.129 **Thailand** submits that the Panel is incorrect in suggesting that Thailand adduced only two pieces of evidence (namely the *Textbook on the Revenue Code*,<sup>300</sup> and a 1995 DG Revenue Ruling<sup>301</sup>) to support its position that exempted sales must be reported in line 3 ("exempted sales") of form Por.Por.30. In addition to these two pieces of evidence referred to by the Panel, Thailand provided the instructions for form Por.Por.30, which make unambiguously clear that in completing line 3 ("exempted sales") in the form, "a taxpayer shall fill [in] the amount of exempted sales that [are] reported in [its] revenue account". Those instructions clearly state that the amounts corresponding to the sale of VAT exempt products must be reported in line 3 of form Por.Por.30. Nonetheless, the Panel has not provided any analysis for its choice not to interpret those official instructions to mean what they plainly state on their face.<sup>302</sup> Thailand also submits that samples of form Por.Por.30 which it provided<sup>303</sup> – forms filled out by TTM and a convenience store that sells both imported and domestic products, as well as other products – indicate that sales exempted of VAT must be reported

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<sup>298</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79.

<sup>299</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 80.

<sup>300</sup> Exhibit THA-95.

<sup>301</sup> Exhibit THA-96.

<sup>302</sup> Thailand's comments on the Interim Panel Report, para. 49.

<sup>303</sup> Exhibit THA-89.

in line 3 of form Por.Por.30, even though the form does not require a breakdown of these amounts.<sup>304</sup> Accordingly, Thailand requests the Panel to revise paragraphs 7.694 *et seq.* of the Interim Panel Report to refer to and to address these additional pieces of evidence.

6.130 The **Philippines** contends that the Panel has duly taken into account all the evidence before it in relation to form Por.Por.30. In particular, the Philippines stresses that the instructions for form Por.Por.30 were addressed by the Panel at paragraph 7.690 of the Interim Panel Report where the Panel found that "[t]he introductory statement contained in the instructions for filling in and the filing of Por.Por.30 attached to form Por.Por.30 also confirms [the] understanding [that] the obligation to file [this] form hinges on the supplier's status as a VAT registrant, not the specific type of goods".<sup>305</sup> Similarly, the Philippines states that the Panel properly took into account the form filled in by TTM and a convenience store submitted as Exhibit THA-89. In particular, at footnote 1033 to paragraph 7.694, the Panel noted that sample forms Por.Por.30 had been submitted by Thailand, including those in Exhibit THA-89, but that those pieces did *not* inform it on *which exempted sales* must be recorded in line 3 of the form.<sup>306</sup> Overall therefore, the Panel has taken into account all the evidence before it to decide that resellers of both domestic and imported cigarettes would not have to report the sale of domestic cigarettes under line 3 of Form Por.Por.30 which the Philippines had explained to be reserved to amounts that are exempted from the VAT tax base pursuant to Section 79, third paragraph of the Revenue Code<sup>307</sup> (PHL-94) and Notification No.40.<sup>308</sup> In this vein, the Panel considered all of (i) the text of form Por.Por.30, (ii) the Thai Revenue Code, (iii) the excerpt of the Textbook on the Revenue Code, (iv) the 1995 DG ruling, (v) the 2000 DG Ruling and (vi) expert statements about the meaning of the phrase "less exempted if any" in line 3 of Form Por.Por.30.<sup>309</sup> The Philippines suggests that the Panel slightly modify the current text of the relevant sections in this regard to clarify that it considered all the evidence before it.<sup>310</sup>

6.131 Thailand submits that the Panel failed to consider the sample Por.Por.30 forms produced by Thailand as Exhibit THA-89 and the instructions to fill Form Por.Por.30 provided as Exhibit THA-42. The **Panel**, however, concluded, based on its examination of all the relevant evidence, that they do not clearly establish that the amount corresponding to the retail sale of domestic cigarettes must be reported in line 3 of the form.

6.132 Specifically, regarding the instructions to fill out Form Por.Por.30, based on the text of the instructions and having considered the parties' arguments, we could not find any clear indication that the sale of domestic cigarettes falls within the scope of the category of sales that must be reported in line 3 of form Por.Por.30. Further, we found that the two sample Por.Por.30 forms filled out by TTM and a convenience store selling domestic cigarettes as well as other goods did not clarify whether VAT-exempt sales reported in line 3 specifically correspond to the sale of domestic cigarettes.

6.133 In light of the above considerations, the Panel has decided to maintain its current analysis and conclusions. We have nonetheless revised the relevant paragraphs to further clarify our reasoning in this regard.

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<sup>304</sup> Thailand's comments on the Interim Panel Report, paras. 49 and 50.

<sup>305</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 124.

<sup>306</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 133.

<sup>307</sup> Exhibit PHL-94.

<sup>308</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 128, referring to Exhibit PHL-283.

<sup>309</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 130.

<sup>310</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 132 and 135.

- (c) The Panel's analysis of certain evidence submitted by Thailand for the purpose of paragraphs 7.694-7.698 of the Interim Panel Report.

6.134 **Thailand** argues that the Panel's analysis of some evidence regarding the alleged change in reporting practice does not fully or accurately reflect the content of that evidence. Specifically, the Panel misinterpreted the evidence related to the 2000 DG Revenue ruling submitted by the Philippines<sup>311</sup>, and failed to substantiate its rejection of arguments based on an excerpt from a Textbook submitted by Thailand.<sup>312</sup>

6.135 First, Thailand considers that the Panel failed to adequately discuss the 2000 DG Revenue ruling submitted by the Philippines as Exhibit PHL-253 because a careful analysis of this evidence does not support the Philippines' explanations.<sup>313</sup> Thailand submits that the 2000 DG Revenue ruling presented two questions: (i) whether income from legal advocacy services was exempt from VAT under Section 81(1)(i) of the Revenue Code, and (ii) whether "in submitting and paying VAT the company does not have to include the income from advocacy or defending the case in courts for calculation in order to pay for value added tax".<sup>314</sup> These questions only relate to whether income from legal services was *exempt* from the VAT and, therefore, not included in the *calculation* of the VAT. Contrary to the Philippines' expert's statement therefore, these questions do not refer to what must be reported in lines 1 and 3 of form Por.Por.30 and the ruling does not make *any* direct reference to that issue.

6.136 Thailand also notes that the *calculation* of VAT, to which the 2000 ruling actually relates, does not change depending on whether exempt sales are reported in lines 1 and 3 of Form Por.Por.30. This is because, as the Panel's summary of form Por.Por.30 at paragraph 7.693 of the Interim Panel Report makes clear, the taxable sales amount is the amount reported in line 4 of sales net of exempted sales and sales at the 0% rate. This amount will be the same regardless of whether exempt sales are reported in lines 1 and 3.<sup>315</sup>

6.137 The Panel therefore mistakenly concluded that this evidence supported the view that the sale of VAT exempt cigarettes need not be reported in line 3 of form Por.Por.30. In particular, the Panel based its conclusion that "DG Revenue, however, subsequently changed the rule ..." <sup>316</sup> regarding the recording of VAT exempt sales from its past practise as evidenced by the 1995 ruling <sup>317</sup> on both the 2000 ruling and the statement of the Philippines' expert that the banks have "never been required" to include income from activities that are not subject to VAT such as the income "from non-VAT banking services" in their VAT reporting. Given that the 2000 ruling makes no direct reference to form Por.Por.30, and that, in contrast, the 1995 ruling on which Thailand relied expressly addressed the issue of what must be reported on lines 1 and 3 of form Por.Por.30 and expressly stated that "the company is required to include income arising from the transport of goods, which is a VAT-exempted activity, in the gross sales to be shown in item 1 of form Por.Por.30 and this income is to be listed as exempted sales under item 3 of Form Por.Por.30"<sup>318</sup>, Thailand requests the Panel to reconsider its conclusion that the amounts for the sales of VAT exempt cigarettes do not have to be recorded in lines 1 and 3 of form Por.Por.30.<sup>319</sup>

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<sup>311</sup> Exhibit PHL-253.

<sup>312</sup> Exhibit THA-95.

<sup>313</sup> Thailand's comments on the Interim Panel Report, para. 51.

<sup>314</sup> Exhibit PHL-253.

<sup>315</sup> Thailand's comments on the Interim Panel Report, para. 53.

<sup>316</sup> Interim Panel Report, para. 7.696.

<sup>317</sup> Exhibit THA-96.

<sup>318</sup> Thailand's comments on the Interim Panel Report, para. 55.

<sup>319</sup> Thailand's comments on the Interim Panel Report, para. 57.

6.138 Further, Thailand argues that both the Panel and the Philippines' expert appear to be confusing two types of income in their combined readings of Section 77/2 and 79 of the Revenue Code and the 2000 ruling discussed above. The first type is income that is not within the scope of the Thai VAT system because it is subject to another Thai tax, the Specific Business Tax, rather than VAT. This income is not subject to any kind of VAT reporting and, therefore, has *never* been required to be reported on form Por.Por.30. This is clear from Section 77/3 of the Revenue Code.<sup>320</sup> In contrast, income that is within the scope of the VAT system, including sales of cigarettes pursuant to Section 77/2 of the Revenue Code, is required to be reported on the appropriate line of form Por.Por.30. Contrary to the Panel's discussion and the Philippines' expert's statement, as explained above, nothing in the 2000 ruling changed this. Moreover, the Panel and the Philippines' expert are incorrect to refer to "Section 79 income" as a category of income which would need to be reported in form Por.Por.30, because Section 79 only deals with the tax base for VAT, not the VAT exempt income.<sup>321</sup>

6.139 Accordingly, the Panel's statement in paragraph 7.696 that (i) so-called "Section 79 income must be reported" and (ii) this represents a change in practice with respect to the reporting of income that is within the scope of the VAT system but "exempt" on lines 1 and 3 of form Por.Por.30 is incorrect in both respects. Thailand requests the panel to reconsider its conclusion that the amounts for the sales of VAT-exempt cigarettes do not have to be recorded in line 1 and 3 of form Por.Por.30.<sup>322</sup>

6.140 Second, Thailand states that, even though the Panel referred to the excerpt from the leading textbook on the Thai Revenue Code, it did not adequately discuss the content of this excerpt.<sup>323</sup> This excerpt strongly supports Thailand's position as it makes unequivocally clear that the "VAT registrant must report all sales occurring in a tax month in Form Por.Por.30, consisting of gross sales or services subject to the standard rate, sales and the zero rate, and sales exempted from VAT".<sup>324</sup> The Panel chose not to rely on the excerpt arguing that, while the textbook post-dated the 2000 Ruling submitted by the Philippines, it did not mention the change of practice alleged by the Philippines' expert. The Panel failed to provide any other objective assessment of why the textbook would be inaccurate. In particular, the Panel failed to consider that the change alleged by the Philippines may not have taken place, which would of course be a good reason why it is not discussed in the concerned textbook.

6.141 The **Philippines** understands Thailand's comments to include two types of arguments: (i) old and new arguments concerning the interpretation of evidence related to the 2000 DG Revenue ruling and (ii) new arguments regarding the type of income to be reported in form Por.Por.30.

6.142 Concerning the 2000 DG Revenue Ruling, the Philippines first replies to old arguments which it rebutted earlier in the proceedings.<sup>325</sup> Thailand refers back to its arguments provided in its response to Panel question No. 142(2) that the 2000 DG Revenue Ruling does not directly address the issue whether sales of exempted cigarettes must be reported in line 3 of form Por.Por.30. The Philippines cites an excerpt from the ruling stating that the "operator providing such [VAT-exempt service] does not have to include the income received from such provision of service for calculation in order to pay the value added tax".<sup>326</sup> The Philippines explains that the word "calculation" must be understood to mean that the VAT-exempt amounts do not have to be reported under line 3 of form Por.Por.30 because (i) the DG ruling answered the question "whether or not it is correct that submitting and

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<sup>320</sup> Exhibit PHL-94.

<sup>321</sup> Thailand's comments on the Interim Panel Report, para. 60.

<sup>322</sup> Thailand's comments on the Interim Panel Report, para. 57.

<sup>323</sup> Thailand's comments on the Interim Panel Report, para. 56.

<sup>324</sup> Exhibit THA-95.

<sup>325</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 130.

<sup>326</sup> Philippines comments on Thailand's response to Panel's question No. 142, paras. 277 and 288.



paying value added tax under form Por.Por.30 in respect of each tax month, the company does not have to include the income from [the sale of the VAT exempt service in question] for *calculation* in order to pay for value added tax", which shows that inclusion in the calculation and reporting in line 3 of form Por.Por.30 were intertwined, and (ii) form Por.Por.30 is headed "VAT *Calculation*" and the form sets forth the registrant's *calculation* for payment of the monthly VAT.<sup>327</sup>

6.143 The Philippines is of the view therefore that the Panel should reject Thailand's objection to the Panel's assessment that the 2000 DG Revenue ruling shows that the sale of products exempted from VAT do not have to be recorded in line 3 of form Por.Por.30. The Philippines considers in addition that the terms of the 2000 DG Revenue ruling are sufficient in themselves, without the clarifications from the expert opinion in Exhibit PHL-254, to support the Panel's findings. However, the Philippines would not object to the inclusion of "further discussion of the text of this ruling" as requested by Thailand.<sup>328</sup>

6.144 The Philippines also addresses Thailand's new argument in relation to the 2000 DG Revenue ruling that, irrespective of whether the exempt sales are reported in form Por.Por.30, "the taxable sales amount ... will be the same".<sup>329</sup> Through this argument Thailand seems to suggest that the more onerous administrative requirement of reporting the sale of domestic cigarette would be acceptable because it does not affect the tax base. Thailand however confuses the obligations under Article III:4 and Article III:2.

6.145 Finally, the Philippines answers Thailand's new argument that the Panel and the Philippines confuse two types of income: income from non-VAT (i.e. banking services exempted from VAT) banking services and income from the sale of domestic cigarettes. Thailand seems to make a particular reference to the Panel's finding that "VAT registrants need not include income from VAT-exempt sales under Section 81, but must include income from VAT-liable sales that is exempt from the tax base under Section 79 in line 3 of form Por.Por.30".<sup>330</sup> The Philippines argues that, in any case, income from "non-VAT banking services" and income from the resale of domestic cigarettes are both exempt from VAT, and, for that reason, need not be reported in lines 1 and 3 of form Por.Por.30. The Philippines contends that the fact that income from "non-VAT banking services" is subject to a specific business tax does not alter the fact that *this is VAT-exempt income*,<sup>331</sup> and, thus, it needs not be reported in form Por.Por.30.<sup>332</sup>

6.146 Regarding Thailand's request that the Panel's analysis and conclusion in paragraphs 7.694-7.698 of the Interim Panel Report be modified because, in its view, the Panel has failed to adequately examine both the evidence related to the 2000 DG Revenue ruling submitted by the Philippines and the excerpt from a textbook on the Revenue Code submitted by Thailand, the **Panel** first notes that the evidence and explanations before it suggest that not all sales exempted from VAT should be reported on form Por.Por.30.

6.147 In the Interim Report, we found that a 2000 DG Revenue ruling suggests that certain VAT-exempt amounts do not have to be "included for calculation in order to pay the value added tax" so that they do not have to be reported on Form Por.Por.30.

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<sup>327</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 140.

<sup>328</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 143.

<sup>329</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 144, referring to Thailand's comments on the Interim Panel Report, para. 53.

<sup>330</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 147.

<sup>331</sup> Exhibit PHL-94: Thai Revenue Code, Chapter IV, Division 1, Section 77/3.

<sup>332</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 148.

6.148 We note Thailand's argument that the 2000 DG Revenue ruling that VAT exempt amounts should not be included in the *calculation* only means that they should not be counted towards line 4 of the form, but must otherwise be reported in lines 1 and 3. Form Por.Por.30 includes line 1 ("sales amounts this month") and line 3 ("exempted sales"). Logically, an amount that would be included in line 1 in order to calculate VAT will be subject to the subtraction of an amount included in line 3. In other words, when an amount is added and then subtracted for the purpose of a VAT calculation, it has been included in the mathematical *calculation* of the VAT liability. *A contrario*, if an amount need not be included for calculation in principle, it is neither added nor subtracted for the purpose of the calculation process. Thus, we understand that in requiring that transactions exempted from VAT by virtue of Section 81(1)(i) of the Revenue Code be excluded from the calculation of the VAT payable, DG Revenue indicated that the amounts corresponding to those transaction need not be added in line 1, which consequently eliminates the need for it to be included in line 3 of form Por.Por.30. We therefore understand the 2000 DG Revenue ruling to mean that the sale of domestic cigarettes, which is exempted from VAT under Section 81(1)(v) of the Revenue Code<sup>333</sup>, need not be reported either in line 1 or in line 3 of Form Por.Por.30.

6.149 Thailand further argues that the Panel<sup>334</sup> and the Philippines<sup>335</sup> confuse two different types of income (i.e. income exempted by virtue of Article 81 and income exempted by virtue of Article 77/3) and are both incorrect in considering that income exempted from VAT under Section 79 of the Thai Revenue Code should be reported in Form Por.Por.30. Specifically, Thailand points out that "Section 79 income" is a category of income that need not be reported in Form Por.Por.30, because Section 79 only deals with the tax base for VAT, not the VAT exempt income.

6.150 Based on our understanding of the 2000 DG Revenue ruling as discussed above, however, we are not persuaded by Thailand's position that operations exempted from VAT under Section 77/3 need not be reported on form Por.Por.30 while operations exempted from VAT under Section 81 must be reported. Furthermore, we are of the view, that even if Thailand's arguments were to be accepted, they relate to the identification of other categories of VAT-exempted products the sales for which need not be reported on form Por.Por.30. In other words, whether this other type of income must be reported or not does not answer the question whether the income from the sales of domestic cigarettes, which is exempted from VAT by virtue of Article 81(1)(v) of the Revenue Code, has to be reported in Form Por.Por.30. For the same reason, we do not consider that Thailand's arguments relating to Section 77/3 of the Thai Revenue Code are relevant to the question before us.<sup>336</sup>

6.151 Regarding Thailand's comments that the Panel incorrectly refers to "Section 79" income, the main point by the Panel's analysis in paragraph 7.696 is that its reading of an expert opinion submitted by the Philippines *supported* the understanding of the 2000 DG Revenue ruling as changing its past practice of requiring VAT-exempt income under Section 81 of the Revenue Code to be reported in Form Por.Por.30.<sup>337</sup> Although we did refer to the expert's view that this change in practice also had

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<sup>333</sup> Philippines' first written submission, para. 534, referring to Exhibit PHL-95.

<sup>334</sup> Interim Panel Report, para. 7.696.

<sup>335</sup> Philippines' comments on Thailand's answer to Panel question No. 142.

<sup>336</sup> Thailand's comments on the Interim Panel Report, paras. 57 and 58. An expert opinion presented by the Philippines (Exhibit PHL-254) explains that income from non-VAT banking services does not have to be reported in form Por.Por.30, even when the operator also carries banking activities subject to VAT. The expert then establishes an analogy between non-VAT banking services and the sale of domestic cigarettes, and concludes that the amounts corresponding to the sale of domestic cigarettes never have to be reported on Form Por.Por.30, even when the operator also carries business subject to VAT. Thailand replies that this reasoning must fail because non-VAT banking services are exempt from VAT reporting requirements by virtue of Section 77/3 of the code, not Section 81.

<sup>337</sup> Philippines' comments on Thailand's answer to Panel question No. 142; Expert Statements by Mr. Piphob Veraphong, Exhibits PHL-207, PHL-254, and PHL-289, stating that "income from VAT-liable sales that is exempt from the tax base under Section 79 must be reported [in form Por.Por.30]".

the implication of requiring that any income exempt from the tax base under Section 79 be reported [in Form Por.Por.30], we consider that issues relating to the existence or non-existence of a "Section 79" category of income are irrelevant to the question whether the sales of domestic cigarettes need to be reported in Form Por.Por.30. As the Philippines submits, our reading of the 2000 DG Revenue ruling as submitted by the Philippines sufficiently shows that income exempted by virtue of Section 81 need not be calculated for the purpose of deriving at VAT liability and thus consequently need not be reported in Form Por.Por.30.

6.152 Finally, Thailand takes the position that the Panel failed to provide an objective assessment of the excerpt from a textbook submitted by Thailand as Exhibit THA-95. This excerpt describes the obligation to file Form Por.Por.30 as one to "report all sales occurring in a tax month" and then "subtracting [...] sales exempted from VAT." It also explains that "sales which are not within the scope of VAT" (for example, the sale of goods or the provision of services outside Thailand) need not be reported on the Form Por.Por.30. We consider sufficient our examination of Thailand's arguments in this regard in paragraphs 7.694 to 7.698, and footnote 1038 of the Interim Panel Report.

6.153 For the foregoing reasons, we decline to accept Thailand's request. We have, however, made modifications to relevant paragraphs to clarify the basis for our conclusion in this regard.

(d) The Panel's weighing of the evidence relating to the interpretation of Thailand's domestic law in reaching the conclusion in paragraph 7.698.

6.154 **Thailand** claims that the Panel incorrectly weighed the evidence before it concerning the requirements to file form Por.Por.30. Thailand points to the Panel's statement in paragraph 7.901 of the Interim Panel Report relating to an Article X:3(a) claim, to the effect that "*in the absence of convincing evidence to prove that the said Act also applies to a public company such as TTM, we do not have the authority to interpret a Member government's law in a manner contrary to Thailand's explanation of its own law*" (emphasis added). Given this standard, Thailand requests the Panel to clarify how, in the context of the Philippines' claim regarding the requirements to fill Por.Por.30, the expert's testimony provided by the Philippines as Exhibit PHL-283, which is unsupported by any other evidence, constitutes "convincing evidence" that would confer on the Panel authority to interpret the Por.Por.30 reporting requirements in a manner contrary to Thailand's explanation of its own law in this instance.<sup>338</sup>

6.155 The **Philippines** relies on the Appellate Body *US – Carbon Steel* decision to argue that the meaning of municipal law has to be determined by panels as a question of fact, taking into account not only the assertions of the regulating country, but also, necessarily, evidence provided as grounds for those assertions (typically including judicial rulings, opinions of legal experts, writings of recognized scholars). In other words, the assertions of the regulating country do not enjoy a presumption of correctness unless they are supported by convincing evidence.<sup>339</sup> The Philippines contends that panels therefore have a margin of discretion in assessing the evidence before them, which the Panel correctly used in its analysis of the form Por.Por.30 requirements.

6.156 The Philippines therefore considers that the Panel's statement in paragraph 7.901 of the Interim Panel Report may not be fully in keeping with the requirements of Article 11 of the DSU, as clarified by the Appellate Body statement in *US – Carbon Steel*. Also, the Philippines argues that there is no reason of principle under Article 11 of the DSU why a Panel should necessarily prefer the meaning of municipal law advanced by the regulating country to the meaning advanced by an expert

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<sup>338</sup> Thailand's comments on the Interim Panel Report, para. 62.

<sup>339</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 117.

in municipal law. Furthermore, an expert's statement prepared on a specific legal question is before a panel may also be preferred by a panel to general statements made in a textbook.<sup>340</sup>

6.157 The **Panel** recalls that the Appellate Body has clarified the appropriate approach that panels must adopt in their analysis of municipal law. The cases cited in paragraph 7.681 of the Interim Panel Report and the Appellate Body statements in *US – Carbon Steel* confirm that, while deference may be given to a Member's interpretation of its own laws, this interpretation must be substantiated by adequate evidence. As the Appellate Body stated in *US – Carbon Steel*, "the nature and extent of the evidence required to satisfy the burden of proof will vary from case to case".<sup>341</sup> The Appellate Body in that case also acknowledged the relevance of expert opinions as supporting evidence to clarify the meaning of municipal law.<sup>342</sup> We have accordingly modified our statement in paragraph 7.901 to clarify this interpretative principle as clarified by the Appellate Body. We have also made additional statements following paragraph 7.697 of the Interim Panel Report to clarify that we have fully and appropriately weighed the evidence before us.<sup>343</sup>

## 2. Record-keeping requirements – paragraphs 7.702-7.715 of the Interim Panel Report

6.158 **Thailand** argues that the Panel has mistakenly established a link between the income tax exemption for individuals reselling domestic cigarettes and VAT-related record keeping requirements. In paragraph 7.702 of the Interim Panel Report, the Panel refers to the Philippines' argument that an individual that resells domestic cigarettes is exempt from personal income tax by virtue of Article 2(19) of Ministerial Regulation No. 126, Section 17(1) of the Revenue Code and Director General's Notification No. 161 on income tax. As a consequence, the Panel concludes that they need not prepare and maintain revenue and expense reports while resellers of imported cigarettes on the other hand must prepare input/output tax reports and goods/raw material reports because of VAT liability. However, as the Panel noted in paragraph 7.703 of the Interim Panel Report, there is no evidence to show "the link between the income tax legislation and the VAT measures at issue". As such, the Philippines failed to provide prima facie evidence of this link. Thailand argues that there was nothing for it to rebut.<sup>344</sup>

6.159 In any event, Thailand considers that, contrary to what the Panel stated in paragraph 7.703 of the Interim Panel Report, it has adduced sufficient evidence to rebut the Philippines' expert opinion allegedly showing that additional reports have to be prepared by resellers of imported cigarettes.<sup>345</sup> Thailand explained that resellers of domestic cigarettes must maintain revenue and expense reports under Section 17(1) of the Revenue Code<sup>346</sup>, provided a copy of a reseller's output tax report showing that sales of cigarettes were reported<sup>347</sup>, and explained that corporate resellers of domestic cigarettes are required to maintain sales accounting records under the Accounting Act (BE 2543). Thailand notes that the Panel has failed to discuss those sales records in the context of the obligation to maintain revenue and expense records. Thailand sees no evidence to support the conclusion drawn by the Panel that VAT registrants do not have to maintain revenue and expense reports.

6.160 In addition, Thailand requests the Panel to make two clarifications. First, Thailand requests the Panel to make clear that the reason why resellers of domestic cigarettes are exempt from income tax is because TTM is responsible for income taxes incurred with respect to resales of domestic

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<sup>340</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 116-119.

<sup>341</sup> Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>342</sup> Appellate Body Report, *US – Carbon Steel*, para. 157.

<sup>343</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 110.

<sup>344</sup> Thailand's comments on the Interim Panel Report, para. 65.

<sup>345</sup> Thailand's comments on the Interim Panel Report, para. 67.

<sup>346</sup> Thailand's comments on the Interim Panel Report, para. 67, referring to Thailand's first written submission, para. 252.

<sup>347</sup> Thailand's comments on the Interim Panel Report, para. 67, referring to Exhibit THA-30.

cigarettes. Specifically, Thailand suggests that the Panel modify paragraphs 7.703-7.705 of the Interim Panel Report accordingly.<sup>348</sup> Second, Thailand considers that the Panel's conclusions in paragraphs 7.702-7.715 regarding the record-keeping requirements for VAT fail to properly explain that many of the reporting requirements apply to *all* VAT registrants and that only resellers of *exclusively* domestic cigarettes that were not VAT registrants would not be subject to these requirements.<sup>349</sup>

6.161 The **Philippines** recalls that Thailand, not the Philippines, tried to establish a link between the income tax legislation and VAT measures at issue.<sup>350</sup> Since Thailand adduced this argument first in support of its position, the Philippines considers that it did not bear the burden of showing the link between the income tax legislation and the VAT measures at issue. Thus, the Philippines requests the Panel to revise paragraph 7.703 of the Interim Panel Report accordingly. In addition, and in any event, the Philippines submits that it has sufficiently substantiated the only important link between the income tax legislation and the VAT measures at issue: resellers of domestic cigarettes are exempt from both, and are spared the corollary record keeping efforts, while resellers of imported cigarettes are subject to both, and must therefore comply with the related administrative requirements.<sup>351</sup>

6.162 Moreover, the Philippines contends that the arguments put forward by Thailand to show that it has adduced sufficient evidence to rebut the Philippines' expert testimony have no relevance because, as Thailand accepts<sup>352</sup>, the Philippines has established that resellers of domestic cigarettes are not liable to income tax. In any event, the Philippines had stressed in its comments of 8 December 2009 that the issue was that only resellers of domestic cigarettes were exempt from VAT-related administrative requirements, a "discrimination [which] cannot be cured or offset by the respective regulatory treatment afforded to the two categories of goods in other areas."<sup>353</sup>

6.163 Regarding Thailand's comments that the Panel has mistakenly established a link between the income tax exemption for individuals reselling domestic cigarettes and VAT-related record keeping requirements, the **Panel** first notes the Appellate Body's clarification that a party who asserts a fact bears the burden of showing its existence.<sup>354</sup> In the course of the proceedings, Thailand first argued that, as resellers of domestic cigarettes are subject to income tax, they are subject to administrative requirements that are similar to those imposed on resellers of imported cigarettes.<sup>355</sup> In response, the Philippines subsequently relied on an expert opinion to establish that individual resellers of domestic cigarettes are exempt not only from VAT, but also from income tax and hence any administrative requirements linked to income tax. As provided in paragraph 7.702 of the Interim Panel Report, based on our consideration of the relevant parties' arguments and evidence in this regard, we

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<sup>348</sup> Thailand's comments on the Interim Panel Report, para. 66.

<sup>349</sup> Thailand's comments on the Interim Panel Report, para. 69.

<sup>350</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 152, referring to Thailand's second written submission, para. 175 where Thailand argued that resellers of domestic cigarettes were required to file income tax revenue and expense reports that are "virtually identical" to the input/output tax reports that need be filed in connection with resales of imported cigarettes.

<sup>351</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 153.

<sup>352</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 156, referring to Thailand's comments on the Interim Panel Report, para. 66.

<sup>353</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 156, referring to Philippines' comment of 8 December 2009, para. 297, third bullet point.

<sup>354</sup> Appellate Body Report, *US — Wool Shirts and Blouses*, para. 335: "[V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."

<sup>355</sup> Thailand's second written submission, para. 175. It is also Thailand that pointed to the fact that being subject to income tax triggered the obligation to fill the revenue and expense reports (Thailand's first written submission, para. 252).

concluded that resellers of *exclusively* domestic cigarettes are exempt from income tax. Nonetheless, even if we were to accept that resellers of domestic cigarettes are subject to income tax, we are not presented with any evidence establishing that the administrative requirements attached to the obligation to pay income tax can be equated to the administrative requirements relating to goods and raw material reports and VAT-related reports. The Panel has modified its analysis in paragraph 7.703 of the Interim Panel Report to clarify this point.

6.164 Thailand also argues, in any event, that it has produced sufficient evidence and explanations to rebut the Philippines' expert opinion which affirmed (i) that resellers of domestic cigarettes are not subject to income tax and (ii) that the resellers of imported cigarettes therefore bear an additional administrative burden linked to their VAT liability. Thailand first contends that resellers of domestic cigarettes must maintain revenue and expense reports under Section 17(1) of the Revenue Code.<sup>356</sup> As indicated in paragraph 7.708, we considered that the Philippines rebutted Thailand's argument by putting forward an expert opinion as provided in Exhibit PHL-254: "I ... can confirm that an individual who resells domestic cigarettes is exempt from personal income tax by virtue of Article 2(19) of the Ministerial Regulation No.126, [as this] is not assessable income".<sup>357</sup>

6.165 We also note Thailand's argument that it has provided a copy of an output tax report in Exhibit THA-30 which shows that resellers of domestic cigarettes also have to complete output tax reports. We note, however, that this evidence includes three columns: "cigarettes, other products, VAT exempt product". From the fact that a figure is shown in the "cigarettes" column of this report, we can assume that this output tax report comes from a business reselling at least some imported cigarettes because any figure corresponding to the sale of domestic cigarettes would logically appear in the "VAT exempt product" category. Thus, in our view, this evidence does not establish that resellers of *exclusively* domestic cigarettes face the same administrative burden as resellers of imported cigarettes only or resellers of both domestic and imported cigarettes. We have made an additional statement in paragraph 7.709 to address our consideration of this evidence as put forward by Thailand.

6.166 Finally, Thailand contends that corporate resellers of domestic cigarettes are required to maintain sales accounting records under the Accounting Act (BE 2543).<sup>358</sup> We note that the Philippines does not contest that corporate resellers must maintain those accounts.<sup>359</sup> Nevertheless, the Panel is unable to compare the accounts to be maintained under the Accounting Act with the VAT-related administrative requirements imposed on resellers of imported cigarettes because no evidence has been produced to inform the content of the accounts to be maintained. We only know from Exhibit PHL-182 that the content of the accounts to be maintained under the Accounting Act differs from that of the input/output reports and the goods and raw materials reports that resellers of imported cigarettes must fill out. We are therefore not in a position to accept Thailand's position that the administrative burden linked to the VAT-related record keeping requirements can be equated to that related to the sales accounting records. We have added a sentence in paragraph 7.709 to reflect our view in this regard.

6.167 Overall, we are not convinced by the evidence produced by Thailand to show that resellers of *exclusively* domestic cigarettes bear an administrative burden that is similar to the one for resellers of imported cigarettes. We have added a concluding statement to this effect in paragraph 7.715.

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<sup>356</sup> Thailand's first written submission, para. 251.

<sup>357</sup> Exhibit PHL-254, para. 11.

<sup>358</sup> We note that the Philippines did not dispute that resellers of domestic cigarettes may have a corporate status. In its second written submission, at footnote 467 under para.494, the Philippines stated: "Even if resellers of domestic cigarettes cannot use some or all of their utilities-related VAT as an input tax, they may nevertheless claim this VAT as a deductible expense for corporate income tax purposes".

<sup>359</sup> Exhibit PHL-182, table under para. 15.2, p. 9.

E. ARTICLE X:3(B) OF THE GATT 1994: CUSTOMS VALUATION DETERMINATIONS – THAILAND'S COMMENTS

1. Factual aspects

6.168 **Thailand** requests that the Panel delete the italics, the underlining and the prefix "THA" in the table under paragraph 7.946 of the Interim Panel Report. Thailand explains that the use of italics and the prefix "THA" to emphasize the facts alleged by Thailand is not adequate because those facts are non-controversial, and no similar emphasis is used in relation to the facts alleged by the Philippines. Concerning the underlining, it is not clear to Thailand why the Panel has used them.<sup>360</sup>

6.169 The **Philippines** finds it useful to italicize and use the prefix "THA" in front of facts alleged by Thailand. It is not clear to the Philippines why the Panel underlined some dates. The Philippines suggests that the Panel include a key or narrative to explain the different features of the chart.<sup>361</sup>

6.170 The **Panel** agrees with Thailand that the absence of italics, underlining and prefix would make the chart under paragraph 7.946 of the Interim Panel Report clearer, and has modified it accordingly.

2. Legal aspects

6.171 **Thailand** requests the Panel to review its conclusion that the Thai system for the purpose of reviewing customs value determinations runs foul of Article X:3(b) of the GATT 1994.

6.172 First, Thailand notes that the Panel established that a violation of Article X:3(b) requires "the process that a Member maintains for review of administrative actions relating to customs matters, when viewed in its entirety, presents a systemic flaw that prevents such actions from being reviewed by an independent tribunal without delay".<sup>362</sup> Thailand is of the view that the Philippines has not produced sufficient evidence to show such a systemic flaw. In particular, the Philippines only established that [[xx.xxx.xx]] appeals lodged by a single importer (PM Thailand) and presenting similar legal issues have been delayed. In the meantime, however, [[xx.xxx.xx]] of the [[xx.xxx.xx]] appeals lodged by this importer between 2000 and 2002 had been completed in a prompt manner.<sup>363</sup> Thailand requests the Panel to clarify how in those circumstances the BoA appeals process can be considered as presenting "in its entirety, ... a systemic flaw that prevent actions from" prompt review by the Tax Court.<sup>364</sup>

6.173 Specifically, Thailand requests the Panel to clarify the meaning of its statement in paragraph 7.1009 that "the interposing process leading to the review by the Thai Tax Court has the capacity to impede a prompt review by an independent tribunal of administrative actions".<sup>365</sup> Thailand argues that every administrative proceeding indeed has the capacity to delay individual cases. Hence, the Panel's statement could be read to mean that the mere existence of administrative review proceedings constitutes a "systemic flaw that prevents actions from review." Thailand therefore requests the Panel to clarify (i) that it does not suggest that the mere existence of administrative reviews as intermediate steps before judicial review violates Article X:3(b) and (ii) whether it is the

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<sup>360</sup> Thailand's comments on the Interim Panel Report, paras. 71-73.

<sup>361</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 167.

<sup>362</sup> Interim Panel Report, para. 7.1005.

<sup>363</sup> Thailand's second written submission, para. 219; Exhibit THA-97.

<sup>364</sup> Thailand's comments on the Interim Panel Report, para. 77, citing Interim Panel Report, para. 7.1005.

<sup>365</sup> Thailand's comments on the Interim Panel Report, para. 78.

mere capacity for delays, or rather actual delays, that give rise to a "systemic flaw" in the Thai system.<sup>366</sup>

6.174 The **Philippines** does not object to further clarifications on paragraph 7.1005. The Philippines contends that in assessing a systemic failure to provide for prompt appeals within the meaning of Article X:3(b), the Panel must take into account both the nature and the extent of the delays. Here, the evidence at issue does not involve isolated appeals but several hundreds, the delays are considerable as they sometimes reach 7 years, and they are due to a series of actions by the BoA, which proved dilatory both in seeking information, and in holding meetings with PM Thailand. The Philippines considers that such delays would not have been possible in a system of review that would be consistent with Article X:3(b) of the GATT 1994.<sup>367</sup>

6.175 Concerning paragraph 7.1009, the Philippines does not share Thailand's reading of the Interim Panel Report, and rather understands that unchecked delays in interposing steps, not the mere existence of administrative review procedures as interposing steps, constitute a breach of Article X:3(b) of the GATT 1994.

6.176 First, the **Panel** does not consider that the mere existence of an intermediate administrative review of the customs value decisions can violate X:3(b). The Panel recalls its statement in paragraph 7.1009 of the Interim Panel Report that:

"Members may have a system under which an initial appeal of an administrative action must be made to an authority within the agency entrusted with enforcement prior to an independent body. We do not therefore consider that the existence of interposing steps prior to an independent review in itself is a systemic flaw that prevents Thailand from maintaining procedures for the *prompt* review of administrative actions under Article X:3(b)."

6.177 In our view, this statement clearly reflects our consideration that the existence of interposing steps prior to an independent review in itself is *not* a systemic flaw that prevents Thailand from maintaining procedures for the *prompt* review of administrative actions consistently with the obligations under Article X:3(b).

6.178 Second, the Panel confirms its view that a violation of Article X:3(b) occurs when a systemic flaw in the procedures and institutions established and/or maintained for the purpose of the review of administrative decisions impede *prompt* review thereof. Under the factual circumstances of this case, we considered that the number of appeals subject to the concerned delays ([[xx.xxx.xx]] appeals) and the duration of such delays (to the maximum of 7 years) warranted the conclusion that the system maintained by Thailand for the review as set forth in Article X:3(b) was flawed. Therefore, our finding of a violation of Article X:3(b) in respect of Thailand's review process maintained for such purpose lies in the fact that the extent of the delays caused in the BoA appeal process was excessive and significant enough to show a certain *systemic* flaw in that very review process. In other words, the mere fact that the actual delays were found in the appeal process was not conducive to our conclusion.

6.179 Thailand also contends that [[xx.xxx.xx]] appeals by the same importer have been duly reviewed. However, this does not affect our conclusion because the fact that those [[xx.xxx.xx]] appeals were promptly reviewed cannot negate the fact that under the same system, excessive delays have been caused in a significant number of other appeals.

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<sup>366</sup> Thailand's comments on the Interim Panel Report, para. 79.

<sup>367</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, paras. 162-164.



6.180 In the light of the foregoing considerations, we have modified paragraphs 7.1005 and 7.1009 of the Interim Report to further clarify our reasoning as requested by Thailand.

F. OTHER REQUESTS FOR REVIEW

1. Paragraph 7.39 – Thailand's comments

6.181 **Thailand** requested the panel to correct paragraph 7.39 of the Interim Panel Report as it summarizes the Philippines' arguments regarding the Panel's terms of reference with respect to superseded or expired MRSP measures instead of those on the August 2006-September 2007 MRSP Notices. The **Philippines** submits that the Panel should not accept Thailand's request to make this change.

6.182 The **Panel** observes that paragraph 7.39 reflects the submissions by the Philippines on the August 2006-September 2007 MRSP Notices and therefore has not modified this paragraph.

2. [[xx.xxx.xx]] import entries as business confidential information – Thailand's comments

6.183 **Thailand** requested the Panel not to treat as business confidential the number of import entries at issue, *i.e.* [[xx.xxx.xx]], as business confidential information. Thailand sees no ground for treating the number of entries, already publicly disclosed in the Philippines' panel request, as "financially or commercially sensitive information" that is "not otherwise available in the public domain" within the meaning of paragraph 1 of the Panel's Additional Working Procedures Concerning BCI. Thailand is also concerned that deleting the references to the [[xx.xxx.xx]] entries from the non-BCI version of the final report may cause confusion as to whether the Panel was ruling on the measures actually identified in the Philippines' panel request.<sup>368</sup>

6.184 The **Philippines** considers that the specific number of entries that occurred during a defined period of time is BCI, and it states that although the panel request lists the [[xx.xxx.xx]] entries, it does not specify the precise number of entries that occurred in a defined period, because the request does not exclude the possibility that other entries occurred in the period mentioned.<sup>369</sup>

6.185 The **Panel** considers that paragraph 1 of the Panel's Additional Working Procedures Concerning BCI states: "BCI is defined as financially or commercially sensitive information submitted to the Panel in the course of these proceedings that is (i) not otherwise available in the public domain, and (ii) clearly designated as BCI by the Philippines or Thailand in their submissions to the Panel". First, we note that in all its submissions the Philippines treated the [[xx.xxx.xx]] entries as BCI. Second, we recognize that, as Thailand puts forward, this number of entries was disclosed in the Philippines' Panel request. However, we note that in that request, the Philippines referred to these entries as being "included" into "individual determinations made by Thai Customs for entries of cigarettes exported from the Philippines ...", hence the Panel request does not make clear whether these were all the entries made during the period at issue or whether more entries existed. Hence, the Panel agrees with the Philippines that although the panel request listed the [[xx.xxx.xx]] entries, it did not state that these were the only entries in a specific period and therefore the information is not available in the public domain. Regarding Thailand's fear that deleting the references to the [[xx.xxx.xx]] entries from the non-BCI version of the final report may cause confusion as to whether the Panel was ruling on the measures actually identified in the Philippines' panel request, we note that in our report and in our findings we refer to the [[xx.xxx.xx]] entries *at issue* and that therefore, it is clear that we are dealing with the entries listed in the Philippines' panel request and not to any other

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<sup>368</sup> Thailand's comments on the Interim Panel Report, para. 90-91.

<sup>369</sup> Philippines' comments on Thailand's comments on the Interim Panel Report, para. 167.

entries. Consequently, the Panel decides to not make changes to its final report and treat the [[xx.xxx.xx]] entries as confidential.

### 3. Paragraph 7.436 – The Philippines comments

6.186 The **Philippines** argues that, in examining the TNS study provided by the Philippines as Exhibit PHL-111a, the Panel has mixed the numbers the switch in and switch out rates applicable to *Marlboro* and *L&M*. The Philippines requests the Panel to modify paragraph 7.436 of the Interim Panel Report to reflect the correct number applicable to each brand respectively, and to add the relevant reference to the page numbers of the study.<sup>370</sup> In the absence of any comment by Thailand, the **Panel** has modified paragraph 7.436 of its Interim Panel Report accordingly.

### 4. Paragraph 7.467 – The Philippines comments

6.187 **The Philippines** contests the statement in paragraph 7.467 of the Interim Panel Report that "the Philippines does not appear to take issue with the methodology to be applied to establish MRSPs". The Philippines underlines that Thailand had not published a methodology to be applied, it has only described an overall methodology, but as the Philippines has shown, it departed from it to determine MRSPs at issue in this dispute. As a result, the Philippines is unaware of the overall methodology to be applied by Thailand.<sup>371</sup> The Philippines therefore requests the Panel to modify paragraph 7.467 of its Interim Panel Report, and suggests some language in this regard. In the absence of objection by Thailand, the **Panel** has modified paragraph 7.467 accordingly.

### 5. Typographical errors and clerical observations

6.188 The **Philippines** requested modifications to footnote 428 to paragraph 7.916, paragraphs 7.444, 7.445 and 7.446 of the Interim Panel Report, and made some clerical observations, which it made in track changes to the Interim Panel Report.

6.189 **Thailand** did not object to any of these requests and observations, although it noted that some of the Philippines' comments appear to involve stylistic changes instead of mere typos and it requested the Panel not to work from the Philippines' track changed version.

6.190 Thailand also requested modifications to paragraphs 7.51, 7.60, 7.61, 7.999, 8.3(a), and heading VII.E of the Interim Panel Report and made some clerical observations.

6.191 The **Panel** has worked from the original version of the Interim Panel Report, not from the Philippines' track changed version. Further, as noted above, the Panel has incorporated all other comments by the parties on typographical errors in the Interim Panel Report and has modified the Report to the extent it deemed necessary.

## VII. FINDINGS

### A. OVERVIEW OF THE MATTERS BEFORE THE PANEL

7.1 In this dispute, the Philippines advances claims against certain Thai customs and fiscal measures affecting cigarettes imported from the Philippines. The Philippines claims that these measures violate Thailand's obligations under various provisions of the Customs Valuation Agreement and Articles III:2, III:4 and X of the GATT 1994.

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<sup>370</sup> Philippines' comments on the Interim Panel Report, paras. 85-87.

<sup>371</sup> Philippines' comments on the Interim Panel Report, paras. 88-93.

7.2 Under the Customs Valuation Agreement, the Philippines submits that Thai Customs improperly rejected the transaction values of the cigarette entries that were cleared between 11 August 2006 and 13 September 2007 in violation of Articles 1.1 and 1.2(a). The Philippines further claims that Thai Customs applied the deductive valuation method inconsistently with the obligations under Articles 5 and 7 in determining the customs value of the subject cigarettes. The Philippines also takes the position that Thailand violated procedural obligations under both Article 10 not to disclose confidential information and Article 16 to provide an explanation for the determination of the final customs value.

7.3 The Philippines also challenges a number of measures imposed on imported cigarettes under the Thai VAT regime. It argues that Thailand determines the tax base for VAT imposed on imported cigarettes in the manner in which imported cigarettes are subject to a VAT in excess of that imposed on like domestic cigarettes in violation of the first sentence of Article III:2 of the GATT 1994. The Philippines further claims that imported cigarettes are also subject to the VAT liability in excess of that applied to like domestic cigarettes in violation of the first sentence of Article III:2 through the VAT exemption afforded only to domestic cigarette resellers. The excessive tax liability imposed on the imported cigarette resellers also allegedly entail additional administrative requirements for those selling imported cigarettes. This results in less favourable treatment for imported cigarettes in violation of Article III:4.

7.4 Finally, the Philippines asserts that Thailand violates various obligations under Article X of the GATT 1994 in connection with its customs and fiscal measures. The Philippines claims that Thailand violates Article X:1 by failing to publish laws and regulations pertaining to the determination of a VAT for cigarettes and the release of a guarantee imposed in the customs valuation process. The Philippines also challenges the Thai government system under which certain government officials simultaneously serve on the board of TTM, a state-owned domestic cigarette manufacturer, which, according to the Philippines, is inconsistent with the obligations under Article X:3(a) to administer customs matters in a reasonable and impartial manner. It is also claimed that Thailand violates Article X:3(a) through the alleged unreasonable delays caused in the BoA review process for appeals against customs determinations. Thai Excise's determinations of the tax base for VAT as well as its use of a guarantee value in calculating the excise, health and television taxes, the Philippines argues, are non-uniform, unreasonable and partial, and therefore in violation of Article X:3(a). The Philippines further claims that Thailand failed to maintain an independent tribunal or process for the prompt review of administrative actions relating to customs matters, particularly customs value decisions and guarantee decisions inconsistently with the obligations under Article X:3(b).

B. PRELIMINARY MATTERS

1. Terms of reference

(a) The Philippines' claim under Article X:3(a) of the GATT 1994 with respect to Thailand's administration of the VAT system

(i) *Main arguments of the parties*

7.5 **Thailand** submits that the Philippines' claim that Thailand fails to administer its VAT system consistently with Article X:3(a) is outside the Panel's terms of reference because it is not made in the Philippines' panel request.<sup>372</sup> Thailand argues that the Philippines' claims under Articles X:3(a) and X:3(b) of the GATT 1994 were set out in Section II, paragraphs 3-11 of its panel request<sup>373</sup>, in

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<sup>372</sup> Thailand's first written submission, paras. 304-305.

<sup>373</sup> See WT/DS371/3, 6 October 2008, paras. 3-11.

which the only reference to the Thai VAT system is made in paragraph 5. According to Thailand, this section of the Philippines' panel request, however, refers to a measure different from the VAT system, namely the allegedly improper "links" between TTM and other Thai government agencies.<sup>374</sup> In other words, this claim has nothing to do with the question of whether Thailand's establishment of the MRSPs (VAT system) was consistent with Article X:3(a).

7.6 While the Philippines sets out its claims relating to Thailand's VAT system in Section V, paragraphs 25-30 of the panel request, none of these paragraphs contains any reference to Article X:3(a) of the GATT 1994. Thus, there is nothing in the Philippines' panel request to suggest that it intended to make a claim under Article X:3(a) regarding how Thailand calculated the MRSPs. Thailand submits that the Philippines has not "plainly connect[ed]" the absence of generally applicable criteria and the use of guarantee values to calculate MRSPs with the obligations under Article X:3(a) of the GATT 1994 in a manner that "presents the problem clearly".<sup>375</sup> Specifically, the panel request does not contain any reference to claims that Thailand administers the VAT measures in a *non-uniform* manner.<sup>376</sup> While Article X:3(a) sets out three distinct and legally independent obligations – an obligation to administer laws and regulations in a *uniform, impartial and reasonable* manner<sup>377</sup>, the Philippines' panel request fails to set out that Thailand has violated its obligation to administer laws and regulations in a "non-uniform" manner.<sup>378</sup> From a reading of the Philippines' panel request, Thailand could not have been expected to be aware that the Philippines would advance these specific requests.

7.7 Thailand further submits that the factual basis for this claim consists entirely of the September 2006 and March 2007 MRSP Notices, which are *not* themselves within the Panel's terms of reference because they are not listed in the Philippines' panel request and were not in effect as of the date of establishment of the Panel.<sup>379</sup>

7.8 The **Philippines** asserts that its panel request complies with Article 6.2 of the DSU as it plainly connected the administration of the listed VAT measures with Article X:3(a), which is "*an identified provision of a particular agreement*".<sup>380</sup> According to the Philippines, Article 6.2 establishes two requirements for a panel request: it must "identify the specific measures at issue"; and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The Philippines submits that Thailand does not argue that the Philippines has failed to "identify the *specific [VAT] measures*". These measures are listed in paragraph 26 of the panel request, and cross-referenced in paragraph 5.

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<sup>374</sup> Thailand's first written submission, para. 305.

<sup>375</sup> Thailand's first written submission, para. 305; second written submission, para. 311. Thailand refers to the Appellate Body's statement in *US – Oil Country Tubular Goods Sunset Reviews*:

"It follows, therefore, that in order for a panel request to 'present the problem clearly', it must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claim to have been infringed, so that the respondent party is aware of the basis of the alleged nullification and impairment of the complaining party's benefits. Only by such connection between the measure(s) and the relevant provision(s) can a respondent know what case it has to answer, and ... begin preparing its defence." (para. 162).

<sup>376</sup> Thailand's second written submission, para. 312.

<sup>377</sup> Thailand refers to the Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.383.

<sup>378</sup> Thailand's second written submission, para. 312.

<sup>379</sup> Thailand's first written submission, para. 306, referring to paras. 194-202 of the same submission.

<sup>380</sup> Philippines' first oral statement, para. 232 (*italics in original*). The Philippines also refers to the Appellate Body statement in *US – Oil Country Tubular Goods Sunset Reviews* that a panel request must plainly connect the challenged measure(s) with the provisions(s) of the covered agreements claimed to have been infringed.

7.9 The Philippines argues that Thailand confuses the Philippines' Article X:3(a) *claim* against the Thai VAT system with *arguments* substantiating that, and other, claims.<sup>381</sup> Therefore, according to the Philippines, Thailand incorrectly asserts that the Philippines' panel request fails to satisfy the requirements under Article 6.2 because the panel request does not "suggest" that the Philippines "intended to make a claim under Article X:3(a) regarding *how Thailand calculated the MRSPs*".<sup>382</sup> In the Philippines' view, such a statement is not required by Article 6.2 of the DSU as it is an *argument*, and *not a measure or claim*.<sup>383</sup> Referring to a finding by the Appellate Body in *EC – Selected Customs Matters*, the Philippines argues that Article 6.2 does not require an explanation to be provided in a panel request concerning *why* the legal instruments listed in a panel request are administered in a manner that is inconsistent with Article X:3(a).

(ii) *Analysis by the Panel*

7.10 In this Panel proceeding, the Philippines has advanced four claims under Article X:3(a), including its claim that Thailand violates Article X:3(a) by administering *the VAT system* in a non-uniform, unreasonable and partial manner.<sup>384</sup> Thailand claims that the Philippines' Article X:3(a) claim with respect to Thailand's administration of the VAT system is outside the Panel's terms of reference because it is inconsistent with the obligations set forth in Article 6.2 of the DSU. Specifically, Thailand argues that the Philippines failed to plainly connect the absence of generally applicable criteria and the use of guarantee values to calculate MRSPs with the obligations under Article X:3(a) of the GATT 1994 in a manner that "presents the problem clearly".<sup>385</sup> The Philippines asserts that its panel request complies with Article 6.2 of the DSU as it plainly connected the administration of the listed VAT measures with Article X:3(a), which is "an identified provision of a particular agreement".<sup>386</sup>

7.11 Article 7.1 of the DSU defines panels' terms of reference as follows:

"Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

7.12 The document on the constitution of the panel established at the request of the Philippines in this case provides:

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<sup>381</sup> Philippines' first oral statement, para. 229.

<sup>382</sup> Philippines' first oral statement, paras. 230-231.

<sup>383</sup> Philippines' first oral statement, para. 233, referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

<sup>384</sup> Philippines' first written submission, heading V.C.(iv); Philippines' first oral statement, heading VII.D.2; Philippines' second written submission, heading V.F; Philippines' second oral statement, heading V.F. Section V of the Philippines' first written submission covers its claims pertaining to the Customs Valuation Agreement. The Philippines designates a separate section (Section III) in its first written submission for its claims under Article X of the GATT 1994 with respect to the dual role of Thai senior government officials, undue delays in the BoA process, and Thailand's alleged failure to provide for an appeal against the imposition of guarantees.

<sup>385</sup> Thailand's first written submission, para. 305; second written submission, para. 311.

<sup>386</sup> Philippines' first oral statement, para. 232.

"At its meeting on 17 November 2008, the Dispute Settlement Body (DSB) established a panel in accordance with Article 6 of the DSU (WT/DSB/M/259), with standard terms of reference, to examine the matter referred to the DSB by the Philippines in document WT/DS371/3."<sup>387</sup>

7.13 Therefore, the Panel in the present dispute has the standard terms of reference, which are governed by the Philippines' request for the establishment of a panel. As Article 6.2 of the DSU is the provision governing the standards for a panel request, we will first examine the text of Article 6.2.

7.14 Article 6.2 of the DSU provides:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

7.15 In *Korea – Dairy*, the Appellate Body clarified that Article 6.2 contains four distinct elements with respect to the panel request:

"The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."<sup>388</sup>

7.16 The Appellate Body further clarified that in the fourth requirement above, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint, but the summary must, in any event, be one that is "sufficient to present the problem clearly".<sup>389</sup> In order for a panel request to "present the problem clearly", the complainant must *plainly connect* the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.<sup>390</sup>

7.17 We will examine the Philippines' request for the establishment of a panel to determine whether its claim under Article X:3(a) in respect of the administration of the Thai VAT system is properly made in accordance with the standard under Article 6.2 of the DSU. The Philippines identifies its claims pertaining to the Thai VAT system in Section V of its panel request as follows:

"V. CLAIMS PERTAINING TO THAILAND'S VALUE-ADDED TAX ("VAT") REGIME

26. The Philippines understands that Thailand operates the VAT regime for cigarettes through measures including:

...

27. The MRSPs for imported brands of cigarette, including those exported by the Philippines, are set at significantly higher levels than the MRSPs for like and/or

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<sup>387</sup> WT/DS371/4 (circulated on 17 February 2009).

<sup>388</sup> Appellate Body Report, *Korea – Dairy*, para. 120.

<sup>389</sup> Appellate Body Report, *Korea – Dairy*, para. 120.

<sup>390</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

directly competitive or substitutable domestic brands. Moreover, the MRSPs for imported cigarettes are set significantly above the actual retail selling price of those cigarettes, whereas the MRSPs for domestic cigarettes are set at the level of the actual retail selling price of those cigarettes. The higher MRSPs for imported products result in a higher fiscal burden for these products than for like and/or directly competitive or substitutable domestic products, and thereby afford protection to the domestic products. Therefore, the Philippines considers that the VAT imposed on imported products as a result of these measures is inconsistent with Article III:2, first and second sentence, of the GATT 1994.

28. Thailand also has not published the regulations pertaining to the determinations of the MRSPs, which constitutes the tax base for Thailand's imposition of VAT on domestic and imported cigarettes. This failure is a violation of Article X:1 of the GATT 1994. Moreover, Thailand has not published any rules governing VAT refunds in the event of a revision of the MRSP or of an element thereof, giving rise to another violation of Article X:1 of the GATT 1994. Finally, Thailand's failure to grant refunds in these circumstances for overpaid amounts of VAT is contrary to Article III:2 of the GATT 1994."

7.18 After setting out in paragraph 26 the Thai measures through which Thailand operates the Thai VAT regime, the Philippines identifies, in paragraphs 27 and 28 of the request, Article X:1 and Article III:2 of the GATT 1994 as the legal provisions that it alleges Thailand violates with respect to various aspects of the Thai VAT regime. Article X:3(a) is therefore not listed in Section V of its panel request, the specific section in which Thailand identifies the relevant VAT measures.

7.19 The Philippines argues that it plainly connected the administration of the listed VAT measures with Article X:3(a).<sup>391</sup> We recognize that the Philippines did identify the specific VAT measures at issue in Section V of its panel request as noted above. In respect of the alleged connection between these VAT measures and the provision of a particular agreement with which the Philippines argues Thailand is acting inconsistently, Article X:3(a) in this instance, we understand the Philippines to be referring to Article X:3(a) that is listed in Section II of the panel request.

7.20 Section II, as cited in paragraph 7.24 below, however indicates that the Philippines' claims under Articles X:3(a) and X:3(b) therein concern, *inter alia*, the following three Thai government actions: (i) the pervasive institutional and personal links between TTM and the Thai government; (ii) undue delays in the BoA process, and (iii) Thailand's failure to provide for an appeal against the imposition of guarantees. Therefore, the objects of the Philippines' challenges under Articles X:3(a) and X:3(b) in Section II of the Philippines' request do not include the VAT measures as identified in Section V of the Philippines' panel request.

7.21 In this regard, the Appellate Body in *EC – Selected Customs Matters* further clarified the two distinct requirements under Article 6.2 of the DSU, namely identification of *the specific measures at issue* and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). According to the Appellate Body, the measure at issue is *what* is being challenged by the complaining Member, whereas, in contrast, the legal basis of the complaint, namely, the 'claim', pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated. The Appellate Body explains that a brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by

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<sup>391</sup> Philippines' first oral statement, para. 232.

the complaining Member to be violating the WTO obligation in question and that this brief summary must be sufficient to present the problem clearly.<sup>392</sup>

7.22 In paragraph 5 of Section II in particular, the Philippines claims that the alleged pervasive institutional and personal links between TTM and the Thai government<sup>393</sup> *lead to* conflicts of interest, and partial and unreasonable administration of Thai fiscal and customs measures. It further states in the same paragraph that "in particular, Thailand administers in a partial and unreasonable manner ... the value added tax ("VAT") measures in paragraph 26". Read together, the Thai government action being challenged by the Philippines in paragraph 5 of Section II of the panel request is the alleged institutional and personal links between TTM and the Thai government, which allegedly lead to a partial and unreasonable administration of the VAT measures identified in paragraph 26. In our view, this reference to the VAT measures is what qualifies as a brief summary of the legal basis of the Philippines' claim under Article X:3(a): the Philippines is explaining how the concerned link between TTM and the Thai government, the object of its challenge, leads to a violation of Thailand's obligations under Article X:3(a). On the other hand, the Thai VAT measures, as one of the *objects* of the Philippines' challenges in this dispute, are identified in Section V of the panel request.

7.23 In this light, we do not consider that the Philippines explained succinctly *how* or *why* Thailand must be considered to be violating Article X:3(a) through its VAT measures as identified in a different section of the panel request. In other words, the problem relating to the VAT system or Thailand's administration of such a system in the context of Article X:3(a) is not clearly presented to satisfy the requirements under Article 6.2 of the DSU.

7.24 This disconnection between the identification of what is being challenged (the Thai VAT system) and *how* or *why* the Philippines considers such specific measures to be violating Article X:3(a) is all the more obvious when we compare the way the Philippines presented this claim against the overall structure of the Philippines' panel request and the Philippines' other claim under Article X:3(a) with respect to other internal taxes.<sup>394</sup> For instance, the Philippines divided its panel request into five sections mainly according to the type of the Thai measures it challenges in this panel proceeding.<sup>395</sup> Apart from the introductory section, the only section deviating from this structure is Section II in which the Philippines presents its general claims under Article X:3(a) as follows:

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<sup>392</sup> Appellate Body Report, *EC – Selected Customs Matters*, paras. 129-130.

<sup>393</sup> We recall the Appellate Body's statement in *EC – Selected Customs Matters* that "a complainant is entitled to include in its panel request an allegation of inconsistency with a covered agreement of any measure that may be submitted to WTO dispute settlement". Also referring back to guidance provided in this regard by the Appellate Body in *US – Corrosion Resistant Steel Sunset Review* that "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings", the Appellate Body underlined that "as long as the specificity requirements of Article 6.2 are met, we see no reason why a Member should be precluded from setting out in a panel request 'any act or omission' attributable to another Member as the measure at issue". (Appellate Body Report, *EC – Selected Customs Matters*, para. 133, referring to Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 81).

<sup>394</sup> The Appellate Body in *EC – Selected Customs Matters* confirmed its previous clarification that "determining the scope of the claims that are set out in a panel request requires that the panel request be construed as a whole". (Appellate Body Report, *EC – Selected Customs Matters*, para. 168, referring to the Appellate Body Reports on *US – FSC (Article 21.5 – EC II)*, paras. 66-68; *US – Carbon Steel*, para. 127). The Appellate Body therefore stated that it would be able to conclude that the panel request included a challenge to the European Communities' system of customs administration as a whole or overall only if it was convinced that the panel request, read as a whole, states this claim in a way that is "sufficient to present the problem clearly".

<sup>395</sup> The Philippines' panel request (WT/DS371/3) is structured as follows: Section I (introduction); Section II (claims under Articles X:3(a) and X:3(b) of the GATT 1994); Section III (claims pertaining to customs valuation); Section IV (claims pertaining to the excise tax, health tax and television tax regimes); and Section V (claims pertaining to Thailand's value-added tax ("VAT") regime).



"II. CLAIMS UNDER ARTICLES X:3(A) AND X:3(B) OF THE GATT 1994

...

5. These pervasive institutional and personal links between TTM and the Thai government lead to conflicts of interest, and partial and unreasonable administration of Thai fiscal and customs measures. In particular, Thailand administers in a partial and unreasonable manner:

- the customs valuation measures in paragraph 13;
- the excise tax measures in paragraph 19;
- the health tax measures in paragraph 20;
- the television tax measures in paragraph 21; and
- the value added tax ("VAT") measures in paragraph 26.<sup>396</sup>

...

8. Furthermore, Thailand does not administer the customs valuation measures and the VAT measures in a reasonable manner because of undue delays in its administrative decision making. For instance, the Board of Appeals (BoA), an administrative tribunal within the Ministry of Finance, which operates under Section 112 sexies to Section 112 undevicies of the Customs Act, to which an appeal against a customs valuation decision is initially made, has a substantial backlog of appeals filed by the importer dating as far back as March 2003. The excessive delays violate Articles X:3(a) and also X:3(b), which requires WTO Members to maintain tribunals for the purpose of the "prompt review and correction of administrative action relating to customs matters.

...

10. Finally, Thailand does not provide for judicial or administrative review of the customs authorities' decisions relating to the imposition and collection of guarantees, pending the issuance of a notice of assessment, covering the customs duties and excise, health and television taxes that may become payable. Given that Thailand has taken 16 months to issue Notices of Assessment, and that guarantees are collected as either bank guarantees or in cash for the full amount of duties potentially payable, it is not reasonable administration under Article X:3(a) to deny recourse to judicial or administrative review. Equally, this failure is contrary to the duty in Article X:3(b) to provide for "prompt review" of administrative actions relating to customs matters."

7.25 In Section II of its panel request, therefore, the Philippines has clearly presented its other Article X:3(a) claims that it pursues in this proceeding by connecting them to the particular measures at issue that are allegedly violating the obligations under the provision.

7.26 Moreover, unlike in the case of the VAT system as a measure, we observe that the Philippines presented an Article X:3(a) claim with respect to the Thai excise, health and television tax regimes in section IV of the panel request. Specifically, in paragraph 23 of the panel request, the Philippines

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<sup>396</sup> Philippines' panel request (WT/DS371/3), para. 5.

states that "the failure of Thailand to provide for such procedures, as well as Thailand's failure to grant refunds for amounts of these taxes that have been overpaid, ... also constitutes partial and unreasonable administration of the measures referred to in paragraph 19, 20, and 21, contrary to Article X:3(a) of the GATT 1994". This illustrates that when the Philippines intended to make a specific claim concerning a certain measure, it did so with clarity under the relevant section of the panel request. As for the Thai VAT measures, the Philippines did not clearly present the problem that the VAT measures present in the light of the obligations under Article X:3(a). We do not consider that on the basis of the Philippines' panel request, Thailand could have been made aware of the Philippines' claim under Article X:3(a) with respect to the Thai VAT measures, specifically how or why the Thai VAT measures identified in paragraph 26 must be considered to be violating Article X:3(a).<sup>397</sup> Therefore, we find that the Philippines' claim under Article X:3(a) with respect to the Thai VAT system is outside the Panel's terms of reference.

(b) The Philippines' claim under Article X:3(a) of the GATT 1994 with respect to Thailand's administration of the excise, health and television taxes

(i) *Main arguments of the parties*

7.27 In its second written submission, **Thailand** claims that the Philippines fails to "plainly connect" the utilization of unlawful tax bases to assess excise, television and health taxes with Thailand's obligations under Article X:3(a) of the GATT 1994.<sup>398</sup> Thailand argues that these matters are not even mentioned in the Philippines panel request. By omitting any reference to these matters, the Philippines has failed to describe its claims in a manner that suffices to present the relevant problems clearly. From a reading of the panel request, Thailand could not have been expected to be aware that the Philippines would advance these specific claims.

7.28 Specifically, the panel request does not contain any reference to claims that Thailand administers the excise, television and health tax measures in a *non-uniform* manner.<sup>399</sup> While Article X:3(a) sets out three distinct and legally independent obligations – an obligation to administer laws and regulations in a *uniform, impartial and reasonable* manner<sup>400</sup>, the Philippines' panel request fails to set out that Thailand has violated its obligation to administer laws and regulations in a "non-uniform" manner.<sup>401</sup> On a reading of the panel request, Thailand could not be able to discern that it would have to respond to two claims regarding the "non-uniform" administration of the excise, television and health taxes. Thailand asserts that in this case, the "mere listing" of Article X:3(a) does not provide a description of the legal basis of the Philippines' claims in a manner that suffices to

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<sup>397</sup> The Appellate Body stated that "the fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself" (Appellate Body Report, *Thailand – H-Beams*, para. 95). The Appellate Body in that dispute found:

"In assessing Thailand's claims of prejudice, we consider it relevant that, although Thailand asked the Panel for a preliminary ruling on the sufficiency of Poland's panel request with respect to Articles 5 and 6 of the Anti-Dumping Agreement at the time of filing of its first written submission, it did not do so at that time with respect to Poland's claims under Articles 2 and 3 of that Agreement. We must, therefore, conclude that Thailand did not feel at that time that it required additional clarity with respect to these claims, particularly as we note that Poland had further clarified its claims in its first written submission. This is a strong indication to us that Thailand did not suffer any prejudice on account of any lack of clarity in the panel request."

<sup>398</sup> Thailand's second written submission, paras. 309-314.

<sup>399</sup> Thailand's second written submission, para. 312.

<sup>400</sup> Thailand refers to the Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.383.

<sup>401</sup> Thailand's second written submission, para. 312.

"present the problem clearly" and for Thailand to understand the case it had to answer. Thailand points out that in similar circumstances, prior WTO panels have ruled that the mere listing of a provision containing multiple obligations is insufficient to meet the requirements of Article 6.2 of the DSU.<sup>402</sup>

(ii) *Analysis by the Panel*

7.29 For the reasons explained in paragraph 7.25 above, we are of the view that the Philippines identified the specific measures relating to the Thai excise, health and television tax regimes and plainly connected these measures to its claim under Article X:3(a) within the standard of Article 6.2 of the DSU.

7.30 Thailand further argues, however, that the Philippines' claim under Article X:3(a) with respect to the Thai internal tax regime falls outside the Panel's terms of reference because, while Article X:3(a) sets out three distinct and legally independent obligations – an obligation to administer laws and regulations in a *uniform, impartial and reasonable* manner – the Philippines' panel request fails to set out that Thailand has violated its obligation to administer laws and regulations in a "non-uniform" manner.

7.31 We recall the Appellate Body's statement in *Korea – Dairy* that the mere listing of an *article*, in and of itself, may fail to satisfy the standard of clarity. Rather, the sufficiency of the Panel request in terms of a particular claim must be considered on a case-by-case basis, taking into account whether "the ability of the respondent was prejudiced" by the fact that only the Article was listed.<sup>403</sup> We are not convinced, however, that the standard set by the Appellate Body with respect to a claim is equally applicable to specific elements and/or obligations within an Article of a WTO covered agreement. While the uniformity, impartiality and reasonableness are the three distinct and legally independent obligations within Article X:3(a), in our view, each obligation does not constitute an independent claim that needs to be identified in the panel request to satisfy the requirements of Article 6.2 of the DSU. Although it would be desirable for the complainant to present as precise and clear a claim as possible, we do not consider that its failure to specify a particular obligation under Article X:3(a) renders the panel request inconsistent with Article 6.2 of the DSU.<sup>404</sup>

(c) Thai Customs' valuation determinations for the cigarettes at issue that were cleared between 11 August 2006 and 13 September 2007

(i) *Main arguments of the parties*

7.32 **Thailand** claims that many of the Philippines' claims relate to expired measures and completed acts.<sup>405</sup> Thailand is of the view that to the extent that the Philippines had concerns

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<sup>402</sup> Thailand's second written submission, para. 312, referring to the Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.50.

<sup>403</sup> Appellate Body Report, *Korea – Dairy*, paras. 124 and 127.

<sup>404</sup> Previous panels that were presented with claims under Article X:3(a) appear to have taken a similar approach. For example, the Panel in *Dominican Republic – Import and Sale of Cigarettes* analyzed the framework of Article X:3(a) claim with regard to all three obligations, despite the omission of an explicit reference to the uniformity and impartiality obligations (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.375 and 7.383). In *Argentina – Hides and Leather*, the panel request listed Article X:3(a) and referred to the uniformity and impartiality obligations. Nonetheless, the complainant and the Panel proceeded to address all three obligations (Panel Report, *Argentina – Hides and Leather*, para. 11.86).

<sup>405</sup> Thailand's first oral statement, para. 23; second written submission, para. 308. In its first oral statement, Thailand states that the expired measures and past acts include the valuation and assessment of duties with respect to the [[xx.xxx.xx]] entries listed in the panel request, the setting of MRSPs for 2006, and the

regarding actions taken in the past by Thailand, those concerns had been resolved by the time the Philippines requested the establishment of a panel.<sup>406</sup> For example, Thai Customs has used PM Thailand's declared transaction values as the customs value since September 2007, well over a year before the request for the establishment of a panel.

7.33 Thailand submits that in these circumstances, it questions the extent to which dispute settlement proceedings may be fruitful to address issues that, in effect, have already been resolved.<sup>407</sup> Thailand argues that as a practical matter, had Thailand intended to protect its domestic cigarette industry from competition from imports, there were – and still are – perfectly legitimate means by which it could do so, such as by raising its applied tariff rate for cigarettes or by renegotiating its tariff bindings. Thailand has not done so and, as the Philippines' own evidence indicates, cigarettes are currently being imported freely and in increasing quantities into Thailand. Thailand therefore questions the utility of these proceedings.

7.34 Thailand urges the Panel to consider carefully: (i) whether each of the Philippines' claims identified in Exhibit THA-36 are properly within its terms of reference such that the Panel can rule on those claims; (ii) if the claims are within the Panel's terms of reference, whether and to what extent it is appropriate or useful for the Panel to rule on claims that relate either to expired measures or completed acts; and (iii) whether the Panel is permitted under Article 19.1 of the DSU to make recommendations with respect to such claims.<sup>408</sup>

7.35 Particularly with respect to panels' recommendations under Article 19.1 of the DSU in WTO dispute settlement proceedings, Thailand submits that under Article 19.1 of the DSU, 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. Thailand submits that the Panel cannot issue recommendations pursuant to Article 19.1 that Thailand bring expired measures or completed acts into conformity with the covered agreements because it amounts to legal error for a panel to make an Article 19.1 recommendation with respect to measures that no longer exist.<sup>409</sup> Thailand states that following the Appellate Body's guidance, numerous panels have refrained from making Article 19.1 recommendations regarding measures that are no longer in force.<sup>410</sup> This rule applies with equal force to "measures" that consisted of individual, completed governmental acts.

7.36 Thailand argues that there are good reasons for this rule. By adopting Articles 19.1 and 21.3 of the DSU, WTO Members accepted that they would not have to undo past actions in response to a finding of violation of the covered agreements. Instead, Members are required only to cease the WTO-inconsistent conduct by the end of the reasonable period of time for implementation. According to Thailand, for this reason, remedies under the DSU are generally described as being "prospective", rather than retrospective, in nature.<sup>411</sup> Given this feature of the DSU, it would serve no purpose to allow a WTO Member to obtain recommendations from panels with respect to past and consummated actions.

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alleged violation of Article 10 of the Customs Valuation Agreement. Thailand also refers to a list of the relevant claims as set out in Exhibit THA-36.

<sup>406</sup> Thailand's first oral statement, para. 3.

<sup>407</sup> Thailand's first oral statement, para. 4.

<sup>408</sup> Thailand's first oral statement, paras. 23-27; second written submission, para. 308.

<sup>409</sup> Thailand's first oral statement, para. 24. Thailand refers to Appellate Body Report, *US – Certain EC Products*, para. 81 and Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 479.

<sup>410</sup> Thailand refers to the Panel Report, *Chile – Price Band*, para. 8.3; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 8.3; Panel Report, *Turkey – Rice*, para. 8.4; and Panel Report, *US – Stainless Steel (Mexico)*, para. 8.3.

<sup>411</sup> Thailand refers to the Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 494 and the Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.

7.37 Because the conduct on which the relevant claims of the Philippines are based, as listed in Exhibit THA-36, took place entirely in the past and has ceased or been completed, Thailand submits that were the Panel to find violations with respect to these claims, there would be nothing further that Thailand could do in order to achieve compliance with its WTO obligations. In these circumstances, the Panel should not issue recommendations under Article 19.1 of the DSU that Thailand bring itself "into conformity" with its WTO obligations with respect to any of the claims listed in Exhibit THA-36.

7.38 Further, in Thailand's view, because the Panel cannot make any *recommendations* with respect to the claims listed in Exhibit THA-36, it is not clear whether any purpose at all is served by making *findings* regarding these claims. Even assuming, for the sake of argument, that the Panel may make findings with respect to measures that no longer exist on the date of its establishment<sup>412</sup>, the Panel should exercise its discretion and decline to make such findings. Thailand submits, panels have a responsibility to prevent the WTO's dispute settlement procedures from being used to obtain purely declaratory judgments or to address matters that are completely moot by the time the Panel is established. In these circumstances, Thailand submits that the Panel should decline to make findings with respect to the claims listed in Exhibit THA-36 that would serve no clear purpose and would not contribute to the resolution of any current and concrete dispute between the Philippines and Thailand regarding these matters.

7.39 The **Philippines** submits that in previous cases, the Appellate Body accepted that expired measure may be subject to dispute settlement proceedings<sup>413</sup>, "in particular where a risk of reintroduction exists".<sup>414</sup> According to the Philippines, such a risk of reintroduction exists in this case as there are no published generally applicable rules on how MRSPs are calculated, and the methodology can change any time at the discretion of DG Excise.<sup>415</sup> In fact, the methodology was suddenly changed in September 2006 and March 2007 for no apparent reason and without notice. In the light of these facts, according to the Philippines, the Panel should rule on the September 2006 and March 2007 MRSP Notices.

(ii) *Analysis by the Panel*

7.40 In the current dispute, we are presented with the Philippines' claims pertaining to various customs and fiscal measures. Among the measures at issue are Thai Customs' valuation determinations for the [[xx.xxx.xx]] entries of imported cigarettes as well as certain MRSP Notices for the imported cigarettes, as identified in Exhibit THA-36. Thailand characterizes these particular measures as "completed acts" and "expired measures" that had been resolved by the time the Philippines requested the establishment of a panel. In this light, Thailand urges the Panel to consider: (i) whether each of the Philippines' claims identified in Exhibit THA-36 are properly within its terms of reference such that the Panel can rule on those claims; (ii) if the claims are within the Panel's terms of reference, whether and to what extent it is appropriate or useful for the Panel to rule on claims that relate either to expired measures or completed acts; and (iii) whether the Panel is permitted under Article 19.1 of the DSU to make recommendations with respect to such claims.<sup>416</sup>

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<sup>412</sup> Thailand's first written submission, paras. 194-203; first oral statement, para. 27.

<sup>413</sup> Philippines' first oral statement, para. 219, referring to Appellate Body Report, *US – Upland Cotton*, paras. 263 and 268ff, and Panel Report, *Argentina – Textiles and Apparel*, para. 6.14; Philippines' second oral statement, para. 76, referring to Appellate Body Report, *EC – Bananas (21.5 – US)*, paras. 267-269, and Appellate Body Report, *US – Zeroing (21.5)*, paras. 182 and 194.

<sup>414</sup> Philippines' first oral statement, para. 219, referring to Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.

<sup>415</sup> Philippines' first oral statement, para. 219.

<sup>416</sup> Thailand's first oral statement, paras. 23-27; second written submission, para. 308.

7.41 We will first consider Thailand's proposition with respect to Thai Customs' individual valuation determinations for the entries at issue. Thailand does not dispute that these determinations are specifically identified in the Philippines' panel request within the meaning of Article 6.2 of the DSU and thus fall within the scope of the Panel's terms of reference.<sup>417</sup> Thailand nonetheless takes the position that the Panel should not and cannot make recommendations with respect to the concerned customs valuation determinations. Consequently, according to Thailand, because the Panel cannot make any *recommendations* with respect to these claims, it is not clear whether any purpose at all is served by making *findings* regarding these claims. .

7.42 In *US – Upland Cotton*, the Appellate Body addressed the question of whether measures whose legislative basis had expired at the time of establishment of a panel could nonetheless fall within the scope of the panel's terms of reference under Article 6.2 of the DSU. The Appellate Body reasoned that the text of Article 6.2, considered in the light of the relevant context (i.e. Articles 3.3 and 4.2 of the DSU), does not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered agreements are still being impaired by those measures.<sup>418</sup> Furthermore, according to the Appellate Body, although the fact that a measure has expired may affect what recommendation a panel makes, it is not dispositive of the preliminary question of whether a panel can address claims in respect of that measure. In reaching this conclusion, the Appellate Body noted that GATT and WTO panels in previous disputes have frequently made findings with respect to measures withdrawn after the establishment of the panel. The Appellate Body observed therefore that its conclusion was consistent with the approach taken by those panels to questions relating to the expiry of measures "after the initiation of dispute settlement proceedings, but before those proceedings were completed".<sup>419</sup> In none of those cases, the Appellate Body points out, had a panel or the Appellate Body premised its decision on the view that, *a priori*, an expired measure could not be within a panel's terms of reference.

7.43 The Appellate Body's guidance above therefore suggests that the mere fact that a certain measure was no longer in force at the time of establishment of a panel would not in itself provide a basis for excluding such a measure from the scope of the Panel's terms of reference and consequently from the Panel's examination of the measure. At the same time, we are mindful that the expired measure at issue in *US – Upland Cotton* concerned payments under a subsidy programme. The Appellate Body considered it important to recognize the particular characteristics of subsidies and the nature of the complainant's claims against the particular payments under the subsidies concerned. Particularly, in the light of the language of Article 7.8 of the SCM Agreement, the Appellate Body considered that there could be a time-lag between the payment of a subsidy and any consequential adverse effects. As a consequence, the Appellate Body found that if expired measures underlying past payments could not be challenged in WTO dispute settlement proceedings, it would be difficult to seek a remedy for such adverse effects.

7.44 Thai Customs' valuation process leading to the issuance of the Notices of Assessment for the subject cigarette imports took place between 11 August 2006 and 13 September 2007. The last Notices of Assessment for the concerned entries of cigarettes were issued on 10 October 2007, which precedes 17 November 2008 – the date of establishment of this Panel. Given the Appellate Body's guidance, we do not consider that just because these valuation determinations had been completed at

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<sup>417</sup> These measures are identified in para. 13 of the Philippines' panel request (WT/DS371/3).

<sup>418</sup> Appellate Body Report, *US – Upland Cotton*, para. 270.

<sup>419</sup> Appellate Body Report, *US – Upland Cotton*, footnote 214. In this footnote the Appellate Body cites to: GATT Panel Report, *EEC – Apples I (Chile)*, paras. 2.4 and 4.1 ff; Panel Report, *India – Autos*, para. 7.29; GATT Panel Report, *EEC – Animal Feed Proteins*, para. 2.4; GATT Panel Report, *US – Canadian Tuna*, para. 4.3; Panel Report, *US – Wool Shirts and Blouses*, para. 6.2; and Panel Report, *Indonesia – Autos*, para. 14.9.

the time of establishment of the panel in itself precludes them from falling within the scope of our terms of reference. We therefore turn to the question of whether it is then for any other reasons inappropriate for us to examine the Philippines' claims under the Customs Valuation Agreement with respect to Thai Customs valuation determinations.

7.45 Thai Customs' valuation determinations at issue are, as Thailand describes it, "individual, completed governmental acts" in the sense that they reflect Thai Customs' final decisions on the customs values of the concerned imported cigarettes. The concerned determinations consequently formed the basis for the calculation of customs duties and other various tax liabilities for the imported cigarettes. The Philippines' claims in this relation cover both substantive and procedural obligations imposed on customs authorities under the Customs Valuation Agreement. The Philippines' main contention is that Thai Customs failed to comply with certain procedural requirements under the Customs Valuation Agreement, which led to the final valuation determinations being also inconsistent with Thailand's obligations under the Customs Valuation Agreement.

7.46 The Customs Valuation Agreement sets out the principles to be observed by WTO Members in assessing the customs value of imported goods as well as the procedural requirements relating to the assessment process. In the light of the nature of the obligations under the Customs Valuation Agreement, we consider that in the context of the WTO dispute settlement proceedings, claims under the Customs Valuation Agreement would inevitably encompass individual valuation determinations and the assessment processes, which would have normally been *completed* by the time such claims are brought before a WTO panel. To that extent, customs valuation determinations can be distinguished from other types of measures, be it legislation or specific government acts, which can be described as having *expired or ceased to exist* at the time of establishment of a panel or during the panel proceedings. Customs valuation determinations, once completed and finalized, will be applied to a specific entry of imported goods as the basis for the customs duties as well as other internal taxes for which the importer is held liable. In that sense, customs valuation determinations cannot be characterized as having expired or ceased to exist just for the reason that they are completed and final. We underline this distinction because it addresses the question of whether it is appropriate for the Panel to rule on claims that relate to completed acts.<sup>420</sup> The procedural requirements linked to the process of the relevant determinations may also affect the operation of the Customs Valuation Agreement.

7.47 In this connection, although the measure concerned was a provisional safeguard measure, we agree with the Panel's observation in *Chile – Price Band System*: "if a Member cannot have the conformity of valuation determinations made under the auspices of the Customs Valuation Agreement [provisional safeguard measures in that dispute] reviewed solely because they are completed before the establishment of a panel, then customs value determinations generally will escape panel scrutiny as they are generally completed before the matter reaches the panel stage".<sup>421</sup> Panels would then never be allowed to examine the WTO-consistency of such customs determinations. We also share the view of the Panel in *Chile – Price Band System* that the drafters of the DSU cannot have meant to

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<sup>420</sup> The Panel in *EC – Trademarks and Geographical Indications (Australia)* also noted that distinction between provisions of the Regulation which established procedures, but are no longer in force, and individual registrations effected under them (Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.14). The Panel considered that because individual GI registrations effected under prior versions of the Regulation remained in force, there was, in principle, no reason why it should not be possible to challenge them under the TRIPs Agreement. According to the Panel, they were measures which may affect the operation of that agreement. The Appellate Body's analysis in *US – Upland Cotton* also supports this reasoning: "the relevant context for Article 6.2 in this regard includes Articles 3.3 and 4.2 of the DSU. ... those provisions do not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered agreements are still being impaired by those measures".

<sup>421</sup> Panel Report, *Chile – Price Band System*, para. 7.114.

exclude, in such a manner, governmental acts such as customs determinations from its scope. The absence of such intention is manifested in, for example, Article 16 of the Customs Valuation Agreement, a provision requiring customs authorities to provide an explanation of their customs valuation determinations. As both parties acknowledged in the context of the Philippines' claims under the Customs Valuation Agreement, the obligations imposed under Article 16 is to serve the principles of transparency and due process, including the need to provide a basis for a domestic court and/or a WTO panel to review the customs authority's determination. As we address in detail in Section VII.C.6 below, a request for explanations pursuant to Article 16 can be made only once the valuation process is completed. This means that valuation determinations will by definition be final and completed acts by the time they are subject to a review process.

7.48 We note that the United States, a third party participant in these proceedings, also shares this view. In its response to a question from the Panel, it states:

"An 'act' would appear by its nature to be time limited. The argument that a panel is unable to make a recommendation with respect to a 'complete act' would therefore raise significant issues. In particular, it is difficult to see how an 'act' that is within a panel's terms of reference would not be 'completed' prior to the end of the panel proceedings. Accordingly, the argument that a panel is unable to make a recommendation with respect to a 'completed act' would appear to mean that no panel could ever make a recommendation with respect to an 'act'. There is nothing in the DSU or the covered agreements that would support such an approach."<sup>422</sup>

7.49 Further, we observe that the right of WTO Members to resort to the WTO dispute settlement proceeding pertaining to customs matters is contained in Article 19 of the Customs Valuation Agreement. Article 19.2 in particular provides:

"If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective of this Agreement is being impeded, *as a result of the actions of another Member* or of other Members, it may, with a view to reaching a mutually satisfactory solution of this matter, request consultations with the Member or Members in question. ..." (emphasis added)<sup>423</sup>

7.50 In this case, the Philippines considers that Thailand's customs determinations and the valuation process leading to such determinations led to a nullification or impairment of the benefits accruing to it. The Philippines also asserts that the concerned Thai Customs' acts impede the objectives of the Customs Valuation Agreement, particularly the objective to respect transaction value as the primary basis for customs value. Article 3.8 of the DSU provides further contextual basis for the understanding that "in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment".

7.51 In the light of the foregoing considerations, we find it necessary to examine the individual valuation determinations and the processes leading to the determinations as part of the matter before us.<sup>424</sup>

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<sup>422</sup> United States' response to Panel question No. 1 to all third parties.

<sup>423</sup> This is a provision equivalent to Article XXIII of the GATT 1994.

<sup>424</sup> As for the Panel's decision to make a recommendation for the concerned customs valuation determinations, see Section VI.A.2 and para. 8.7 of this Report for its reasoning and conclusion. In contrast to our decision with respect to the MRSP Notices at issue, in the Interim Panel Report (paras. 8.2 and 8.8



(d) The September 2006 and March 2007 MRSP Notices issued by Thai Excise to PM Thailand

(i) *Main arguments of the parties*

7.52 **Thailand** claims that the 2006 and 2007 MRSP Notices for imported cigarettes are outside the Panel's terms of reference because they were neither listed in the panel request nor in existence as of the date of establishment of the Panel.<sup>425</sup>

7.53 Thailand argues that the Panel's terms of reference are limited to the MRSP Notices actually listed in paragraph 26 of the Philippines' panel request<sup>426</sup> and that the MRSP Notices for imported cigarettes for 2006 and 2007 are *not* listed in the panel request and thus are not within the Panel's terms of reference.<sup>427</sup>

7.54 Further, Thailand asserts that the 2006 and 2007 MRSP Notices were superseded and ceased to have any legal effect once Thai Excise published the 2008 MRSP Notice for imported products that was listed in the Philippines' panel request as "Notice B.E. 2551 (2008) of 19 August 2008".<sup>428</sup> Thus, the 2006 and 2007 Notices did not exist as of the date of the establishment of the Panel. According to Thailand, it is well established that, in general, panels cannot consider measures that have ceased to exist as of the date of the establishment of the panel. Thailand submits that it would greatly undermine the security and predictability of the dispute settlement system were this Panel to permit the Philippines to pursue such claims.<sup>429</sup>

7.55 In support of its position, Thailand refers to the Appellate Body's statement in *EC – Selected Customs Matters* that "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 establishment of the panel".<sup>430</sup> The Appellate Body went on to identify two exceptions from this general rule: (i) amendments enacted after the establishment of the panel which do not change the essence of the measures identified in the panel request; and (ii) a measure whose legislative basis has expired but whose effects continue to impair benefits accruing to the complainant under the covered agreements. Thailand argues that the 2006 and 2007 MRSP Notices pre-date the establishment of the Panel (i.e. 17 November 2008) and thus do not fall within the scope of the two exceptions identified by the Appellate Body. Thailand further submits that a number of panels have refused to rule on measures which expired before the establishment of the panel. It refers to the Panel's decision in *Argentina – Textiles and Apparel* in which the Panel declined to consider a measure on the ground that "the Argentine measure under consideration was revoked before the Panel

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combined), we decided to make a recommendation for these customs valuation determinations even if they were final decisions that had been completed prior to the time of the panel establishment. Having considered the parties' arguments at the interim review stage on the question of whether the Panel should make a recommendation with respect to these determinations, we decided to maintain our decision in this relation. We have clarified our reasoning for the decision to make a recommendation for these customs determinations as provided in Section VI.A.2 and para. 8.7 of this Report.

<sup>425</sup> Thailand's first written submission, paras. 202-203.

<sup>426</sup> Thailand's first written submission, para. 197.

<sup>427</sup> Thailand's first written submission, para. 197; Exhibits PHL-61 and PHL-100.

<sup>428</sup> Thailand's first written submission, paras. 198-203.

<sup>429</sup> Thailand refers to the Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1652 (in determining whether to make findings on a measure no longer in existence on the date of establishment of a panel, panels should take into account the object and purpose of the dispute settlement system "to secure a positive solution to a dispute", as stated in Article 3.7 of the DSU).

<sup>430</sup> Thailand's first written submission, para. 199, referring to the Appellate Body Report, *EC – Selected Customs Matters*, para. 184.

was established and its terms of reference set, i.e. before the Panel started its adjudicative process", even though the measure had been listed in the panel request.<sup>431</sup>

7.56 Thailand does not contest, however, the use of the MRSP Notices as evidence because the use of evidence does not raise any temporal limitations as opposed to the measures at issue.<sup>432</sup> Thailand argues, however, that even if the Panel were to consider these Notices as evidence regarding the WTO-consistency of the MRSP Notices that are within the Panel's terms of reference, these Notices would be of very limited probative value because the methodology used to arrive at the MRSPs in the 2006-2007 Notices was very different from the methodology used before and after that period, on which the Panel must rule.<sup>433</sup> Thailand therefore urges the Panel to take care to ensure that its rulings with respect to the MRSP methodology before it are not based on evidence relating to a different MRSP methodology that is not within the Panel's terms of reference.

7.57 The **Philippines** argues that the measures identified in the panel request are the "MRSP Notices issued by the Director-General for Excise".<sup>434</sup> Moreover, paragraph 26 of the panel request further clarifies the measures at issue by referring to the August 2007 and August 2008 MRSP and separately noting the inclusion of "any amendments, implementing measures or other measures related to the measures listed in this paragraph".

7.58 In response to Thailand's argument that the 2006 and 2007 MRSP Notices are outside the Panel's terms of reference because they expired at the time of the establishment of the panel, the Philippines submits that in previous cases, the Appellate Body accepted that expired measures may be subject to dispute settlement proceedings<sup>435</sup>, "in particular where a risk of reintroduction exists".<sup>436</sup> According to the Philippines, such a risk of reintroduction exists in this case as there are no published generally applicable rules on how MRSPs are calculated, and the methodology can change any time at the discretion of DG Excise.<sup>437</sup> In fact, the methodology was suddenly changed in September 2006 and March 2007 for no apparent reason and without notice. In the light of these facts, according to the Philippines, the Panel should rule on the September 2006 and March 2007 MRSP Notices. The Philippines submits that in any event, they are evidence that supports the view that the MRSP system is discriminatory.

(ii) *Analysis by the Panel*

7.59 Thailand claims that the September 2006 and March 2007 MRSP Notices for imported cigarettes are outside the Panel's terms of reference for two reasons: first, they were not listed in the

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<sup>431</sup> Thailand's first written submission, para. 199, referring to the Panel Report, *Argentina – Textiles and Apparel*, para. 6.13. Thailand also refers to the Panel Report, *US – Gasoline* (para. 6.19) in which the Panel states that "it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective".

<sup>432</sup> Thailand's response to Panel question No. 90.

<sup>433</sup> Thailand's second written submission, paras. 144-145.

<sup>434</sup> Philippines' panel request, para. 26; Philippines' first oral statement, para. 218.

<sup>435</sup> Philippines' first oral statement, para. 219, referring to Appellate Body Report, *US – Upland Cotton*, paras. 263 and 268, and Panel Report, *Argentina – Textiles and Apparel*, para. 6.14; Philippines' second oral statement, para. 76, referring to Appellate Body Report, *EC – Bananas (Article 21.5 – US)*, paras. 267-269, and Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, paras. 182 and 194.

<sup>436</sup> Philippines' first oral statement, para. 219, referring to Panel Report, *Argentina – Textiles and Apparel*, para. 6.14.

<sup>437</sup> Philippines' first oral statement, para. 219.

panel request; and, second, they expired as of the date of establishment of the Panel.<sup>438</sup> We will address these arguments in turn.

7.60 As explained above, in order to comply with Article 6.2 of the DSU, it is necessary for the complaining party to identify the specific measures at issue. While identifying a measure by the name, number, date and place of promulgation of a law, regulation may be sufficient, identification through other means may also satisfy the identification obligation within Article 6.2 of the DSU.<sup>439</sup> For instance, a measure may be identified through substance<sup>440</sup>, by providing a narrative description of the nature of the measure so that what is referred to adjudication by a panel may be discerned from the panel request.<sup>441</sup> We also note the clarification by the Panel in *Japan – Film* in this regard:

"To fall within the terms of Article 6.2, it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified 'measure'. In our view, the requirements of Article 6.2 would be met in the case of a 'measure' that is subsidiary or so closely related to a 'measure' specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements – close relationship and notice – are inter-related: only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate."<sup>442</sup>

7.61 With respect to the administration of the VAT system, the Philippines' panel request provides:

"25. In the last two and a half years, the MRSPs for imported cigarettes have been changed more frequently than those for domestic cigarettes.

26. The Philippines understands that Thailand operates the VAT regime for cigarettes through measures including:

...

- MRSP Notices issued by the Director-General for Excise. The currently applicable MRSPs are set out in the Notice B.E. 2550 (2007) of 29 August 2007 (for domestic products) and in the Notice B.E. 2551 (2008) of 19 August 2008 (for imported products); and
- any amendments, implementing measures or other measures related to the measures listed in this paragraph."

In our view, the phrase "MRSP Notices issued by the Director-General for Excise", considered together with "in the last two and a half years", is broad enough to encompass the MRSP 2006 and 2007 Notices in the scope of the Philippines' panel request. We do not find any factual circumstances that make us question whether Thailand, as the responding party in this dispute, could not reasonably

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<sup>438</sup> Thailand's first written submission, paras. 202-203. We note that Thailand did not include the December 2005 MRSP Notice and the August 2007 MRSP Notice in its claims relating to the Panel's terms of reference. To the extent that the December 2005 MRSP were also not in force at the time of the establishment of the Panel, however, our analysis in this section as regards the September 2006 and the March 2007 MRSP Notices will equally apply to the December 2005 MRSP Notice and the August 2007 MRSP Notice.

<sup>439</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10, point 36.

<sup>440</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.40; Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

<sup>441</sup> Appellate Body Report, *US – Continued Zeroing*, para. 168.

<sup>442</sup> Panel Report, *Japan – Film*, para. 10.8.

be found to have received adequate notice of the scope of the claims asserted by the Philippines in this regard.

7.62 Furthermore, we are not convinced by Thailand's argument that the September 2006 and the March 2007 MRSP Notices are outside the Panel's terms of reference because they expired at the time of the establishment of the panel. We recall that in addressing the issue of whether an expired measure can be a "measure at issue" within the meaning of Article 6.2 of the DSU, the Appellate Body in *US – Upland Cotton* rejected the United States' argument that because an expired measure is not susceptible to a recommendation under Article 19.1 of the DSU, it cannot be a "measure at issue" under Article 6.2.<sup>443</sup> The Appellate Body considered that the text of Article 6.2 of the DSU, considered in its relevant context (Articles 3.3 and 4.2 of the DSU), does not suggest that measures whose legislative basis has expired could not be the subject of a panel request as "specific measures at issue".<sup>444</sup> As such, the Appellate Body in that dispute ruled that the fact that a measure has expired is not dispositive of the preliminary question of whether a panel can address claims in respect to that measure, although it may affect what recommendation a panel may make.

7.63 As the Appellate Body noted in *US – Upland Cotton*, GATT and WTO panels have frequently made findings with respect to measures withdrawn after the establishment of the panel. The Appellate Body in *US – Upland Cotton* states:

"We find contextual support for this interpretation in Article 3.3 of the DSU, which underscores the importance of the prompt settlement of certain situations that, in the absence of settlement, could undermine the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. We note, first, that Article 3.3 focuses not upon existing measures, or measures that are currently in force but, rather, upon "measures taken" by a Member, which includes measures taken in the past. We also observe that Article 3.3 envisages that disputes arise when a Member "considers" that benefits accruing to it are being impaired by measures taken by another Member. By using the word considers, Article 3.3 focuses on the perception or understanding of an aggrieved Member. This does not exclude the possibility that a Member requesting consultations may have reason to believe that a measure is still impairing benefits even though its legislative basis has expired."<sup>445</sup>

7.64 The panel on *Argentina – Textiles and Apparel* observes certain common factors that can be found in those cases where panels made findings in respect of the measures that were no longer in force.<sup>446</sup> These factors include the following: (i) whether either party raised an objection to the panel's

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<sup>443</sup> Appellate Body Report, *US – Upland Cotton*, paras. 271-272. Further following up on the Appellate Body's reasoning in *US – Upland Cotton*, the Appellate Body in *EC – Selected Customs Matters* stated:

"... In [*US – Upland Cotton*], the Appellate Body had to address the issue of whether an expired measure can be a 'measure at issue' within the meaning of Article 6.2 of the DSU. The Appellate Body rejected the United States' argument that, because an expired measure is not susceptible to a recommendation under Article 19.1 of the DSU, it cannot be a 'measure at issue' under Article 6.2. For the Appellate Body, the question of whether a panel can address claims in respect of an expired measure is to be distinguished from the question of whether that measure is susceptible to a recommendation under Article 19.1. ...the Appellate Body's reasoning in *US – Upland Cotton* supports our position that Article 19.1 of the DSU does not place restrictions on the type of measure that can be identified in a panel request under Article 6.2 of the DSU" (paras. 134-135).

<sup>444</sup> Appellate Body Report, *US – Upland Cotton*, para. 270.

<sup>445</sup> Appellate Body Report, *US – Upland Cotton*, para. 264.

<sup>446</sup> Panel Report, *Argentina – Textiles and Apparel*, para. 6.12.

consideration of the expired measure; (ii) if there was an objection, whether there remained the prospect of the reintroduction of the measure; and (iii) whether making findings with respect to expired measures would contribute to resolving a particular dispute.

7.65 In *Argentina – Textiles and Apparel*, Argentina objected to the Panel's examination of the Argentine measure – Argentina's specific duties on footwear – that used to be imposed on footwear and were revoked before the Panel was established.<sup>447</sup> Despite the United States' argument that there was a serious threat of recurrence of the measure, the Panel decided that in the absence of clear evidence that Argentina would reintroduce the specific duties, it would not review the WTO compatibility of the duties.<sup>448</sup>

7.66 The factual circumstances presented in the current dispute must be distinguished from those in *Argentina – Textiles and Apparel*. We do recognize that the MRSP Notices at issue had been replaced by the August 2008 MRSP Notice and thus were no longer in force at the time of establishment of the Panel. Despite the expiry nature of the subject MRSP Notices, however, we consider our review of these Notices to prove useful. For one, as the Philippines points out, Thailand does not maintain the general methodology, which Thailand claims it normally uses in determining MRSPs, in a written form. To the extent that this could provide a certain degree of uncertainty to importers regarding how the tax base for VAT on their products is determined, we find it important to review the conformity of the specific MRSP Notices and the methodology allegedly used by Thai Excise to determine those MRSPs with Thailand's obligations under the GATT 1994.

7.67 We find further support for our decision on the need for the examination of these Notices in Thailand's explanation that in revising existing MRSPs, under the general methodology, Thai Excise could choose to rely on the same marketing cost component of the current MRSPs.<sup>449</sup> Therefore, the assessment of the marketing costs comprising the current MRSPs may have implications on the marketing cost component to be used for the determination of the new MRSPs.<sup>450</sup>

## 2. Standard of review

7.68 As the Appellate Body has observed, there are two aspects of panels' standard of review: panels' *formulation* of the legal standard to be used in reviewing the parties' legal and factual claims, and panels' *application* of the formulated standard of review.<sup>451</sup> Regarding the formulation of the proper standard for the Panel's review of the matter before it, we recall the Appellate Body's finding in

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<sup>447</sup> Panel Report, *Argentina – Textiles and Apparel*, paras. 6.13-6.15.

<sup>448</sup> The Panel stated that it must assume that WTO Members would perform their treaty obligations in good faith, as they were required to do by WTO Agreement and by international law pursuant to Article 3.10 of the DSU and Article 26 of the *Vienna Convention on the Law of Treaties (Pacta Sunt Servanda)* (Panel Report, *Argentina – Textiles and Apparel*, paras. 6.14).

<sup>449</sup> We also note that although not as common as measures withdrawn after the establishment of a panel, panels have also made findings with respect to measures that had expired before the establishment of the panel (Panel Report *US – Upland Cotton*, paras. 7.128, 7.529 and 8.1, upheld in Appellate Body Report, *US – Upland Cotton*, para. 272; Panel Report *EC – Trademarks and Geographical Indications*, paras. 7.12-7.17).

<sup>450</sup> In the Interim Panel Report (para. 8.8), we decided not to make a recommendation with respect to these Notices as they had ceased to exist at the time of the panel establishment. Having considered the parties' arguments at the interim review stage on the question of whether the Panel should make a recommendation with respect to these MRSP Notices, we modified our decision in this relation so as to make a recommendation to the extent that the concerned MRSP Notices will continue to have effects on the subsequent MRSP Notices that are currently in force. See Section VI.A.1 and para. 8.8 of this Report for the detailed reasoning and our conclusion in this regard.

<sup>451</sup> Appellate Body Report, *US – Lamb*, para. 99.

*Argentina – Footwear (EC)* that "[f]or all but one of the covered agreements (Anti-Dumping Agreement), Article 11 of the DSU sets forth the appropriate standard of review for panels".<sup>452</sup>

7.69 Article 11 of the DSU provides:

*"Function of Panels"*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreement. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements ..."

7.70 The Philippines' claims in this dispute concern certain obligations under the Customs Valuation Agreement and the GATT 1994. Article 11 of the DSU therefore sets forth the standard of review for this Panel, namely to "make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". According to the Appellate Body, this means "neither *de novo* review as such, nor 'total deference'".<sup>453</sup>

7.71 In this connection, we also recall the Appellate Body's statement in *US – Countervailing Duty Investigation on DRAMS*:

"An objective assessment under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review."<sup>454</sup>

7.72 Following this guidance, we will make an objective assessment of the matter before us in the light of the relevant obligations of the Customs Valuation Agreement and the GATT 1994.

C. CUSTOMS VALUATION AGREEMENT

**1. Overview of the Customs Valuation Agreement**

7.73 The Customs Valuation Agreement comprises a "General Introductory Commentary"; Part I (Rules on Customs Valuation (Articles 1 through 17)); Part II (Administration, Consultations and Dispute Settlement (Articles 18 and 19)); Part III (Special and Different Treatment (Article 20)); Part IV (Final Provisions (Articles 21-24)); Annex I (Interpretative Notes [to certain provisions of Part I]); Annex II (Technical Committee on Customs Valuation); and Annex III.

7.74 The General Introductory Commentary section provides for general principles of customs valuation of goods. Paragraph 1 states, *inter alia*, that "the primary basis for customs value under [the Customs Valuation Agreement] is 'transaction value' as defined in Article 1" and that "Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1". The methods of valuation under Articles 1 through 7 are set out in a

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<sup>452</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 118.

<sup>453</sup> Appellate Body Report, *EC – Hormones*, para. 117; Appellate Body Report, *US – Lamb*, para. 1.

<sup>454</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184. The Appellate Body states that the standard of review developed under the Agreement on Safeguards was instructive for cases under the SCM Agreement.

sequential order of application. General principles underlying the Customs Valuation Agreement are further elaborated in the subsequent recitals.<sup>455</sup>

7.75 We also note that Annex I to the Customs Valuation Agreement contains the interpretative notes to certain provisions of the Customs Valuation Agreement. In this regard, Article 14 of the Customs Valuation Agreement reads:

"The notes at Annex I to this Agreement form an integral part of this Agreement and the Articles of this *Agreement* are to be read and applied in conjunction with their respective notes. Annexes II and III also form an integral part of this Agreement."

7.76 Therefore, in considering the complainant's claims under the Customs Valuation Agreement, we will clarify the obligations under the relevant provisions, read in conjunction with the Interpretative Notes corresponding to those provisions.

## 2. Products at issue

7.77 The Philippines claims that the products at issue for its claims under the Customs Valuation Agreement are *Marlboro* and *L&M* cigarettes manufactured in the Philippines by PM Philippines and imported into Thailand by PM Thailand<sup>456</sup> in [[xx.xxx.xx]] separate customs entries (the "subject entries") that were cleared<sup>457</sup> between 11 August 2006 and 13 September 2007. These cigarettes are classifiable under Thailand's tariff nomenclature, the "Customs Tariff of Thailand" under heading 2402.20.90. "[c]igars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes ... cigarettes containing tobacco ... other".<sup>458</sup> Thai Customs determined the final customs value of these entries between 15 March 2007 and 10 October 2007.<sup>459</sup>

7.78 The Philippines describes that both PM Thailand and PM Philippines are wholly owned subsidiaries of Philip Morris International Inc. ("PM International"), a corporation organized under the laws of the Commonwealth of Virginia in the United States. The Philippines accepts that PM Thailand and PM Philippines are related for purposes of the Customs Valuation Agreement.<sup>460</sup>

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<sup>455</sup> The WTO Members recognize, *inter alia*, "the importance of the provisions of Article VII of GATT 1994" and desire "to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation". The Members also recognize that "the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued".

<sup>456</sup> Philippines' first written submission, para. 128. PM Thailand is the Thailand branch of Philip Morris (Thailand) Ltd., a corporation organized under the laws of the U.S. State of Delaware, and was established in [[xx.xxx.xx]] and began distributing cigarettes in Thailand in [[xx.xxx.xx]].

<sup>457</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 423 (2002). "Clear" is defined as "9. Settle, discharge (a debt, a bill, etc) ... 14. Pass through the formalities of (a customs office etc.)".

<sup>458</sup> Philippines' first written submission, para. 130, footnote 87; Exhibit PHL-29 (Harmonized Tariff Schedule of Thailand, Chapter 24). The Philippines explains that the bound tariff rate for the cigarettes at issue is 80 baht/kilogram (volume) or 60 per cent *ad valorem*, i.e. Thailand applies a MFN duty of 80 baht/kilogram, provided that this is no less than 60 per cent of the value of the cigarettes (Philippines' first written submission, footnote 88). However, under the Association of South-East Asian Nations ("ASEAN") Free Trade Agreement, to which both Thailand and the Philippines are parties, imports under subheading 2402.20.90 qualify for the preferential rate of five per cent *ad valorem* (Philippines' first written submission, para. 130).

<sup>459</sup> Philippines' first written submission, paras. 128 and 167. See also Table 2 (History of Values) (Philippines' first written submission, p. 61). The Philippines explains that "[u]nder Thai law, Notices of Assessment constitute the definitive determination of customs value for a particular shipment, subject to administrative and judicial appeal." (Philippines' first written submission, footnote 146).

<sup>460</sup> The Philippines agrees that PM Thailand and PM Philippines are related within the meaning of Article 15.4(f) of the Customs Valuation Agreement, because they are both directly or indirectly controlled by a

### 3. Measures at issue

7.79 In its request for establishment of a Panel, the Philippines identified the following as the measures pertaining to customs valuation:

- "the general rule and/or methodology providing for the systematic rejection of transaction value and the systematic use of a deductive valuation method;
- individual determinations made by Thai Customs for entries of cigarettes exported from the Philippines and entered between 4 August 2006 and 19 March 2008, including:
  - the Notices of Assessment for the entries listed in Annex I to the Philippines' request for the establishment of a panel; and
  - the assessment of value for purposes of setting the guarantee or cash deposit at the time of entry for the entries listed in Annex II to the Philippines' request for the establishment of a panel;
- Customs Act, B.E. 2469<sup>461</sup> (1926), including all amendments;
- Ministerial Regulation No. 132 B.E. 2543 (1990) issued under authority of the Customs Act B.E. 2469 (1926) and the amending Ministerial Regulation No. 145 B.E. 2547 (2004) and Ministerial Regulation No. 146 B.E. 2550 (2007);
- Notification No. 23/2549 (2006) of Thai Customs, containing guidelines on customs valuation;
- Customs Regulation No. 2/2550 (2007) Re: amendment of the Customs Formalities and Guidelines Code B.E. 2544 (2001) re: Customs formalities to prevent Customs value duty evasion, and amendment of Customs Department Regulation No. 14/2549 (2006) re: Guideline for Fixing of Customs Value;
- Customs Regulation No. 14/2549 (2006), re Guideline for Fixing of Customs Value, as amended by Customs Regulation No. 2/2550 (2007);
- Customs Notification No. 29/2549 (2006) Procedure in requesting duty fee assessment; and
- any amendments, implementing measures, or other related measures."

7.80 In the course of the Panel proceedings, the Philippines claimed that Thailand's customs valuation of *Marlboro* and *L&M* cigarettes, imported by PM Thailand from the Philippines in the subject entries and cleared between 11 August 2006 and 13 September 2007, was inconsistent with Articles 1.1, 1.2(a), 5, 7, 10, and 16 of the Customs Valuation Agreement.<sup>462</sup> The Philippines also claims that Thailand acts inconsistently with Article 1.1 and 1.2(a) by maintaining an unpublished

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third person, PM International (Philippines' first written submission, para. 129, footnote 86). See Section VII.C.5.

<sup>461</sup> The "B.E." year number designates the year in the Buddhist calendar. The year number in parentheses designates the corresponding year A.D.

<sup>462</sup> Philippines' first written submission, para. 167.



general rule requiring the rejection of transaction value and the use of the deductive valuation method.<sup>463</sup>

7.81 In the light of the Philippines' claims presented in the Panel proceedings, the measures at issue with respect to the Philippines' claims under the Customs Valuation Agreement are Thai customs valuation determinations of the subject entries of cigarettes imported by PM Thailand and an alleged general rule requiring the rejection of the transaction value and the use of the deductive valuation method. It is therefore our understanding that the Philippines is not challenging Thailand's customs laws and regulations as such.

#### **4. Overview of the factual events surrounding the rejection of PM Thailand's declared transaction values of the [[xx.xxx.xx]] entries at issue**

7.82 The Philippines states that, on 4 August 2006, Thai Customs refused to clear the cigarettes at issue at the declared transaction values of ([[xx.xxx.xx]] baht/pack for *Marlboro* cigarettes and [[xx.xxx.xx]] baht/pack for *L&M* cigarettes).<sup>464</sup> The parties appear to agree that, prior to that date, Thai Customs had been accepting the declared transaction values without any further inquiry.<sup>465</sup> PM Thailand was orally informed on 4 August 2006 that, pursuant to the memorandum by Thai Customs of 3 August 2006<sup>466</sup>, the acceptable transaction values would be [[xx.xxx.xx]] baht/pack for *Marlboro* cigarettes and [[xx.xxx.xx]] baht/pack for *L&M* cigarettes.<sup>467</sup>

7.83 On 7 August 2006, Thai Customs orally advised PM Thailand to submit further information confirming its declared transaction values of the cigarettes at issue.<sup>468</sup>

7.84 On 11 August 2006, Thai Customs informed PM Thailand in writing that the guarantee values<sup>469</sup> for *Marlboro* cigarettes and *L&M* cigarettes were set at [[xx.xxx.xx]] baht/pack and [[xx.xxx.xx]] baht/pack respectively.<sup>470</sup> Upon receiving this letter, PM Thailand began clearing the concerned cigarettes at these guarantee values. For the cigarettes subsequently imported in new shipments, PM Thailand continued declaring the transaction values of [[xx.xxx.xx]] baht/pack for *Marlboro* cigarettes and [[xx.xxx.xx]] baht/pack for *L&M* cigarettes, which were not accepted by Thai Customs.<sup>471</sup> In order to clear the cigarettes at issue, PM Thailand paid the relevant taxes on the declared transaction values and posted bank or cash guarantees for the relevant taxes in respect of the difference between the declared transaction values and the guarantee values as set by Thai Customs, pending the definitive assessment of the customs value.<sup>472</sup>

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<sup>463</sup> Philippines' response to Panel question No. 16.

<sup>464</sup> Philippines' first written submission, para. 143.

<sup>465</sup> Philippines' first written submission, paras. 131-136; Thailand's first written submission, para. 32. According to the Philippines, Thailand relied on "indicative" prices for customs valuation of imported cigarettes between January 2000 and March 2003. The Philippines explains that in March 2003, Thailand began accepting PM Thailand's declared transaction values and abandoned the use of minimum/indicative prices for cigarettes (Exhibit PHL-33). Thailand submits that between 2003-2006, Thai Customs has consistently accepted PM Thailand's declared transaction values as the basis for the customs value.

<sup>466</sup> Exhibit PHL-38. See also para. 7.183 for the sequence of events in this regard.

<sup>467</sup> Philippines' first written submission, paras. 143-150. We note that the Philippines refers to these figures as both the new customs values and the guarantees.

<sup>468</sup> Exhibit PHL-56, p. 1.

<sup>469</sup> For a definition of the term guarantee see Section VII.I.2, para. 7.1039.

<sup>470</sup> Philippines' first written submission, paras. 151-152; Exhibit PHL-59. Thailand submits that "these [guarantee] values were derived by the deductive values for certain PM Thailand imports covered by the Board of Appeals ruling of June 2006." Exhibit PHL-36.

<sup>471</sup> Philippines' first written submission, para. 154.

<sup>472</sup> Philippines' first written submission, para. 155, footnotes 131 and 132. We note that PM Thailand was also required to post bank or cash guarantees for the relevant internal taxes that are calculated on the basis

7.85 In the meantime, by letters to Thai Customs, PM Thailand requested Thai Customs to provide its reasons for questioning the acceptability of the declared transaction values in writing.<sup>473</sup> On 9 December 2006, Thai Customs sent PM Thailand a letter communicating its reasons for considering that the acceptability of the declared transaction values was questionable.<sup>474</sup>

7.86 On 16 February 2007, Thai Customs decreased the guarantee values to [[xx.xxx.xx]] baht/pack for *Marlboro* cigarettes and [[xx.xxx.xx]] baht/pack for *L&M* cigarettes.<sup>475</sup> PM Thailand continued to clear the cigarettes from PM Philippines by paying the relevant taxes on the declared transaction values and by posting bank or cash guarantees.

7.87 On 16 March 2007, Thai Customs further decreased the guarantee values to [[xx.xxx.xx]] baht/pack for *Marlboro* cigarettes and [[xx.xxx.xx]] baht/pack for *L&M* cigarettes.<sup>476</sup>

7.88 Between 16 March 2007 and 10 October 2007, Thai Customs issued Notices of Assessment for the [[xx.xxx.xx]] entries of the PM Thailand cigarettes at issue. Thai Customs assessed the [[xx.xxx.xx]] entries cleared between 11 August 2006 and 22 September 2006 at [[xx.xxx.xx]] baht/pack for *Marlboro* and [[xx.xxx.xx]] baht/pack for *L&M*.<sup>477</sup> For the rest of the [[xx.xxx.xx]] entries cleared between 27 September 2006 and 13 September 2007, the final assessed customs values were [[xx.xxx.xx]] baht/pack for *Marlboro* and [[xx.xxx.xx]] baht/pack for *L&M*.

7.89 On 5 April 2007, PM Thailand sent a letter to Thai Customs requesting that Thai Customs provide, *inter alia*, the reason for the rejection of the declared transaction values, the method used to determine the customs value and how the final customs values were derived.<sup>478</sup> Thai Customs responded to this request in a letter dated 12 April 2007.<sup>479</sup>

7.90 On 28 March 2008, Thai Customs began to accept transaction values declared by PM Thailand as the customs value for entries made on or after that date.<sup>480</sup> Hence, for these new entries, no guarantees were collected, and the transaction values were accepted on clearance. On or after 14 July 2008, Thailand assessed the customs value of [[xx.xxx.xx]] entries that cleared between

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of the duty-paid landed cost of imported products in respect of the difference between the declared transaction values and the guarantee, pending the definitive assessment of customs value. The relevant internal taxes are customs duties, excise, health and television taxes.

<sup>473</sup> Philippines' first written submission, para. 157, footnote 134 (Exhibits PHL-56, PHL-60, PHL-268, and PHL-65). Thailand does not contest this either.

<sup>474</sup> Philippines' first written submission, para. 161; Thailand's first written submission, para. 49; Exhibit PHL-66. The parties do not appear to dispute that the doubts of Thai Customs about the acceptability of the declared transaction values were in relation to the c.i.f. Bangkok prices of Philip Morris cigarettes, imported by "Importer A" (imports destined for duty free shops), that were over 300 per cent of the c.i.f. Bangkok values declared by PM Thailand (Thailand first written submission, paras. 33-39; Exhibit THA-7). The Philippines also does not contest that PM Thailand was aware of the nature of doubts of Thai Customs doubts. It should be noted though, that the Philippines' is of the opinion that Importer A is not technically an importer because its goods transit through duty free areas, and have not formally entered Thailand or been cleared through Thai Customs (Philippines' first written submission, paras. 234-235).

<sup>475</sup> Philippines' first written submission, para. 164.

<sup>476</sup> Philippines' first written submission, para. 166.

<sup>477</sup> Philippines' first written submission, para. 168; Exhibits PHL-27 and PHL-129. The Philippines points out that four entries of the PM Thailand cigarettes at issue that cleared in the same period (i.e. 11 August 2006-13 September 2007) as the [[xx.xxx.xx]] entries at issue were assessed by Thai Customs on 16 July 2008 and 3 October 2008, later than the dates of assessments for the [[xx.xxx.xx]] entries. Furthermore, Thai Customs accepted the declared transaction values for these four entries, namely [[xx.xxx.xx]] baht/pack for *Marlboro* and [[xx.xxx.xx]] baht/pack for *L&M*.

<sup>478</sup> Philippines' first written submission, para. 182; Exhibit PHL-69.

<sup>479</sup> Philippines' first written submission, para. 183; Exhibit PHL-70.

<sup>480</sup> Philippines' first written submission, para. 187.

13 September 2007 and 19 March 2008, accepting the transaction values.<sup>481</sup> For these entries, transaction values were not accepted at the time of clearance, and guarantees were collected in respect of potential customs and fiscal liabilities. These [[xx.xxx.xx]] entries include one entry that cleared on 13 September 2007, and that was assessed on or after 14 July 2008.<sup>482</sup> On or after 14 July 2008, Thailand also assessed the customs value of [[xx.xxx.xx]] entries that cleared, respectively, on 28 March 2007 ([[xx.xxx.xx]] entry) and 10 September 2007 ([[xx.xxx.xx]] entries), accepting the transaction values.<sup>483</sup> For these entries, the transaction values were not accepted at the time of clearance, and guarantees were collected in respect of potential customs and fiscal liabilities. Finally, on or before 10 October 2007, Thailand assessed the customs value of [[xx.xxx.xx]] entries that cleared between 11 August 2006 and 13 September 2007, rejecting the transaction values.<sup>484</sup> For these entries also, the transaction values were not accepted at the time of clearance, and guarantees were collected in respect of potential customs and fiscal liabilities. These [[xx.xxx.xx]] entries include [[xx.xxx.xx]] entries that cleared on, respectively, 28 March 2007 ([[xx.xxx.xx]] entry) and 13 September 2007 ([[xx.xxx.xx]] entry), and that were assessed on or before 10 October 2007.<sup>485</sup>

7.91 An importer can appeal final customs duties to the Thai Board of Appeals ("BoA") pursuant to Section 112*sexies* of the Customs Act.<sup>486</sup> An importer can then appeal the decision of the BoA to the Thai Tax Court pursuant to Section 7(1) of the Tax Court Act.<sup>487</sup>

## **5. Article 1.1 and 1.2 of the Customs Valuation Agreement**

### **(a) Introduction**

7.92 With respect to Article 1.1 and 1.2 of the Customs Valuation Agreement, the Philippines claims that Thailand violates: (i) Article 1.1 and 1.2 by maintaining and applying a general rule requiring the rejection of the transaction value and the application of the deductive valuation method; (ii) Article 1.1 and 1.2 by improperly rejecting PM Thailand's declared the transaction values for the [[xx.xxx.xx]] entries; and (iii) Article 1.2(a) by failing to communicate "grounds" before rejecting the transaction values for these entries.

7.93 Before we examine the Philippines' claims in turn, we first clarify the standard appropriate for our review of the claims under Article 1.1 and 1.2(a) of the Customs Valuation Agreement.

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<sup>481</sup> Philippines' first written submission, para. 195, Table 2; second written submission, paras. 120-137.

<sup>482</sup> Philippines' first written submission, para. 195, Table 2, Row 4; second written submission, paras. 120-137.

<sup>483</sup> Philippines' first written submission, para. 195, Table 2, Row 4; second written submission, paras. 120-137.

<sup>484</sup> Philippines' first written submission, para. 195, Table 2, Rows 1-4.

<sup>485</sup> Philippines' first written submission, para. 195, Table 2, Row 4; second written submission, paras. 120-137.

<sup>486</sup> Thailand's first written submission, para. 74. Between 2000 and 2003, PM Thailand appealed [[xx.xxx.xx]] customs valuation decisions by Thai Customs, [[xx.xxx.xx]] of which are still pending today. In addition, between August 2006 and September 2007, Thai Customs rejected the transaction value of [[xx.xxx.xx]] imports of cigarettes from the Philippines imported by PM Thailand. PM Thailand appealed these rejections at the BoA, these appeals are still pending as well. (Philippines' first written submission, paras. 90-91; response to Panel question No. 80; Thailand's response to Panel question No. 82).

<sup>487</sup> Thailand's response to Panel question No. 145 citing Exhibit THA-88; Exhibit PHL-281.

(b) Standard of review for the claims under Article 1.1 and 1.2(a)

(i) *Main arguments of the parties*

7.94 The **Philippines** submits that the WTO standard of review requires a panel to "objectively assess" under Article 11 of the DSU whether the authority's explanation demonstrates that it complied with its obligation to examine the circumstances of sale by critically examining the evidence.<sup>488</sup> As with other covered agreements, the explanation must show, among other things, how the authority treated the evidence and how the evidence supported its conclusion. The Panel cannot assess the WTO-consistency of Thai Customs' decision on the basis of reasons developed by Thailand in these proceedings, which may or may not reflect the view of Thai Customs at the time.<sup>489</sup>

7.95 Further, in deciding whether an authority has properly examined the circumstances of sale, a panel must also objectively assess other relevant evidence that addresses the legitimacy of the authority's conclusion, in particular where that conclusion does not explain the factual grounds supporting it. Given that Thai Customs never mentioned the evidence at the time of its rejections, Thailand has failed to demonstrate that it was entitled to reject the transaction values under Articles 1.1 and 1.2 of the Customs Valuation Agreement.<sup>490</sup>

7.96 **Thailand** generally agrees with the Philippines that the appropriate standard with respect to the claims under the Customs Valuation Agreement is whether the valuation decision by Thai Customs valuation was reasonable given the facts and evidence before Thai Customs at the time of its determination.<sup>491</sup> Thailand also agrees that the Panel must *not* conduct a de novo review.<sup>492</sup>

7.97 Thailand disagrees, however, with the Philippines on how to apply this standard to the current dispute. Thailand argues that the Philippines has failed to show that *any* of Thailand's arguments before the Panel are *ex post* in that they differ from the grounds on which Thai Customs acted. In Thailand's view, while the explanations provided to the Panel are much more detailed than those provided to PM Thailand at the time of determination, the explanations before the Panel are consistent with the grounds on which Thai Customs acted and the explanations provided to PM Thailand at the time.<sup>493</sup>

7.98 Furthermore, Thailand contests that the theory of *ex post* justifications can be applied to the current dispute dealing with the customs valuation measures, since it has been largely derived from disputes relating to trade remedy measures.<sup>494</sup> Unlike the Anti-Dumping Agreement or the SCM Agreement, the Customs Valuation Agreement does not require the customs administration to disclose "all issues of fact and law considered material" at the time it makes a customs value determination. Nor does it require the customs administration to inform all interested parties of the essential facts under consideration which form the basis for the decision, as do Article 6.9 of the Anti-Dumping Agreement and Article 12.8 of the SCM Agreement. In these circumstances, Thailand argues, there is no logical or legal basis for a reviewing panel to decline to consider arguments by a defending Member on the ground that they were not among the "issues of fact and law" or "essential facts" disclosed at the time of the customs valuation. According to Thailand, were the Panel to decline to consider arguments put forth by Thailand in this dispute on *ex post* grounds, the Panel would, in effect, be reading the disclosure provisions of the Anti-Dumping and the SCM Agreements into the

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<sup>488</sup> Philippines' response to Panel questions Nos. 4 and 6.

<sup>489</sup> Philippines' response to Panel question No. 108.

<sup>490</sup> Philippines' response to Panel question No. 16.

<sup>491</sup> Thailand's second written submission, para. 15; second oral statement, paras. 3-8.

<sup>492</sup> Thailand's combined response to Panel questions Nos. 4 and 6.

<sup>493</sup> Thailand's response to Panel question No. 93(1).

<sup>494</sup> Thailand's response to Panel question No. 93(2).

Customs Valuation Agreement, thereby improperly adding to or diminishing the rights and obligations provided in the covered agreements.<sup>495</sup>

(ii) *Analysis by the Panel*

7.99 We recall our consideration in Section VII.B.2 above that an objective assessment under Article 11 of the DSU, the proper standard of review for this Panel, must be understood in the light of the relevant obligations of the substantive agreement at issue, the Customs Valuation Agreement. In this connection, the Appellate Body in *US – Upland Cotton* stated:

"Unlike in certain other instances under the WTO agreements, a panel conducting an analysis under Article 6.3(c) of the SCM Agreement is the first trier of facts, rather than a review of factual determinations made by a domestic investigating authority. Bearing this in mind, we underline the responsibility of panels in gathering and analyzing relevant factual data and information in assessing claims under Article 6.3(c) in order to arrive at reasoned conclusions."<sup>496</sup>

7.100 This statement suggests that the 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. We are also mindful of the Appellate Body's view that the principles of the standard of review based on Article 11 of the DSU with respect to one WTO-covered agreement can equally be applied to other WTO-covered agreements.<sup>497</sup> We will therefore be guided by the Appellate Body's clarification of the standard of review under other WTO-covered agreements in previous disputes.

7.101 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 sale between PM Thailand and PM Philippines within the meaning of Article 1.2(a). As summarized in Section VII.C.5(d) below, the parties' arguments in this regard are focused on whether Thai Customs examined the evidence submitted by PM Thailand at the time of determination and whether the Thai Customs' determination not to accept the transaction value of the cigarettes at issue can be justified by such evidence. Our mandate in examining the claims under Article 1.1 and 1.2(a) is therefore to assess whether the Thai Customs determination under Article 1.2(a) is supported by the factual evidence before it, but *not* to determine as the first trier of facts whether the relationship between PM Thailand and PM Philippines influenced the price based on the information submitted by PM Thailand at the time of the valuation determination.

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<sup>495</sup> Thailand further notes that the practice of declining to consider arguments or evidence on *ex post* grounds is not as clear cut as the Philippines might suggest, even in disputes under the Anti-Dumping Agreement (Thailand's response to Panel question No. 93(2)). Thailand cites to the Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 162 and 164. The Appellate Body stated at para. 162: "The panel itself did not explain what it understood by a prohibition on "*ex post* rationalization", nor on what basis such a prohibition would limit a Member's right to present *evidence*—as opposed to reasoning—in dispute settlement proceedings" and at para. 164 "we are of the view that Article 22.5 does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination").

<sup>496</sup> Appellate Body Report, *US – Upland Cotton*, para. 458.

<sup>497</sup> Specifically, the Appellate Body stated that the standard of review principles with respect to the Safeguards Agreement "apply equally to a panel's review of a Member's determination under Article 6 of the ATC" (Appellate Body Report, *US – Cotton Yarn*, para. 75) and are "instructive for cases under the SCM Agreement that also involve agency determinations" (Appellate Body Report, *US – DRAMS CVD Investigation*, para. 184).

7.102 The substantive obligation under the Customs Valuation Agreement that is relevant to the formulation of the applicable standard of review of the Philippines' claims under Articles 1.1 and 1.2(a), is the obligation imposed on a customs administration under Article 1.2(a) to communicate its grounds for considering that, in the light of the information provided by the importer, the relationship influenced the price. Further, under Article 16, upon request from the importer, the customs administration must provide a written explanation as to how the customs value was determined, as addressed in Section VII.C.6 below.

7.103 Consequently, an objective assessment of whether Thai Customs properly rejected the transaction value by examining the circumstances of sale within the meaning of Article 1.2(a) must be based on the grounds as well as on the explanation provided by Thai Customs under Articles 1.2(a) and 16 respectively.<sup>498</sup> We find support for our view in the Appellate Body's statement in *US – Lamb*:

"It follows that the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the *Agreement on Safeguards*, stems, in part, from the panel's obligation to make an 'objective assessment of the matter' under Article 11 of the DSU, and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim. By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement of Safeguards*."<sup>499</sup>

7.104 The Appellate Body also emphasized that a panel must *critically* examine a domestic authority's explanation "in depth, and in the light of the facts before the panel".<sup>500</sup> Although the concerned provision in that dispute (Article 4.2(a)) was under the Agreement on Safeguards, which has a more detailed obligation to provide a "reasoned and adequate" explanation, we do not see the

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<sup>498</sup> We recognize that there may be a situation where the importer does not request a written explanation under Article 16. We do not consider it necessary for the purpose of resolving this dispute to determine the proper standard of review in such a situation.

<sup>499</sup> Appellate Body Reports on *US – Lamb*, para. 105; *US – Countervailing Duty Investigation on DRAMs*, para. 184. The Appellate Body in *US – Steel Safeguards* further states:

"[A] panel must not be left to *wonder* why a safeguard measure has been applied. ... As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgment for that of the competent authorities. Therefore, the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority. (paras. 298-299)

.... However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority...." (para. 303).

<sup>500</sup> Appellate Body Report, *US – Lamb*, para. 106.

reason why the same principle would not apply to a panel reviewing the provisions under the Customs Valuation Agreement that contains obligations of a similar nature.<sup>501</sup>

7.105 In this connection, we further recall the Appellate Body's reasoning that panels need not necessarily confine their review of a domestic authority's determination to an examination of that determination in terms of the factual and legal arguments put forward by the interested parties during the domestic investigation.<sup>502</sup> The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* also stated, "this is not to say that a panel is prohibited from examining whether the agency has given a reasoned and adequate explanation for its determination, in particular, by considering other inferences that could reasonably be drawn from – and explanations that could reasonably be given to – the evidence on record. Indeed, a panel must undertake such an inquiry".<sup>503</sup>

7.106 We therefore conclude that in the light of the nature of obligations under Articles 1.2(a) and 16 the Customs Valuation Agreement, the standard appropriate for our review of the Philippines' claims under Articles 1.1 and 1.2(a) of the Customs Valuation Agreement is to assess, based on the grounds as well as the explanation provided by Thai Customs, whether Thai Customs' decision to reject the transaction value of the imported cigarettes at issue was consistent with the Customs Valuation Agreement.

7.107 We will now commence our review of the parties' claims under the Customs Valuation Agreement by applying the standard of review as set above.

(c) Whether Thailand maintained and applied a general rule requiring the rejection of transaction values and the use of the deductive valuation method in violation of Articles 1.1 and 1.2

(i) *Main arguments of the parties*

7.108 The **Philippines** submits that "[a] WTO Member is entitled to bring claims against any general rules of prospective application that are attributable to another WTO Member, whether the rule is formally published or not".<sup>504</sup> The Philippines argues that Thailand's general rule, applied from 4 August 2006 until 19 March 2008, included the following two elements: (i) the systematic refusal, at the time of importation, to accept the transaction values for all entries of imported cigarettes, with the collection of guarantees as a condition for allowing customs clearance<sup>505</sup>; and (ii) the systematic valuation of imported cigarettes using the deductive valuation method, instead of the transaction value, at the time of final assessment.<sup>506</sup> All entries that have been assessed after 19 March 2008 have

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<sup>501</sup> The Appellate Body further stated that "panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. ..." (Appellate Body Report, *US – Lamb*, para. 106).

<sup>502</sup> Appellate Body Report, *US – Lamb*, paras. 110-116, referring to its report on *Thailand – H-Beams*, para. 94.

<sup>503</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, footnote 278.

<sup>504</sup> Philippines' response to Panel question No. 1, citing the Appellate Body Report, *US – Zeroing (EC)*, para. 198.

<sup>505</sup> The Philippines submits that "with respect to aspect (1) (systematic refusal of transaction valuation) of the general rule, Thailand refused to accept transaction value at the time of importation, and collected guarantees for all *[[xx.xxx.xx]] entries that were imported* between 4 August 2006 until 19 March 2008, without exception." (Philippines' response to Panel question No. 1) (emphasis added).

<sup>506</sup> Philippines' response to Panel question Nos. 1 and 96(1). The Philippines submits that "with respect to aspect (2) (systematic use of deductive valuation) of the general rule, Thailand valued imported cigarettes using the deductive valuation methodology, instead of transaction value *for all [[xx.xxx.xx]] entries* for which Thailand issued a *notice of assessment* for these entries between 11 August 2006 and 19 March 2008, again

been valued using the transaction value, even if their date of entry was during the same period as the [[xx.xxx.xx]] entries for which transaction values were rejected.

7.109 The Philippines requests the Panel to find that Thailand's general rule is inconsistent with Articles 1.1 and 1.2 of the Customs Valuation Agreement because it involves the systematic rejection of the transaction value in related party sales both at the time of importation and at the time of assessment, without examination of the circumstances of sale.<sup>507</sup> The Philippines asserts that various Thai government documents demonstrate the *existence or establishment* of the general rule<sup>508</sup>, whereas Thailand's rejection of the transaction value and valuation using the deductive valuation method in the [[xx.xxx.xx]] entries at issue is evidence of the *application* of the general rule.<sup>509</sup> Although Thailand is not applying its general rule today, it is unclear to the Philippines whether the rule has been fully repealed or whether Thailand has simply decided not to apply the rule for the time being. Therefore, the Philippines requests that the Panel recommends that, to the extent that the rule continues to exist, Thailand brings it into conformity with its obligations under the Customs Valuation Agreement.<sup>510</sup>

7.110 **Thailand** submits that the Philippines failed to establish that a "general rule and/or methodology" existed as that term is understood in WTO jurisprudence, in particular according to the threshold, as set by the Appellate Body in *US – Zeroing (EC)*, to be met to establish a general rule. Thailand objects to the classification of the Thai customs valuation determinations at issue as a general rule/methodology because the determinations challenged are not general and prospective in nature: they only apply to a specific corporation (i.e. PM Thailand), and the Philippines itself has argued that such calculations are actually random and unpredictable in nature under different claims. Thailand therefore submits that it does not have any practice of systematically rejecting the transaction value for cigarettes.<sup>511</sup>

7.111 Thailand further argues that there is no need for the Panel to rule on this claim in order to resolve the dispute before it. This is because the Philippines' claims with respect to the [[xx.xxx.xx]] entries listed in the Philippines' panel request are within the terms of reference. As long as the entries listed in the Philippines' panel request constitute the measures at issue, there is no need for the Panel to consider the general rule because no purpose would be served by also ruling on the revised claim regarding a general methodology.<sup>512</sup> Finally, Thailand asserts that the Philippines misinterprets the Thai Customs' memorandum dated 3 August 2006 in order to prove the existence of the general rule. This memorandum, which the Philippines alleges dictates general rules for the collection of guarantees, clearly explains that the guarantees to be collected on PM Thailand's imports will be based on the deductive valuation method used in the June 2006 Board of Appeals decision from which the guarantee values were derived.<sup>513</sup> This memorandum therefore relates directly to a specific instance, and does not show the existence of a general rule.<sup>514</sup>

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without exception" (emphasis added). These [[xx.xxx.xx]] entries are a sub-set of the [[xx.xxx.xx]] entries, cleared between 11 August 2006 and 19 March 2008.

<sup>507</sup> Philippines' response to Panel question No. 1.

<sup>508</sup> Philippines' response to Panel question No. 96(1) (emphasis added).

<sup>509</sup> Philippines' response to Panel question No. 96(1).

<sup>510</sup> The Philippines refers to the Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 8.16 and 8.36.

<sup>511</sup> Thailand's first written submission, para. 126.

<sup>512</sup> Thailand's second written submission, para. 305.

<sup>513</sup> Exhibit THA-38 includes a Thai Customs memo dated 9 August 2006, in which it states that the customs valuation of cigarettes "needs to be valued by Method 4" and that PM Thailand is "facing the question of how much guarantee should be imposed on such products". The memo goes on to explain that the "maximum customs valuation" is the "deductive price" in accordance with the BoA's "Decision No. Gor.Or. 19/2549". This refers to the BoA decision of June 2006, provided as Exhibit PHL-36, from which the values



(ii) *Analysis by the Panel*

7.112 The Philippines claims that Thailand maintains a general rule or norm of systematically rejecting transaction values for certain imported goods and using the deductive valuation method for customs valuation inconsistently with Article 1.1 and 1.2(a) of the Customs Valuation Agreement. We will begin our analysis of the Philippines' claim by recalling the Appellate Body's consideration in previous disputes of whether "general rules" can constitute a "measure" for the purpose of a WTO dispute settlement proceeding.

7.113 The Appellate Body stated that measures that may be subject to WTO dispute settlement include acts applying a written law in a specific context and "acts setting forth rules or norms that are intended to have general and prospective application".<sup>515</sup> Regarding whether *unwritten* rules or norms can also constitute a measure, the Appellate Body clarified in *US – Zeroing (EC)* that there is "no basis to conclude that 'rules or norms' can be challenged, as such, *only* if they are expressed in the form of a written instrument".<sup>516</sup>

7.114 In this connection, the Appellate Body has noted that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document. If a panel were to do so, it would act inconsistently with its obligations under Article 11 of the DSU to 'make an objective assessment of the matter' before it".<sup>517</sup> The Appellate Body thus emphasized the need for clearly distinguishing "between the issue of ascertaining the *existence* of the challenged measure, which is especially important when unwritten measures are at issue; and the separate examination of its *consistency* with the relevant provisions of the covered agreement".<sup>518</sup>

7.115 In particular, the Appellate Body states:

"When an 'as such' challenge is brought against a 'rule or norm' that is expressed in the form of a written document – such as law or regulation – there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against a 'rule or norm' that is *not* expressed in the form of a written document. In such cases, the very existence of the challenged 'rule or norm' may be uncertain."<sup>519</sup>

7.116 The Appellate Body stated that to support a finding of the *existence* of an *unwritten* rule or norm, a complaining party must therefore show: (i) the rule or norm attributable to the responding Member; (ii) its precise content; and (iii) its general and prospective application.<sup>520</sup> Further, to determine whether the complaining party has proved the existence of an unwritten rule or norm, a panel must examine the *concrete instrumentalities* that evidence the existence of the purported rule or

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used as the guarantees required on PM Thailand's imports from August 2006 were derived. Thus, it is clear that this memo refers to the issue of the establishment of the guarantee values, which were based on a previous deductive value and were required as of the date of the memo, and not to the final valuation of the [[xx.xxx.xx]] entries at issue, which did not take place until March 2007, after extensive further contact between PM Thailand and Thai Customs.

<sup>514</sup> Thailand's second written submission, para. 306.

<sup>515</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

<sup>516</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 193.

<sup>517</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 196.

<sup>518</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 203.

<sup>519</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 197.

<sup>520</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198.

norm to conclude that such rule or norm can be challenged as such.<sup>521</sup> This evidence may include proof of the *systematic application* of the challenged rule or norm.<sup>522</sup>

7.117 Given that the general rule allegedly maintained by Thailand is not in the form of a written document<sup>523</sup>, our analysis of the Philippines' claim will be guided by the criteria, set out by the Appellate Body as above, to be applied in examining an as such challenge against an unwritten rule or norm as a measure. We will therefore first examine whether the Philippines has established the *existence* of the unwritten rule or norm, namely the systematic rejection of the declared transaction value and the systematic use of the deductive valuation method. Only if we find, based on the evidence before us, that the Philippines established the existence of the unwritten rule or norm, will we continue with an examination of the *consistency* of such an unwritten rule or norm.

7.118 The Philippines claims that the existence or establishment of the alleged general rule is demonstrated by the following eight categories of evidence:<sup>524</sup>

- A Thai Customs memorandum of 3 August 2006, a day before Thai Customs started doubting declared transaction values of imported cigarettes, that states that Prime Minister Thaksin instructed Thai Customs to take action with respect to "very unusually low declared values" for certain categories of imported goods, including cigarettes<sup>525</sup>;
- A Thai Customs memorandum of 9 August 2006 that instructs Thai customs officers to value *all* imported cigarettes using the deductive valuation method<sup>526</sup>, which allegedly shows that Thailand adopted a policy of systematically rejecting the transaction value, and using the deductive valuation method to value imported cigarettes;
- The minutes of the 6 March 2007 meeting, stating that Thailand did not examine the circumstances of sale, which is consistent with the fact that Thailand adopted a general rule involving the systematic rejection of transaction value irrespective of the circumstances of sale<sup>527</sup>;

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<sup>521</sup> Appellate Body Report, *US – Zeroing (EC)*, paras. 197-198.

<sup>522</sup> Further, the Appellate Body in *US – Zeroing (EC)* recognized the following factors as relevant to determining the existence of an unwritten rule/norm: (i) the United States (the responding party) did not contest that a certain instrument proved the application of the concerned rule for an extended period of time; (ii) the United States had been unable to identify any instance where the rule was not applied; and (iii) the United States had not contested in that proceeding that the rule reflects a deliberate policy. The Appellate Body noted that the Panel concluded, based on its assessment of the evidence mentioned above, that "the zeroing methodology manifested in the 'Standard Zeroing Procedures' [an instrumentality] represents a well-established and well-defined norm followed by the USDOC and that it is possible based on this evidence to identify with precision the specific content of that norm and the future conduct that it will entail." (Appellate Body Report, *US – Zeroing (EC)*, paras. 199-200, citing the Panel Report, paras. 7.103-7.104). The Appellate Body further observed that the evidence before the Panel consisted of the following: (i) USDOC determinations in the "as applied" cases challenged by the European Communities; (ii) the standard programs used by the USDOC to calculate margins of dumping; (iii) expert opinions regarding the use and the content of the rule; (iv) the United States' indication at the Appellate Body oral hearing that it will soon be publicly announcing that it no longer will engage in the rule at issue in certain circumstances; and (v) the Anti-Dumping Manual as evidence of the standard character of the rule.

<sup>523</sup> Philippines' response to Panel question Nos. 96(2)(iii) and (iv).

<sup>524</sup> Philippines' response to Panel question Nos. 1, 4, 6 and 96(1).

<sup>525</sup> Exhibit THA-38. The Philippines states that this memorandum was the source of the events within the Thai government that led to this dispute (its response to Panel question No. 1).

<sup>526</sup> See *supra* footnote 513

<sup>527</sup> Exhibit PHL-74.

- An analysis of Thai Customs' deductive testing, which indicates that the motivation of Thai Customs' decisions was not the gap between the transaction values and the deductive test values<sup>528</sup> and hence suggests the existence of a general rule involving the systematic rejection of transaction value irrespective of the circumstances of sale;
- Thailand's acceptance of the transaction values for four entries that were cleared at or around the same time as the [[xx.xxx.xx]] entries at issue (i.e. 11 August 2006 and 13 September 2007), but assessed *after* 19 March 2008, which shows that the basis for accepting or rejecting transaction value was not the circumstances of sale, but the Thai government policy prevailing at the time of assessment<sup>529</sup>;
- A Thai Customs memorandum of 23 August 2006, entitled "guide price consideration of liquor and beer products"<sup>530</sup>;
- A Thai Customs memorandum of 27 September 2006, entitled "Guideline on the Customs Valuation of Alcoholic Beverages and Beer"<sup>531</sup>; and
- A Thai Customs meeting report of 24 October 2006 regarding the customs valuation of "cigarettes, liquor, beer and wine products".<sup>532</sup>

7.119 In examining the Philippines' claim, we will assess whether these exhibits individually and/or as a whole demonstrate the existence of the alleged general rule or norm.

7.120 The first element that needs to be established to prove the existence of an unpublished rule or norm is that the alleged rule or norm is *attributable* to the responding Member. The alleged Thai Customs' systematic refusal of transaction value and use of the deductive valuation method at issue is attributable to Thailand as Thai Customs and Thai Excise both consist of appointed government officials who are accountable to the Thai government. WTO Members are responsible for the actions of their government officials, where their action is inconsistent with the WTO covered agreements.<sup>533</sup>

7.121 Next, regarding the precise content of the alleged general rule, the Philippines submits that the Thai government's internal documents as listed above, show the applicability of the rule to imported cigarettes, liquor, beer, and wine.<sup>534</sup> We also understand from the Philippines' claim that the general rule includes two elements: first, the systematic rejection of importers' declared transaction value without properly examining the circumstances of the sale in related-party transactions; and, second, the systematic use of the deductive valuation method in determining the customs value of imported goods.

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<sup>528</sup> The Philippines puts forward that this argument is based on its analysis that "when the gap between the value was at its largest, Thailand accepted the declared transaction values; and, when the gap was at its smallest, Thailand rejected the declared transaction values" (Philippines' combined response to Panel question Nos. 4 and 6).

<sup>529</sup> Philippines' second written submission, paras. 126-129; Exhibits PHL-200, PHL-201, PHL-202, PHL-203, and PHL-219.

<sup>530</sup> Exhibit THA-69.

<sup>531</sup> Exhibit THA-70.

<sup>532</sup> Exhibit THA-72.

<sup>533</sup> Article 4(1) of the Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UN GA Resolution 56/83 (12 December 2001); Appellate Body Report, *U.S. – Gasoline*, p. 28.

<sup>534</sup> Philippines' response to Panel question No. 96(2)(i).

7.122 As regards whether the alleged rule or norm has *general* and *prospective* application, the Philippines refers to the following Thai government documents: (i) four Thai Customs memoranda concerning customs valuation of cigarettes and alcoholic beverages; (ii) the 24 October 2006 meeting report; and (iii) the minutes of the 6 March 2007 meeting.

7.123 The Thai Customs memorandum of 3 August 2006 instructs, according to the order of the Prime Minister, Thai Customs "to act carefully in making a customs valuation for imported products" with "very unusually low declared values", including wine and cigarettes.<sup>535</sup> The language and content of the memorandum, however, appears too broad and vague to be considered as constituting a rule or norm systematically rejecting declared transaction values or using the deductive valuation method.

7.124 Further, the Thai Customs' memorandum of 9 August 2006 instructs Thai Customs officers to value *Marlboro* and *L&M* imports by PM Thailand using the deductive valuation method.<sup>536</sup> This falls short of evincing a rule or norm requiring to *systematically* use the deductive valuation method because the instruction in the subject memorandum appears to have been made because of the doubts on the acceptability of PM Thailand's declared transaction values that were triggered by the purchase price of Importer A, not because of the existing norm or rule. In other words, the content of the memorandum shows that Thailand was responding to a particular set of circumstances where an importer's declared transaction value raised doubts as to its acceptability rather than systematically applying a norm or rule. We are not presented with any evidence to understand otherwise. Similarly, the minutes of the 6 March 2007 meeting also concern customs valuation issues relating to cigarette imports by PM Thailand only, not cigarettes in general.

7.125 Finally, Thailand based the customs value for PM Thailand's entries in the period August 2006-March 2007 on the deductive valuation method and it used these values as "test values" to determine whether transaction values would be accepted with respect to future entries. Thailand states that it used these test values, because there was a gap between the declared transaction values and the calculated deductive values.<sup>537</sup> The Philippines argues that the results of this testing show that Thailand's decision-making was arbitrary, and not based on the circumstances surrounding PM Thailand's imports, since, when the gap between the declared transaction value and the test value was at its largest, Thailand accepted the declared value; and, when the gap between the declared transaction value and the test value was at its smallest, Thailand rejected the declared value.<sup>538</sup>

7.126 We note that all of the above mentioned memoranda, the 6 March 2007 meeting minutes and Thailand's deductive testing concern valuation issues solely relating to PM Thailand. The question is therefore whether these government documents that specifically concern PM Thailand can be considered as showing the general and prospective application of the alleged general rule or norm.

7.127 In this connection, in previous disputes where claims under Article X:1 of the GATT 1994 were at issue, panels had an opportunity to address the meaning of laws, regulations and rulings "of *general* application". In essence, a domestic agency's determination or ruling that concerns a particular importer only was not considered *per se* determinative to deciding whether such a determination or ruling should be considered as constituting a rule or norm of general and prospective application. The Panel in *Japan – Film*, for example, found that "inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria

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<sup>535</sup> Exhibit THA-38.

<sup>536</sup> Exhibit THA-38.

<sup>537</sup> Thailand's first written submission, paras. 62-63.

<sup>538</sup> Philippines' combined response to Panel question No. 4 and 6, referring to its response to Panel question No. 1.

applicable in future cases".<sup>539</sup> The Panel considered that, in such a case, it is incumbent upon the complainant to clearly demonstrate the existence of such unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases. On the basis of the text of the concerned official memoranda and the meeting minutes in this dispute, we do not find the content therein to be applied generally and prospectively in future cases where similar issues arise.

7.128 The Philippines further submits that Thai Customs' valuation of the [[xx.xxx.xx]] entries at issue constitutes evidence of the existence of the general rule. Thailand argues that "the concept of a 'general rule' applicable to all determinations cannot be extended to company-specific determinations such as the valuation decisions under the Customs Valuation Agreement at issue in this case, even where those determinations cover multiple entries".<sup>540</sup> As noted in the previous paragraph, we consider that administrative rulings in individual cases could constitute rulings of general application where such rulings establish or revise principles or criteria applicable in future cases. We further consider that showing that an unwritten rule or norm has consistently been applied for an extended period of time could also demonstrate the existence of the general rule. The panel in *US – Zeroing (EC)* found that the evidence before it indicated that the concerned practice (zeroing) had been *invariably* performed by the United States' government "for an extended period of time", as also acknowledged by the Appellate Body.<sup>541</sup> In another zeroing dispute, the Appellate Body found that a practice of zeroing was applied for approximately 20 years.<sup>542</sup> In the current dispute, the subject valuation determinations were made for [[xx.xxx.xx]] entries assessed between 16 March 2007 and 10 October 2007, and cleared between 11 August 2006 and 13 September 2007. The parties do not dispute that Thai Customs is no longer rejecting the declared transaction values of PM Thailand's cigarettes.<sup>543</sup> We note that this is, for example, in contrast to the factual circumstances in *US – Zeroing (EC)* where the United States could not point to any instance where the concerned practice was *not* used. The Philippines is also not certain whether the alleged general rule may be applied to imports in the future.<sup>544</sup>

7.129 Neither has the Philippines been able to point to a specific instance in which the alleged general rule was in fact applied to imported products other than the cigarettes imported by PM Thailand. In the Philippines' view, because the concerned general rule is challenged as such "independently from the application" of the rule in any given case, evidence of the actual application of a general rule is not required.<sup>545</sup> We do not agree with the Philippines. As set out above, an allegation that an *unwritten* rule or norm violates WTO obligations requires the complaining party to first show the *existence* of such a rule or norm for the very reason that the concerned rule or norm is *unwritten*. In these circumstances, the actual application of an unwritten general rule will clearly qualify as evidence of the existence of such a rule.

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<sup>539</sup> Panel Report, *Japan – Film*, para. 10.388. Previously, the Panel in *US – Underwear* considered that an administrative order targeting a specific country did not preclude the possibility of it being a measure of general application, whereas the same measure (general application of the initial date of calculation for a safeguard measure, regarding silence of ATC interpreted as prohibition of practice) would not have qualified as a measure of general application if it was addressed to a specific company or applied to a specific shipment (Panel Report, *US – Underwear*, para. 7.65).

<sup>540</sup> Thailand's second written submission, para. 302.

<sup>541</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 191.

<sup>542</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.51-7.52.

<sup>543</sup> Based on the fact that Thai Customs stopped rejecting the declared transaction values, the European Communities, a third-party participant, also comments that "the existence of a general rule with *prospective* effect would appear not to be at issue in this dispute." (emphasis added) (the European Communities' third party oral statement, para. 3).

<sup>544</sup> Philippines' response to Panel question No. 96(iv).

<sup>545</sup> The Philippines refers to the Appellate Body finding in *US – 1916 Act*, paras. 60-61, (Philippines' response to Panel question No. 96(2)(i), footnote 63). However, unlike in this case, in that dispute the concerned measure was "legislation", not an unwritten rule or norm.

7.130 The Philippines refers to the meeting report of 24 October 2006, which in the Philippines' view shows that the general rule was applied to cigarettes of two other importers because the meeting addressed how to calculate a deductive value for imports from these two companies for use as a test value.<sup>546</sup> The meeting report indicates that the discussion concerned the valuation of cigarettes, liquor, beer and wine imports and profit rates and general expenses of these products. It then provides specific case considerations: first, the current guarantees used for *Marlboro* and *L&M* imports; and, second, the direction according to which the proper profit rates and general expenses are applied in calculating deductive values to *test* the declared transaction values of other cigarette importers such as [[xx.xxx.xx]] company and [[xx.xxx.xx]] company. We do not find in the meeting report, however, a government rule or policy directing Thai customs officers to systematically reject declared transaction values for these imports or to use the deductive valuation method to *determine* – not to *test* – the customs value of cigarette imports. We do not consider that this meeting report shows the application of the alleged general rule or norm to other cigarette imports as the Philippines submits.

7.131 The Philippines also argues that the statements by the Scotch Whisky Association and the European Spirits Association demonstrate that the general rule has been applied to products other than cigarettes.<sup>547</sup> These statements are press releases made by the above two associations. In these press releases, using almost identical language, both associations welcome the European Union's decision in January 2008 to request consultations with Thailand in the context of the WTO dispute settlement regarding Thailand's customs valuation system.<sup>548</sup> The associations state that Thailand has systematically rejected product values declared by importers since September 2006 and has instead calculated the value of imports according to an arbitrary, standard margin, breaching the WTO Customs Valuation Agreement. We agree that certain statements in the press releases, as pointed out by the Philippines, echo the Philippines' position in this dispute with respect to Thai Customs valuation determinations during the same period at issue. They also do indicate that certain alcoholic beverage imports faced similar customs valuation issues in Thailand as the concerned cigarettes in this dispute. Although we do not find these statements alone sufficient to prove the existence of an *unwritten* general rule or norm, particularly given their nature as a secondary evidentiary source, we do not eliminate the possibility that they may, considered together with other evidence, show the existence of such a rule.<sup>549</sup>

7.132 Further, there is also no evidence showing a deliberate policy by the Thai Government of maintaining a general rule. Thailand's acceptance of the transaction values for four entries that were cleared at or around the same time as the [[xx.xxx.xx]] entries at issue (i.e. 11 August 2006 and 13 September 2007), but assessed after 19 March 2008, would not be sufficient to prove the existence of a Thai government's *deliberate policy* of general and prospective application, although it might have been a prevailing practice at the time of assessment. On the contrary, it illustrates the instances where the alleged rule has not been applied, which goes against the Philippines' very position that Thailand maintains a general rule or norm through the concerned valuation practice.

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<sup>546</sup> Philippines' response to Panel question No. 96(2)(ii), referring to Exhibit THA-72, pp. 2-3. We understand based on this exhibit that Thai Customs undertakes a deductive value calculation, the result of which is called 'test value'. If the test value is approximately the same as the declared value, then Thai Customs will accept the declared transaction value.

<sup>547</sup> Exhibits PHL-267 ("WTO talks on Thai customs rules welcomed" News Release by Scotch Whisky Association, 28 January 2008), PHL-269 ("EU spirits producers welcome decision to file WTO talks on Thai customs rules" Press Release by the European Spirits Organization (CEPS), 27 January 2008).

<sup>548</sup> *Thailand – Customs Valuation of Certain Products from the European Communities*, WT/DS370, request for consultations 30 January 2008.

<sup>549</sup> The Philippines states that "the statements by the two associations demonstrate that the general rule has been applied to products other than cigarettes" (Philippines' response to Panel question No. 96(2)(ii)). It is our view that these statements may rather be referenced to assess the existence of the alleged general rule, not the other way around. If the general rule were found to exist, we would not see any particular need to confirm that the general rule applied to products other than cigarettes.

7.133 We are mindful that the burden of proving the existence of an *unwritten* norm or rule, as elaborated by the Appellate Body, is rather high, specifically because of the very fact that it does not exist in the form of a written document. In this case, we do not consider that the Philippines has discharged its burden of proving that Thailand maintains an *unwritten* rule according to which Thai Customs is required to reject the declared transaction values and to use the deductive valuation method. Given the high standard required to prove the existence of such an unwritten general rule, we cannot uphold the Philippines' claim as the Philippines could not even refer to any instance in which the alleged rule was applied to other concerned imports or any other cigarette brands. Nor did the Philippines itself know whether the alleged general rule would apply in future cases. In this light, its reference to a secondary evidentiary source such as the press releases by other industry associations, although raising certain doubts with respect to the circumstances surrounding the customs value decision in Thailand during the period at issue, is not sufficient in itself to prove the existence of the alleged unwritten general rule.

- (d) Whether Thailand improperly rejected PM Thailand's declared transaction values of the imported cigarettes at issue inconsistently with Articles 1.1 and 1.2

7.134 The Philippines claims that Thai Customs rejected PM Thailand's declared transaction values for the [[xx.xxx.xx]] entries at issue inconsistently with Article 1.1 and 1.2(a) because (i) it failed to "examine" the circumstances of transaction between PM Thailand and PM Philippines within the meaning of Article 1.2(a) and (ii) it rejected the transaction values based on "invalid reasons". Thailand contests the Philippines' claim. Thailand asserts that the importer, PM Thailand in this case, failed to establish to the satisfaction of the Thai customs authority that the relationship between the importer and the exporter did not influence the transaction price.

7.135 We will begin our analysis by clarifying the nature of obligations imposed on customs authorities under Article 1.2(a) of the Customs Valuation Agreement.

- (i) *Obligations under Article 1.2(a)*

Main arguments of the parties

7.136 The **Philippines** argues that in cases in which the parties are related and the customs administration has doubts about the acceptability of the transaction value, Article 1.2(a) imposes an obligation on the customs authority to investigate whether the relationship did have an effect on the price.<sup>550</sup> Pursuant to Article 1.2(a) and the Interpretative Note to Article 1.2, paragraph 3, in a related-party transaction, an authority cannot reject the proposed transaction value if it sits idly and does not take active steps to establish that the relationship did, indeed, influence the price.

7.137 Specifically regarding the meaning of the phrase "shall be examined" in Article 1.2(a), the Philippines argues that the requirement imposed on a customs authority to look into the circumstances of sale entails two elements: (i) the requirement to seek and gather relevant information from the importer and, if necessary, from other WTO Members; and (ii) the requirement to critically analyze the gathered information and, upon request, explain how the facts, other than the relationship, justify the rejection of the transaction value.<sup>551</sup> In the Philippines' view, the requirement to seek and gather relevant information from the importer includes the obligation to request information from the importer. To satisfy this requirement, customs authorities, in accordance with Article 1.2(a), must communicate "grounds", which should be based on facts and evidence, not legal conclusions, for considering that the relationship influenced the price, to the importer and provide the importer with a reasonable opportunity to respond.

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<sup>550</sup> Philippines' first written submission, para. 207.

<sup>551</sup> Philippines' response to Panel questions Nos. 4 and 6; second written submission, para. 76.

7.138 **Thailand** takes the position that once the customs administration decides to examine the transfer price between the importer and the related seller, the importer, not the customs administration, bears the burden of establishing that the relationship did *not* influence the price.<sup>552</sup> Thailand submits that the burden of proof is important in understanding the responsibility of customs administrations.<sup>553</sup> Thailand argues that in every instance in which an individual or enterprise complies with the disclosure requirements of tax, customs, and fiscal authorities of any WTO Member, the burden is on the declarant to prove the accuracy or reliability of the information he provides to the authorities.<sup>554</sup> Thailand considers that this rule and the notion of a burden of proof equally apply to the situation provided for in Article 1.2(a) of the Customs Valuation Agreement. Imposing the burden of proof on the importer is consistent with the rule that the burden of proof lies with the party in possession of the facts. Therefore, when issues arise as to whether the negotiation of prices between related buyers and sellers were at arm's length, it is clearly the importer and its related seller that are in possession of the facts and, therefore, bear the burden of proving that the relationship did not influence the price. In support of its position, Thailand refers to the *Decision Regarding Cases Where Customs Administrations Have Reasons to doubt the Truth or Accuracy of the Declared Value* (the "Decision"), Article 1.2(b) of the Customs Valuation Agreement, the WTO Technical Committee Commentary, as well as a letter from the WCO Secretariat.<sup>555</sup>

7.139 Given that the importer has the burden of establishing that the relationship between the buyer and the seller did not influence the price, the nature of the examination to be conducted by the customs administration is necessarily affected by how the importer chooses to discharge its burden and by what evidence the importer submits.<sup>556</sup> Accordingly, the customs authority's requirement to "examine" under Article 1.2(a) is satisfied by: (i) notifying the importer that it has preliminarily determined that there are grounds to consider that the relationship influenced the price and that additional information is required; and (ii) reviewing that information when such information is provided.<sup>557</sup> Thailand is of the view that its position is supported by Case Study 10.1 by the WTO Technical Committee on Customs Valuation concerning the application of Article 1.2<sup>558</sup> and documents by the customs authorities of the United States and Canada.<sup>559</sup>

7.140 Furthermore, Thailand points out that Article 1.2(a) contemplates a very different type of examination by the customs administration than that by the anti-dumping authority as envisaged under the Anti-Dumping Agreement because, unlike the Customs Valuation Agreement, the Anti-Dumping Agreement imposes significant procedural obligations on investigating authorities.<sup>560</sup> For example, Article 6.1 of the Anti-Dumping Agreement stipulates that parties in an anti-dumping investigation shall be given notice of the information which the authorities *require*, whereas, under the Customs Valuation Agreement, the customs administration should give the importer an opportunity to provide such additional information as may be necessary. Pursuant to the Customs Valuation Agreement, the *importer* has the right to choose the kind of information and the method used. Thailand submits that the Panel should not interpret the Customs Valuation Agreement to contain either substantive or

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<sup>552</sup> Thailand's first written submission, paras. 135, 149 and 151.

<sup>553</sup> Thailand's response to Panel question No. 6.

<sup>554</sup> Thailand's response to Panel question No. 5(3).

<sup>555</sup> Thailand's first written submission, paras. 127-136; response to Panel question No. 5. The Decision provides, in relevant part, that in such cases, "the customs administration may ask the importer to provide further explanation, including documents or further evidence, that the declared value represents the total amount actually paid ...".

<sup>556</sup> Thailand's response to Panel question No. 6.

<sup>557</sup> Thailand's response to Panel question No. 4; second written submission, paras. 37-47. In this connection, Thailand considers that communicating doubts does not, in itself, constitute the extent of the customs administration's responsibilities (Thailand's response to Panel question No. 6).

<sup>558</sup> Thailand's response to Panel question No. 6; Exhibit THA-41.

<sup>559</sup> Thailand's first written submission, para. 138; Exhibits THA-27 and THA-62.

<sup>560</sup> Thailand's response to Panel question No. 6.



procedural obligations regarding the examination of an importer's declarations and the determination of customs values that the drafters did not include in that Agreement and which would make it impossible for all but the WTO Members with the greater amount of resources to comply with the Customs Valuation Agreement.<sup>561</sup>

7.141 The **Philippines** considers it unnecessary for the Panel in this dispute to decide whether the Customs Valuation Agreement imposes a burden of proof in related-party situations.<sup>562</sup> If the Panel were to consider it necessary to decide the issue, the Philippines questions the applicability of the concept of "burden of proof" in the valuation setting, particularly given that the Customs Valuation Agreement does not use the term "burden of proof" or contains express treaty language on the legal presumption to describe the evidentiary obligations imposed on importers. Specifically, the Customs Valuation Agreement does not establish any legal presumption that the transaction value is influenced by the relationship in a related party transaction, unless the importer proves the contrary. The Customs Valuation Agreement provides that the fact that parties are related is not a sufficient reason to reject the transaction value, which means that there is no legal presumption against the sales price in a related-party transaction. A neutral "examination" under Article 1.2(a) of the Customs Valuation Agreement can therefore be conducted without any legal presumption.<sup>563</sup> The Philippines is of the view that even if there is no burden of proof requirement, the importer's role, and the evidence it provides, is extremely important and may even be decisive.

7.142 **Thailand** notes that there is a difference between the responsibility of the customs administration to examine the facts, on the one hand, and the burden on the importer to produce evidence that is sufficient to demonstrate that the relationship did not influence the price. Thailand is of the view that placing the burden of proof on the importer is not the same as establishing a "legal presumption" against the transaction value. Requiring the importer to play its proper role in ensuring that the provision in the second sentence of Article 1.2(a) is met is fully consistent with the ordinary meaning and object and purpose of Articles 1.1 and 1.2(a) of the Customs Valuation Agreement and does not amount to creating an impermissible "legal presumption" against the transaction value. Thailand notes that this is also consistent with the second sentence of paragraph 1 of the Decision, which states that in cases of doubt as to the truth or accuracy of declared values, "if, after receiving further information, *or in the absence of a response*, the customs administration still has reasonable doubts" it may reject the transaction value (emphasis by Thailand). Thailand submits that the reference to "the absence of a response" makes clear that the burden of proof lies with the importer. The textual analogy to Article 1.2(a) is to the reference in that provision to "information provided by the importer *or otherwise*" because the reference to "otherwise" necessarily encompasses a failure by the importer to provide information.

#### Analysis by the Panel

7.143 In this section, we address the parties' arguments on the nature of obligations imposed on customs authorities under Article 1.1 and 1.2(a), specifically the obligation to examine the circumstances of sale in a related-party transaction. In this regard, we recall that the Interpretative Notes contained in Annex I of the Customs Valuation Agreement are also an integral part of the Customs Valuation Agreement. Accordingly, we will also refer to the Interpretative Notes in

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<sup>561</sup> Thailand also notes that the Customs Valuation Agreement does not contain any provisions equivalent to Articles 6.9 and 12.2 of the ADA that provide for detailed substantive and procedural standards with which a final anti-dumping determination must comply.

<sup>562</sup> Philippines' response to Panel question No. 5.

<sup>563</sup> Philippines' response to Panel question No. 5. The Philippines refers to examples in the WTO covered agreements of provisions that establish legal presumptions with explicit language – Article 10.3 of the Agreement on Agriculture, Article 6.2 of the SCM Agreement, Article 3.2 of the SPS Agreement, Article 2.5 of the TBT Agreement.

interpreting the concerned provisions of the Customs Valuation Agreement with respect to the parties' claims and arguments.

7.144 Article 1.1 of the Customs Valuation Agreement reads:

**"PART I  
RULES ON CUSTOMS VALUATION**

*Article 1*

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

...

- (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2."

7.145 Article 1 sets out the principle under the Customs Valuation Agreement that the customs value of imported goods must be the transaction value provided that the conditions set out in paragraphs (a) – (d) are met.<sup>564</sup>

7.146 Sub-paragraph (d) of Article 1 stipulates, as one of the conditions for accepting the transaction value, that the buyer and the seller should *not* be related.<sup>565</sup> In a situation where they are related within the meaning of Article 15, the customs value of the concerned imported goods will be the transaction value if that transaction value is acceptable for customs purposes under Article 1.2. Therefore, the obligation under Article 1.1 of the Customs Valuation Agreement to use the transaction value as the customs value of imported goods is linked to Article 1.2(a) in a situation where the buyer and the seller are related.<sup>566</sup>

7.147 Article 1.2(a) provides:

- "2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related

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<sup>564</sup> The general principle under the Customs Valuation Agreement that the primary basis for customs value is "transaction value", as indicated in paragraph 1 of the *General Introductory Commentary* of the *Agreement*, is also reaffirmed in the recitals to the Customs Valuation Agreement by "*recognizing* that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued." The preamble to the Ministerial "Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value" also states that the Ministers reaffirmed that "the transaction value is the primary basis of valuation under the [Customs Valuation Agreement]".

<sup>565</sup> Paragraphs (a)-(c) of Article 1.1 are not at issue in this dispute.

<sup>566</sup> The European Union, a third party participant in this dispute, noted in its third-party submission that the Philippines' request for a finding from the Panel in its first written submission referred only to Article 1.1, and not to Article 1.2(a), with respect to Thai Customs' rejection of the declared transaction values for the [[xx.xxx.xx]] entries at issue. The European Union was of the view that the Panel should make a finding pursuant to both Articles 1.1 and 1.2 of the Customs Valuation Agreement (European Communities' third party written submission, footnote 22). The Philippines agrees with the European Union and points out that the Philippines' panel request included claims under both Articles 1.1 and 1.2 in this relation and the Philippines arguments set forth in its first written submission references both Articles 1.1 and 1.2, which are inter-related provisions (Philippines' response to Panel question No. 18).

within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, 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. If the importer so requests, the communication of the grounds shall be in writing.

...<sup>567</sup>

7.148 Article 1.2(a) stipulates in the first two sentences that in a related-party situation, the fact that the parties are related is not a sufficient basis for the customs authorities to reject the transaction value. Under this circumstance, Article 1.2(a) imposes an obligation on customs authorities to "examine" the circumstances of the sale. Based on the results of the examination, the customs authorities must then accept the transaction value provided that the relationship did not influence the price. We review first the *procedural* steps that the customs authorities' examination entails under Article 1.2(a), and then the nature of the "examination" to be conducted by the customs authorities to fulfil the obligations under Article 1.2(a).

7.149 In relevant part, the Interpretative Note to Article 1.2 provides:

- "1. Paragraph 2(a) and (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 has no doubts about the acceptability of the price, it should be accepted without requiring further information from the importer. For example, the customs administration may have previously examined the relationship, or it may

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<sup>567</sup> Article 15 provides for definitions of the terms used in the Customs Valuation Agreement. Particularly, Article 15(4) provides:

- "4. For the purposes of this Agreement, persons shall be deemed to be related only if:
  - (a) they are officers or directors of one another's businesses;
  - (b) they are legally recognized partners in business;
  - (c) they are employer and employee;
  - (d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;
  - (e) one of them directly or indirectly controls the other;
  - (f) both of them are directly or indirectly controlled by a third person;
  - (g) together they directly or indirectly control a third person; or
  - (h) they are members of the same family.
5. Persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related for the purposes of this Agreement if they fall within the criteria of paragraph 4."

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."

7.150 Therefore, paragraph 2 sets out that in a related-party situation, an examination of the circumstances surrounding the sale is not required in all cases, but only when there are *doubts* about the acceptability of the price. Article 1.2(a), taken together with paragraph 2 of the Interpretative Notes to Article 1.2, indicates that only when customs authorities have doubts about the transaction value in a related-party transaction, they will need to inquire into the acceptability of the transaction value.<sup>568</sup>

7.151 Paragraph 3 of the Interpretative Notes to Article 1.2(a) then provides that "if 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 [the customs administration] to examine the circumstances surrounding the sale". In examining the circumstances of the sale, therefore, the customs administration may, if and to the extent necessary, choose to ask the importer to provide information relevant to the customs authorities' examination. Paragraph 3 of the Interpretative Notes to Article 1.2(a) illustrates specific examples of the aspects of the transactions that the customs administration should be prepared to examine.<sup>569</sup>

7.152 Article 1.2(a) further requires that if the customs administration has grounds for considering that the relationship influenced the price "in light of the information provided by the importer or otherwise", the customs administration shall communicate such grounds to the importer so as to "give the importer a reasonable opportunity to respond". The phrase "in light of the information provided by the importer *or otherwise*" indicates that Article 1.2(a) does not impose an obligation on the customs administration to seek information or clarification from the importer when it decides to look further into the circumstances of sale. Particularly, the term "*or otherwise*" in the subject sentence and the absence of the requirement to seek information from the importer in Article 1.2(a) confirms that a customs administration may reach the decision on whether it has grounds for preliminarily considering that the relationship influenced the price without informing the concerned importer of its need for further inquiry or seeking information from the importer.<sup>570</sup> In other words, while a customs administration may choose to inform the importer of its decision to examine the circumstances of sale,

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<sup>568</sup> We understand, and the parties do not dispute, that customs authorities' 'doubts' on the acceptability of the declared transaction value need not be communicated to the importer. (Thailand's first written submission, para. 134; second written submission, para. 27. The Philippines does not contest this in its submissions).

<sup>569</sup> The examples listed in paragraph 3 of the Interpretative Notes to Article 1.2(a) are as follows:

- the way in which the buyer and seller organize their commercial relations;
- the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price;
- where it can be shown that the buyer and seller, ..., buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. For example:
  - if the price had been settled in a manner consistent with the normal pricing practises of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller; or
  - 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.

<sup>570</sup> The European Union also appears to support this view. It states in its third party submission that "Article 1.2(a) of the CVA does not limit the source or type of information which may trigger a further inquiry by the customs authorities as to whether the relationship between the seller and the related importer influenced the transaction price. The term 'otherwise' is general enough to support the conclusion that customs authorities may proceed to a further inquiry in cases of higher declared transaction values by unrelated importers with respect to the same product from the same seller." (European Union's third party submission, para. 33)

it is *not required* to do so in the light of the absence of language to that effect in Article 1.2(a). This is in contrast to the phrase in Article 1.2(a) – "[the customs administration] *shall* communicate its grounds to the importer" – that imposes an explicit obligation on the customs administration to communicate its grounds regarding its consideration to the importer.

7.153 Despite the absence of the explicit obligation to inform the importer of its decision to examine the circumstances of the sale, however, we wish to emphasize that it may still be highly desirable for the customs administration to do so in order to facilitate the valuation process by respecting the transparency principle underlying the process. We observe such an example in the clearance procedures of Thai Customs according to which, if Thai Customs has grounds to question the acceptability of the transaction value based on initial clarification by the importer, a further opportunity for additional clarification is provided to the importer.<sup>571</sup>

7.154 Although Article 1.2(a) does not further elaborate on specific procedures subsequent to customs authorities' communication of grounds, it is logical to understand that the scope of Article 1.2(a) extends to the submission by the importer of further information in response to the customs authorities' communication of grounds for its consideration and the customs authorities' subsequent determination to accept or reject the declared transaction value. If a customs authority decides to reject the transaction value, another valuation method must be used by observing the sequential order of the methods stipulated in Articles 2, 3, 5, 6 and 7.

7.155 Overall, therefore, the determination of whether to accept the transaction value as the customs value in a related-party situation under Article 1.2(a) entails the following procedural steps:<sup>572</sup>

- The importer declares a transaction value for the goods imported;
- The customs authority is required to examine the circumstances of the sale only if it has doubts about the validity of the transaction value of the imported goods, because the fact that the buyer and seller are related should not in itself be grounds for regarding the transaction value as unacceptable<sup>573</sup>;
- 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.

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<sup>571</sup> Exhibit THA-4.

<sup>572</sup> The parties also generally agree on the procedural steps required under Article 1.2(a). Parties' responses to Panel questions Nos. 2 and 103; Exhibit THA-4 ("Flowchart of Thai Customs' Procedures for Entry and Valuation"). The parties appear to agree that once importers provide *initial* information regarding the acceptability of the transaction value, customs authorities must then communicate grounds based on such initial information, which is distinguished from the information that the importers may *subsequently* provide in response to the customs authorities' grounds (Parties' responses to Panel question No. 103) (emphasis added).

<sup>573</sup> The parties appear to agree that customs authorities are not obliged under Article 1.2(a) to notify the importer of the nature of their doubts about the acceptability of the transaction value. (Thailand's first written submission, para. 134; second written submission, para. 27. The Philippines does not contest this in its submissions) This understanding is based on the text of Article 1.2(a) read together with paragraph 2 of the Interpretative Note to Article 1.2.

7.156 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 decision on the acceptability of that transaction value. Once that determination is made, either the transaction value will be accepted as declared by the importer under Article 1.1 or another method will be used according to the sequential order of the valuation methods to determine the value of the goods imported. Articles 2, 3, 5, 6 and 7 set out the respective method to be used under each provision and describes how to apply such a method.

7.157 We now consider the *substantive* nature of the customs authorities' examination under Article 1.2(a). While not disputing the overall sequence of the procedural steps as described above, the parties disagree on the nature of the examination of the circumstances of the sale that the customs administration must conduct under Article 1.2(a). In essence, the Philippines' position is that a customs authority is obliged to undertake an active investigative role by requesting and gathering information from the importer as well as other WTO Members and by analysing information pertaining to the circumstances of the concerned transaction. On the other hand, Thailand emphasizes that an obligation imposed on customs authorities to examine the circumstances of sale under Article 1.2(a) must be considered in the light of the fact that the burden is on the importer to prove that the relationship did not influence the price. As such, Thailand is of the view that the obligation on the customs authority will be met as long as it notifies the importer of its preliminary determination and reviews the information provided by the importer before reaching a final conclusion on the acceptability of the transaction value.

7.158 Turning first to ordinary meaning, the term "examine" can be defined as "2 verb trans. Investigate the nature, condition, or qualities of (something) by close inspection or tests; inspect closely or critically...; scrutinize; ... 3 verb trans. Inquire into, investigate, (a subject); consider or discuss critically; try to ascertain (*whether, how, etc.*)".<sup>574</sup> The dictionary definition of the term "examine" therefore indicates that to examine a given matter means to "inquire into, investigate or consider critically" that matter. The dictionary meaning of the term "examine" also suggests its link to the word "investigate", which in turn is defined as "**1. verb trans.** Search or inquire into; examine (a matter) systematically or in detail; make an (official) inquiry into".<sup>575</sup>

7.159 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. We also consider that the principle under the Customs Valuation Agreement that the primary basis of valuation is the transaction value sheds light on the nature of examination to be conducted concerning the circumstances of sale in a related-party situation. 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.

7.160 At the same time, we understand that 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. This is related to the fact that the importer and, in certain situations, its related seller in an exporting country are in possession of the facts relevant to the question before the customs authorities and therefore responsible for providing customs authorities with sufficient information to enable them to assess the acceptability of the

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<sup>574</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, 2002, Vol. I, p. 878 (2002).

<sup>575</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, 2002, Vol. I, p. 1417 (2002).

transaction value. Specifically, for example, Article 1.2(a) refers to "in the light of information provided by the importer". The Interpretative Note to Article 1.2(a) also stipulates in paragraph 3 that the customs administration 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". 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.<sup>576</sup>

7.161 In this connection, in *US – Wheat Gluten*, a dispute concerning certain obligations under the Agreement on Safeguards, the Appellate Body clarified the nature of the investigation to be conducted by the competent authorities: "[t]he focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. ... The Agreement on Safeguards, therefore, envisages that the interested parties [importers, exporters and other interested parties] play a central role in the investigation and that they will be a primary source of information for the competent authorities".<sup>577</sup> To the extent that it is also the importers that are responsible for providing information to the customs authorities under Article 1.2(a) of the Customs Valuation Agreement, we consider that the above observation made by the Appellate Body in the context of the Agreement on Safeguards can assist us in clarifying the nature of the examination to be conducted by customs authorities under Article 1.2(a). In our view, therefore, as in the investigative process necessary for the imposition of safeguard measures, importers "play a central role" in the customs authorities' examination of the circumstances of sale in related-party transactions as importers are also a primary source of information for the customs authorities.

7.162 In the same dispute, the Appellate Body also elaborated on "the scope of the obligation of competent authorities to conduct an investigation". In essence, the Appellate Body underlined 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*.'"<sup>578</sup> Specifically, the Appellate Body states in relevant part:

"[T]he ordinary meaning of the word 'investigation' suggests that the competent authorities should carry out a 'systematic inquiry' or a 'careful study' into the matter before them."<sup>579</sup> The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information.

...

[T]he competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a)... Moreover, Article 4.2(a) requires the competent authorities – and *not the interested parties* – to evaluate fully the relevant, if any, of 'other factors'. If the competent authorities consider that a particular 'other factor'

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<sup>576</sup> The negotiating history of the Customs Valuation Agreement also shows that certain developing WTO Members expressed the view that in the light of the limited resources of their customs offices, the primary responsibility of establishing the acceptability of the transaction value in a related-party situation should be placed on importers. (T.P. Stewart, *The GATT Uruguay Round: A Negotiating History* (Kluwer Law International, 1999), pp. 1128-1129).

<sup>577</sup> Appellate Body Report, *US – Wheat Gluten*, para. 54.

<sup>578</sup> Appellate Body Report, *US – Lamb*, para. 114 (emphasis in original), referring to Appellate Body Report, *US – Wheat Gluten*, para. 55.

<sup>579</sup> (original footnote) *The New Shorter Oxford English Dictionary*, *supra*, footnote 43, Vol. I, p. 1410.

may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors."<sup>580</sup>

7.163 Although the Appellate Body's statement is not directly on the customs authorities' obligation to "examine" under the Customs Valuation Agreement, we find its clarification above of the obligation to "investigate" relevant to our analysis of the nature of "examination". For one, as noted above, the terms "examine" and "investigate" cross-refer to each other in their dictionary meaning, which indicates a substantive similarity, if not identical, in their ordinary meanings. Further, both the obligation to *examine* the validity of the transaction value under Article 1.2(a) of the Customs Valuation Agreement and the obligation to carry out a full *investigation* to conduct a proper evaluation of all of the relevant factors under Article 3.1 of the Agreement on Safeguards are imposed on "domestic authorities".

7.164 As the Appellate Body inferred from the term "investigate", we consider therefore 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". To that extent, in order to properly examine the circumstances of a given transaction, 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 (the required step under Article 1.2(a) identified in paragraph 7.102 above) 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.

7.165 We note Thailand's position that there is no obligation in the Customs Valuation Agreement on the customs administration to communicate with the importer regarding deficiencies in the information provided by the importer.<sup>581</sup> However, as explained in Section VII.C.5(e) below, 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.<sup>582</sup>

7.166 We underline in this regard that the obligations imposed on the customs authorities to examine the circumstances of sale under the Customs Valuation Agreement at the same time need to be understood against the succinct language of Article 1.2(a) of the Customs Valuation Agreement.

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<sup>580</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 53-55.

<sup>581</sup> Thailand's response to Panel question No. 100.

<sup>582</sup> Besides, we note the Philippines' argument that, in its *examination* of the customs value, a customs authority bears the obligation to seek information from other Members when the importer is unable to provide it. The Decision relied on by the Philippines, however, does not suggest that information beyond what the importer is able to provide *must* be sought by the customs authority. The Decision provides that in case of doubts as to the accuracy of the transaction value,

"the customs administration may ask the *importer* to provide further explanation, including documents or other evidence, .... If, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may ... be deemed that the customs value of the imported goods cannot be determined under the provisions of Article 1 [of the Customs Valuation agreement].



Particularly, for this reason, we are mindful that the extent and scope of the obligations imposed on customs authorities to "examine" under Article 1.2(a) of the Customs Valuation Agreement cannot be the same as that imposed on domestic investigative authorities under the WTO agreements concerning trade remedy measures.

7.167 As Thailand submits, the procedural obligations imposed on investigating authorities under the Anti-Dumping Agreement, the SCM Agreement and the Agreement on Safeguards are much more detailed and specific than those imposed on customs authorities under Article 1.2(a) or Article 16 of the Customs Valuation Agreement. For example, Article 6.1 of the Anti-Dumping Agreement stipulates that parties in an anti-dumping investigation "shall be given notice of the information which the authorities *require*" and "*ample* opportunity to present in writing all evidence which they consider relevant". Article 6.9 obliges the authorities to inform all interested parties of the *essential* facts under consideration which form the basis for the decision whether to apply definite measures before a final determination is made, whereas such requirements cannot be found in the text of Article 1.2(a) of the Customs Valuation Agreement. Furthermore, Article 3.1 of the Agreement on Safeguards requires the competent authorities to publish a report setting forth their findings and *reasoned* conclusions reached on *all pertinent issues of fact and law* after the completion of their investigation.

7.168 Article 1.2(a) of the Customs Valuation Agreement, by contrast, uses less stringent language in requiring that the customs administration give the importer a "*reasonable* opportunity to respond" to the customs authority's consideration. The Interpretative Note to Article 1.2(a), in paragraph 2, contains similar language stating that "[the customs administration] 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".

7.169 The particular nature of the examination to be conducted by the customs authorities can further be inferred from Case Study 10.1 on the application of Article 1.2 of the Customs Valuation Agreement by the WTO Technical Committee on Customs Valuation:

"Under Article 1.2 of the Agreement the responsibility for demonstrating that relationship [between buyer and seller] has not influenced price [sic] lies with the importer. While the Agreement requires Customs to provide reasonable opportunity to the importer to provide information that would indicate that prices are not influenced by the relationship, it does not require the Customs administration to conduct an exhaustive enquiry for the purpose of justifying the price difference. Thus, any decision in this regard must, to a significant degree, be based on the information provided by the importer."

7.170 The WTO Technical Committee's comment supports the understanding that while customs authorities are responsible for providing a "reasonable opportunity" to the importer to provide information, once given this opportunity, importers are in principle liable for supplying the customs authorities with information that would indicate that the relationship did not influence the price.

7.171 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.

7.172 We find that the above understanding of the nature of the respective obligations imposed on customs authorities and importers under Article 1.2(a) is consistent with the objective of the Customs Valuation Agreement to promote "a fair, uniform and neutral system for the valuation of goods for customs purposes". As indicated in the Ministerial "Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value", the Customs Valuation Agreement aims at striking the balance between respecting the customs authorities' need to address cases where it has reason to doubt the truth or accuracy of the particulars or of documents produced by traders in support of a declared value and protecting the legitimate commercial interests of traders. The process of examining the circumstances of the sale under Article 1.2(a) therefore resembles that of consultation as both the importer and the customs administration respectively need to make a good faith effort on the one hand to provide relevant information and on the other hand to provide a reasonable opportunity to the importer to submit information and review the information provided in reaching a final determination.

7.173 As a final observation, we note that in the course of this dispute, the parties have contested the applicability of the principle of the burden of proof to the Customs Valuation Agreement, in particular with respect to the examination of the circumstances of sale in a related-party transaction. As our analysis above illustrates, the nature of the obligations under Article 1.2(a) can be clarified on the basis of the text of Article 1.2(a) considered in its context and in the light of the objective and purpose of the Customs Valuation Agreement. Therefore, to that extent, we do not consider it necessary to address the applicability of the notion of burden of proof in the context of the Customs Valuation Agreement for the purpose of resolving the present dispute.<sup>583</sup>

- (ii) *Thai Customs examination of the circumstances of the transaction between PM Thailand and PM Philippines*

Main arguments of the parties

7.174 The **Philippines** submits that the arguments and evidence before the Panel show that Thailand failed to conduct an examination of the circumstances of sale within the meaning of Article 1.2(a). To support its claim, the Philippines relies on the following five factors: (i) the minutes of the 6 March 2007 meeting, which state that Thailand did not examine the circumstances of sale; (ii) Thailand's failure to examine the evidence submitted by PM Thailand regarding its costs and profits (e.g. "referencing to" annual filings for FY 2003-2005, further data on GAQ prices, a copy of 2005 Financial Statements...); (iii) Thailand's failure to seek cost information from PM Philippines; (iv) an analysis of Thailand's deductive testing showing it is incoherent; and (v) Thailand's valuation of four entries in March and September 2007 confirming that Thailand's valuation decisions were arbitrary.

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<sup>583</sup> In sum, Thailand has asserted before the Panel that the burden of proof is important in understanding the responsibility of customs administrations and that importers bear the burden of proving that the relationship did *not* influence the price. The Philippines questions whether the concept of burden of proof is applicable to the valuation setting and, even if the concept were applicable, the Philippines argues that the burden is on the customs authorities to establish that the relationship influenced the price before rejecting transaction value.

We observe Thailand's reference to a letter from the WCO Secretariat to the Thai government [office of customs counsellor at the Thai Embassy in Brussels] explicitly mentions the burden of proof. In relevant part, it states that "since the acceptance of the transaction value is *prima facie* based on the condition that the buyer and seller are not related, the burden of proof is generally considered to be on the importer to demonstrate that the transaction value is otherwise acceptable in spite of the fact that the buyer and seller are related." (Exhibit THA-9, p. 2; Thailand's first written submission, para. 136). Setting aside the legal status of the letter for the purpose of interpreting the obligations under Article 1.2(a), we do not find the WCO Secretariat's reference to the term "burden of proof" dispositive of the question of whether the burden of proof is applicable to the Customs Valuation Agreement. The reference to the term in the letter appears to have been made more in a general sense rather than as a legal concept as described above.

7.175 The Philippines argues that it is false for Thailand to contend that PM Thailand made no effort whatsoever and presented no evidence to establish that the relationship did not influence the price.<sup>584</sup> PM Thailand made repeated efforts to satisfy Thai Customs of that very fact.<sup>585</sup>

7.176 The Philippines also accepts that, in assessing Thailand's compliance with its substantive obligations, the Panel may review the explanation given in the minutes of the 6 March 2007 meeting, as a contemporaneous statement of the determination.<sup>586</sup> The Philippines points out that the explanation given in the minutes, sent to PWC ABAS, for rejecting the transaction value is substantively the same as the explanation given in the 12 April letter: (i) PM Thailand's prices are lower than Importer A's prices; and (ii) PM Thailand and PM Philippines are related. According to the Philippines, in one respect, the minutes add to the 12 April letter because, in the minutes, Thai Customs states that it did not examine the circumstances of sale.<sup>587</sup>

7.177 **Thailand** submits that once Thai Customs informed PM Thailand that it had doubts about the transfer price, PM Thailand took *no* steps and offered no supporting evidence to establish that the relationship did not influence the price.<sup>588</sup> According to Thailand, the grounds for Thai Customs not using the transaction value as the customs value were that PM Thailand failed to establish that the relationship did not influence the transfer price.<sup>589</sup>

7.178 Thailand's position that Thai Customs did "examine" the circumstances of sale between PM Philippines and PM Thailand within the meaning of Article 1.2(a) rests on the following three points: (i) Thai Customs notified PM Thailand that further information was necessary; (ii) PM Thailand failed to provide new or additional information/evidence (other than its past [[xx.xxx.xx]] filings) necessary to establish that the relationship between PM Philippines and PM Thailand did *not* influence the price under one of the methods provided in the Customs Valuation Agreement – moreover, none of the evidence provided by PM Thailand in the course of the Thai Customs examination of the circumstances surrounding the sales at issue was sufficient; and (iii) Thai Customs continued to examine the circumstances even after fulfilling its obligations under Article 1.2(a), including the obligation to communicate its grounds for considering that the relationship influenced the price by sending the 19 December 2006 letter, and after receiving the 5 February 2007 letter from PM Thailand indicating that it wanted the valuation expedited.

7.179 Thailand argues that even after its 19 December 2006 letter, and in the absence of further claims or evidence regarding the circumstances of sale by PM Thailand, Thai Customs continued to examine the sales by regularly interacting with, and requesting information from, PM Thailand.<sup>590</sup> In this connection, Thailand refers to oral communications, correspondence, and meetings with PM Thailand and its representatives (PWC) that took place during February-March 2007, including Thai Customs' contacts with PWC.<sup>591</sup> Although there is no documentary record of the content of

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<sup>584</sup> Philippines' first oral statement, para. 47, citing Thailand's statements in its first written submission, paras. 54 (see also 48, 69 and 70) and 158.

<sup>585</sup> Philippines' first oral statement, para. 47.

<sup>586</sup> Philippines' response to Panel question No. 108.

<sup>587</sup> Philippines' second oral statement, para. 49; response to Panel question No. 108.

<sup>588</sup> Thailand's first written submission, paras. 153-160.

<sup>589</sup> Thailand's first written submission, para. 162. Thai Customs did not rely on a comparison between PM Thailand's c.i.f. prices and the c.i.f. prices for duty-free purchases as a ground for rejecting the transaction value.

<sup>590</sup> Thailand's second written submission, paras. 77-84.

<sup>591</sup> Thailand submitted a new piece of evidence in this connection – statement of Mrs. Natina Santiyanont (Exhibits THA-64 and THA-65) regarding the circumstances of Thai Customs' interaction with PWC and its attendance at the 6 March 2007 meeting on behalf of PM Thailand. Thailand argues that this evidence proves that the minutes of the 6 March 2007 meeting were mailed to PWC on behalf of PM Thailand (Thailand's second written submission, para 79, footnote 57).

some of the telephone conversations and meetings between Thai Customs and PM Thailand, it does not appear to be contested that these extensive contacts between Thai Customs and the importer took place. Therefore, unless the Philippines proves that these contacts were *not* an examination of the circumstances surrounding these sales within the meaning of Article 1.2(a), Thai Customs must be presumed to have acted in accordance with its obligations under that provision.

7.180 Regarding the fact that Thai Customs is now accepting PM Thailand's declared values using the deductive values at which the [[xx.xxx.xx]] entries were valued as "test" values, Thailand rejects entirely the implication that Thai Customs' decision to accept transaction values is in any way evidence that prior non-acceptance was inconsistent with Thailand's WTO obligations.<sup>592</sup>

#### Analysis by the Panel

7.181 Based on the nature of the obligations imposed on customs authorities to "examine" the circumstances of the sale under Article 1.2(a) as clarified in the previous section, we will now evaluate the Philippines' claim that Thai Customs failed to examine the circumstances of the transaction between PM Thailand and PM Philippines within the meaning of Article 1.2(a).

7.182 In this connection, we recall our discussion in Section VII.B.2 above that the standard appropriate for our review of the Philippines' claims under Articles 1.1 and 1.2(a) was an objective assessment of the matter before us in the light of the substantive obligations under Articles 1.1 and 1.2(a). We further clarified that customs authorities are obliged under Article 1.2(a) to communicate their grounds for their consideration before making a final decision on whether to reject the transaction value and under Article 16 to explain their final valuation determination after the valuation process is complete.<sup>593</sup> Given these obligations, which are also part of the Philippines' claims in this dispute, our objective assessment whether Thai Customs properly examined the circumstances of sale must be based on Thai Customs' *grounds* and *explanations* provided. In other words, we must evaluate, based on Thai Customs' communication of grounds and explanations, whether Thai Customs properly examined the circumstances of sale between PM Thailand and PM Philippines in the light of the information before it at the time of the determination. If Thai Customs is found to have conducted a proper examination under Article 1.2(a), its determination to reject the transaction values of the entries at issue will also be considered consistent with its obligations under Article 1.1 and 1.2(a).

7.183 We start our analysis with a description of the main interactions between Thai Customs and PM Thailand for the period of August 2006-April 2007. In so doing, we will bear in mind the procedural steps to be taken under Article 1.2(a) as discussed in the previous section.

#### **CORRESPONDENCE SURROUNDING THE VALUATION OF THE ENTRIES AT ISSUE (AUGUST 2006–APRIL 2007)**

<b>DATE</b>	<b>PM THAILAND</b>	<b>THAI CUSTOMS</b>
<b>4 August 2006</b>	Sent a letter to Thai Customs replying to Thai Customs doubts on the transaction value of the same day referencing to its annual data filings for FY 03, 04, 05 and [[xx.xxx.xx]]. <sup>594</sup>	Started questioning the acceptability of the transaction value of the cigarettes at issue

<sup>592</sup> Thailand's second written submission, para. 92.

<sup>593</sup> An analysis of the difference between the obligations under Article 1.2(a) and Article 16 respectively is at para. 7.213

<sup>594</sup> Exhibit PHL-55.

DATE	PM THAILAND	THAI CUSTOMS
7 August 2006	Sent a letter to Thai Customs advising that Thai Customs could examine the cost structure of PM Thailand through the supporting documentation for Form D. <sup>595</sup>	Orally advised PM Thailand that further information was required.
8 August 2006	Sent a letter to Thai Customs <ul style="list-style-type: none"> <li>– referencing [[xx.xxx.xx]]</li> <li>– asking Thai Customs to (i) accept the declared values; <i>or</i> (ii) explain in writing why it was not clearing the goods at the declared values<sup>596</sup>;</li> <li>– providing a copy of PM Thailand's most recent annual filing to Thai Customs (FY 05), showing PG&amp;E of [[xx.xxx.xx]] and deductive value calculation.<sup>597</sup></li> </ul>	
11 August 2006		Sent a "written notice" of the guarantee amounts to PM Thailand. <sup>598</sup>
15 Sept. 2006		Thai Customs <i>Audit Bureau</i> sent a letter to PM Thailand requesting additional financial info. <sup>599</sup>
25 Oct. 2006	Sent a letter to Thai Customs <ul style="list-style-type: none"> <li>– requesting a "written confirmation" of the reasons for Thai Customs' rejection of PM Thailand's declared invoice prices<sup>600</sup>;</li> <li>– asserting that Thai Customs' deductive testing methodology demonstrated the acceptability of its declared transaction value; - referencing to annual filings.</li> </ul>	
8 Nov. 2006	Sent a letter to Thai Customs <ul style="list-style-type: none"> <li>– requesting to accept the declared transaction values;</li> <li>– if not, requesting to notify the assessed value and to clarify how the values were assessed.<sup>601</sup></li> </ul>	
20 Nov. 2006	Sent a letter to Thai Customs <ul style="list-style-type: none"> <li>– complaining about the guarantees being required to clear its goods;</li> <li>– requesting for "an explanation" for rejecting the declared transaction values<sup>602</sup>;</li> <li>– requesting to notify the assessed value and to clarify how the values were assessed.</li> </ul>	

<sup>595</sup> Exhibits PHL-57 and PHL-76.

<sup>596</sup> The Philippines submits that by this letter, it made a first request for Thai Customs' "grounds" for its consideration under 1.2(a) (Philippines' response to Panel question No. 114; Exhibit PHL-56). The Philippines also refers to Thailand's second oral statement, para. 24.

<sup>597</sup> Exhibit PHL-56.

<sup>598</sup> Exhibit PHL-59.

<sup>599</sup> Exhibits PHL-19 and PHL-138.

<sup>600</sup> Exhibit PHL-60. The Philippines submits that this was the second request for Thai Customs' grounds under 1.2(a).

<sup>601</sup> Exhibit PHL-268. The Philippines submits that this was the first request for an explanation under Article 16 (Philippines' response to Panel question No. 114).

<sup>602</sup> Exhibit PHL-65. The Philippines submits that this was the second request for an explanation under Article 16.

DATE	PM THAILAND	THAI CUSTOMS
19 Dec. 2006		Sent a letter "communicating its grounds" under Article 16 that "the importer has yet to prove if the said relationship influenced the customs value determination or not". <sup>603</sup>
5 Feb. 2007	Sent a letter to Thai Customs asking Thai Customs to expedite its examination and valuation of the entries at issue and to use a testing methodology. <sup>604</sup>	
15 Feb. 2007		Orally advised PM Thailand to provide its 2006 financial statements to assist in the valuation process. <sup>605</sup>
16 Feb. 2007	Sent a letter to Thai Customs <sup>606</sup> <ul style="list-style-type: none"> <li>– confirming that the 2006 statements were not yet ready, and instead indicated that it was pleased to submit 2005 statements;</li> <li>– submitting financial statements for FY 05 and PG&amp;E.</li> </ul>	
21 Feb. 2007	Sent a letter to Thai Customs with new information on the sales price of its GAQ sale and certain adjustments, which was ultimately used in the calculation of the deductive values for the cigarettes at issue. <sup>607</sup>	
26 Feb. 2007		Sent an invitation letter to PWC (ABAS) to meetings on 2 and 6 March. <sup>608</sup>
27 Feb. 2007		Sent a letter to managing director of PM Thailand requesting information relevant to the determination of the customs value of the company's imports. <sup>609</sup>
2 March 2007		Sent a letter to PWC (ABAS) requesting additional info; <sup>610</sup> and Held a meeting with two PWC entities.
6 March 2007	Sent a letter to Thai Customs requesting the use of a "deductive method". <sup>611</sup>	Held a meeting, and invited PWC (ABAS) to discuss the financial data that had been provided <i>and</i> Thai Customs' subsequent calculations of deductive values.
7 March 2007	<i>Following a request from Thai Customs, sent a letter Thai Customs providing further information supporting the information provided in the 21 Feb. 07 letter.</i> <sup>612</sup>	

<sup>603</sup> Exhibit PHL-66.

<sup>604</sup> Exhibit PHL-68.

<sup>605</sup> Thailand's response to Panel question No. 10; Thailand's first oral statement, para. 31. Thailand submits that the sentence "we wish to confirm our advice yesterday" in the 16 February letter (Exhibit PHL-137) by PM Thailand confirms the fact that on 15 February oral communications took place, the Philippines does not rebut this.

<sup>606</sup> Exhibit PHL-137.

<sup>607</sup> Exhibit THA-39.

<sup>608</sup> Exhibit THA-10.

<sup>609</sup> Exhibit THA-11.

<sup>610</sup> Exhibit THA-12.

<sup>611</sup> Exhibit THA-92.

<sup>612</sup> Philippines' response to Panel question No. 29; Exhibit PHL-169.

DATE	PM THAILAND	THAI CUSTOMS
14 March 2007	<i>In response to a further request from Thai Customs, sent a letter to Thai Customs providing further info, including information relating to PM Thailand's payments to PM Philippines.</i> <sup>613</sup>	
15 March 2007		Started issuing the notices of assessment for the entries at issue
5 April 2007	Sent a letter to Thai Customs. <sup>614</sup>	
12 April 2007		Sent a letter to PM Thailand - providing an explanation as to how the customs value was determined. <sup>615</sup>

7.184 Regarding the above sequence of events, the Philippines does not appear to take issue with whether Thai Customs had formally taken the overall procedural steps envisaged under Article 1.2(a).<sup>616</sup> In other words, the Philippines does not contest the fact that Thai Customs sent the letters of 19 December 2006 and of 12 April 2007 to PM Thailand, which respectively form the communication of grounds and the explanation of its determination in the formalistic sense. Rather, the Philippines' claims are focused on the substantive aspect of the requirements under Article 1.2(a). Particularly, the Philippines alleges that Thai Customs failed to "examine" the circumstances of sale within the meaning of Article 1.2(b) because it ignored the evidence submitted by PM Thailand at the time of determination. According to the Philippines, Thai Customs' explanations in its letter of 12 April 2007 and the minutes of the 6 March 2007, allegedly invalid and insufficient, show the inadequate examination of the circumstances of the sale.

7.185 Thailand argues that Thai Customs properly examined the circumstances of sale. Contrary to the Philippines' argument, once Thai Customs informed PM Thailand that it had doubts about the transfer price, PM Thailand took no steps and offered no supporting evidence to establish that the relationship did not influence the price.<sup>617</sup> According to Thailand, the grounds for Thai Customs not using the transaction value as the customs value were that PM Thailand failed to establish that the relationship did not influence the transfer price.<sup>618</sup>

7.186 First, it is not disputed that PM Thailand presented Thai Customs with information that, in the Philippines' view, was sufficient to establish that its relationship with PM Philippines did not influence the price. The table above shows that PM Thailand submitted a number of letters, together with financial data and information, to Thai Customs during the period at issue. In sum, the Philippines appears to have largely relied on the documents and financial data relating to Thai Customs' deductive testing method that were memorialized in the [[xx.xxx.xx]].<sup>619</sup> Specifically, the

<sup>613</sup> Philippines' response to Panel question No. 29; Exhibit PHL-170.

<sup>614</sup> Exhibit PHL-69. The Philippines submits that this was a further request for an explanation under Article 16 and a request for an explanation under Article 7.3 (Philippines' response to Panel question No. 114).

<sup>615</sup> Exhibit PHL-70.

<sup>616</sup> We note Thailand's argument that Thai Customs properly examined the circumstances of transaction at issue by notifying the importer of its grounds for considering that the relationship influenced the price and of the need for additional information and by reviewing the additional information provided by PM Thailand. However, what is contested by the Philippines is whether Thai Customs examined all the relevant evidence provided by PM Thailand at the time of determination.

<sup>617</sup> Thailand's first written submission, paras. 153-160, referring to Exhibit THA-28.

<sup>618</sup> Thailand's first written submission, para. 162. Thai Customs did not rely on a comparison between PM Thailand's c.i.f. prices and the c.i.f. prices for duty-free purchases as a ground for rejecting the transaction value.

<sup>619</sup> The Philippines' response to the Panel question No. 16, also referring to its first oral statement (paras. 36-56). Exhibit PHL-39. Regarding the [[xx.xxx.xx]], the Philippines states that [[xx.xxx.xx]]

information provided by PM Thailand up until 19 December 2009, when Thai Customs communicated its grounds, includes the following: (i) annual data filing for FY 2003, 2004, and 2005; (ii) annual filings to Thai Customs for FY 2005, which contains the company's PG&E [gross margin]<sup>620</sup> of [[xx.xxx.xx]] and a deductive calculation showing the sales prices to the first independent buyer in the GAQ<sup>621</sup> price as well as certain deductions to be made from this price (including sales allowances, the costs of transportation in Thailand, and the provincial tax); (iii) a copy of the [[xx.xxx.xx]] together with information on gross margin calculations which had already been submitted to Thai Customs on 17 July 2006<sup>622</sup>; (iv) evidence that the company has ordered and made payments according to invoice prices without any additional payment either directly or indirectly (import tickets for the three most recent shipments, remittance document for the same)<sup>623</sup>; (v) a table comparing the declared import price (invoice c.i.f. value) to the new import price (Customs imposed new reference c.i.f. value) orally reported to PM Thailand (no written confirmation).<sup>624</sup> To the extent that PM Thailand provided in good faith the above-mentioned evidence to establish that the relationship did not influence the price, we consider that PM Thailand did fulfil its procedural responsibility under Article 1.2(a) to provide information to the customs administration.

7.187 Whether the information actually submitted by PM Thailand pertained to the acceptability of the transaction value and, if so, whether it was sufficient to establish the acceptability is of course another matter. Thailand asserted before this Panel that the information provided by PM Thailand as above did not prove that the relationship did not influence the price because information showing the accuracy of the declared value was neither at issue at that time nor probative of whether that price was at arm's length. Thailand argues that Articles 1.2(a) and 1.2(b) and the Interpretative Notes describe several methodologies whereby the importer can establish that its relationship with the foreign seller did not influence the price between the two within the meaning of Article 1.2(a).<sup>625</sup> According to Thailand, however, PM Thailand did not provide evidence relating to any of these methods, or any other method, that was sufficient to establish that the relationship between PM Philippines and PM Thailand did not influence the price within the meaning of Article 1.2(a).<sup>626</sup> The financial data and information of the kind provided by PM Thailand, according to Thailand, does not establish the "costs plus" approach listed in paragraph 3 of the Interpretative Notes to Article 1.2(a). Nor is the information appropriate to conduct the deductive value calculation within the meaning of Article 1.2(b) and 5.

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(Exhibit PHL-34, point 5) and that [[xx.xxx.xx]] Thailand contests this and states that the [[xx.xxx.xx]] has no formal status and that Thai Customs never accepted or agreed to be bound by the [[xx.xxx.xx]]. Moreover, Thailand holds that Thai Customs never used the methodology allegedly contained in the [[xx.xxx.xx]] as the basis either for the customs value for any of PM Thailand's imports or even as test values for PM Thailand's imports during the period 2003-2006. (Philippines' response to Panel question Nos. 8, 11 and 17; Thailand's response to Panel question No. 11).

<sup>620</sup> The parties appear to use these two terms interchangeably. Exhibit PHL-42.

<sup>621</sup> Article 5.1 of the Customs Valuation Agreement refers to the "unit price at which ... goods are sold in the greatest aggregate quantity", the GAQ price. In the Note to this Article it is explained that this GAQ price means "the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales take place".

<sup>622</sup> The Philippines' response to the Panel question No. 16, also referring to its first oral statement (paras. 36-56).

<sup>623</sup> Exhibit PHL-57.

<sup>624</sup> Exhibit PHL-58.

<sup>625</sup> Thailand's second written submission, para. 49.

<sup>626</sup> Thailand's second written submission, paras. 50-51. Thailand refers to the evidence provided by PM Thailand that the Philippines summarized in para. 45 of its first oral statement and in its response to Panel question No. 16.



7.188 In the light of the nature of the obligation to "examine" under Article 1.2(a), as clarified in paragraphs 7.158-7.159 above, upon receiving information and data from PM Thailand, Thai Customs was required to inquire into, investigate and critically consider such information and data and communicate its grounds and explain the final determination. In this regard, we wish to emphasize that this question should be distinguished from the question of whether the content of the information provided by PM Thailand did not establish the validity of the transaction value as explained by Thailand [before the Panel]. Addressing the latter would amount to acting outside our mandate to make an objective assessment of the matter at issue.<sup>627</sup>

7.189 Turning back to the question before us, we recognize that it may well be that Thai Customs critically considered the information and data submitted based on the reasons it has provided to the Panel in this proceeding. However, we would not be in the position to find that Thai Customs did in fact examine such information unless such reasoning is provided in its communication of grounds and its explanations to the importer in accordance with the obligations under the Customs Valuation Agreement. In its explanation given in the 12 April 2007 letter, Thai Customs does not elucidate the reason why it reached the conclusion that the relationship influenced the price with respect to the entries at issue. We therefore do not have the evidence confirming that Thai Customs did in fact examine the circumstances of the sale by critically considering all information and data before it at the time of determination, as it claims in this proceeding.<sup>628</sup> We do not find any other explanation in the subject letter than that the importer and the exporter are related and that the importer failed to meet the burden of proof. As explicitly stipulated in Article 1.2(a), however, the mere fact that an 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 the 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.

7.190 Thailand further submits that the grounds for Thai Customs not using the transaction value as the customs value were communicated in its letter of 19 December 2006, namely that PM Thailand failed to establish that the relationship did not influence the transfer price.<sup>629</sup> Other than this statement, the concerned letter does not include any of the other explanations that Thailand provided in this proceeding, as noted in the 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).

7.191 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 the minutes of the 6 March

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<sup>627</sup> See Section VII.B.2.

<sup>628</sup> We recall the Appellate Body's statement in *US – Steel Safeguards*:

"[A]s stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the Agreement on Safeguards. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority...." (para. 303)

<sup>629</sup> Thailand's first written submission, para. 162.

2007 meeting. We address the consistency of Thai Customs' explanations in these instruments with the obligation under Article 16 in Section VII.C.6 below. Thai Customs indicates in the letter as the reason for its decision to reject the transaction value the following statement: "[t]he company and the overseas seller are related parties, and it cannot be proven whether the relationship has an influence on the determination of customs values or not". However, none of the explanations provided by Thailand in this Panel proceeding were set out in the Thai Customs' letter of 12 April 2007. In response to the Panel question of whether Thai Customs ever communicated the same explanations that were given in this Panel proceeding to PM Thailand during the domestic proceedings, Thailand submits that although its explanations before the Panel are much more detailed, they are fully consistent with the grounds on which Thai Customs acted and the explanations provided to PM Thailand at the time.<sup>630</sup> As already addressed above, however, in the light of the nature of the obligation to "examine" the circumstances of the sale, considered in the due process objective of Article 1.2(a) as well as the Customs Valuation Agreement in its entirety, the absence of any explanations on why the information provided was considered insufficient and consequently led Thai Customs to reject the transaction value renders Thai Customs' examination inconsistent with Article 1.2(a).

7.192 We address next the minutes of the 6 March 2007 meeting. The minutes include the description of Thai Customs' examination of the circumstances of the sale; its determination to reject the transaction value; and the alternative valuation methods considered to be used for valuation of the cigarettes at issue.<sup>631</sup> For the purpose of our analysis here, we will assess whether the minutes explain the basis for Thai Customs' determination to reject the transaction value in the light of the information and evidence provided by PM Thailand. In the relevant part, the minutes provide that "Regarding the relationship, it is found that the Company has a relationship with the seller abroad ([i]t is found that the relationship had an effect on the prices in 2003) ... It is a case where the Customs Department has already had the information and there is no need to examine other circumstances ... ". This therefore shows that Thai Customs considered it unnecessary to examine the circumstances of the sale in respect of the cigarettes at issue imported in August 2006 based on its examination and consequent determination in 2003 that the relationship between PM Thailand and PM Philippines influenced the price of the cigarettes imported at that time. As the Philippines points out, we do not consider that the requirement to examine the circumstances of the sale under Article 1.2(a) can be satisfied by simply referring back to the examination conducted and determination reached in respect of the transaction that took place three years before the current transaction at issue. There may indeed be a situation where despite the gap in time, the circumstances of both transactions between the same parties turn out to be the same.<sup>632</sup> Even in such a case, however, in our view, the customs authorities are obliged under Article 1.2(a) to explain the basis for finding the current transaction to be the same as the previous transaction which it had already examined.

7.193 Finally, we note Thailand's argument that it continued to examine the circumstances of the sale even after sending out the 19 December 2006 letter in which it communicated its grounds. Specifically, Thailand refers to oral communications, correspondence, and meetings with PM Thailand and its representatives (PWC) that took place during February-March 2007, including Thai Customs' contacts with PWC.<sup>633</sup> Evidence relating to the correspondence between Thai Customs

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<sup>630</sup> Thailand's response to Panel question No. 93(1).

<sup>631</sup> Exhibits THA-37 (revised minutes), PHL-74 (original minutes) and PHL-173.

<sup>632</sup> We note that in its first oral statement, the Philippines stated that in the case at issue, "the BoA's conclusions regarding the 2000-2002 sales provide no basis for conclusions regarding the 2006 sales. The circumstances surrounding the 2000-2002 sales were very different, because the goods came from Malaysia, and involved a different seller. Thus, the relationship was between different parties. Moreover, for some of the 2000-2002 entries, the BoA found that the price was *not* influenced by the relationship" (Philippines' first oral statement, para. 82).

<sup>633</sup> Thailand submitted a new piece of evidence in this connection – statement of Mrs. Natina Santiyanont (Exhibits THA-64 and THA-65) regarding the circumstances of Thai Customs' interaction with

and PM Thailand, as summarized in the table above, indicates that after 19 December 2009, Thai Customs focused on considering an alternative valuation method to be used for the entries at issue, rather than continuing to examine the circumstances of the sale to determine whether the relationship influenced the price or not. In response to our question concerning the point in the examination process at which Thai Customs determined that the transaction value was not acceptable, Thailand stated that it was a process starting with the Philippines' request to use a testing methodology to determine whether the transaction value was affected by the relationship between PM Philippines and PM Thailand in its 5 February 2007 letter. After some consultations between the parties in between, this process ended when Thai Customs, using the deductive testing method as requested by PM Thailand in its letter of 6 March 2007, found that the transaction value was lower than the test deductive value.

7.194 Contrary to Thailand's position, however, our examination of the letter of 5 February 2007 from PM Thailand does not reveal that PM Thailand expressly requested Thai Customs to use a testing methodology to determine whether the transaction value was affected by the relationship, while it pointed out that Thai Customs rejected the transaction value without proper examination of the circumstances of sale.<sup>634</sup> PM Thailand ends the letter with four specific requests: (i) revocation of the guarantees notified by the letter of 11 August 2006; (ii) expeditious assessment process and issuance of an assessment notice; (iii) establishment of a common understanding going forward; and (iv) formation of an inter-ministerial committee comprising representatives from different governmental departments. Regarding the establishment of a common understanding of going forward, PM Thailand indicated that it 'also would like to explore the possibility of an agreement with Customs for a correct, unambiguous and definitive procedure and method to test and reconcile the import value of goods for further transactions'. We do not read this sentence to be a request for Thai Customs to decide on a testing method to be used without any further consultations with the Philippines. In addition, we do not read the 6 March 2007 letter to be a request by PM Thailand to use the deductive value method as a testing method either. Instead, the Panel understands that in this letter, PM Thailand pointed at the fact that Thai Customs was asking PM Thailand to provide information to be used to calculate the computed value, while the hierarchical order of Ministerial Regulation No. 132/2000 (and of the Customs Valuation Agreement), prescribes that the calculation of a deductive value predates the calculation of a computed value.

7.195 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.

(iii) *Thai Customs' reasons for rejecting the transaction values of PM Thailand's cigarettes*

Main argument of the parties

7.196 The **Philippines** submits that Thailand's improper rejection of the transaction values of the imported cigarettes at issue is also proved by the invalid reason for such rejection as provided in the 12 April 2007 letter from Thai Customs.<sup>635</sup> The Philippines argues that the statement, "it cannot be

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PWC and its attendance at the 6 March 2007 meeting on behalf of PM Thailand. Thailand argues that this evidence proves that the minutes of the 6 March 2007 meeting were mailed to PWC on behalf of PM Thailand (Thailand's second written submission, para. 79, footnote 57).

<sup>634</sup> Exhibit PHL-68.

<sup>635</sup> Philippines' first written submission, paras. 184, 225-230, and 234-253; second written submission, para. 139. The Philippines also stated that a second argument put forward by Thai Customs, namely a comparison between the transaction value for PM cigarettes and the price of Importer A's cigarettes, was irrelevant and invalid (Philippines' first written submission, paras. 231-253; first opening statement, paras. 55 and 72). Thailand confirmed that this comparison had not constituted a ground for the rejection of the concerned transaction values (Thailand's first written submission, para. 162).

proven whether the relationship has an influence on the determination of customs values or not", cannot constitute a valid reason for rejection under Article 1.2(a) for the following reasons: (i) the Customs Valuation Agreement does not establish a legal presumption against the transaction value or impose a burden of proof under Article 1.2(a) of the Customs Valuation Agreement; (ii) if "doubts" trigger a presumption, the authority must ensure that the "doubts" are "still reasonable" when transaction value is rejected; and (iii) even if there were a burden of proof, an authority's grounds for rejecting transaction value cannot be a statement that the burden was not met.<sup>636</sup> From the perspective of Articles 1.1 and 1.2(a), this statement in the 12 April letter does not demonstrate that there were facts before the authority, other than the parties' relationship, supporting the conclusion that the transaction value was unacceptable.<sup>637</sup> Under Articles 1.1 and 1.2(a), an authority cannot reject customs value in the absence of such an additional fact.

7.197 **Thailand** did not directly respond to this aspect of the Philippines' argument under Article 1.1 and 1.2(a) although it provided counterarguments in relation to the Philippines' claim under Article 16 to provide an explanation in writing as to how the customs value of the importer's goods was determined. Thailand holds the position that Thai Customs' explanation provided in its letter of 12 April 2007 and the minutes of the 6 March 2007 meeting was sufficient to satisfy the obligation under Article 16.

#### Analysis by the Panel

7.198 The Philippines argues that Thai Customs' improper rejection of the transaction values of the cigarette entries at issue is also proved by the *invalid* and *insufficient* reasons for rejection. These reasons are set out in Thai Customs' letter of 12 April 2007.

7.199 To recall, in support of its claim concerning Thai Customs' rejection of the transaction values of the entries at issue, the Philippines raised two arguments: first, Thai Customs did not examine the circumstances of sale within the meaning of Article 1.2(a) and, second, Thai Customs' rejection was based on *invalid* reasons. We addressed in the previous section the Philippines' first argument and found that Thai Customs' rejection was inconsistent with Article 1.1 and 1.2(a) because it failed to examine the circumstances of sale under Article 1.2(a). To the extent that we have already reached our finding on the Philippines' claim regarding Thai Customs' rejection of the transaction values of the [[xx.xxx.xx]] entries at issue, we need not continue to examine the Philippines' second line of arguments.

7.200 In any event, however, in the context of our analysis of the Philippines' first argument, which in our view is connected to its argument based on the alleged invalid and insufficient reason given, we addressed the substantive adequacy of the reasons provided in the 12 April 2007 letter for Thai Customs' rejection of the transaction values for the cigarettes at issue. We found that they are substantively insufficient to justify Thai Customs' determination with respect to the entries at issue. In this regard, we note that the nature of the reason given by Thai Customs – the importer failed to establish the acceptability of the transaction value – may not necessarily be considered *invalid* in itself if that is the conclusion reached by a customs authority solidly based on the examination of the evidence submitted before it. Setting aside the question of the precise extent and scope of the explanations to be given under Article 16, such a conclusion nevertheless needs to be supported with substantive reasons that are linked to the evidence submitted by the importer or otherwise.

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<sup>636</sup> Philippines' second written submission, paras. 143-156.

<sup>637</sup> Philippines' response to Panel question No. 108.

- (e) Whether Thailand failed to communicate to PM Thailand grounds for rejecting declared transaction values inconsistently with Article 1.2

(i) *Main arguments of the parties*

7.201 The **Philippines** claims that *prior to* taking the decision to reject the transaction value, Thailand failed to inform PM Thailand of its "grounds for considering that the relationship influenced the price", as required by Article 1.2(a).<sup>638</sup> According to the Philippines, this part of the dispute boils down to a disagreement over the ordinary meaning of the term "grounds", read in context and in the light of the stated object and purpose of the provision: Thailand alleges that the statement, "it cannot be proven whether the relationship has an influence on the determination of customs values or not", communicates the "grounds", whereas the Philippines considers that the word "grounds" requires communication of objective facts or information that support the authority's own conclusions on the burden of proof and on the acceptability of the transaction value.<sup>639</sup>

7.202 The Philippines submits that the text, context and object and purpose confirm that the word "grounds" in Article 1.2(a) refers to the objective basis in the facts or information before the authority that provides support for the authority's conclusions; the "grounds" are not the authority's own ultimate or intermediate legal conclusions, such as a conclusion that the burden of proof has not been met. As for the immediate context, the Philippines refers to the first and second sentences of Article 1.2(a) where the Philippines claims the drafters equated the word "fact" with the word "grounds", and indicated that "grounds" must be based in the "information" before the authority. The Philippines also points to the last sentence of the Decision that allegedly explicitly distinguishes between an authority's "decision" and "the grounds therefore".

7.203 The Philippines is of the view that a crucial consideration in interpreting the word "grounds" is the stated due process objective of the provision: the authority's communication of "grounds" must "give[] the importer a *reasonable opportunity to respond*" (emphasis in original). The due process objective of Article 1.2(a) would be frustrated were the Panel to accept Thailand's view that a statement that the burden of proof has not been met is a sufficient communication of "grounds". This is because if an authority does not address the evidence before it, the importer is left completely in the dark as to why the burden of proof has not been met. The importer cannot explain the relevance of the evidence it has submitted, for example, the sources and robustness of the data and calculations in that evidence. The importer is, in sum, deprived of an opportunity to address whatever specific deficiencies the authority perceives in the evidence. The Philippines also submits that the WCO Technical Committee's case-study is instructive in this regard.<sup>640</sup>

7.204 The Philippines considers that its interpretation of the word "grounds" prevents customs valuation from becoming a secret process, by ensuring that the authority is required to communicate its views on the evidence as part of the decision-making process, and by giving the importer a reasonable opportunity to comment on those views in an informed manner.

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<sup>638</sup> Philippines' second written submission, paras. 163-186.

<sup>639</sup> The Philippines also notes that several third parties share the same view, namely that the word "grounds" in Article 1.2(a) refers to the substantive considerations (reasons) in the record before the authority that provide the basis for the authority's conclusion.

<sup>640</sup> Philippines' second written submission, para. 158, referring to Exhibit THA-41. The Philippines submits that in the case study, "the importer and exporter were given a "reasonable opportunity" to explain the specific "price differences" that formed the basis for the authority's doubts, but were unable to do so. ... The authority in the case gathered and analyzed information; it relied on objective facts, besides the relationship, to reject transaction value; and the importer was given an opportunity to explain these specific facts, but could not do so. The authority did not rely on spurious and unsubstantiated grounds, but on objective facts".

7.205 **Thailand** submits that the customs authority's obligation to communicate its grounds to the importer under Article 1.2(a) means that it must give the importer preliminary notice regarding its consideration that it has not been established that the relationship between buyer and seller did not influence the price.<sup>641</sup> This notice must be provided in writing and an opportunity to respond must be given before the final valuation takes place. The *only* ground under Article 1.2(a) under which the transaction value may be rejected is a finding that it is not established that "the relationship [between buyer and seller] did not influence the price".<sup>642</sup> If the importer fails to discharge the burden of establishing that the price is not influenced by the relationship, the "customs administration has grounds for considering that the relationship influenced the price ... in light of information provided by the importer or otherwise" within the meaning of Article 1.2(a)".<sup>643</sup>

7.206 Thailand contests the Philippines' interpretation of the word "grounds" as described above. Thailand understands the Philippines' argument to be: (i) the term "grounds" refers only to the factual basis on which the customs administration acts, rather than the legal basis; and (ii) the absence of factual evidence establishing that the relationship did not influence the price is a legal basis, not a factual basis, for action. Thailand does not agree that the term "grounds" is limited to the factual basis. Rather, it incorporates both.<sup>644</sup> Further, contrary to the Philippines' argument, the absence of evidence also constitutes a factual basis on which the customs administration may act.<sup>645</sup> Thailand argues that the Philippines fails to explain how the "grounds" are not "based in the information before the authority" when the facts are that there is not enough information before the authority. Thailand sees no logical reason why the presence of certain information constitutes an appropriate factual basis on which the customs administration may act but the absence of that information would not. The Philippines' interpretation of grounds would make it legally impossible for a customs administration to communicate the factual grounds properly in cases in which the importer had provided no evidence. Even accepting the Philippines' argument on grounds, a notification that the factual record does not contain sufficient evidence to establish that the relationship did not influence the price, communicates information regarding the "information or otherwise" on which the customs administration is considering to reject the transaction value.<sup>646</sup>

7.207 Thailand further submits that Article 1.2(a) contains no language regarding the detail in which the grounds must be explained. Thailand contrasts this with Article 16 of the Customs Valuation Agreement, which calls for an "explanation" of the determination of customs value, and the provisions of the Anti-Dumping Agreement, which specify the detail in which anti-dumping determinations must be communicated to interested parties.<sup>647</sup> In the absence of any such requirements in the text of Article 1.2(a), the Panel should take care not to impose any obligations to which Members have not agreed.

7.208 Regarding the Philippines' argument that in order for the importer to have such a reasonable opportunity to respond, the notification must address the evidence before the customs administration, Thailand again argues that when there is insufficient evidence before the administration, communicating that fact satisfies the notification requirement. This is related to the fact that the importer chooses the method and evidence to establish that the relationship did not influence the price. Where the customs administration notifies the importer of the insufficiency of information, the importers are in no doubt as to the grounds on which the customs administration is acting.

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<sup>641</sup> Thailand's second written submission, paras. 93-94.

<sup>642</sup> Thailand's response to Panel question No. 20.

<sup>643</sup> Thailand's response to Panel question No. 20.

<sup>644</sup> Thailand's second written submission, paras. 96-99.

<sup>645</sup> Thailand's second written submission, para. 100.

<sup>646</sup> Thailand's second written submission, para. 101.

<sup>647</sup> Thailand's second written submission, para. 102.

(ii) *Analysis by the Panel*

7.209 The Philippines claims that Thailand's communication of the grounds for considering that the relationship between PM Thailand and PM Philippines influenced the price was inconsistent with the obligations under Article 1.2(a). The relevant part of Article 1.2(a) provides:

"[I]f, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship [between the buyer and seller] influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing."

7.210 Concerning Thai Customs' valuation of the entries at issue, the parties do not dispute that from 4 August 2006 until 19 December 2006, Thai Customs continued to question the acceptability of the transaction value of those entries based on the relationship between PM Thailand and PM Philippines. Nor is it disputed that PM Thailand made a request to Thai Customs by a letter dated 20 November 2006 to provide in writing its grounds for such consideration.<sup>648</sup> Thai Customs responded to PM Thailand's request with a letter dated 19 December 2006. The parties agree that this letter is the written communication of grounds that Thai Customs provided pursuant to Article 1.2(a).

7.211 The Philippines claims, however, that the 19 December 2006 letter from Thai Customs does not meet the obligations to communicate its "grounds" within the meaning of Article 1.2(a). The parties contest both the nature of "grounds" within the meaning of Article 1.2(a) and the consistency of the grounds allegedly provided by Thai Customs in its 19 December 2006 letter with the obligations under Article 1.2(a). We will first examine the nature of the obligations imposed on customs authorities to communicate "grounds" under Article 1.2(a).

7.212 The term "ground[s]" can be defined as "*noun*. ... 6 The basis of an opinion or argument, the reason or motive for an action, (now freq. in *pl.*). In *pl.* also, sufficient reason or reasons *for, that, ME*".<sup>649</sup> When used in plural, as in Article 1.2(a), "grounds" thus means "sufficient reason or reasons" for an opinion or an action. Under Article 1.2(a), the grounds to be provided to the importer are the customs authorities' reasons for considering, in the light of the information provided by the importer or otherwise, that the relationship influenced the price. In this regard, we recall our discussion above regarding the procedural steps to be taken by customs authorities as well as importers under Article 1.2(a). The importer is responsible for providing information relevant to the acceptability of the transaction value once it has been notified by the customs authority of the need to examine the circumstances of the sale in related-party situations. Subsequently, the customs authority must assess the information initially provided by the importer and communicate its grounds for considering that the relationship influenced the price based on the evidence provided if that is the preliminary conclusion reached at that point in the process.

7.213 In this context, the obligation to communicate the grounds under Article 1.2(a) can be temporarily distinguished from the obligation to provide an explanation under Article 16 for how the final customs value of the importer's goods was determined. As the parties have also clarified, the obligation to provide "grounds" under Article 1.2(a) arises *during* the valuation process. The obligation to "explain" the determination of the customs value, on the other hand, does not arise until after the customs authority has made a final assessment of the customs value of the concerned goods. This temporal difference in the process, in our view, thus affects the substantive nature of the content of "grounds" under Article 1.2(a) and an "explanation" under Article 16. Given that under

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<sup>648</sup> Exhibit PHL-65.

<sup>649</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition), Oxford University Press, Volume 1, p. 1158 (2002).

Article 1.2(a), the importer shall be given a reasonable opportunity 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.

7.214 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.

7.215 We find support for our view above in a comment by the WTO Technical Committee on Customs Valuation in Commentary 14.1.<sup>650</sup> In response to the question of whether customs authorities must advise the importer of the reasons for believing that the price of goods in a transaction has been influenced by the relationship, the WTO Technical Committee states:

"Yes. Subparagraph 2(a) of Article 1 provides that, where Customs has grounds for considering that transaction value is unacceptable because the relationship has influenced the price and that Article 1 does not therefore apply to the transaction, Customs shall communicate its grounds to the importer. Moreover the importer must be given a reasonable opportunity to respond and is entitled to be advised in writing of the grounds for Customs' beliefs."

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<sup>650</sup> Exhibit THA-26. The Panel notes that the Commentary by the WTO Technical Committee is not legally binding upon the parties, however it is of the opinion that the Commentary is instructive and can provide guidance on the interpretation of the Customs Valuation Agreement, especially since it is the WTO Members that make up the Technical Committee. In this respect, we also refer to the Appellate Body ruling in *EC – Computer Equipment*, which discussed the legal status of non-binding decisions of the WCO HS Committee, and stated that in interpreting tariff concessions, these decisions may be relevant, and therefore they should be examined by the Panel (Appellate Body Report, *EC – Computer Equipment*, para. 90). Following this statement by the Appellate Body, the Panels in *EC – Chicken Cuts* and *China – Auto Parts* considered that decisions of the HS Committee, although not binding, "could well be a very useful source of information on the subsequent practice of WTO Members, a large proportion of whom are signatories to the HS Convention and, thus, are members of the HS Committee" (Panel Report, *EC – Chicken Cuts*, para. 7.298; Panel Report, *China – Auto Parts*, para. 7.423).



7.216 We now turn to the factual situation of this dispute. In its letter of 19 December 2006, Thai Customs provided its grounds for considering that the relationship between PM Thailand and PM Philippines influenced the price as follows:

"Pertaining to the reference letter, PMTL wishes to be informed about grounds and methodology of customs value determination.

The Customs Department would like to inform you of the grounds and methodology of customs value determination as follows:

1. The Customs Department rejected the declared price of PMTL because PMTL and the seller in a foreign country are related parties, in accordance with the Ministerial Regulation No. 132 (B.E. 2543) Article 4, and the importer has yet to prove if the said relationship influences the customs value determination or not.

2. After PMTL has placed a guarantee to release goods from Customs' custody, the import entry will be returned to the assessment officer who requested the guarantee placement. The assessment officer has the right to issue a letter requesting the importer to provide additional clarification as well as supporting evidence for further consideration. After the complete information has been submitted, the assessment officer will determine the customs value in sequential order according to GATT, and subsequently issue a Notice of Assessment (Form KorSorKor 114) in accordance with the Customs Notification No. 23/2549 dated 31 March 2006.

3. Once PMTL has received the Notice of Assessment stated in 2, and completed the procedure of the Notice of Assessment, in the case where additional duty is required, or the guarantee does not cover the import duty amount, PMTL can file an appeal within 30 days from the date of receipt of the assessment, at Customs Valuation Appeal Division, SCPVD, as instructed under Customs Notification No. 29/2549 dated 2 May 2006." (underline added)

7.217 Thai Customs' grounds as provided in the above letter are that "PMTL and the seller in a foreign country are related parties ... and the importer has yet to prove if the said relationship influences the customs value determination or not".

7.218 Based on the dictionary meaning of the term "grounds", we considered above that customs authorities' grounds under Article 1.2(a) were the customs authorities' *reasons for considering*, in the light of information provided by the importer or otherwise, that the relationship influenced the price. As such, we do not consider that the relationship between the buyer and the seller in a foreign country itself can form the "grounds" within the meaning of Article 1.2(a). Further, the first sentence of Article 1.2(a) states that the fact that the buyer and the seller are related shall not in itself be grounds for regarding the acceptability of the transaction value. We understand that the parties do not dispute this either.

7.219 Thailand asserts, however, that the letter of 19 December 2006 satisfies the obligation to communicate the "grounds" because it sets out that "the importer has yet to prove if the said relationship influences the customs value determination or not". This statement means that PM Thailand, the importer in this case, did not prove at that stage of the process that its relationship with PM Philippines did not influence the declared transaction value. Thai Customs does not, however, link this statement to the evidence that PM Thailand had provided until that time or otherwise any other evidence that was before Thai Customs. We do agree with Thailand that if the importer in a given case provided *no* evidence, it would be impossible for a customs authority to

communicate any other specific grounds than the fact that the importer did not demonstrate the acceptability of the transaction value. That is, however, not the situation in the present dispute.

7.220 The facts before us show that PM Thailand did provide Thai Customs with certain information and data to establish the acceptability of the transaction value.<sup>651</sup> To the extent that Thai Customs was presented with certain evidence, the grounds for its consideration that the relationship between the buyer and the seller influenced the price must be linked to that concerned evidence so as to assist the importer in understanding the authority's consideration.<sup>652</sup> Therefore, the subject statement contained in the [19 December 2006] letter from Thai Customs falls short of satisfying the obligation to "communicate its grounds" within the meaning of Article 1.2(a).

7.221 We also observe Thailand's argument that PM Thailand's letter of 5 February 2007 to Thai Customs clarifies that PM Thailand was fully informed of the basis on which Thai Customs was acting by Thai Customs' 19 December 2006 letter.<sup>653</sup> Thailand is therefore of the view that PM Thailand's due process rights under Article 1.2(a) were fully respected. The 5 February 2007 letter from PM Thailand reads in relevant part that "Until the letter in reference (2) [the 19 December 2006 letter], received some four months after Customs first refused to clear the company's goods at declared invoice prices, the company has never been informed by any means or channels that Customs officers have reasons to believe that the relationship between the company and the foreign seller may influence the price". Thailand considers that this statement in PM Thailand's letter supports its position that Thai Customs properly communicated in the 19 December 2006 letter its grounds to believe that the relationship between PM Thailand and PM Philippines influenced the price.

7.222 We do not find the concerned letter to evince PM Thailand's acknowledgment that PM Thailand was sufficiently informed of the *grounds* of Thai Customs' consideration. A plain reading of the above statement in the 5 February 2007 letter indicates that PM Thailand simply underlines the fact that the 19 December 2006 letter was the first communication from Thai Customs regarding its consideration of the related-party transaction at issue since Thai Customs started questioning the declared transaction value of the cigarettes at issue on 4 August 2006. More importantly, read together with PM Thailand's additional statement in the letter that the 19 December 2006 letter from Thai Customs "does not provide sufficient explanation of the reasons for Customs' price rejection and is inconsistent with the [Customs Valuation Agreement]", the 5 February 2007 letter from PM Thailand does not indicate that PM Thailand was sufficiently informed of Thai Customs' "grounds" Article 1.2(a).

7.223 For the foregoing reasons, we therefore find that Thai Customs failed to communicate its grounds for considering that the relationship between PM Thailand and PM Philippines influenced the price within the meaning of Article 1.2(a).

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<sup>651</sup> For example, PM Thailand provided Thai Customs with information and data to establish the acceptability of the transaction value in its letters of 4, 7 and 8 August 2006. In the 4 August letter, PM Thailand referred to its annual filings of 2003, 2004 and 2005 (Exhibit PHL-55); in the 7 August letter it advised Thai Customs how it could examine the cost structure of PM Thailand (Exhibits PHL-57 and PHL-76); and in the letter of 8 August, amongst others, PM Thailand provided a copy of the 2005 annual filing, PG&E, and deductive calculation (Exhibit PHL-56).

<sup>652</sup> In its case study 10.1, the WTO Technical Committee stated that "any decision [on whether the relationship between two entities influenced the price] must, to a significant degree, be based on the information provided by the importer." (Exhibit THA-41).

The United States also states in its oral statement at the third party session with the Panel that "the failure by an importer to prove a negative, specifically to prove that the relationship did not influence the price, does not relieve the customs authority of its obligation to accept the transaction value unless it has grounds for considering that the relationship influenced the price." (United States' third party oral statement, para. 9).

<sup>653</sup> Thailand's second written submission, paras. 105-107; Exhibit PHL-68.

## 6. Article 16 of the Customs Valuation Agreement

### (a) Obligations under Article 16

#### (i) *Main arguments of the parties*

7.224 The **Philippines** submits that Article 16 requires an authority to explain properly (i) why the determination of the customs value was not based on the transaction value; and (ii) what the basis is for the alternative valuation determinations.

7.225 Regarding the legal basis for its position that an explanation required under Article 16 includes an explanation of the basis for the customs authority's rejection of the importer's transaction value, the Philippines relies on the following three points to support its position: (i) the meaning of the words "how" and "explain" requires that the explanation "makes clear the cause" and "reason" for the customs value; (ii) given the sequencing obligation under the Customs Valuation Agreement, an authority must explain how it satisfied the legal preconditions for using the valuation method used, including its failure to use Article 1; and (iii) the Ministerial Decision provides contextual support for the Philippines' interpretation of Article 16 as it stipulates that when the transaction value is rejected, an authority must "communicate to the importer in writing its [final] decision and the grounds therefore". Thus, an explanation must be given of the objective "ground" justifying the rejection of a transaction value under Article 1 of the Customs Valuation Agreement.<sup>654</sup>

7.226 Further, the Philippines submits that an authority must also provide a sufficient statement of the particular valuation methodology, or "means", used to value the importer's goods. To explain how the customs value was determined, the authority must also indicate how it derived the value from the information before it, providing any calculations performed. In a deductive value calculation, the authority must disclose the elements in Article 5.1 of the Customs Valuation Agreement that were deducted and not deducted, and give reasons why.<sup>655</sup>

7.227 The Philippines explains that Article 16 is intended to ensure that importers and foreign governments, as well as reviewing tribunals, courts and panels, understand how the authority reached its conclusion, thereby enabling these parties to exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement in deciding whether the manner or means of valuation were consistent with the importing Member's WTO obligations. This interpretation provides domestic courts and panels with a basis to review the authority's decisions. If the importing Member were not obliged to explain its failure to use valuation methods other than the one used, the means by which the imported goods came to be valued as they were and the means by which the importing Member complied with its sequencing obligations under the Customs Valuation Agreement, are never explained. Such an interpretation would run counter to the due process and transparency purposes promoted by Article 16.

7.228 **Thailand** refers back to its position that the obligations/standards under the Customs Valuation Agreement differ from those under the Anti-Dumping Agreement. Article 16 and the Customs Valuation Agreement generally do not provide detailed rules regarding the nature of the explanation to be provided under Article 16.<sup>656</sup> Specifically, in response to the Philippines' position that the customs administration should provide, under Article 16, an explanation of "what evidence the authority relied upon" and "why the authority disregarded certain evidence or assigned lesser evidentiary weight to evidence contradicting its assessed customs value", Thailand argues that this describes the substantive and procedural standards with which a final anti-dumping determination

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<sup>654</sup> Philippines' response to Panel question No. 24(1); second written submission, paras. 188-192.

<sup>655</sup> Philippines' response to Panel question No. 24(1); second written submission, paras. 193-194.

<sup>656</sup> Thailand's second written submission, para. 116.

must comply pursuant to Articles 6.9 and 12.2 of the Anti-Dumping Agreement, not a customs valuation determination. The Customs Valuation Agreement does not contain any such equivalent provisions and the Panel should not read such obligations into the Customs Valuation Agreement. Thailand emphasizes that given that anti-dumping and countervailing duty investigations are far more complex investigations than a customs valuation determination, the standards for explaining anti-dumping or countervailing duty investigations would be much higher than the standards governing explanations of customs valuation determinations.<sup>657</sup>

7.229 In any event, Thailand contends that even if Article 16 includes an obligation to be informed as to why the transaction value was rejected, Thai Customs complied with this obligation in its 12 April 2007 letter.<sup>658</sup> Regarding the Philippines' position that the purpose of Article 16 is to ensure that importers and foreign governments understand how the authority reached its conclusion, and to enable, *inter alia*, importers to appeal decisions domestically or foreign governments to decide whether to bring WTO proceedings, Thailand asserts that by those standards, Thai Customs' explanation was clearly sufficient to enable PM Thailand to challenge the determinations domestically and the Philippines to challenge them at the WTO.<sup>659</sup>

(ii) *Analysis by the Panel*

7.230 Article 16 of the Customs Valuation Agreement provides:

"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."

7.231 Article 16 sets forth two elements: (i) a written request from an importer for an explanation in writing; and (ii) a customs authority's obligation to provide an explanation in writing as to how the customs value of the importer's goods was determined. Regarding the Philippines' Article 16 claim, the question before us concerns the second element, namely the nature of an explanation to be provided as to how the customs value of the importer's goods was determined.<sup>660</sup> Specifically, the parties disagree on the scope and extent of the explanation to be provided under Article 16.

7.232 To understand the nature of the explanation under Article 16, we first turn to the text of the provision. The term "explanation" can be defined as "*noun*. 1 The action or act of explaining. 2 A statement, circumstance, etc., which makes clear or accounts for something. ...".<sup>661</sup> The word "explain" can in turn be defined as follows: "1 *verb trans. & intrans.* Make clear or intelligible (a

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<sup>657</sup> Thailand's second written submission, paras. 116-117. Thailand points to important policy reasons for which the drafters would not have wanted to apply the same detailed rules to Article 16 of the Customs Valuation Agreement: (i) a customs valuation determination could pertain to a single entry or a series of entries relating to a single importer, as opposed to an anti-dumping or countervailing duty determination that may involve several exporters and importers and transactions covering a period extending up to three years; and (ii) anti-dumping and countervailing duty investigations are conducted by centralized investigating authorities with extensive resources, whereas customs valuation determinations may be made by port or regional customs offices whose resources do not match those of anti-dumping investigating authorities.

<sup>658</sup> Thailand's response to Panel question No. 24(2), also referring to its response to Panel question No. 8 and paras. 294-296 of its first written submission.

<sup>659</sup> Thailand's second written submission, para. 118.

<sup>660</sup> PM Thailand made a written request to Thai Customs for an explanation in writing by the 5 February 2007 letter. Thai Customs responded to this request by the letter dated 12 April 2007 (Exhibit PHL-69). See also the factual summary of the communications between PM Thailand and Thai Customs, para. 7.183.

<sup>661</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 895 (2002).

meaning, difficulty, etc.); clear of obscurity or difficulty; give details of (a matter, *how*, etc) ... 6 *verb trans.* account for; make clear the cause or origin of".<sup>662</sup> The word "how" means "*adverb* 1. In what way or manner; by what means; in whatever way; by whatever means ...".<sup>663</sup> The dictionary meaning of the term "explanation", taken together with the word "how", therefore indicates that the explanation to be provided under Article 16 requires customs authorities to "make clear" and "give details" of the manner and means in which a customs authority determined the customs value of imported goods.

7.233 Further, considered in its context, as discussed above, the explanation under Article 16 is temporarily and substantively distinguished from the authority's communication of its grounds for its consideration under Article 1.2(a) as the explanation under Article 16 must be provided after the final assessment of customs value is made and thus must be based on complete information that formed the basis for the customs authority's decision. This can be contrasted with the "grounds" under Article 1.2(a) that are based on the information initially provided by the importer or otherwise.

7.234 We also heed the transparency and due process objective that Article 16 is intended to achieve. As the Philippines submits, an explanation under Article 16 enables importers and foreign governments to effectively exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations. It provides a window through which domestic tribunals and WTO panels review and understand a customs authority's valuation determination. As observed in Section VII.C.5 above, our objective assessment of the Philippines' claims under Articles 1.1 and 1.2(a) required us to base our evaluation of Thai Customs' examination of the circumstances of the sale on, *inter alia*, its explanation provided pursuant to Article 16.

7.235 As regards the scope of the explanation to be provided under Article 16, the Philippines submits that Article 16 requires a customs authority to provide (i) the reason for rejecting transaction value and (ii) the basis for the alternative valuation determination. Although not expressly endorsing this view, Thailand does not appear to object to the Philippines' view in this regard either. In its explanation provided to PM Thailand in the letter of 12 April 2007, Thai Customs in fact states that it informs PM Thailand of *the reason* and method which was used in the determination of customs values in response to PM Thailand's request for *the explanation on the rejection* of the declared import prices and valuation method used.<sup>664</sup> This suggests that in practice, Thailand itself also includes the basis for its rejection of the importer's declared transaction value as part of the explanation provided to the importer pursuant to Article 16.

7.236 The Philippines also references the sequencing obligation under the Customs Valuation Agreement to support its view that the explanation under Article 16 encompasses both the reason why the transaction value was rejected and why and how the method applied for the determination of the customs value was used. In its view, given that customs authorities are required to respect the sequencing obligation to apply the six different valuation methodologies, an authority's rejection of the transaction value under Article 1 is a necessary and integral element of its determination of the customs value under a different valuation method. In this context, in making "intelligible" the "cause" or "reason" for valuation under a provision other than Article 1, an authority must explain how it satisfied the legal preconditions for using the valuation method used, including its failure to use Article 1.

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<sup>662</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 895 (2002).

<sup>663</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 1219 (2002).

<sup>664</sup> Exhibit PHL-70.

7.237 We share the Philippines' view. As we noted above, the primary basis for customs value under the Customs Valuation Agreement is the transaction value. Whenever the customs value cannot be determined based on the transaction value under Article 1 for the reasons authorized under the same provision, the methods under Articles 2 through 7 are to be used in the sequential order. Therefore, it seems logical for a customs authority to explain the basis for rejecting the transaction value in situations where the authority relies on a valuation method other than the transaction value under Article 1. Interpreting otherwise, in our view, would defeat the procedural objective of Article 16 to preserve due process rights and transparency in the context of customs value determination. This is particularly the case because, if not through an explanation under Article 16, the importer would be deprived of an opportunity to understand the customs authority's determination of the final customs value for the concerned goods.<sup>665</sup> Therefore, we consider 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.

7.238 We now address the extent of an explanation to be provided under Article 16, namely how extensive and detailed an explanation should be to satisfy the obligations under Article 16. The ordinary meaning of the word "explanation", considered in its context and in the light of the object and purpose of Article 16 as discussed above, suggests that customs authorities' explanation must include, at the minimum, the basis for rejecting the transaction value in the light of the information provided by the importer, the identification of the method used and the illustration of how the method was applied in reaching the final customs value.

7.239 In this connection, we observe that the extent of an explanation to be provided under Article 16 is not the same as that under the equivalent provisions of the WTO agreements on trade remedy measures. The obligations imposed on domestic authorities to explain determinations in the context of the trade remedy rules are much more detailed and specific. For example, Article 12.2 of the Anti-Dumping Agreement refers to "*sufficiently detailed* explanations" and "*a full* explanation". Article 4.1(c) of the Agreement on Safeguards requires a *detailed* analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. In contrast to these provisions, Article 16 of the Customs Valuation Agreement contains succinct language that the importer shall have the right to "an explanation ... as to how the customs value of the importer's goods was determined". The absence of any modifying words such as "detailed" or "full" before the term "explanation" in Article 16 should be taken into account in clarifying the extent of the explanation under Article 16. Moreover, the obligation to provide "an explanation in writing" under Article 16 arises only if there is a written request from the importer.<sup>666</sup> This too shows that the standard for the explanation required under Article 16 of the Customs Valuation Agreement is less stringent than that under the Anti-Dumping Agreement, the SCM Agreement or the Agreement on Safeguards.

7.240 The above considerations lead us to conclude that although not as extensive and detailed explanations as required under the WTO agreements on trade remedy measures, 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

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<sup>665</sup> Philippines' response to Panel question No. 24(1); second written submission, paras. 188-192. The Philippines also refers to the Ministerial Decision which allegedly provides contextual support for its interpretation of Article 16. The Decision stipulates that when the transaction value is rejected, an authority must "communicate to the importer in writing its [final] decision and the grounds therefore". Thus, an explanation must be given of the objective "ground" justifying the rejection of transaction value under Article 1 of the Customs Valuation Agreement.

<sup>666</sup> We note in this regard that the Ministerial Decision provides, "[w]hen a final decision is made, the customs administration shall communicate to the importer in writing its decision and the grounds therefore." Therefore, unlike under Article 16 of the Customs Valuation Agreement, under the Ministerial Decision, the customs administration's obligation to communicate *in writing* its decision and the grounds for a final valuation decision does not depend on the importer's request.

rejecting the transaction value and other valuation methods that sequentially precede the method actually used by the customs authorities.<sup>667</sup>

7.241 Further, we recall that we considered the substantive content of the explanation provided by Thai Customs of its determination in the context of reviewing the Philippines' claims with respect to Thailand's obligations under Article 1.1 and 1.2(a). Our examination of the explanation in that context should be distinguished from our evaluation of whether the explanation satisfies the requirements within the meaning of Article 16. As the Philippines responded to a question from the Panel, under a hypothetical in which an authority determines the customs value using a spinning wheel, the authority would be found to have complied with its obligations under Article 16 if an authority concluded that the transaction value was not acceptable and provided an adequate explanation for how the spinning wheel was applied in a specific case. This will be the case even though the disclosed reasons would be insufficient to prove a compliance with Articles 1.1 and 1.2(a) in rejecting the transaction value. If, however, no (or insufficient) reasons, including, for example, how the spinning wheel was applied in a specific case, were disclosed in the explanation, the authority would violate both Articles 1.1 and 1.2(a) as well as Article 16. In this light, our assessment of the Article 16 claim should be focused on whether an explanation is *formally* sufficient to make clear and give details of its decision to reject the transaction value and how the valuation method was applied to derive the customs value.

(b) Whether Thailand failed to provide an explanation for its determination of the customs value of the imported cigarettes at issue inconsistently with Article 16

(i) *Main arguments of the parties*

7.242 The **Philippines** claims that Thailand violated Article 16 of the Customs Valuation Agreement by failing to provide adequate explanation of its determination of the customs value for the entries at issue.<sup>668</sup> The Philippines argues that Thailand failed to explain properly (i) why the determination of the customs value was not based on the transaction value; and (ii) the basis for the alternative valuation determinations made.<sup>669</sup>

7.243 The statement in the 12 April letter that PM Thailand failed to satisfy the burden of proof, without any explanation of how the evidence before the authority supports this legal conclusion, is inadequate to explain how and why the authority was entitled to reject the transaction value in determining the customs value of the importer's goods.<sup>670</sup> In particular, the authority failed to provide any explanation for its decision to disregard PM Thailand's evidence.<sup>671</sup>

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<sup>667</sup> The European Union also supports this view. In its third party submission, it states, "The European Union considers that the relevance of transaction values as the preferred customs valuation method and the sequencing order of the other customs valuation methods provided by the CVA once more imply that, when the customs authorities reject the transaction value and determine the customs value on another basis, such explanation should include: the reason for rejecting the transaction value; the reasons for using a particular valuation method; how the value has been calculated pursuant to that method; and the reasons for not using any other valuation method prior to the one effectively used following the sequencing order of Articles 2 to 7 of the CVA." (European Union's third party written submission, para. 41).

<sup>668</sup> Philippines' first written submission, para. 287.

<sup>669</sup> Philippines' first written submission, paras. 297-323.

<sup>670</sup> Philippines' second written submission, para. 200.

<sup>671</sup> The Philippines refers back to its arguments under Article 1.1 and 1.2(a) regarding the "grounds" for its rejection of declared transaction value. Under Article 1.1 and 1.2(a), the Philippines argued that "it does not suffice for an authority to communicate a legal determination, because the importer has no 'reasonable opportunity' to remedy the perceived deficiencies in the evidence. The authority must inform the importer of

7.244 Furthermore, in respect of the requirement to provide a sufficiently detailed and reasoned explanation to permit the importer to understand how and why the authority determined the assessed customs values, the explanation provided in the 12 April 2007 letter – namely, "Method 6, which is the 'fall back' method, using the deductive valuation method, was used" – is inadequate.<sup>672</sup> It does not reveal the starting point of the deductive value calculation; the specific elements and amounts deducted; and the sources of the data used. It does not explain why certain deductions were not made; and fails to provide supporting calculations for the assessed values. The minimal content of the 12 April 2007 letter may be contrasted with the calculations provided in Exhibit THA-13 for the [[xx.xxx.xx]] transactions between 11 August and 31 December 2006.

7.245 **Thailand** submits that the issue is whether the explanation provided by Thai Customs in the letter of 12 April 2007 and the minutes of the 6 March meeting was sufficiently detailed to satisfy the requirements of Article 16.<sup>673</sup>

7.246 Thailand argues that it satisfied the requirements under Article 16. First, regarding the alleged obligation to properly explain why the determination of customs value was not based on transaction value, Thailand is of the view that the same response that it provided with respect to the claim under Article 1.2(a) also applies here, i.e. Thailand clearly explained in writing by letters dated 19 December 2006 and 12 April 2007.

7.247 With respect to the basis for the alternative valuation determinations made, Thailand submits that in the 12 April 2007 letter, Thai Customs explained that "in the determination of customs values, Method 6, which is the 'fall back' method, using the deductive method, was used under Article 7 of the GATT ... Please be informed accordingly".<sup>674</sup> Therefore, PM Thailand was clearly informed in the 12 April 2007 letter that the deductive valuation method was used to value the entries in question. If that explanation were to be considered insufficient, Thailand submits that the Panel should also take into account the circumstances in which it was provided, including a more detailed explanation that had been provided at the 6 March 2007 meeting.<sup>675</sup> Prior to the meeting on 6 March 2007, both PM Thailand and its accountants, PWC, were in regular correspondence with Thai Customs. Thailand also refers to the minutes of the meeting which, according to Thailand, make clear that PM Thailand was informed in detail how the deductive value was used under Article 5 or Article 7 of the Customs Valuation Agreement.<sup>676</sup> According to Thailand, the minutes of the 6 March 2007 meeting, referred to in the notice of assessment<sup>677</sup>, constitutes written notice of how the customs value was determined.<sup>678</sup>

7.248 The **Philippines** contends that the minutes of the 6 March 2007 meeting cannot be used to supplement the explanation given in the 12 April 2007 letter.<sup>679</sup> However, in its response to the Panel

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specific shortcomings in, or absence of, evidence." (Philippines' second written submission, para. 116, referring back to paras. 104-109).

<sup>672</sup> Philippines' second written submission, paras. 201-203.

<sup>673</sup> Thailand's second written submission, para. 115.

<sup>674</sup> Thailand's first written submission, para. 175.

<sup>675</sup> Thailand's first written submission, para. 178; response to Panel question No. 23; second written submission, para. 114; Exhibits THA-64 and THA-65.

<sup>676</sup> Thailand's first written submission, para. 178.

<sup>677</sup> Exhibit THA-15.

<sup>678</sup> Thailand's second written submission, para. 114; response to Panel question No. 23.

<sup>679</sup> The reasons for the Philippines' initial contention were as follows: (i) Thai Customs never provided the minutes to PM Thailand *in writing* as an explanation of its valuation. The minutes were provided by DG Excise to the Central Tax Court, on 25 August 2008, in the context of court proceedings regarding the September 2006 and March 2007 MRSPs, which served as the base for VAT (Exhibit PHL-108). An oral explanation – even if given to the importer – cannot satisfy the requirement in Article 16 to provide a written explanation; (ii) the minutes do not explain crucial elements of the calculation, such as the sales prices to the



questions following the second substantive meeting, the Philippines submits that it accepts that, in assessing Thailand's compliance with its substantive obligations, the Panel may review the explanation given in the minutes, as a contemporaneous statement of the determination.<sup>680</sup> The Philippines is of the view that the explanation given in the minutes is substantively the same as the explanation given in the 12 April 2007 letter and that, in one respect, the minutes add to the 12 April 2007 letter because, in the minutes, Thai Customs states that it did not examine the circumstances of sale.<sup>681</sup>

(ii) *Analysis by the Panel*

7.249 In response to a written request from PM Thailand on 5 April 2007, Thai Customs provided, pursuant to Article 16 of the Customs Valuation Agreement, an explanation for how the customs value of the cigarettes at issue was determined by a letter sent on 12 April 2007. The Philippines claims that Thai Customs acted inconsistently with Article 16 because the 12 April 2007 letter does not satisfy the requirements under Article 16. Thailand argues that the explanation provided by Thai Customs in the 12 April 2007 letter, considered together with the minutes of the 6 March 2007 meeting, was sufficiently detailed to satisfy the requirements of Article 16.

7.250 The parties' arguments raise two issues: first, whether Thai Customs' letter of 12 April 2007 satisfies the obligations under Article 16 of the Customs Valuation Agreement; and, second, whether the explanation provided in the 6 March 2007 meeting and in its minutes should be considered as constituting the explanation provided pursuant to Article 16 and, if so, whether the minutes, considered together with the letter of 12 April 2007, satisfy the obligations under Article 16. We will examine these two issues in turn.

7.251 The 12 April 2007 letter provides:

"According to the company's letter [dated 5 April 2007], requesting for the explanation on the rejection of the import prices declared by the company, including the method which was used in the determination of Customs values:

The Bonded Warehouse Service Division I, Tax Incentives Bureau, Customs Department, hereby informs the company of the reason and method which was used in determination of customs values, having the following details:

1. The rejection of the import prices comes from the fact that:

1.1 There is another importer importing the same type of goods, with 3-4 times price difference.

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first independent buyer in the GAQ price to be used as the starting point for the calculation; and the nature and amount of the specific deductions that would, and would not, be made; (iii) the explanation must be given to the importer, i.e. PM Thailand (PWC ABAS on behalf PM Thailand), but PM Thailand was not present at the meeting. Regarding PM Thailand's auditors from PWC, they were invited by Thai Customs in a letter addressed to the auditors to the 2 and 6 March meetings only to discuss technical accounting questions regarding the audited financial statement for 2005 (Exhibit THA-10; Philippines' second written submission, paras. 204-212).

<sup>680</sup> Philippines' response to Panel question No. 108.

<sup>681</sup> Philippines' second oral statement para. 49; response to Panel question No. 108.

The Philippines also submits that the 19 December 2006 letter is not relevant to Article 16 because – as Thailand itself admits – the 19 December 2006 letter makes clear that customs valuation was not yet final, and hence, the letter cannot explain the basis for a valuation not "yet" made. (Philippines' second written submission, para. 198, footnote 162).

1.2 The company and the overseas seller are related parties, and it cannot be proven whether the relationship has an influence on the determination of customs values or not (according to the Ministerial Regulation no. 132/2545 Chapter 2, Clause 14).

2. In the determination of customs values, Method 6, which is the "Fall Back" method, using the deductive valuation method, was used (according to the Ministerial Regulation no. 132/2545 Clause 3), under Article 7 of GATT.

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7.252 The parties do not dispute that the 12 April 2007 letter is the explanation provided by Thai Customs pursuant to Article 16. The question is whether the content of the letter satisfies the obligation to provide an "explanation" under Article 16.

7.253 We clarified above that the scope of the explanation under Article 16 encompasses both the reason why the transaction value was rejected as well as why and how the method applied for the determination of the customs value was used. The 12 April 2007 letter sets forth both the reason for rejecting the transaction value and the valuation method (fallback method) that was used in determining the customs value of the cigarettes at issue. Specifically, it states that the rejection of the import prices comes from the fact that PM Thailand and PM Philippines are related parties and it cannot be proven whether the relationship has an influence on the determination of customs values. Further, in determining customs values, the letter provides that Method 6, which is the "Fall Back" method, using the deductive valuation method, was used.<sup>683</sup>

7.254 The relevant question is therefore whether the explanation is substantively sufficient to make clear and give details of the manner in which the customs value of the cigarettes at issue was determined. We considered above that a sufficient explanation could include, for example, the basis for rejecting the transaction value, the type of the method used and an illustration of why the method was selected and how the method was applied in calculating the final customs value.

7.255 First, the basis for rejecting the transaction value as provided in the 12 April 2007 letter is the same as Thai Customs' grounds that were communicated through the letter of 19 December 2006, namely that "it cannot be proven whether the relationship has an influence on the determination of customs values or not". We find the concerned statement in the Thai Customs' letter of 12 April 2007 inadequate to explain the reason for rejecting the transaction value under Article 1. If Thai Customs considered that it could not be proven whether the relationship influenced the customs values declared by PM Thailand, Thai Customs should have specified the precise basis for such a consideration to satisfy the obligation to "explain" its final determination of the customs value. For example, as noted above, PM Thailand presented Thai Customs with certain information and data to prove the acceptability of the declared transaction value. In the concerned letter, however, Thai Customs refers to neither such evidence nor any other information that may have formed the basis for its final decision to reject the transaction value. A mere statement that the importer could not prove whether its relationship with the exporter did not influence the price, in our view, does not fulfil the customs authority's obligation to explain the reason for rejecting the transaction value.

7.256 As regards the alternative valuation method used, the letter identifies Method 6 (Fallback method) under Thai law, a method equivalent to that under Article 7 of the Customs Valuation

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<sup>682</sup> Exhibit PHL-70.

<sup>683</sup> The letter refers to Article 7 of the GATT in relation to the deductive valuation method used under the Fall Back method (Method 6 under the Thai domestic law). We understand that by Article 7 of the GATT, Thai Customs meant Article 7 of the Customs Valuation Agreement.

Agreement, as the method used. It does not, however, further elaborate on why the method was selected and how the chosen method was applied in calculating the final customs value. The statement that simply names the method used for valuation without any further elaboration, in our view, cannot constitute an "explanation" within the meaning of Article 16 as it fails to make clear or give details of the manner in which the customs value of the cigarettes at issue was determined. Thailand points to the fact that PM Thailand was informed that the deductive valuation method was used to value the cigarettes at issue. However, the requirement imposed on customs authorities under Article 16 is to provide an explanation as to "how" the determination of the customs value of the imported goods was made, not to just inform the importer of the method used.

7.257 Nonetheless, Thailand argues that in evaluating the Philippines' Article 16 claim, the circumstances in which the 12 April 2007 letter was provided must also be taken into account should the Panel consider the information provided in this letter insufficient. The circumstances of the letter include the meeting on 6 March 2007 during which a more detailed explanation on the valuation determination was allegedly provided as well as the minutes of that meeting.

7.258 Thailand's argument raises the question of whether a meeting and/or the minutes of a meeting that is *not* formally part of the written explanation provided by a customs authority pursuant to Article 16 can nevertheless be considered as constituting the explanation. In the context of the Agreement on Safeguards, we find an insight on this question in the reasoning of the Panel on *US – Steel Safeguards* concerning the form and timing of a report required to be published by an investigating authority under Article 3.1 of the Agreement on Safeguards. Regarding the form of the report, the Panel in that case stated :

"[N]othing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

The Panel believes that a competent authority's report can be issued in different parts but such multi-part or multi-stage report must always provide for a coherent and integrated explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, ... Whether a report drafted in different parts or a multi-stage report constitutes "the report of the competent authority" is to be determined on a case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. ... The publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner."<sup>684</sup>

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<sup>684</sup> Panel Report, *US – Steel Safeguards*, paras. 10.49-10.50. Regarding the timing of the report, the Panel states:

"Given that the demonstration of unforeseen developments is a prerequisite for the application of a safeguard measure, it cannot take place after the date as of which the safeguard measure is applied. This has been confirmed by the Appellate Body, which noted, in *US – Lamb*, that although Article XIX provides no express guidance on where and when the demonstration of unforeseen developments is to be made, it is nonetheless a prerequisite, and 'it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed.' (Appellate Body Report, *US – Lamb*, para. 72 (emphasis in original); see also Panel Report, *US – Line Pipe*, para. 7.296). Any demonstration made after

7.259 As in the case of the requirement to publish a report under Article 3.1 of the Agreement on Safeguards, Article 16 of the Customs Valuation Agreement does not dictate the manner in which a written explanation must be provided. To that extent, we agree that the question of whether a certain instrument can constitute an explanation under Article 16 will have to be decided on a case-by-case basis. We also agree that if an explanation is to be given in multiple parts, factors such as "the overall structure, logic and coherence" among these various parts must be considered to determine the appropriateness of the explanation given on the determination of the customs value of the goods imported. Furthermore, if explanations are provided in multiple parts, it must also be considered whether such a fact deteriorates the transparency and due process objective of Article 16.

7.260 Before evaluating whether the minutes of the 6 March 2007 meeting should be considered as constituting the explanation under Article 16, we will first briefly explain the circumstances surrounding the 6 March 2007 meeting and the issuance of the minutes.

7.261 Thai Customs sent a letter dated 26 February 2007 inviting a legal auditor, Mr. Prasit Yeungsrikal, for PM Thailand (PWC ABAS) to the 2 and 6 March meetings with Thai Customs officials.<sup>685</sup> Although the invitation refers to meetings on 2 and 6 March, we understand that the relevant meeting for the purpose of this dispute is the 6 March meeting as that is the meeting where the explanation of Thai Customs' valuation determination allegedly took place. The letter states that the purpose of the 6 March 2007 meeting is to clarify queries regarding the sale, expenditure and administration data contained in PM Thailand's 2005 financial statements, which were submitted with PM Thailand's letter to Thai Customs dated 5 February 2007.<sup>686</sup> The letter, however, does not explain the context in which the queries on those data are raised. In this regard, Thailand presented a statement of a Thai Customs official (Mrs. Natina Santinyanont) that the invitation was to discuss the customs valuation of PM Thailand's imports and that they had requested information directly from both PM Thailand and PWC to enable Thai Customs to evaluate this determination. A statement from PWC ABAS, submitted by the Philippines, shows that representatives from both PWC ABAS and PWC WMS attended the meeting on 2 March 2007. As for the attendance by PWC officials of the 6 March 2007 meeting, the parties agree that the same legal auditor from PWC ABAS was present at the meeting in the morning. The parties present, however, contradicting statements regarding whether a representative from PWC WMS was allowed to be present at that morning meeting. The minutes of the meeting were sent out to PWC ABAS on 15 March 2007. The revised meeting minutes have the mailing date of 21 March 2007.

7.262 We will first consider whether the *meeting* of 6 March 2007 itself can form an explanation given by Thai Customs under Article 16. Article 16 specifically requires an explanation to be provided "in writing". In the light of this, we do not consider the discussion that took place during the meeting on 6 March 2007 as forming part of the written explanation provided in accordance with Article 16. Furthermore, the subject meeting took place *before* the final assessment of the customs value for the entries at issue was made, while the requirement to provide an explanation of the

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the start of the application of a safeguard measure would have to be disregarded automatically as it cannot afford legal justification for that measure.

... Since the demonstration of unforeseen developments must be included in the published report of the competent authorities it is necessary to look for the demonstration of unforeseen developments in the 'report of the competent authority', completed and published prior to the application of the safeguard measures" (Panel Report, *US – Steel Safeguards*, paras. 10.52-10.53).

<sup>685</sup> Exhibit THA-10.

<sup>686</sup> In the PM Thailand's letter of 5 February 2007, referred to in Thai Customs' invitation letter of 26 February 2007, PM Thailand requests Thai Customs to expedite its examination and valuation of the entries at issue and to use a testing methodology for valuation (Exhibit PHL-68).

determination of the customs value arises once the final assessment is made.<sup>687</sup> To recall, Thai Customs started issuing the Notices of Assessment for these entries as of 16 March 2007. In fact, evidence shows that further information was submitted to Thai Customs between the 6 March 2007 meeting and 16 March 2007.<sup>688</sup> We are also mindful that it is not clear based on the evidence before us whether PM Thailand was properly represented in this meeting in terms of both the capacity of the representatives, in particular auditors from PWC ABAS, who participated in the concerned meeting as well as the nature of their participation in the meeting. The considerations above, taken together, suggest that although discussions at the 6 March 2007 meeting may be viewed as part of the process of determining the customs value of the entries at issue, the meeting itself does not constitute a written explanation as to the final customs determination. We consider that accepting the position that a discussion(s) before the final assessment of the customs value was even made forms an explanation, would not be in line with the purpose of Article 16 to maintain transparency and due process in the customs valuation process.<sup>689</sup>

7.263 Next, we examine whether the minutes of the 6 March 2007 meeting should be considered as forming the explanation under Article 16.<sup>690</sup> We consider that this requires a consideration of both formalistic and substantive aspects of the explanation.

7.264 We first address the formalistic aspect of the minutes. The original minutes of the 6 March 2007 meeting were sent to PWC ABAS, whereas the explanation provided in the 12 April 2007 letter was directed to PM Thailand. All other written correspondences between Thai Customs and PM Thailand during the valuation process were also addressed to PM Thailand. We also note that the minutes are not referred to in the official explanation provided in the 12 April 2007 letter. We recall our consideration above that although the manner in which a written explanation is provided is up to the discretion of each Member, an explanation given in multiple parts or separate instruments must show structural and logical coherency so as not to deteriorate the transparency and due process objective of Article 16. Considering also that the parties are contesting whether PM Thailand is officially represented by PWC ABAS on its customs matters, we do not find that an instrument, which was sent to a legal auditor for the importer rather than the importer itself and not referred to in the formal letter providing for an explanation pursuant to Article 16, can form part of the written explanation.

7.265 As regards to the substantive aspect of the minutes, the minutes address the rejection of the transaction value, the other alternative valuation methods and the deductive valuation method used. The minute explanation given in the minutes are also much more detailed than those provided in the 12 April 2007 letter. However, as mentioned above, the revised minutes identify Article 5 of the Customs Valuation Agreement as the Article used, whereas the original minutes, which were the version sent to PWC ABAS, refer to Article 7. This is confirmed by the evidence showing that the original minutes have the date of 14 March 2007 and were sent out to PWC ABAS on 15 March

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<sup>687</sup> As the Panel in *US – Steel Safeguard* observed, under the Agreement on Safeguards, a report must be published *prior to* the imposition of a safeguard measure ("a necessary step in conducting an investigation"), whereas under the Customs Valuation Agreement, an explanation is to be provided *after* the final assessment of the customs value.

<sup>688</sup> Exhibits PHL-169 and PHL-170.

<sup>689</sup> We recall that subsequent to the 6 March 2007 meeting, PM Thailand provided, upon the requests from Thai Customs, further information evidencing that the transaction values were the prices actually paid; the GAQ prices; and its financial statements for 2003-2005 to Thai Customs by the letters dated 7 and 14 March 2007 (Philippines' response to Panel question No. 29; Exhibit PHL-169; PHL-170).

<sup>690</sup> The Philippines contends that the minutes cannot be used to supplement the explanation given in the 12 April 2007 letter. The Philippines, however, accepts that the Panel may nonetheless review the explanation given in the minutes as a contemporaneous statement of the determination in assessing Thailand's *substantive* obligations.

2007<sup>691</sup>, whereas the revised version has the mailing date of 21 March 2007. In these circumstances, we cannot consider the subject minutes as constituting part of the written explanation within the meaning of Article 16, even though they may have provided sufficient explanations to meet the procedural requirements under this article, because of the existence of both the original and revised minutes, which respectively provide different methods without an adequate explanation, combined with the lack of evidence confirming that the revised minutes were sent to PM Thailand.

7.266 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. Articles 5 and 7 of the Customs Valuation Agreement**

(a) The Philippines' claims under Articles 5 and 7

(i) *Evolution of the Philippines' arguments with respect to its claims under Articles 5 and 7*

7.267 The Philippines' arguments concerning its claims under Articles 5 and 7 have evolved throughout the proceedings before this Panel. The Philippines explains that this evolution took place, because in its first written submission and oral statement, Thailand denied that it had used Article 7 to value PM Thailand's cigarettes, and asserted that it used Article 5.<sup>692</sup> In its first written submission, the Philippines, therefore, essentially argued that: (i) Thailand violated Article 5 because it failed to value the entries at issue using the deductive valuation method under that provision; and (ii) Thailand violated Article 7, in particular 7.1, because it failed to use "reasonable means" in determining customs values by making erratic valuation decisions with respect to a series of entries that were made in the same circumstances.<sup>693</sup>

7.268 In its subsequent written submissions, the Philippines submits that "[it] makes *alternative claims* under Articles 5 and 7 with respect to Thailand's valuation of the [[xx.xxx.xx]] entries at issue, and that the alternative that applies depends on whether the Panel finds that Thailand valued these entries using Article 5 or 7".<sup>694</sup> In essence, the Philippines' alternative claims are as follows:

"Depending on which provision the Panel finds was used to value PM Thailand's goods, the Philippines makes the following alternative claims:

(1) If the Panel finds that Thailand used Article 7 of the Customs Valuation Agreement to value PM Thailand's cigarettes (the Philippines' primary claim), the Philippines claims that Thailand improperly applied:

(a) Article 5 by declining to use that provision for impermissible reasons, namely, a lack of contemporaneous financial information; and (underline in original)

(b) Article 7 of the CVA because it failed to make deductions for three elements that it was required to deduct; sales allowances; internal transportation; and provincial taxes.

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<sup>691</sup> Exhibits PHL-74 and THA-64. Thailand presented a copy of the registered mail addressed to PWC ABAS to prove that the 6 March meeting minutes were sent to PWC. The copy shows 15 March 2007 as the mailing date.

<sup>692</sup> Philippines' response to Panel question No. 26.

<sup>693</sup> Philippines' first written submission, paras. 361 and 376.

<sup>694</sup> Philippines' second written submission, para. 214.

(2) In the alternative, if the Panel finds that Thailand used Article 5 of the CVA to value PM Thailand's cigarettes (the Philippines' secondary claim), the Philippines claims that Thailand violated Article 5 because it failed to make deductions for three elements that it was required to deduct: sales allowances; internal transportation, and provincial taxes. Under this alternative, no claims are made under Article 7, because Article 7 is inapplicable.<sup>695</sup>

7.269 The Philippines explains that its arguments that Thailand failed to make certain deductions that it was required to make, are based on the calculations that Thailand provided in Exhibit THA-13, which Thailand disclosed for the first time through the current panel proceedings. The Philippines submits that it revised its arguments with respect to the WTO-inconsistent aspects of the deductive calculation (i.e. failure to deduct certain items) based on this new evidence.<sup>696</sup>

(ii) *Scope of the Philippines' claims*

7.270 In the light of the clarification of the Philippines' alternative arguments concerning its claims under Articles 5 and 7 above, we understand that the Philippines' claims are under both Articles 5 and 7 if the Panel decides that the valuation method used by Thai Customs was Article 7. If the Panel finds that the method used was Article 5, the Philippines' claim is limited to Article 5.

7.271 In its response to the Panel's second set of questions, the Philippines further submits that Thailand acted inconsistently with Articles 4 and 7.1 by failing to respect the sequencing obligations under these provisions. Given that the Philippines' claim in this regard was introduced only at the last stage of the proceeding, we wish to address the question of whether the Philippines' claims under Articles 4 and 7.1 are properly presented. We will first describe the Philippines' position with respect to Article 4 and the sequencing obligation under the Customs Valuation Agreement.

7.272 Although it is clear that Article 4 of the Customs Valuation Agreement is identified in the Philippines' Panel request, the Philippines has not pursued a sequencing claim under Article 4 in the course of the Panel proceedings. The question therefore remains as to whether the Philippines made a specific claim in this respect.

7.273 In *US – Certain EC Products*, the European Communities neither requested nor argued for findings under Article 23.2(a) of the DSU. There, the Appellate Body considered that although the inconsistent claim of a given provision may be within a panel's terms of reference, the European Communities failed to actually make such a claim. The Appellate Body ruled that in the absence of a specific claim of inconsistency by the complainant, the burden to present a prima facie case of violation would not be met:

"[A]s the request for the establishment of a panel of the European Communities included a claim of inconsistency with Article 23, a claim of inconsistency with Article 23.2(a) is within the Panel's terms of reference.

However, the fact that a claim of inconsistency with Article 23.2(a) of the DSU can be considered to be within the Panel's terms of reference does not mean that the European Communities actually made such a claim. An analysis of the Panel record shows that, with the exception of two instances during the Panel proceedings, the European Communities did not refer specifically to Article 23.2(a) of the DSU. Furthermore, in response to a request from the United States to clarify the scope of its

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<sup>695</sup> Philippines' second written submission, para. 217; response to Panel question No. 26.

<sup>696</sup> Philippines' response to Panel question No. 26, also referring to the Philippines' first oral statement, paras. 132-144 and 146.

claim under Article 23, the European Communities asserted only claims of violation of Articles 23.1 and 23.2(c) of the DSU; no mention was made of Article 23.2(a). Our reading of the Panel record shows us that, throughout the Panel proceedings in this case, the European Communities made arguments relating only to its claims that the United States acted inconsistently with Article 23.1 and Article 23.2(c) of the DSU.

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As the European Communities did not make a specific claim of inconsistency with Article 23.2(a), it did not adduce any evidence or arguments to demonstrate that the United States made a 'determination as to the effect that a violation has occurred' in breach of Article 23.2(a) of the DSU. And, as the European Communities did not adduce any evidence or arguments in support of a claim of violation of Article 23.2(a) of the DSU, the European Communities could not have established, and did not establish, a *prima facie* case of violation of Article 23.2(a) of the DSU.<sup>697,698</sup>

7.274 Similarly, in the present dispute, although Article 4 of the Customs Valuation Agreement was explicitly listed in the Panel request relating to the entries at dispute<sup>699</sup>, the Philippines neither specifically referenced a violation of Article 4 of the Customs Valuation Agreement, nor provided evidence or specific arguments to demonstrate a violation of that provision except for its passing statement in a response to the Panel question.<sup>700</sup> On the contrary, the Philippines has maintained the position that Article 4 is *not* relevant to its claim relating to valuation methodologies under Articles 5 and 7. The Philippines stated the following in its first written submission:

*"This is not a sequencing claim, but a claim that Article 5 was improperly applied in deciding that the customs value could not be determined under this provision. However, as a consequence of its improper failure to use Article 5, Thailand also failed to respect the proper sequencing of valuation methodologies in the CVA."*<sup>701</sup> (italics added)

7.275 Further, in response to a question from the Panel whether its claim that Thailand failed to respect the sequencing of valuation methodologies would be an issue that needed to be addressed under Article 4 of the Customs Valuation Agreement, the Philippines explicitly stated that it did not consider that Article 4 established a sequencing relationship between Articles 5 and 7. Specifically, the Philippines responded:

"Moreover, the Philippines considers that Article 4, properly interpreted, does not establish a sequencing relationship between Articles 5 and 7. Rather, Article 4 establishes that importers have a choice as to whether the importing Member should

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<sup>697</sup> (footnote original) "We recall that in our Report in *EC – Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), we held that:

... a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case." (WT/DS26/AB/R, WT/DS44/AB/R, adopted 13 February 1998, para. 104)

<sup>698</sup> Appellate Body Report, *US – Certain EC Products*, paras. 111, 112 and 114.

<sup>699</sup> Philippines' request for the establishment of a panel, para. 14.

<sup>700</sup> Philippines' response to Panel question 115. In the Philippines' list of claims included in its first and second written submission, reference to Article 4 cannot be found. (Philippines' first written submission, para. 25; second written submission, para. 604).

<sup>701</sup> Philippines' first oral statement, para. 125.



value goods under Article 5 before Article 6, or the reverse. That sequencing obligation is expressed in paragraphs 1 to 4 of the *General Introductory Commentary* to the CVA. [I]n any event, should the Panel consider that the sequencing obligation is found in Article 4, the Philippines notes that it made a claim under Article 4 in paragraph 14 of its Panel Request."<sup>702</sup>

7.276 The Philippines' position appears to have changed, however, when it provided written responses to a second set of questions from the Panel after the second substantive meeting. In response to the Panel question to the Philippines to clarify its claim under Articles 5 and 7 of the Customs Valuation Agreement, the Philippines, for the first time in the Panel proceedings, made explicit references to Article 4 violations:

"Thailand violated the sequencing obligations in Articles 7.1 and 4 by declining, for impermissible reasons, to use Article 5 to value the [[xx.xxx.xx]] entries".

...

Thailand's determination not to use Article 5 also leads to violations of Articles 7.1 and 4. These provisions establish sequencing obligations, requiring Members to value goods under Article 5 before Article 7. By failing to value goods under Article 5, when doing so was possible, Thailand violated these sequencing obligations."<sup>703</sup>

7.277 In the light of the absence of reference to or arguments concerning Article 4 of the Customs Valuation Agreement until the last stage of the Panel proceedings and given its contradicting views on the relevance of Article 4 through the course of the proceeding, it does not appear to the Panel that the Philippines had properly established and was genuinely pursuing a sequencing claim under Article 4 of the Customs Valuation Agreement. A change in the Philippines' position, expressed for the first time in this proceeding in response to a question from the Panel, is not specific enough to explain the sequencing obligation under Article 4 either. Further, in a footnote to its response, the Philippines continues to question whether Article 4 can be considered as setting forth a sequencing obligation.

7.278 Overall, it is our view that the Philippines' claim regarding Article 4 was neither timely nor specific enough to warrant its inclusion in the Philippines' request for findings and recommendations with respect to its claims under the Customs Valuation Agreement. Our view also reflects a consideration that Thailand's right to due process should not be negatively affected by the Philippines' inclusion of the concerned claim only at the last stage of the proceeding.

7.279 Next, we address the Philippines' claim under Article 7.1 in respect of Thailand's alleged violation of the sequencing obligation.<sup>704</sup> The text of Article 7.1 stipulates that resort to Article 7.1 for customs valuation is conditioned on the situation where "the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6". As such, Article 7 may only be applied if the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6. We understand that the Philippines' sequencing claim under Article 7.1 stems from this part of Article 7.1. In our view, this phrase in Article 7.1 lays down a condition or requirement that needs to be met before a customs authority can use the valuation principles under Article 7.1. As such, we do not consider that Article 7.1 can form the basis for an independent sequencing claim under the Customs Valuation Agreement. We consider that the Philippines' claim

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<sup>702</sup> Philippines' response to Panel question No. 27.

<sup>703</sup> Philippines' response to Panel question No. 115.

<sup>704</sup> We also consider, as in the case of the Philippines' claim under Article 4 of the Customs Valuation Agreement, the Philippines' claim under Article 7.1 was not timely presented.

pertaining to this part of Article 7.1 rather falls within the Philippines' claim that Thailand improperly applied the deductive valuation method under Article 7.1, which is addressed in Section VII.C.7(c)(ii) below.

7.280 In sum, with respect to the Thai Customs' valuation of the [[xx.xxx.xx]] entries at issue, the Philippines makes alternative claims under Articles 5 and 7 depending on the provision under which the Panel finds Thai Customs to have valued the entries at issue. For the reasons explained above, however, we do not find that the Philippines has properly made its sequencing claims under Articles 4 and 7.1.

(b) The provision under which to assess the valuation methodology used by Thai Customs to determine the customs value of the [[xx.xxx.xx]] entries at issue

(i) *Main arguments of the parties*

7.281 The **Philippines** is of the view that the Panel has to first decide whether Thailand valued the imported cigarettes at issue using Article 5 or Article 7; the Philippines' primary claim is that Thailand valued the entries at issue using Article 7.<sup>705</sup> The Philippines supports its position with the following evidence: (i) the original version of the minutes of the 6 March meeting<sup>706</sup>; (ii) Thai Customs' 12 April 2007 letter to PM Thailand stating that the imports were valued using [the method under Article 7]<sup>707</sup>; and (iii) a written statement provided by Thai Customs on [[xx.xxx.xx]] of the [[xx.xxx.xx]] notices of assessment that the imports were valued using [the method under Article 7].<sup>708</sup> The Philippines submits that Thailand's argument that Thai Customs used Article 5 of the Customs Valuation Agreement to value imported cigarettes is based on a revised version of the minutes of the 6 March meeting.<sup>709</sup>

7.282 **Thailand** argues that it is clear that Thai Customs used a deductive valuation method within the meaning of Article 5 of the Customs Valuation Agreement (Method 4 under Thai law) and, to that extent, its WTO-consistency should be determined by reference to Article 5, which governs deductive value calculations.<sup>710</sup> There was confusion which method under Thai law was being used to value the entries at issue. Specifically, Thailand explains that Thai Customs considered that its own regulations prevented it from using the deductive value under Method 5 where current financial information (financial statements for 2006 in this instance) was not available, but permitted it to use the deductive value under Method 6 using the most recent available financial information.<sup>711</sup> Thailand does not contest, for the purpose of this dispute, that Article 5 of the Customs Valuation Agreement does not require that the customs administration use company data from the year of importation (financial statements for 2006 in this instance) in determining the deductive value.<sup>712</sup> The evidence is clear, however, that Thai Customs used a deductive valuation method.<sup>713</sup>

7.283 Thailand submits that the only grounds for the Philippines' claims appear to be the Thai Customs' rejection of adjustments for sales allowances, provincial taxes and inland transportation. In this respect Thailand showed that Thai Customs properly declined to make each of these adjustments

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<sup>705</sup> Philippines' second written submission, para. 213; response to Panel question No. 26.

<sup>706</sup> Philippines' response to Panel question No. 26; Exhibit PHL-74.

<sup>707</sup> Philippines' response to Panel question No. 26; Exhibit PHL-70.

<sup>708</sup> Philippines' response to Panel question No. 26; Exhibit PHL-179.

<sup>709</sup> Philippines' second written submission, para. 216.

<sup>710</sup> Thailand's response to Panel question No. 28; second written submission, para. 112, also referring to its first written submission, paras. 175, 177 and 183-185.

<sup>711</sup> Thailand's first written submission, paras. 185-186.

<sup>712</sup> Thailand's first written submission, para. 188.

<sup>713</sup> Thailand's second written submission, para. 112, also referring to its first written submission, paras. 175, 177 and 183-185.

based on the evidence before it.<sup>714</sup> Regarding the relationship between Articles 5 and 7, Thailand is of the view that, depending on the grounds on which the Panel may find that Thai Customs acted inconsistently with Article 5, it may nevertheless still need to consider Thai Customs' determination under Article 7 of the Customs Valuation Agreement.<sup>715</sup>

(ii) *Analysis by the Panel*

7.284 With respect to the Philippines' claim concerning Thai Customs' valuation of the [[xx.xxx.xx]] entries at issue, the parties do not dispute that the substantive content of the method used by Thai Customs is a deductive valuation method.<sup>716</sup> Because the valuation methods to be employed under Article 7 include a deductive valuation method, both Articles 5 and 7 in principle cover the same disciplines for using a deductive valuation method.<sup>717</sup>

7.285 However, as the Philippines submits, because a given deductive valuation method cannot be simultaneously subject to both Articles 5 and 7, we must address the question of whether Thai Customs used the deductive valuation method under Article 5 or Article 7. We consider it important to determine the specific provision under which Thai Customs used the deductive valuation method particularly because of the sequencing obligation envisaged under the Customs Valuation Agreement. As we mentioned in Section VII.C.1 *au-dessus*, the transaction value is the primary basis for customs value determination under the Customs Valuation Agreement. If the transaction value is considered not applicable under Article 1, the customs administration is then required to use an alternative valuation method in the sequential order as provided in the Agreement, namely the respective valuation methods indicated in Articles 2, 3, 5, 6 and 7. While each of Articles 1, 2, 3, 5 and 6 provides a specific valuation method, Article 7 is slightly different from other provisions in nature, as Article 7 allows the use of the valuation methods laid down in Articles 1 through 6 with a reasonable flexibility.

7.286 In this connection, Thailand argues that, should the Panel find that a Member actually used a *deductive* valuation method, the use of this method should then be examined under Article 5 because "Article 5 of the CVA provides rules governing the deductive value method of customs valuation. Generally, therefore, the WTO-consistency of a deductive value determination is to be determined by reference to Article 5 of the CVA".<sup>718</sup> We may agree with Thailand that the provisions of Article 5 must be referred to in examining whether the rules governing the deductive valuation method were properly applied in a given case. However, we do *not* agree with Thailand's proposition that a

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<sup>714</sup> Thailand's second written submission, para. 110.

<sup>715</sup> Thailand's response to Panel question No. 33, referring back to its response to Panel question No. 28.

<sup>716</sup> The parties' response to Panel question No. 28; the Philippines' response to Panel question No. 30. Thailand's response in this regard is a bit more nuanced: it states that "Article 5 of the CVA provides rules governing the deductive valuation method of customs valuation. Generally, therefore, the WTO-consistency of a deductive value determination is to be determined by reference to Article 5 of the CVA. That said, there may be circumstances in which the WTO-consistency of a deductive valuation method may have to be also assessed under Article 7 of the CVA...". See also, Thailand's response to Panel question No. 33.

<sup>717</sup> Philippines' second written submission, para. 282. The Philippines therefore only refers back to its arguments under Article 7.1 (Thailand's failure to deduct three items) for its alternative claim under Article 5, in the event that the Panel finds that Thailand applied Article 5 of the Customs Valuation Agreement, as Thailand argues.

<sup>718</sup> Thailand's response to Panel question No. 28. In its first written submission, Thailand states that "[T]he issue before the Panel is whether the deductive value method actually used by Thai Customs was consistent with Article 5 of the CVA. It is largely irrelevant how that method was described under municipal law." (para. 187). In this connection, Thailand refers to the statement of the Panel on *US – Hot-Rolled Steel* that "[I]t is not, in our view, properly a panel's task to consider whether a Member has acted consistently with its own domestic legislation". (Panel Report, *US – Hot-Rolled Steel*, para. 7.267) (Thailand's first written submission, footnote 180).

deductive valuation method used must be examined under Article 5 regardless of the actual provision under which the customs administration used it. Furthermore, if we were to follow Thailand's reasoning, the obligations under the provisions of Article 7 will not be properly observed as parties may always be able to insist that the proper provision of the Customs Valuation Agreement under which a panel must examine a certain valuation method be the provision setting forth the substantive elements of that particular method, namely Articles 1 through 6, but not Article 7 which, as explained above, refers back to the methods under Articles 1 through 6. Therefore, we will now proceed to determine the provision under which Thai Customs valued the entries at issue.

7.287 The Philippines submits that the following evidence demonstrates Thai Customs' determination in its own terms to use the deductive valuation method under Article 7: (i) the original version of the minutes of the 6 March meeting<sup>719</sup>; (ii) Thai Customs 12 April 2007 letter to PM Thailand stating that the imports were valued using [the method under Article 7]<sup>720</sup>; and (iii) a written statement provided by Thai Customs on [[xx.xxx.xx]] of the [[xx.xxx.xx]] notices of assessment that the imports were valued using [the method under Article 7].<sup>721</sup> The evidence referred to by the Philippines does reveal that Thai Customs used the deductive valuation method under Article 7 because the documents referenced all specifically describe Article 7 as the provision under which the deductive valuation method was used in determining the customs value of the cigarettes at issue. Specifically, in the minutes of the 6 March meeting, Thai Customs stated: "the determination of customs values for the Company is calculated by Method 6, that is, the Fall Back method ( ... subject to provisions of Article 7 of GATT)"<sup>722</sup>; in the 12 April letter, it is stated that "[i]n the determination of custom values, Method 6, which is the "Fall Back" method, using the deductive method, was used ... under Article 7 of GATT"<sup>723</sup>; and the written statement by Thai Customs states for [[xx.xxx.xx]] out of the [[xx.xxx.xx]] notices of assessment "no. 6 Fall Back Deductive Method ... " was used.<sup>724</sup> Based on the evidence before us, therefore, we can preliminarily determine that Thailand used the deductive valuation method pursuant to Article 7 of the Customs Valuation Agreement.

7.288 In this connection, the only evidence that makes reference to the deductive valuation method under Article 5 is the revised minutes of the 6 March 2007 meeting.<sup>725</sup> However, we note that Thailand also refers to the *original* minutes, not the revised minutes, in its first written submission in stating that "[i]n the minutes of the 6 March 2007 meeting, Thai Customs stated that it was using the deductive valuation method pursuant to Method 6 of Thai Customs' regulations, which corresponds to the "fall back" method of Article 7, rather than pursuant to Method 5 of the regulations, which would correspond to Article 5 of the Customs Valuation Agreement. Thus, while the deductive value was used, the provisions of municipal law relied upon were those relating to the fall back method, not the provisions relating to the deductive valuation method as such". Thailand then continues to explain that there was confusion which method under Thai law was being used to value the entries at issue. These circumstances show that despite the reference to the deductive valuation method under Article 5 in the revised minutes of the 6 March 2007 meeting and regardless of Thai Customs' mistaken understanding of the nature of the requirements under Article 5, Thailand itself acknowledges that Thai Customs used the deductive valuation method under Article 7, not Article 5.

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<sup>719</sup> Philippines' response to Panel question No. 26; Exhibit PHL-74.

<sup>720</sup> Philippines' response to Panel question No. 26; Exhibit PHL-70.

<sup>721</sup> Philippines' response to Panel question No. 26; Exhibit PHL-179.

<sup>722</sup> Exhibit PHL-74, p. 5.

<sup>723</sup> Exhibit PHL-70.

<sup>724</sup> Exhibit PHL-179. No. 6 fall back deductive method is the method used under Article 7 GATT.

<sup>725</sup> Exhibit THA-37, pp. 7-8.

7.289 In the light of the foregoing, we conclude that Thai Customs used the deductive valuation method pursuant to Article 7. As such, the proper provision under which we must examine Thai Customs' valuation of the entries at issue is Article 7.

- (c) Whether Thai Customs determined the customs value of the imported cigarettes at issue inconsistently with the obligations of the Customs Valuation Agreement

7.290 Having found that Thai Customs' valuation decision must be evaluated under Article 7, we will now address the Philippines' claim that Thailand improperly applied the following provisions: *first*, Article 5 by declining to use that provision for impermissible reasons, namely, a lack of contemporaneous financial information; and (underline in original) *second*, Article 7 because it failed to make deductions for three elements that it was required to deduct; sales allowances; provincial taxes; and internal transportation.

(i) *The Philippines' claim under Article 5*

7.291 The Philippines claims that if the Panel concludes that Thai Customs used the deductive valuation method under Article 7, it should find that Thailand violated Article 5 by declining to use that provision for impermissible reasons, namely, a lack of contemporaneous financial information. Article 5.1(a) provides:

"Article 5

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:
  - (i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;
  - (ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;
  - (iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and
  - (iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

..."

7.292 We do not find in the text of Article 5 any specific obligation according to which Members must use the method under that provision rather than the subsequent valuation methods. In other words, the provisions of Article 5 do not provide for the criteria to be used in deciding whether the

decision not to use the valuation method under Article 5 is consistent or not with the obligations under Article 5. Rather, Article 5 prescribes the principles to be applied in using the deductive valuation method once the customs authority has decided to use the deductive valuation method under Article 5. In our view, declining to use Article 5 for impermissible reasons, namely, a lack of contemporaneous financial information, would, for example, lead to a finding that the condition for resorting to a method under Article 7.1 is not satisfied in the light of the text of the provisions under Article 7.1. We address this question in the following section. We therefore find that the Philippines failed to establish a *prima facie* case for its claim under Article 5.

(ii) *The Philippines' claim under Article 7.1*

7.293 The Philippines claims that Thai Customs valued the entries at issue inconsistently with Article 7.1 because it failed to make deductions for sales allowances, provincial taxes and internal transportation costs. Thailand argues that PM Thailand did not provide sufficient evidence before Thai Customs at the time of determination to justify the requested deductions.

7.294 We will start our analysis by examining the text of Article 7.1.

7.295 Article 7.1 provides:

"If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of the GATT 1994 and on the basis of data available in the country of importation."

7.296 Paragraph 2 of the Interpretative Note to Article 7 in turn provides:

"The methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 7."

7.297 As noted above, Article 7.1 sets forth that the customs value shall be determined by a valuation method under Article 7 *if* the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6 of the Customs Valuation Agreement.<sup>726</sup> This condition does not appear to have been met in the factual circumstances of this case because Thai Customs had necessary financial data (financial statement for FY 2005) on the basis of which it could have determined the customs value of the imported goods under the provisions of Article 5. As Thailand acknowledges, Thai Customs however decided to use a deductive valuation method under Article 7 instead because it mistakenly believed that only the most current financial data, but not those from prior years, could be used under Article 5. In our view, this could have provided a basis for finding that Thai Customs' use of a deductive valuation method is not consistent with the requirements under Article 7.1. However, given that the Philippines' claim is not based on this particular aspect of Article 7.1<sup>727</sup>, we will continue with our examination of whether Thai Customs otherwise complied with the requirements of Article 7.1 to use reasonable means consistently with the principles and general provisions of this Agreement and of Article VII of the GATT 1994 and on the basis of data

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<sup>726</sup> We recall our finding in para. 7.279 above that the Philippines' claim under Article 7.1 in respect of Thailand's alleged violation of the sequencing obligation must have been brought under the Philippines' claim that Thai Customs improperly applied the deductive valuation method under Article 7.1.

<sup>727</sup> As addressed in detail in the subsequent sections, the Philippines claims that Thailand violated Article 7.1 because it failed to make deductions for sales allowances, provincial taxes and internal transportation costs.

available in the country of importation, in applying the deductive valuation method to determine the customs value of the cigarettes at issue.

(iii) *Whether Thai Customs applied the deductive valuation method inconsistently with Article 7.1*

#### Introduction

7.298 The text of Article 7.1, read together with paragraph 2 of the Interpretative Note to Article 7, provides that when using a deductive valuation method under Article 7.1, a customs authority is required to apply the same principles that would be applied under Article 5, with allowance for a reasonable flexibility where Article 5 cannot be applied strictly. The parties' arguments concerning Thai Customs' valuation of the entries at issue are therefore based on the specific principles to be applied in using the deductive valuation method as prescribed in Article 5.

7.299 The parties do not dispute that Thai Customs did *not* deduct three items – sales allowances<sup>728</sup>, provincial taxes and transportation costs. The Philippines claims that Thailand's decision is inconsistent with the obligations under Article 5. Thailand takes the position that Thai Customs was not able to deduct the three items at issue because the data provided by PM Thailand for the deductions were not sufficient. In response, the Philippines puts forwards arguments relating to both procedural and substantive aspects of the Thai Customs' application of the deductive valuation method to the entries at issue.

7.300 Specifically, the Philippines submits that because Thailand failed to explain the reason why it decided not to deduct the requested items at the time of determination pursuant to Article 16, the standard appropriate for this Panel's review of the Philippines' claim under Article 7.1 prevents the Panel from basing its decision on *ex post* explanations provided by Thailand in this proceeding.<sup>729</sup>

7.301 The Philippines further underlines the alleged *procedural* deficiency in the Thai Customs' determination: Thai Customs failed to give the importer an opportunity to explain the information provided and/or to present Thai Customs with further information and data that Thai Customs considered necessary for the requested deductions.<sup>730</sup>

7.302 The Philippines also claims that Thai Customs' decision not to deduct the three items is *substantively* inconsistent with the principles of the deductive valuation method under Article 5. Essentially, the parties disagree on how Article 5.1(a) should be interpreted in respect of the deductibility of the three items at issue as well as on whether Thai Customs' decision not to deduct the concerned items is consistent with Article 5.1(a).

7.303 We will start our analysis with the description of the valuation process by Thai Customs in assessing the customs values of the entries at issue.

7.304 Before turning to the analysis, we observe that the Philippines takes the position that it has put forward another claim under Article 7.1, namely that Thailand acted inconsistently with Article 7.1 of the Customs Valuation Agreement *by deducting incorrect amounts for VAT and excise tax for certain transactions*.<sup>731</sup> According to the Philippines, this is a claim additional to the claim that Thai Customs violated Article 7.1 by failing to deduct certain items inconsistent with the principles under Articles 7.1 of the Customs Valuation Agreement. In our view, while the alleged deduction of incorrect

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<sup>728</sup> We note that in their submissions the parties refer to "sales allowances" and "sales discounts" interchangeably, in this report we will only refer to "sales allowances".

<sup>729</sup> Thailand's second written submission, paras. 232-279.

<sup>730</sup> Thailand's second written submission, paras. 264-267.

<sup>731</sup> Philippines' comments on the Interim Review Report, paras. 36-42 (para. 6.78 of the Interim Review section of this Report).

amounts for VAT and excise tax may form an additional *argument* for the Philippines' claim against Thai Customs' application of the deductive valuation method under Article 7.1, it does *not* constitute a separate *claim* as argued by the Philippines.<sup>732</sup> In the Descriptive Part of the Report, the Philippines requests that the Panel find that "Thailand violated Article 7.1 of the Customs Valuation Agreement by incorrectly assessing the deductive value of PM Thailand's transactions, specifically by failing to deduct three claimed items and by deducting incorrect amounts for VAT and excise tax for certain transactions".<sup>733</sup> In our view, this statement indicates that the Philippines has made one claim under Article 7.1 based on two sets of arguments. Having so considered and to the extent that we examine and make a finding in the following sections with respect to the Philippines' claim under Article 7.1 based on Thai Customs' decision not to deduct the three items at issue, we do not find it necessary to examine the same claim based on another set of arguments.<sup>734</sup>

#### Factual background

7.305 Following a communication with Thai Customs on 15 February 2007<sup>735</sup>, PM Thailand submitted to Thai Customs on 16 February 2007 its financial statement for 2005 to be used by Thai Customs in calculating the deductive value.<sup>736</sup> In its letter of 21 February 2007, PM Thailand then made a request for the deduction of sales allowances and provincial taxes.<sup>737</sup> Thailand does not dispute this either. The same letter also indicates the GAQ price and the amounts to be deducted for VAT and profits and general expenses (i.e. gross margin). This letter does not include a request for the deduction of transportation costs.

7.306 On 27 February 2007, Thai Customs sent PM Thailand a letter in which it requested information regarding the import price per unit, the highest first-tier selling price (i.e. the GAQ price), the retail price between 1 January and 31 December 2006, and PM Thailand's gross margin for 2006, with a profit and loss statement certified by the auditor and copies of PND 50 for 2006.<sup>738</sup> According to the Philippines, Thai Customs' letter of 27 February therefore sought additional information regarding two elements raised by PM Thailand in the 21 February letter, namely the GAQ price and

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<sup>732</sup> The Appellate Body made the following statement in this regard:

"By '*claim*' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision. Arguments supporting a claim are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties" (Appellate Body Report, *Korea – Dairy*, para.139 (footnote original omitted)).

<sup>733</sup> See para. 3.1 of this Report.

<sup>734</sup> Even if we were to consider it as a separate claim, we are of the view that the Philippines neither pursued nor substantiated its claim in a timely and sufficient manner to warrant the inclusion of the claim in our examination and findings. Further, the same consideration also applies even if we decided to proceed with the examination of this additional set of arguments.

<sup>735</sup> The content of this communication are not on the record before the Panel (Thailand's response to Panel question No. 10; first oral statement (para. 31)). Thailand submits that the sentence "we wish to confirm our advice yesterday" in the 16 February letter (Exhibit PHL-137) from PM Thailand confirms the fact that on 15 February 2007, oral communications took place. The Philippines does not dispute this either.

<sup>736</sup> Exhibit PHL-137.

<sup>737</sup> Exhibit THA-39.

<sup>738</sup> Exhibits THA-11; PHL-18. We note that these two exhibits refer to the identical letter. "PND 50" is the income tax return form for companies or juristic partnerships. (Philippines' second written submission, para. 234, footnote 197).



the gross margin. PM Thailand responded to the Thai Customs' request for additional information on the GAQ prices by a letter dated 7 March 2007.<sup>739</sup>

7.307 We also note that on 2 March 2007 Thai Customs sent PWC ABAS (the auditors of PM Thailand) and PM Thailand respectively two separate letters requesting specific information to clarify PM Thailand's letter of 5 February 2007.<sup>740</sup> PM Thailand responded by a letter of 6 March 2007 wherein it submitted the trial balance of the year 2005 and forecasted the trial balance of the year 2006.<sup>741</sup> As for the request for information on the computed value, PM Thailand stated in the letter that it did not have the information of production, such as the price of material, production cost, profit and general expenses of the foreign manufacturer, as the company is the cigarette importer as well as the distributor in Thailand. In the letter, PM Thailand also expresses its opinion that given the sequential obligation under the Customs Valuation Agreement and as there are no identical or similar goods, the deductive valuation method is the next method used in testing the acceptance of the imported value.

Thai Customs' application of the deductive valuation method – standard of review

Main argument of the parties

7.308 The **Philippines** submits that the Panel cannot conduct a *de novo* review of the evidence before the customs authority.<sup>742</sup> Instead, if PM Thailand claimed a deduction for a particular item, the Panel should establish whether the authority adequately explained how the evidence supported its decision to reject the claimed deduction. The Philippines notes that a customs authority cannot simply *ignore* a requested deduction, without explaining, when requested, why the evidence does not support a deduction.<sup>743</sup> The Philippines considers that the WTO covered agreements, and the Customs Valuation Agreement in particular, are not formulated in such a way that an importer must find a route by using the WTO dispute settlement mechanism so as to obtain an explanation on why the domestic customs authority refused a claimed deduction.

7.309 The Philippines argues that Thailand makes *ex post* objections to the sufficiency of the information which PM Thailand provided to Thai Customs in support of certain deduction claims. The Philippines contends that Thailand's arguments to the Panel on the deductibility of the items claimed by PM Thailand are entirely *ex post* explanations which Thai Customs did not provide to PM Thailand at the time of determination.<sup>744</sup> If Thai Customs had raised these queries, when they arose, PM Thailand could have produced supporting evidence for the figures. According to the Philippines, the appropriate forum for a first determination on the sufficiency of the evidence concerning items claimed for deduction from the customs values is not the WTO, even less if the arguments are based on *ex post* explanations which the authority failed to provide.<sup>745</sup> The failure of Thai Customs to articulate its concerns about PM Thailand's evidence limits the examination of Thai Customs' reasoning and decision-making process. In short, there is no Thai Customs determination or explanation that the Panel can review.<sup>746</sup> For the Panel to now decide that the evidence was, or was

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<sup>739</sup> Exhibit PHL-169.

<sup>740</sup> Exhibit THA-12. Thai Customs sought to confirm with PWC ABAS whether the "reserve tobacco stamp tax" of a certain amount in the financial statement of 2005 was derived by following the accounting standard. Thai Customs requested PM Thailand for information on the trial balance of 2005 and 2006 and the computed value of certain items (e.g. material costs and labour costs in packaging goods).

<sup>741</sup> Exhibit THA-92.

<sup>742</sup> Philippines' second written submission, paras. 225-229.

<sup>743</sup> Philippines' second written submission, para. 226 (emphasis in original).

<sup>744</sup> Philippines' second written submission, paras. 228, 247 and 272.

<sup>745</sup> Philippines' second written submission, paras. 255, 272-273 and 278.

<sup>746</sup> Philippines' second written submission, paras. 228 and 272.

not, sufficient to warrant a deduction, it would have to conduct a *de novo* examination of the evidence based on Thailand's *ex post* explanations, which is not the task of a WTO panel.

7.310 **Thailand** did not provide any specific counterarguments in this regard. We understand, however, that its position on the standard appropriate for the Panel's review of the Philippines' claims under Article 1.1 and 1.2(a) of the Customs Valuation Agreement would also stand with respect to the Article 7.1 claim.

#### Analysis by the Panel

7.311 Our mandate in examining the Philippines' claim under Article 7.1 is to make an objective assessment of whether Thai Customs properly applied the deductive valuation method in determining the customs values of the cigarettes at issue in accordance with the disciplines under Article 7.1 and the principles of the deductive valuation method as prescribed in Article 5. We considered above that in objectively assessing the factual aspects of the customs administration's determinations, we may neither conduct a *de novo* review nor completely defer to the administration's determination.

7.312 In examining the Philippines' claim under Article 1.1 and 1.2(a) in respect of Thai Customs' rejection of the transaction value, we clarified that our objective assessment of the claims must be based on the grounds and explanations provided by Thai Customs at the time of determination pursuant to Articles 1.2(a) and 16. Under Article 16, in particular, a customs authority is required to make clear and give details of not only the basis for rejecting the transaction value, but also how the chosen deductive valuation method was applied for the calculation of the final customs value.

7.313 In applying a valuation method falling under Article 7, customs authorities are required under Article 7.3 to *inform* the importer in writing of the customs value determined under Article 7 and the method used to determine such value if the importer so requests. As we address in Section VII.C.7(d) *au-dessous*, the Philippines made a claim under Article 7.3 in this dispute. In order to set the standard for our review of the Philippines' claim under Article 7.1, we consider the obligation imposed on the customs authority under Article 7.3 also relevant. This is because our objective assessment of Thailand's compliance with its obligations under Article 7.1 requires us to base our review of the factual determinations made by Thai Customs when it applied the valuation method under Article 7.1 on Thai Customs' explanations and information at the time of determination.

7.314 Accordingly, we must assess whether Thai Customs' application of the deductive valuation method was consistent with Article 7.1 and Article 5. Particularly, in deciding whether Thai Customs' decision not to deduct certain items was supported by the factual evidence before it at the time of determination, we will base our assessment on Thai Customs' explanations provided pursuant to Article 16 as well as information given to the importer under Article 7.3.

#### Thai Customs' application of the deductive valuation method – procedural aspect

##### Main arguments of the parties

7.315 The **Philippines** submits that on 21 February 2007, PM Thailand sent a letter to Thai Customs indicating the GAQ price and the amounts to be deducted for sales allowances, VAT, provincial tax, and profits and general expenses.<sup>747</sup> According to the Philippines, the letter of 21 February 2007 mistakenly did not mention the deduction of transportation costs,<sup>748</sup> however, Thai Customs knew that PM Thailand had included a deduction for internal transportation costs in annual

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<sup>747</sup> Philippines' second written submission, para. 233; Exhibit THA-39. In its submission, the Philippines mistakenly refers to Exhibit PHL-68.

<sup>748</sup> Philippines' second written submission, para. 277.

filings covering the three year period from 2003 to 2005 for either "inland freight" or "domestic transportation".<sup>749</sup>

7.316 In response to this, Thai Customs sent PM Thailand a letter on 27 February 2007 to request more information on import price per unit, the highest first-tier selling price (i.e. the GAQ price), the retail price between 1 January and 31 December 2006, PM Thailand's gross margin for 2006 with a profit and loss statement certified by the auditor and copies of PND 50 for 2006 by 7 March 2007.<sup>750</sup> The Philippines points out that in this letter of 27 February 2007, Thai Customs did not request further information on the deductions for sales allowances and provincial taxes as presented in its letter of 21 February.<sup>751</sup>

7.317 In this connection, the Philippines underlines that the customs authority and the importer must cooperate with a view to determining a proper basis of the value for customs purposes. This is particularly important under Article 5 of the Customs Valuation Agreement because the importer typically possesses the relevant information for a deductive calculation, whereas the customs authority knows what specific information it requires to make certain deductions.<sup>752</sup> As such, the Philippines argues that if Thai Customs had queries concerning PM Thailand's claimed deductions, it should have engaged in a "process of consultation" with PM Thailand. Thai Customs' failure to indicate clearly the evidence it required and its failure to seek further information precludes Thailand from now relying on the fact that PM Thailand did not provide the required supporting information. If Thai Customs considered, at the time, that additional information was required to support the 21 February deductions claimed for sales allowances and provincial tax, it was required to include these items in its 27 February request for additional information.<sup>753</sup>

7.318 On 7 March 2007, PM Thailand sent a letter to Thai Customs in response to the request for information of 27 February. In this letter, PM Thailand submitted the additional information as requested by Thai Customs and it included a spreadsheet showing the GAQ price and additional information PM Thailand thought might be relevant to the GAQ price, including absolute and relative volume amounts, total sales receivable and the net sales receivable, with the deductions to account for the difference between the two ("Less VAT", "Less Discount", "Less Other Sales Allowance", and "Less P. Tax").<sup>754</sup> According to the Philippines, based on the data in this spreadsheet, Thai Customs accepted the GAQ price shown in the spreadsheet.<sup>755</sup>

7.319 The Philippines further argues that Exhibit THA-13 provides a deductive calculation for the entries at issue and that the heading of the Exhibit shows that the calculation was prepared by Thai Customs "for [the] 6 March Meeting".<sup>756</sup> In the Philippines' view, this calculation shows that Thai Customs deducted customs duties, all internal taxes, and an amount for profits and general expenses. According to the Philippines, therefore, all of the elements to be deducted in the calculation had been finalized by 6 March 2007, before PM Thailand's requested response was even received on 7 March.

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<sup>749</sup> Exhibits PHL-40, PHL-41, PHL-42 and PHL-43.

<sup>750</sup> Philippines' second written submission, para. 234; Exhibit PHL-18. "PND 50" is the income tax return form for companies or juristic partnerships. (Philippines' second written submission, para. 234, footnote 197).

<sup>751</sup> Philippines' second written submission, para. 235.

<sup>752</sup> Philippines' second written submission, para. 230.

<sup>753</sup> Philippines' second written submission, paras. 254 and 257.

<sup>754</sup> Philippines' second written submission, para. 242; Exhibit PHL-169.

<sup>755</sup> Philippines' second written submission, para. 242.

<sup>756</sup> The Philippines refers to the meeting held on 6 March 2007 concerning the prescription of import prices of cigarettes between several Thai government departments and two accountants of PricewaterhouseCoopers (the "6 March Meeting") (Philippines' first written submission, para. 336). It should be noted though the the parties disagree as to whether the two accountants of PricewaterhouseCoopers represented PM Thailand during this meeting, see para. 7.261 above.

The Philippines asserts that therefore by 6 March, Thailand had already decided not to deduct sales allowances or provincial taxes.<sup>757</sup>

7.320 **Thailand** submits that the Philippines' objection to the Thai Customs decision not to deduct sales allowances, provincial taxes and transportation costs are based largely on procedural, not substantive, grounds.<sup>758</sup> Regarding the Philippines' position that Thai Customs should have continued to collect more information regarding the deductions, Thailand emphasizes that PM Thailand itself had twice requested Thai Customs to expedite the assessments and use the deductive valuation method.<sup>759</sup> In the light of this, in Thailand's view, under the standard of review proposed by the Philippines, the Panel should defer to Thai Customs' exercise of its discretion to expedite the assessments in the manner requested by the importer at that time.

7.321 Thailand submits that in response to PM Thailand's letter of 5 February 2007<sup>760</sup>, Thai Customs expedited its examination and began to issue assessment notices for the entries at issue within weeks. Thailand argues that there were several documented events in "a process of consultation" between Thai Customs and PM Thailand regarding the entries at issue.<sup>761</sup> According to Thailand, PM Thailand's letter of 5 February 2007 was first followed up by a meeting between Thai Customs and PM Thailand on 15 February 2007.<sup>762</sup> Upon Thai Customs' requests for more information presented between 16 and 20 February 2007, PM Thailand then provided the requested information in its letter of 21 February 2007.<sup>763</sup> Thailand emphasizes that the letter does not refer to the deduction of transportation costs.<sup>764</sup>

7.322 In response to the 21 February 2007 letter by PM Thailand, Thailand sent a request for further information on 27 February 2007.<sup>765</sup> Thailand acknowledges that PM Thailand responded to this request by a letter on 7 March 2007 including a spreadsheet on the GAQ price. However, Thailand asserts that the price adjustments requested by PM Thailand were not supported by the information provided by PM Thailand in the spreadsheet.<sup>766</sup> Moreover, the spreadsheet does not contain any claim for deduction of transportation costs.

7.323 Thailand argues that also in response to PM Thailand's 5 February 2007 letter, Thai Customs sent a letter on 2 March 2007 to PM Thailand requesting additional information on trial balance and computed value.<sup>767</sup> In a letter dated 6 March 2007, PM Thailand provided the requested information on the trial balance and explained that it could not provide information on the computed value.<sup>768</sup>

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<sup>757</sup> Philippines' second written submission, paras. 238-239.

<sup>758</sup> Thailand's second oral statement, para. 45.

<sup>759</sup> Thailand's second oral statement, paras. 46-47, referring to Exhibits PHL-69 and THA-92.

<sup>760</sup> Thailand's first written submission, para. 50; second written submission, para. 51; Exhibit PHL-68. In its first written submission, Thailand mistakenly refers to exhibit PHL-69. In the 5 February letter, PM Thailand put forward its concerns regarding the guarantee values requested by Thai customs and the rejection of PM Thailand's import prices and the fact that the reason provided by Thai Customs was that the buyer and seller were related. Moreover, PM Thailand stated that it wanted to establish a common understanding for going forward and to expedite the assessment process and issue an assessment notice.

<sup>761</sup> Thailand's first written submission, para. 157; second oral statement, para. 31.

<sup>762</sup> Thailand's response to Panel question No. 10; second oral statement, para. 31; Exhibit PHL-137. Thailand states that this meeting of 15 February 2007 was also referred to by the Philippines in its letter of 16 February 2007.

<sup>763</sup> Thailand's response to Panel question No. 10; Exhibit THA-39.

<sup>764</sup> Thailand's response to Panel question No. 29.

<sup>765</sup> Thailand's first written submission, para. 52; Exhibit THA-11.

<sup>766</sup> Thailand's response to Panel question No. 29; Exhibit PHL-169.

<sup>767</sup> Thailand's response to Panel question No. 10; Exhibit THA-12.

<sup>768</sup> Exhibit THA-92.

Thailand submits that at a meeting held on 6 March 2007, the method for calculating the deductive value was discussed with accountants from PWC ABAS (auditors for PM Thailand).<sup>769</sup>

7.324 Contrary to the Philippines' argument that in the light of the deductive value calculations available at the 6 March meeting (Exhibit THA-13), Thai Customs could not have taken into account information submitted by PM Thailand on 7 March 2007, Thailand asserts that Thai Customs did not make adjustments because the 7 March 2007 information did not warrant such changes. Had PM Thailand submitted any information subsequent to that meeting that warranted revisions to those calculations, Thai Customs could and would have made appropriate revisions.<sup>770</sup> Thailand agrees with the Philippines that from 16 March 2007 onwards, Thai Customs started issuing notices of assessment for entries by PM Thailand since August 2006, in which it rejected the declared transaction values by PM Thailand. It also confirms that PM Thailand wrote a letter on 5 April 2007 asking for clarification.<sup>771</sup> Thai Customs responded by letter on 12 April 2007, explaining that the deductive valuation method was used.<sup>772</sup>

#### Analysis by the Panel

7.325 The parties do not dispute that PM Thailand made a request for the deduction of sales allowances and provincial taxes in its letter dated 21 February 2007.<sup>773</sup> Thailand asserts, however, that these items could not be deducted because the information and data submitted together with this letter was not sufficient for Thai Customs to make the requested deductions. The Philippines argues that if Thai Customs considered the information and the data submitted on 21 February 2007 insufficient, Thai Customs should have given PM Thailand an opportunity to further explain the submitted data and to provide the further information it considered necessary to make the requested deductions.

7.326 Paragraph 2 of the General Introductory Commentary to the Customs Valuation Agreement provides:

"[W]here the customs value cannot be determined under the provisions of Article 1 there should normally be *a process of consultation* between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. ... *A process of consultation* between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes."

7.327 Although the first sentence of paragraph 2 refers to "value under the provisions of Article 2 or 3", we consider that the spirit of the Customs Valuation Agreement envisaged under this paragraph, namely the determination of customs value through *a process of consultation* between the customs administration and importer, equally applies to other valuation methods. The phrase "using reasonable means consistent with the principles and general provisions of this Agreement" in Article 7.1 also supports this view. As the Philippines submits, while the importer is the party that typically possesses relevant information for a deductive calculation, it is the customs authority that knows the specific information necessary to accept the requested deductions. Viewed in this light, it

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<sup>769</sup> Thailand's response to Panel question No. 10.

<sup>770</sup> Thailand's second oral statement, para. 45.

<sup>771</sup> Thailand's first written submission, paras. 61 and 70; Exhibit PHL-69.

<sup>772</sup> Thailand's first written submission, para. 64; Exhibit PHL-70.

<sup>773</sup> As for the transportation costs, the Philippines does not contest that PM Thailand did not include the item in the 21 February 2007 letter. We address in Section VII.C.7(c)(iii) the question of whether an importer must make a specific request for the deduction of transportation costs for a customs authority to make such a deduction.

is difficult to conceive that the drafters of the Agreement would have intended a process of consultation between the customs administration and importer to be limited solely to the valuation process under Article 2 or 3. Neither does Thailand appear to dispute that the process of determining a customs value under the principles of Article 5 should be "a process of consultation". Rather, Thailand argues that there *was* in fact a process of consultation between Thai Customs and PM Thailand regarding the entries at issue.<sup>774</sup>

7.328 Following PM Thailand's letter of 21 February 2007, Thai Customs requested PM Thailand to provide more information on the import price per unit, the highest first-tier selling price (i.e. the GAQ price), the retail price between 1 January and 31 December 2006, and PM Thailand's gross margin for 2006, with a profit and loss statement certified by the auditor and copies of PND 50 for 2006, through its letter on 27 February 2007.<sup>775</sup> Thai Customs, however, did *not* request any further information concerning sales allowances and provincial taxes. We also understand that in a meeting subsequently held on 6 March 2007, Thai Customs addressed issues relating to the method for calculating the deductive value although it is not clear whether and, if so, to what extent the representatives from PWC ABAS participated in the discussion. The deductive calculation shown in Exhibit THA-13 confirms that Thai Customs had considered prior to the 6 March 2007 meeting the valuation method to be applied to determine a customs value of the entries at issue.<sup>776</sup> The calculation in Exhibit THA-13, however, does not reflect the deductions requested by PM Thailand through its 21 February 2007 letter. This is despite the fact that the minutes of the 6 March 2007 meeting indicate that at the time of that meeting, Thai Customs was aware of questions relating to the deductibility of certain items.<sup>777</sup>

7.329 In the light of these circumstances, it is not clear to us why Thai Customs neither posed any question nor requested further information or data relating to sales allowances and provincial taxes from PM Thailand. This is particularly the case as Thai Customs did make a request for more information on other items through its 27 February 2007 letter to PM Thailand. In our view, if upon receiving the specific request for the deduction of sales allowances and provincial taxes, Thai Customs had doubts about the deductibility of those items, as it explained to the Panel in this proceeding, it could and should have communicated such views to the importer during the valuation process.<sup>778</sup>

7.330 Regarding the deduction of transportation costs, we note that although PM Thailand (mistakenly) omitted to request deduction of these costs, Thailand should have inquired as to whether such a deduction was needed. First, deduction of "the usual costs of transport" is specifically mentioned in Article 5.1(a)(ii), and therefore a common item to be deducted. Second, the minutes of the 6 March meeting show that Thailand was aware of the fact that in the calculation of the deductive value, transportation costs must be deducted. Third, Thai Customs was aware of the fact that PM Thailand had included a deduction for internal transportation costs in annual filings covering the

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<sup>774</sup> See para. 7.321.

<sup>775</sup> Exhibit THA-11.

<sup>776</sup> Exhibit THA-13 was revised by Exhibit THA-71, but the only changes incorporated in the revised version were the dates to which the calculations in the exhibit applied, hence those changes have no influence on the discussion in this section.

<sup>777</sup> The minutes of the 6 March 2007 meeting also read that "there was a weak point in certain issues in determining customs values, that is, there should be clarification regarding the calculation methods, the meaning of the words 'normal commission and general expenses', 'insurance cost', 'other taxes from selling of things'" (original minutes, Exhibit PHL-74, p. 8).

<sup>778</sup> We note a general lack of definite and clear rules on the type of deductible items under Article and the kind and nature of evidence required for the necessary deduction. This, in our view, provides more reason for customs authorities to engage in the process of consultation with the importer in using the deductive valuation method.

three year period from 2003 to 2005 for either "inland freight" or "domestic transportation".<sup>779</sup> We believe, therefore, that although PM Thailand did not specifically request deduction of the transportation costs, Thailand should have deducted these costs based on the information put forward by PM Thailand, or if it considered this information to be insufficient, it again could and should have communicated such views to the importer during the valuation process.

7.331 We note that in response to the Philippines' position that Thai Customs should have continued to collect more information regarding the deductions if the information submitted was insufficient, Thailand emphasizes that Thai Customs exercised its discretion to expedite the assessments because PM Thailand itself had twice requested Thai Customs to expedite the assessments and use the deductive valuation method.<sup>780</sup> It is our view that an importer's request for expeditious assessments of the customs value of imported goods cannot justify the customs administration's failure to respect the due process principle inherent in a process of consultations between the administration and the importer. In the factual circumstances of this case in particular, the Panel has taken note of the argument that Thai Customs could not ask for further information because of the request from PM Thailand to expedite the process. However, the Panel also notes that through its letter of 27 February 2007, Thai Customs did request the importer to provide more information on *other* items that were submitted at the same time as the information relating to sales allowances and provincial taxes. Therefore, we are not convinced by Thailand's argument that PM Thailand's request for an expeditious assessments prevented Thai Customs from seeking further information concerning sales allowances, provincial taxes and transportation costs.

7.332 In the light of the foregoing, we conclude that Thai Customs' failure to properly consult the importer on the information necessary for the requested deductions renders its decision not to deduct sales allowances, provincial taxes and transportation costs in the determination of the customs value of the entries at issue inconsistent with Article 7.1 of the Customs Valuation Agreement.

#### Thai Customs' application of the deductive valuation method – substantive aspect

##### Introduction

7.333 Regarding the deductions for sales allowances, provincial taxes and transportation costs, the parties do not dispute that these items are, in principle, deductible under Article 5.1(a). The parties also appear to agree that deductions under Article 5.1(a) are not automatic, but must be based on relevant information and data. The parties, however, disagree on the type of evidence required from the importer for the deduction of these items, namely, first, whether, as a general matter, the importer is required to prove that these expenses are actually tied to the GAQ sales based on which the unit price was decided<sup>781</sup>, and, second, whether Thai Customs acted inconsistently with the principles under Article 5.1(a) in not deducting these items in the light of the information and data before it at the time of determination.

7.334 Particularly, Thailand takes the position that all these three items must be deducted only to the extent that they reflect documented expenses that are actually included in the GAQ price. In support of its position, Thailand has provided extensive arguments in the course of this proceeding on why the information and data submitted by PM Thailand to Thai Customs was not sufficient to make the relevant deductions. The Philippines argues that there is no requirement in Article 5 that deductions from the GAQ price be tied specifically to the GAQ sale. Further, the Philippines submits that the Panel should not take into account Thailand's explanations in this proceeding of Thai Customs'

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<sup>779</sup> Exhibits PHL-40, PHL-41, PHL-42 and PHL-43.

<sup>780</sup> Thailand's second oral statement, paras. 46-47, referring to Exhibits PHL-69 and THA-92.

<sup>781</sup> Thailand's response to Panel question No. 29.

decision on the deductibility of the claimed items because they are *ex post* explanations that were never provided to the importer at the time of determination.

7.335 In evaluating the parties' claims and arguments in respect of the deductive valuation method, we will first address whether the importer is generally required to prove that expenses requested for deduction are actually tied to the GAQ sales based on which the unit price was decided.

#### Deductibility of sales allowances, provincial taxes and transportation costs

##### *Main arguments of the parties*

##### **General**

7.336 The **Philippines** claims that Thailand's *ex post* calculations demonstrate a violation of Article 7.1 because Thailand failed to deduct sales allowances, provincial taxes and transportation costs when it was obliged to deduct them because they had been raised by PM Thailand.<sup>782</sup> The Philippines submits that a customs authority is required to apply the same principles for deductive calculations under Article 7 as would be applied under Article 5, with an allowance for "reasonable flexibility" where Article 5 cannot be strictly applied.<sup>783</sup> Accordingly, Thailand should have deducted these three items, which would have resulted in significantly lower customs values.<sup>784</sup>

7.337 Regarding the specific calculation used for the deductive valuation method, the Philippines argues that the GAQ price refers to the importer's unit resale price of the largest quantity sold to unrelated parties in the country of importation<sup>785</sup>, and that the items (i)-(iv) in Article 5 must be deducted from this GAQ price.<sup>786</sup> There is no requirement in Article 5 that deductions from the GAQ price be tied specifically to the GAQ sale.<sup>787</sup> Several provisions of Article 5 use language showing that deductions should be average amounts not tied to one specific sale (e.g. Art. 5.1(a)(i) – deduction of "commissions usually paid" and the "additions usually made for profit and general expenses"; Article 5.1(a)(ii) – deduction of "usual costs of transport and insurance and associated costs ...").<sup>788</sup> In further support of its position, the Philippines refers to a statement in a treatise that "the deductions [under Article 5] will in general not relate to the same resale(s) from which the price has just been derived".<sup>789</sup> The Philippines argues that there is no logical reason to require that deductions be tied to the particular GAQ sale, because an authority does not determine the customs value of the GAQ sale. Rather, it determines the customs value of a particular import, and the GAQ price is taken from a resale made in the GAQ within 90 days of importation. Therefore, that resale need not involve goods imported as part of the entry being valued. Because many parameters relating to the entry are unknown at the time of valuation, an averaging approach is, at the very least, consistent with Article 5.<sup>790</sup>

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<sup>782</sup> Philippines' response to Panel question No. 29; second written submission, para. 222.

<sup>783</sup> Philippines' response to Panel question No. 28; second written submission, para. 223.

<sup>784</sup> Philippines' first oral statement, para. 143; second written submission, para. 223.

<sup>785</sup> Philippines' first oral statement, para. 133.

<sup>786</sup> Philippines' first oral statement, para. 133.

<sup>787</sup> Philippines' second written submission, para. 263.

<sup>788</sup> Philippines' second written submission, para. 258.

<sup>789</sup> Philippines' second written submission, para. 264; Exhibit PHL-206, para. 695.

<sup>790</sup> Philippines' second written submission, paras. 265-267. As examples of such parameters, the Philippines refers to "a very large volume of goods that will subsequently be broken down into smaller units, sold to different customers, across a wide geographical area, at different points in time, stocked at various points in the distribution chain for different periods of time, and sold subject to potentially divergent regional and local taxes".



7.338 **Thailand** claims that the Philippines has failed to make a prima facie case that the Thai Customs' determination of the deductive value, based on the evidence before it at the time, was in any way inconsistent with Article 5 of the Customs Valuation Agreement. Thailand does not contest that the three elements at issue are in principle deductible from the GAQ price, whether under Article 5 or Article 7.<sup>791</sup> However, according to Thailand, deductions are to be made from the GAQ price only to the extent that they reflect documented expenses that are actually reflected in the GAQ price based on the evidence available to the customs administration when it makes its determination.<sup>792</sup> Thailand argues that the evidence provided by PM Thailand to the Thai authority in this case did not justify a deduction for any of the three items.

#### Sales allowances

7.339 **Thailand** submits that with respect to sales allowances, there would be no basis to make adjustments to the GAQ price if that price were based on a sale to a customer that did *not* benefit from a discount.<sup>793</sup> Thailand argues that the starting point for the deductive value calculation under Article 5(1)(a) is the price for a particular sale of the imported goods made at or about the time of importation of the goods being valued.<sup>794</sup> Discounts, rebates and similar price adjustments are not expenses, but instead form part of the price itself.<sup>795</sup> According to Thailand, Article 5.1(a)(i)-(iii) does not mention discounts as deductions that must be made on the basis of usual amounts, such as commissions or profits.<sup>796</sup> Therefore, items such as discounts may only be deducted when tied to the particular unit price for the GAQ sale that is being used in the deductive value calculation.<sup>797</sup>

7.340 The **Philippines** submits that where the importer offers an allowance or discount on the GAQ price, that allowance reduces the "unit price" at which the goods "are sold", and must therefore be deducted under Article 5 to provide a proper starting-point for a deductive calculation.<sup>798</sup> The failure to deduct sales allowances means that the assessed customs value was inflated by discounts that were never part of the "unit price" at which the goods "[we]re sold" by the importer.<sup>799</sup>

#### Provincial taxes

7.341 Regarding provincial taxes, the **Philippines** submits that Article 5.1(a)(iv) requires the deduction of the national taxes *payable*, not the taxes *paid* on the GAQ sale as Thailand argues.<sup>800</sup> The amount of taxes "payable" may be determined on an average basis.<sup>801</sup>

7.342 **Thailand** takes the view that provincial taxes are different from national taxes as referred to in Article 5(a)(iv), and deductible only if included in the resale price on which the [deductive value] is based.<sup>802</sup> Thailand submits that the Philippines does not appear to argue in its second written submission that the evidence before Thai Customs established that provincial taxes were included in the GAQ price on which the deductive value is based.<sup>803</sup>

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<sup>791</sup> Thailand's response to Panel question No. 29.

<sup>792</sup> Thailand's response to Panel question No. 29.

<sup>793</sup> Thailand's response to Panel question No. 29.

<sup>794</sup> Thailand's second oral statement, para. 42.

<sup>795</sup> Thailand's second oral statement, para. 42.

<sup>796</sup> Thailand's second oral statement, para. 42.

<sup>797</sup> Thailand's second oral statement, para. 42.

<sup>798</sup> Philippines' first oral statement, para. 134.

<sup>799</sup> Philippines' first oral statement, para. 137.

<sup>800</sup> Philippines' second written submission, para. 265.

<sup>801</sup> Philippines' second written submission, paras. 265-267.

<sup>802</sup> Thailand's second oral statement, para. 43; Exhibit PHL-206, para. 743.

<sup>803</sup> Thailand's second oral statement, para. 43.

### Transportation costs

7.343 The **Philippines** submits that Article 5.1(a)(ii) requires the deduction of the *usual* costs of transportation, which means costs typically incurred, or average costs, *not* the costs linked to the sales on which the GAQ price was based.<sup>804</sup>

7.344 **Thailand** argues that the treatise cited by the Philippines states that the "usual" cost of transportation should be, as far as possible in practice, the actual average inland cost incurred in the resale of the imported goods whose price is the first step in the calculation.<sup>805</sup>

#### *Analysis by the Panel*

### General

7.345 We will first review the general principles in Article 5.1(a). Article 5.1(a) provides:

"If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the *unit price* at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

- (i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;
- (ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;
- (iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and
- (iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods."

7.346 The Interpretative Note to Article 5 in paragraph 1 defines the term "unit price at which ... goods are sold in the greatest aggregate quantity" as "the price at which the greatest number of units is sold in sales to persons who are not related to the persons from whom they buy such goods at the first commercial level after importation at which such sales take place".

7.347 In this regard, we note that the terms "usually" and "usual" can be found in Article 5.1(a)(i) and (ii), which states, for example, "the commissions *usually* paid or agreed to be paid", "the additions *usually* made for profit and general expenses" and "the *usual* costs of transport and insurance and associated costs". A plain reading of these phrases therefore suggests that the deductions of the commissions or the additions or the costs of transport as set out in Article 5.1(a)(i) and (ii) need not necessarily be tied to a particular unit price for the GAQ sale that is being used in the deductive value calculation.

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<sup>804</sup> Philippines' second written submission, para. 276.

<sup>805</sup> Thailand's second oral statement, para. 43.

7.348 A treatise cited to by the parties also supports this view: "It should be pointed out initially that the deductions will in general *not* relate to the same resale(s) from which the price has just been derived".<sup>806</sup> At the same time, we note the phrase "in general" in this statement, which appears to imply that there may be exceptional situations. We also observe the Technical Committee's commentary on Article 5.1 that "in general, the application of the deductive valuation method under Article 5 of the Customs Valuation Agreement may differ on a set of circumstances from another and thus the practical application of Article 5 requires a flexible approach, having regard to the circumstances in each case".

7.349 Considered overall, therefore, we do not find a *general* requirement under Article 5.1, which can be applied to every situation, that deductions must be made only to the extent that they reflect documented expenses that are actually tied to the GAQ sale. Particularly, items that fall within the categories of (i), (ii) and (iv) of Article 5.1(a) do not appear to require such a requirement in the light of the terms used in the text of the provisions such as "usual" and "payable"<sup>807</sup> and the statements in reference sources. Further, as the Philippines submits, we do not see a logical reason to require that deductions be tied to the particular GAQ sale, because the customs value to be determined using the deductive valuation method under Article 5 is *not* the customs value for that specific GAQ sale.<sup>808</sup> It is rather the customs value for a particular import subject to the customs' valuation.

7.350 Having the foregoing in mind, we will proceed to examine the parties' arguments on the deductibility of the three items under Article 5, namely, sales allowances, provincial taxes and transportation costs.

#### **Sales allowances**

7.351 Regarding sales allowances, the parties' arguments raise the question of whether the deductions of sales allowances can be made only if there is information and data showing that such allowances are tied to a particular unit price for the GAQ sale that is being used in the deductive value calculation.

7.352 Thailand argues that items such as discounts, rebates and sales allowances are not expenses, but instead form part of the price itself. As the unit price for a particular sale, which is the starting point for the deductive value calculation, is the net revenue obtained by the importer net of adjustments such as discounts and sales allowances, it is reasonable for the customs administration to accept deductions of these items only for discounts that are tied to the particular unit price for the GAQ sale that is being used in the deductive value calculation. Thailand argues that this is consistent with the fact that Article 5.1(a)(i)-(iii) make no mention of discounts as deductions that must be made on the basis of *usual* amounts, such as commissions or profits.

7.353 The Philippines submits that where the importer offers an allowance or discount on the GAQ price, that allowance reduces the "unit price" at which the goods "are sold", and must therefore be deducted under Article 5 to provide a proper starting point for a deductive calculation.

7.354 We note that sales allowances, discounts and rebates are not one of the items listed in Article 5.1(a)(i)-(iv). Nor do the interpretative notes to Article 5 provide any guidance on the deductibility of these expenses under Article 5.1(a). We also observe a statement in the above-mentioned treatise cited to by the parties that "[price] means all direct and indirect net payments ...

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<sup>806</sup> Philippines' second written submission, para. 264, referring to Exhibit PHL-206, para. 695.

<sup>807</sup> For the discussion on the term "payable" contained in Article 5.1(a)(iv), please see para. 7.358.

<sup>808</sup> Philippines' second written submission, para. 263.

excluding all rebates, discounts and similar reductions in the price payable".<sup>809</sup> We can infer from this statement that sales allowances are an item that must be deducted from the sales price in order to arrive at the unit price (GAQ price) within the meaning of Article 5. Therefore, to the extent that sales allowances are included in the sales price, they must be excluded from that sales price before deducting the items falling within the categories under Article 5. We do not consider that the Philippines is necessarily putting forward a different view on this either. As its statement cited above in paragraph 7.340 shows, the Philippines submits that, as sales allowances reduce the unit price at which the goods are sold, they must be deducted under Article 5(1)(a), without specifying a specific category under Article 5.1(a), to provide a proper starting point for a deductive calculation.

7.355 We therefore agree with Thailand that it is reasonable for the customs administration to accept deductions only for sales allowances that are tied to the particular unit price for the GAQ sale that is being used in the deductive value calculation. Although the Philippines asserts that the grant of sales allowances, and their amount, is a function of factors including events in the marketplace; the evolution of the business and marketing strategy; and, considerations relating to particular customers (e.g. sales volumes), we do not see how this assertion can disprove of Thailand's position that deductions of sales allowances (e.g. discounts, rebates and sales allowances) must be tied to a particular unit price for the GAQ sale that is being used in the deductive value calculation.<sup>810</sup>

### Provincial taxes

7.356 Thailand argues that unlike national taxes, which are deductible if they are *payable* under Article 5.1(a)(iv), provincial taxes are deductible if included in the unit price on which the deductive value is based. The Philippines asserts that Article 5.1(iv) requires the deduction of the national taxes *payable*, not the taxes *paid* on the GAQ sales.

7.357 Article 5.1(a)(iv) refers to "the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods", but not to provincial taxes. "Local taxes" are however mentioned in the interpretative note to Article 5, in paragraph 8, where it states, "local taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5". The phrase in the Interpretative Note to Article 5 "local taxes payable by reason of the sale of the goods" mirrors the phrase in Article 1(a)(iv).

7.358 The term "payable" can be defined as "*adj.* (Of a sum of money or a negotiable instrument) that is to be paid. An amount may be payable without being due. Debts are commonly payable long before they fall due".<sup>811</sup> It can also be defined as "*adjective.* 1 Of a sum of money, a bill, etc: that is to be paid; falling due (usu. at or on a specified date or to a specified person). 2 Able to be paid".<sup>812</sup> Therefore, the ordinary meaning of the term "payable" refers to both "a sum of money that is to be paid without being due" and "that is due to be paid". This suggests that national taxes and provincial taxes subject to the deduction under Article 5 need not be related to the GAQ sale. The phrase "by reason of the importation or sale of the goods" also supports the view that these taxes refer to those usually to be paid upon importation and upon sale in the market.

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<sup>809</sup> Exhibit PHL-206, para. 692. We note that there appears to be a very limited number of treaties or reference materials concerning customs valuation issues. The definition of the term "payable" can be found *infra* para. 7.358.

<sup>810</sup> Gross margin calculations submitted by PM Thailand, *inter alia*, for FY 2003-2005 show that items such as VAT, provincial tax and sales allowances are deducted from the amount of income (GAQ) to derive at a net GAQ amount. Subsequently, domestic transportation costs and warehouse costs are deducted from the net GAQ amount. (See, for example, Exhibits PHL-40, PHL-41, and PHL-42).

<sup>811</sup> *Black's Law Dictionary*, 7<sup>th</sup> ed., B.A. Garner (ed.) (West Group, 1999), p. 1150.

<sup>812</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. II, p. 2127 (2002).

7.359 Furthermore, paragraph 8 of the Interpretative Note to Article 5 states that "local taxes payable ... for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5". Article 5.1(a)(i) refers to "either the commission *usually* paid or agreed to be paid or the additional *usually* made for profit and general expenses ...". Therefore, we consider that provincial taxes *payable* must be deducted if the information shows *usual* payments made for local taxes even if they are not included in the sales price based on which the deductive valuation method will be applied under Article 5.

7.360 Further, we note the statement in the above-mentioned treatise, as Thailand points out, that "state and local taxes ... are deductible if included in the resale price upon which the [deductive value] is based". This statement, in our view, supports our view as it stipulates that while state and local taxes are *deductible* if they are included in the resale price, it does not necessarily imply that that is the only situation in which state and local taxes can be deducted.

### **Transportation costs**

7.361 Finally, the parties dispute whether the transportation costs, which were not included in PM Thailand's request made in its letter dated 21 February 2007, should have been deducted in determining the customs value of the cigarettes at issue. Thailand argues that PM Thailand never claimed a deduction for transportation costs and in any event, the available evidence did not establish that PM Thailand itself incurred transportation costs with respect to the sales on which the GAQ price was based. The Philippines submits that although the 21 February 2007 letter mistakenly omitted transportation costs, Thai Customs should have deducted such costs based on the information included in PM Thailand's annual filings for 2003-2005.

7.362 Article 5.1(a)(ii) refers to "the *usual* costs of transport and insurance and associated costs occurred within the country of importation". As noted in paragraph 7.347 above, we consider that the term *usual* in the provision indicates that the costs to be deducted may not be specifically linked to the GAQ sale at issue. Thailand refers to a statement in the treatise that the usual cost of transportation should be, as far as possible in practice, the actual average inland cost incurred in the resale of the imported goods. The statement cannot however be understood as requiring transportation costs to be specifically linked to the GAQ sale at issue. Furthermore, it is not clear whether using the actual average inland cost incurred in the resale of the imported goods was "possible" in practice in the situation at issue in this dispute. This is particularly so given that Thai Customs did not seek any further information from PM Thailand in this regard. We therefore do not agree with Thailand's argument that transportation costs need to be specifically linked to the GAQ sale for a deduction to be made under Article 5.

Thai Customs' decision not to deduct sales allowances, provincial taxes and transportation costs

### *The standard for the Panel's review*

7.363 We clarified above that the proper standard for our review of the Philippines' claims under Article 7.1 requires an assessment, based on Thai Customs' explanations provided pursuant to Article 16 as well as information given to the importer under Article 7.3, of whether Thai Customs' application of the deductive valuation method was consistent with Article 7.1 and Article 5.<sup>813</sup>

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<sup>813</sup> See *supra* paras. 7.311-7.314.

7.364 As for Thailand's explanations and information provided pursuant to Articles 16 and 7.3, the parties refer to the same 12 April 2007 letter from Thai Customs.<sup>814</sup> As noted earlier, however, the explanations in the 12 April 2007 letter are not very detailed as they simply identify the valuation method used, Method 6 (Article 7) without any further elaboration. In the context of examining Thailand's compliance with the substantive obligations under the Customs Valuation Agreement, we considered that the minutes of the 6 March 2007 meeting may also be considered. The minutes of the 6 March 2007 meeting are relatively more elaborative on the application of the deductive valuation method chosen to be used in determining the customs value of the imported cigarettes at issue.

7.365 However, neither the 12 April 2007 letter nor the minutes explain why Thai Customs decided not to deduct sales allowances, provincial taxes and transportation costs.<sup>815</sup> We note that Thai Customs did not provide a basis for its final decision not to deduct these items at the time it took its decision. In the light of the standard of review formulated for our examination of the Philippines' claim under Article 7.1, therefore, we can conclude based on the absence of such explanation that Thai Customs failed to apply the deductive valuation method consistently with Article 7.1. Nonetheless, during the course of the proceeding, both parties heavily substantiated their arguments related to the deductibility of the three items at issue. Particularly, Thailand explained in detail the reason why Thai Customs, at the time of the domestic proceeding, decided not to deduct the three items at issue. In these circumstances, we consider that making an assessment of Thai Customs' decision not to deduct these three items, as explained in this proceeding based on the evidence before Thai Customs at the time of the determination, helps to resolve the parties' dispute relating to the deductibility of the concerned items.<sup>816</sup>

#### *Main argument of the parties*

##### **Sales allowances**

7.366 Regarding the spreadsheet attached to the Philippines' 7 March 2007 letter<sup>817</sup>, **Thailand** submits that in many of the months for which data was provided, no discount was provided to [[xx.xxx.xx]], a customer on which the GAQ price was based. Further, it shows a negative discount in a couple of months. In September, the month in which the greatest single quantity was sold to this customer, the amount of the discount was about one fifth of the amount of the discount claimed by PM Thailand for *Marlboro* and about half of the discount claimed for *L&M*. PM Thailand provided no method or breakdown of data to determine whether the discount was actually paid on *Marlboro* or *L&M* sales or, if on both, in what proportion. For example, PM Thailand did not provide any invoice showing that these discounts had actually been paid.<sup>818</sup> Thailand also points to the differences

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<sup>814</sup> As noted in Section VII.C.7(d)(ii) below, if the importer knows that a customs authority used a valuation method under Article 7 when it requests for the explanation under Article 16 as well as under Article 7.3, we understand that the same request may be used for both purposes. The customs authority could then provide the requested explanation as well as information through the same instrument.

<sup>815</sup> As described above in para. 7.330, PM Thailand mistakenly omitted transportation costs in its letter of 21 February 2007.

<sup>816</sup> Panels in previous disputes addressed a similar issue. In *Argentina – Ceramic Tiles* and *Argentina – Poultry Anti-Dumping Duties*, for instance, the panels considered that *ex post facto* explanations provided by Argentina in the Panel proceedings should not be taken into account in the panels' analysis. (Panel Report, *Argentina – Ceramic Tiles*, para. 6.27; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.178). The panel in *Argentina – Ceramic Tiles* also refers to the panel's analysis in *Guatemala – Cement (II)*, para. 8.245. We further note that the panels in *Argentina – Ceramic Tiles* and *Guatemala – Cement (II)* nonetheless continued to examine the parties' claims based on the *ex post facto* explanations. The panel in *Argentina – Poultry Anti-Dumping Duties*, however, did not proceed to examine *ex post* explanations.

<sup>817</sup> Exhibit PHL-169.

<sup>818</sup> Thailand's response to Panel question No. 29.

between the GAQ prices reported in the July 2006 letter and the 21 February 2007 and 7 March 2007 letters on which the deductive price was actually based.<sup>819</sup>

7.367 On the topic of the copies of the annual filings submitted by PM Thailand, in particular the FY 2005 filing made in the July 2006 letter, including an explanatory note in PM Thailand's [[xx.xxx.xx]] document of July 2006<sup>820</sup>, Thailand argues that the explanatory note consists merely of an assertion that "sales allowances are sales discounts for [company name]". Information about discounts on a different price reported on July 2006 do not establish the existence or amount of discounts that might have been paid on the price reported in the 21 February 2007 letter that was actually used to establish the deductive value.<sup>821</sup>

7.368 Regarding the information submitted in the spreadsheet attached to its 7 March 2007 letter, the **Philippines** submits that the grant of sales allowances, and their amount, is a function of factors including events in the marketplace; the evolution of the business and marketing strategy; and, considerations relating to particular customers (e.g. sales volumes). As a result, sales allowances are not granted automatically on each sale, or in each month, and allowances do not simply track sales volumes.<sup>822</sup> Negative allowances account for sales allowances that were granted in relation to goods subsequently returned. The allowance initially granted was, therefore, cancelled and appears as a negative number.<sup>823</sup> As regards the lack of a breakdown of sales allowances between *Marlboro* and *L&M*, an aggregate sales allowances was given because PM Thailand was not asked to provide additional information on the sales allowances.<sup>824</sup> It was not aware that brand-specific amounts for sales allowances and proof thereof, were requested as part of its 7 March response. In any event, brand-specific amounts were provided in the 21 February 2007 letter.<sup>825</sup>

7.369 In response to Thailand's statement that there is a lack of invoice showing actual payment of these discounts, the Philippines holds that Thailand's *ex post* explanation suggests that Thai Customs' treatment of the evidence in the 7 March letter was not even-handed. Thai Customs accepted the GAQ price shown in the spreadsheet, without information such as "invoices" to support the GAQ prices shown in the spreadsheet. However, Thailand now asserts that Thai Customs could not accept other information, shown in the same spreadsheet, regarding sales allowances because there were no supporting "invoices". Differences between the GAQ prices reported in PM Thailand's letters of 17 July 2006, 21 February 2007, and 7 March 2007 are explained by the fact that the July 2006 letter concerned the GAQ for FY 2005, whereas the other letters concerned the GAQ for FY 2006. The differences have no bearing on sales allowances.<sup>826</sup>

7.370 Moreover, the Philippines argues that annual filings, in particular the FY 2005 filing made in July 2006, explicitly provided a breakdown of the deduction values for sales allowances, provincial tax and domestic transportation (the most recent filing before Thailand began conducting assessments in March 2007).<sup>827</sup> This information was resubmitted by letter of 8 August 2006 and referred to in a separate letter of 25 October 2006.<sup>828</sup>

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<sup>819</sup> Thailand's response to Panel question No. 29.

<sup>820</sup> Exhibit PHL-42.

<sup>821</sup> Thailand's response to Panel question No. 29.

<sup>822</sup> Philippines' second written submission, para. 248.

<sup>823</sup> Philippines' second written submission, para. 249.

<sup>824</sup> Philippines' second written submission, para. 250.

<sup>825</sup> Philippines' second written submission, para. 251; Exhibit THA-39.

<sup>826</sup> Philippines' second written submission, para. 252.

<sup>827</sup> Philippines' first oral statement, para. 135; Exhibits PHL-40, PHL-41, and PHL-42.

<sup>828</sup> Philippines' first oral statement, para. 136; Exhibits PHL-56 and PHL-60.

### Provincial taxes

7.371 The **Philippines** claims that the spreadsheet attached to its 7 March 2007 letter provided information related to the GAQ price, including the total sales receivable ("Sales A/R") and the net sales receivable ("Net Sale to PM"), with deductions to account for the difference between the two ("Less VAT", "Less Discount", "Less Other S.A.", and "Less P. Tax"). This last element is the provincial tax.<sup>829</sup>

7.372 The Philippines further argues that PM Thailand's distribution agreements provide that the provincial tax is payable by PM Thailand and passed on to its customers through a higher price.<sup>830</sup> The GAQ price is inclusive of this amount. PM Thailand deducted the provincial tax in each of the filings made for FYs 2003, 2004, 2005, and 2006. The FY 2005 filing was submitted on 6 July 2006, resubmitted on 8 August 2006, and referenced in a letter on 25 October 2006. The provincial taxes were also mentioned in a letter of 28 June 2007. Thai Customs sought no additional information on this issue and, as Exhibit THA-13 shows, failed to deduct the provincial tax.<sup>831</sup> Given Thai Custom's failure to seek additional information regarding these items in its 27 February 2007 request, Thailand cannot now rely on the fact that PM Thailand did not provide the required supporting information.<sup>832</sup>

7.373 **Thailand** argues that provincial taxes are payable only on sales in provinces outside the Bangkok area.<sup>833</sup> Specifically concerning PM Thailand's cigarette sales, Thailand estimates that one half of all cigarette sales, including sales of imports, are made outside Bangkok.<sup>834</sup> Based on the national figures, it could not be assumed that PM Thailand paid provincial taxes on the sales on which the GAQ price was actually based. Regarding the information put forward in the spreadsheet accompanying the 7 March 2007 letter, Thailand submits that the printout from PM Thailand's sales records lists total provincial taxes paid during each month (in the column headed "less P Tax"), but that it shows no values for provincial taxes for sales to individual customers, including, in particular, the sales to the customer on which the GAQ price was based. In these circumstances, the evidence before Thai Customs, when it made its valuation determinations for these entries, did not support adjustment.<sup>835</sup>

7.374 In relation to the Philippines' argument on the distribution agreements, Thailand argues that to support its argument that an adjustment should have been made, the Philippines relies on evidence that does not appear to have been provided to Thai Customs at the time it made its valuation determinations.<sup>836</sup> This evidence includes a sample provincial tax return filed by PM Thailand<sup>837</sup> and a standard distribution agreement with a clause providing that PM Thailand would pay provincial taxes.<sup>838</sup> Thailand stresses that the Panel should ensure that it reviews the Thai Customs' determination in the light only of the contemporaneous evidence before Thai Customs and not of evidence submitted *ex post facto* to the Panel.<sup>839</sup> However, even if this evidence had been before Thai Customs at the time it made its determinations, it does not establish that PM Thailand paid provincial taxes on the sales on which the GAQ prices were based. The provincial tax return does not appear to

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<sup>829</sup> Philippines' second written submission, para. 258.

<sup>830</sup> Philippines' first oral statement, para. 141.

<sup>831</sup> Philippines' first oral statement, para. 141.

<sup>832</sup> Philippines' second written submission, paras. 248-253.

<sup>833</sup> Thailand's response to Panel question No. 29.

<sup>834</sup> Thailand's response to Panel question No. 29.

<sup>835</sup> Thailand's response to Panel question No. 29.

<sup>836</sup> Thailand's response to Panel question No. 29.

<sup>837</sup> Exhibit PHL-144.

<sup>838</sup> Exhibit PHL-146.

<sup>839</sup> Thailand's response to Panel question No. 29.



have anything to do with to whom the GAQ sales were made, and there was no evidence that PM Thailand had a distribution agreement requiring it to pay provincial taxes with that customer.<sup>840</sup>

### Transportation costs

7.375 In respect of transportation costs, the **Philippines** submits that although the 21 February 2007 letter mistakenly omitted transportation costs, Thai Customs knew that PM Thailand had included a deduction for internal transportation costs in annual filings covering the three year period from 2003 to 2005 for either "inland freight" or "domestic transportation".<sup>841</sup> In particular, the FY 2005 filing shows such a deduction, this is the most recent filing before the current year in which the customs value of the entries at issue were assessed, and it was submitted on 7 July and 8 August 2006 and also referenced in a letter of 25 October 2006.<sup>842</sup> Therefore, if Thai Customs had queries regarding the facts surrounding this deduction, Thai Customs should have clarified whether PM Thailand pursued such a deduction or requested additional information for clarification.<sup>843</sup>

7.376 The Philippines also points out that PM Thailand requested a deduction for transportation costs in its letter of 28 June 2007.<sup>844</sup> Although Thailand argues that this letter was *not* before Thai Customs at the time it made its valuation decisions, the letter was submitted before Thai Customs assessed the customs value for [[xx.xxx.xx]] of the [[xx.xxx.xx]] entries at issue.<sup>845</sup>

7.377 **Thailand** submits that PM Thailand never claimed a deduction. Specifically, neither PM Thailand's letter of 21 February 2007, nor the spreadsheet attached to the 7 March 2007 letter, nor any other correspondence from PM Thailand regarding the deductive value for these entries refers to a claim for a deduction for inland transportation costs.<sup>846</sup>

7.378 Thailand further contends that in any event, the documents submitted by the Philippines in previous years do not establish that PM Thailand itself incurred transportation costs with respect to the sales on which the GAQ price was based. Further, although the Philippines also refers to documents submitted in the context of appeals of these entries before the BoA, these documents were not before Thai Customs at the time of the valuation decision and thus cannot be used in this dispute. Besides, Thailand asserts that nothing in the 28 June 2007 letter cited by the Philippines constitutes evidence that PM Thailand incurred inland transportation costs.<sup>847</sup>

### *Analysis by the Panel*

### Sales allowances

7.379 Regarding the actual data submitted, Thailand refers to the spreadsheet attached to the Philippines' 7 March 2007 letter. Thailand argues that this evidence does not prove that the sales allowances claimed for the deduction were provided to the company on which the GAQ price was based. Thailand points to the following elements in support of its position: in many of the months for which data was provided, no discount was provided to this company; in September, the month in which the greatest single quantity was sold to this customer, the amount of the discount was not equal to, but was actually less than the amounts of the discount claimed respectively for *Marlboro* and

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<sup>840</sup> Thailand's response to Panel question No. 29.

<sup>841</sup> Exhibits PHL-40, PHL-41, PHL-42 and PHL-43.

<sup>842</sup> Philippines' second written submission, para. 274; Exhibits PHL-55, PHL-57 and PHL-60.

<sup>843</sup> Philippines' second written submission, para. 277.

<sup>844</sup> Exhibit PHL-142.

<sup>845</sup> Philippines' second written submission, para. 275; Exhibit PHL-198.

<sup>846</sup> Thailand's response to Panel question No. 29.

<sup>847</sup> Thailand's response to Panel question No. 29; Exhibit PHL-142, p. 13.

*L&M*; and PM Thailand provided no method or breakdown of data to determine whether the discount was actually paid on *Marlboro* or *L&M* sales or, if on both, in what proportion.

7.380 The Philippines does not dispute that the subject spreadsheet in Exhibit THA-39 shows that the actual amount of sales allowances given to the company on which the GAQ price was based was less than the actual deductions claimed for *Marlboro* and *L&M*. The Philippines, however, asserts that sales allowances are not granted automatically on each sale, or in each month, and allowances do not simply track sales volumes and that negative allowances account for sales allowances that were granted in relation to goods subsequently returned.

7.381 In assessing the parties' arguments in respect of the deduction of sales allowances, we are not presented with any evidence that clarifies whether the amount of sales allowances that a company declares for deduction to the customs authorities must exactly match the amount of sales allowances actually provided by the company in the period under evaluation. Thailand, as the party claiming that sales allowances may only be deducted when tied to the particular unit price for the GAQ sale, had the burden of proving its position with supporting evidence. Thailand, however, failed to do so. Further, Thailand is not disputing the fact that sales allowances were provided to the company on which the GAQ price was based for the valuation of the imported cigarettes at issue. What is contested by Thailand is that the amounts of sales allowances shown on the spreadsheet provided by PM Thailand are *less* than the amounts requested for the deduction for *Marlboro* and *L&M*. In the light of these circumstances, we do not see how the Thai Customs' decision *not* to deduct sales allowances at all, as opposed to adjusting the deductible amount for the sales allowances of the imported cigarettes at issue, can be justified. Even if Thailand's position concerning the determination of the deductible amount for sales allowances were correct, this does not render the Thai Customs' decision not to deduct sales allowances consistent with Article 5.1 of the Customs Valuation Agreement.

#### **Provincial taxes**

7.382 In the light of our finding above in paragraph 7.360 that provincial taxes payable must be deducted if the information shows usual payments made for local taxes even if they are not included in the sales price, we consider that it is not necessary for us to continue with the parties' arguments on whether the evidence submitted by PM Thailand to Thai Customs show the inclusion of the requested provincial taxes in the GAQ price used for the deductive calculation.

#### **Transportation costs**

7.383 The next issue raised by the parties in relation to transportation costs is whether Thai Customs' decision not to deduct this item was not inconsistent with the principles of Article 5 because PM Thailand failed to make a specific request for its deduction. In respect of the transportation costs at issue in this case, as the Philippines acknowledges, PM Thailand mistakenly omitted them in its letter of 21 February 2007. Thailand argues that due to PM Thailand's failure to claim a deduction for transportation costs, it did not have to deduct these costs, but even if the deduction had been claimed, the documents submitted by PM Thailand do not establish that PM Thailand incurred transportation costs with respect to the sales on which the GAQ price was based. Nonetheless, we note the following Thai Customs' statement relating to the deductive valuation method in the original minutes of the 6 March 2007 meeting:

"To prescribe customs prices by using deductive value, the deductive value must comprise the following: selling price of the imported thing per unit sold at the first sale in the country, and sold in the biggest volume to the person with no relationship less commission or normal profit and general expenses less insurance cost,

*transportation cost in the country and less import tariff, other taxes for the import and the sale of such things.*"<sup>848</sup>

7.384 This shows that Thai Customs understood and discussed at the 6 March 2007 meeting that transportation costs in the country of importation, as one of the items that are subject to deductions under Article 5, had to be deducted in calculating the customs value of the cigarettes at issue. As we explained above, a valuation process must be that of consultation between an importer and a customs administration. To the extent that transportation costs usually are incurred in the resale of goods in the country of importation, Thai Customs had to rely on the available evidence or, if not, consult PM Thailand as regard this item if it had queries on the available evidence.

7.385 As such, it is not necessary for us to proceed with the parties' argument on whether Thai Customs had sufficient information and data to make the deduction for transportation costs.

### Conclusion

7.386 As noted above in paragraph 7.365, we decided to examine the parties' arguments on Thai Customs' decision not to deduct sales allowances, provincial taxes and transportation costs despite our earlier conclusion based on the absence of an adequate explanation in the record that Thai Customs acted inconsistently with its obligations under Article 7.1 of the Customs Valuation Agreement. This was to help resolve the parties' dispute on the deductibility of these items. Our examination of the arguments and evidence leads to the conclusion that even if we *were* to base our findings in respect of the Philippines' claim under Article 7.1 on Thailand's explanations as provided in this proceeding, Thai Customs' decision not to deduct the three items at issue is not supported by the evidence before it at the time of determination.

(d) Whether Thai Customs acted inconsistently with Article 7.3

(i) *Main arguments of the parties*

7.387 The **Philippines** claims that contrary to the obligations in Article 7.3, despite PM Thailand's request, Thailand did not inform PM Thailand in writing of the customs value determined under the provision of this Article and the method used to determine such value. Article 7.3 requires that the customs authority explain to the importer, upon request, "the method used to determine such value". The term "method" is defined, *inter alia*, as "a way of doing anything, esp. according to a defined and regular plan; a mode of procedure in any activity, business, etc".<sup>849</sup> The Philippines therefore argues that Article 7.3 requires the customs authority to inform the importer of its "defined" "mode of procedure" – that is, the particular procedural steps to be followed in assessing the customs value under Article 7. Thai Customs did not do this at the time of the valuation at issue here.

7.388 PM Thailand requested information on the method used in assessing its customs values by its letter of 5 April 2007.<sup>850</sup> The Philippines acknowledges that Thai Customs responded to its request by the 12 April 2007 letter, in which it provides that it applied, "Method 6, which is the deductive value under the 'Fall Back' method". However, in the light of the nature of the obligation under Article 7.3, the Philippines is of the view that PM Thailand was not notified of the "method used" within the meaning of Article 7.3, because merely stating the method used is not adequate information regarding

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<sup>848</sup> Exhibit PHL-74, p. 6 (emphasis added). This statement is not included in the revised minutes (Exhibit THA-37).

<sup>849</sup> Exhibit PHL-87. *Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2<sup>nd</sup> ed.), p. 690.

<sup>850</sup> PM Thailand's letter to Thai Customs of 5 April; Exhibit PHL-69. *See also* Philippines' first written submission, para. 182; response to Panel question No. 112.

the procedural steps that comprised the deductive valuation method used. Specifically, the Philippines claims that Thailand omitted to show the starting point for the deductive value calculation; the sources of the data used to determine the starting point; which components were deducted; how the amounts to be deducted for these components were calculated; and how this "deductive value under the 'Fall Back' method" differed from the deductive valuation approach under Article 5, which Thailand rejected.<sup>851</sup> The Philippines provides that, with the omission of such "basic information, it cannot understand how Thailand valued PM Thailand's imports or how Thailand arrived at its erratic and arbitrary valuation results". Therefore, Thailand acted inconsistently with Article 7.3 of the Customs Valuation Agreement.<sup>852</sup>

7.389 In response to a question from the Panel, however, the Philippines submits that an explanation under Article 7.3 is more limited in scope than that under Article 16 because it relates solely to the valuation process under Article 7. Under Article 7.3, there is no obligation to explain *how* the determination as a whole was made, as there is under Article 16. Therefore, the Philippines explains that no requirement exists under Article 7.3 to explain how the facts support the rejection of the prior valuation methods under Articles 1, 2, 3, 5, and 6.<sup>853</sup>

7.390 **Thailand** has not submitted any counter-arguments against this claim.<sup>854</sup>

(ii) *Analysis by the Panel*

7.391 Article 7.3 provides:

"If the importer so request, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value."

7.392 Under Article 7.3, therefore, when there is a request from an importer, the customs authority must inform the importer of the customs value determined and the method used to determine such value.

7.393 We observe that the obligation to inform the customs value determined under the provisions of Article 7.3 and the method used to determine such value can be compared to the obligation under Article 16 to provide an explanation as to how the customs value was determined. We clarified above that the explanation to be provided under Article 16 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, the identification of the method used and the illustration of how the method was applied in reaching the final customs value. The information to be provided under Article 7.3 on the other hand may be different from the explanation to be given under Article 16, *inter alia*, in its scope, as the Philippines submits. In other words, as Article 7 is a provision addressing how to determine the customs value when it cannot be determined under the provisions of Articles 1 through 6, the information to be delivered to an importer under Article 7.3 may be confined to the specific valuation method used within the meaning of Article 7 and may not include, for example, the basis for rejecting the transaction value.

7.394 We also consider that the request for information under Article 7.3 would become possible only if the importer was already aware at the time of requesting that the customs authority had relied on a valuation method under Article 7. Given the particular nature of Article 7, i.e. allowing the

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<sup>851</sup> Philippines' first written submission, para. 384.

<sup>852</sup> Philippines' first written submission, para. 385.

<sup>853</sup> Philippines' response to Panel question No. 112.

<sup>854</sup> Philippines' second written submission, para. 280.

customs authority to use any of the valuation methods under Articles 2 through 6 with a reasonable flexibility, we can envisage a situation where the importer wishes to clarify the exact method used under Article 7 once it is known that the customs authority used one of the methods falling within the scope of Article 7.

7.395 To the extent that the information to be provided under Article 7.3 is linked to a particular method used under Article 7, the content of the information, in our view, needs to be specific and elaborative on the method chosen as well as the application of that method to derive at the final customs value. The term "method" in Article 7.3 is defined as "*noun*. I. Procedure for attaining an object. 2. A mode of procedure; a (defined or systematic) way of doing a thing, esp. (with specifying word or words) in accordance with a particular theory or as associated with a particular person".<sup>855</sup> The ordinary meaning of the word "method" therefore indicates that more than a mere identification of the type of valuation method used must be provided, including how a given method was applied to calculate the customs value of the imported goods concerned.

7.396 The Philippines refers to the 5 April 2007 letter as PM Thailand's request made to Thai Customs pursuant to Article 7.3 for the customs value and the method. This is the same letter in which PM Thailand requested an explanation pursuant to Article 16 of the Customs Valuation Agreement.<sup>856</sup> We note in this regard that Thailand did not dispute the Philippines' characterization of this letter as the written request for information submitted to Thai Customs under Article 7.3. The Philippines further submits that Thai Customs' response to this request was made in the 12 April 2007 letter, which is the very letter in which, the parties agree, Thai Customs provided an explanation pursuant to Article 16 of the Customs Valuation Agreement.

7.397 We noted above that the 12 April 2007 letter did not satisfy the requirements of the explanation to be provided under Article 16. As examined in detail in Section VII.C.6 au-dessus, we do not consider that the mere identification of a valuation method used by a customs authority as Thai Customs did in the 12 April 2007 letter (i.e. the Fall Back method) without setting out the actual application of the particular method to arrive at the customs value, is sufficient for the purpose of Article 7.3.

7.398 Accordingly, we find that the Philippines established a *prima facie* case that Thai Customs acted inconsistently with the obligations under Article 7.3 of the Customs Valuation Agreement.

## 8. Article 10 of the Customs Valuation Agreement

### (a) Main arguments of the parties

7.399 The **Philippines** claims that Thailand has breached Article 10 of the Customs Valuation Agreement by repeatedly revealing to the press PM Thailand's c.i.f. price, transaction values and 2005 import volumes.<sup>857</sup>

7.400 The Philippines argues that import prices and import volume are confidential information "by nature" within the meaning of Article 10 of the Customs Valuation Agreement. It points out that Thailand admitted that "there is no dispute that c.i.f. prices for imported cigarettes are confidential information and that the disclosure of this information would prejudice the legitimate commercial

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<sup>855</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 1762 (2002).

<sup>856</sup> If an importer already knows that the customs authority used a method under Article 7, it is not inconceivable that the importer may request through the same communication for both the information under Article 7.3 as well as the explanation under Article 16.

<sup>857</sup> Philippines' first written submission, paras. 386-409.

interests of importers of cigarettes".<sup>858</sup> Thus, Article 10 prohibits the disclosure of such information by customs authorities, unless the company agrees to have its information made public. The Philippines argues that PM Thailand considered this information as confidential: it repeatedly exhorted the Thai government to stop releasing such information, for instance by requests dated 27 September 2006<sup>859</sup> and 27 April 2007.<sup>860</sup> The Philippines submits that, although the aggregate quantities of imported cigarettes are commonly made public, no company-specific information should be made available by Thai authorities.

7.401 The Philippines claims that on 9 August 2006<sup>861</sup>, 29 August 2006<sup>862</sup>, 31 August 2006<sup>863</sup>, and again on 27 September 2006<sup>864</sup>, Thai Government officials have disclosed PM Thailand's c.i.f. price to the press. Moreover, the Philippines argues that on 10 August 2006, "unnamed sources from the Customs department" declared to the *Post Today* that "*Marlboro's* import price is Bt.[xx.xxx.xx] and retail selling price Bt. 65 while *L&M's* import price [is] Bt.[xx.xxx.xx] per pack and retail selling price is Bt. 47 per pack. In 2005, [xx.xxx.xx] of *Marlboro* and [xx.xxx.xx] packs of *L&M* were imported to Thailand for domestic sale".<sup>865</sup> Thus both PM Thailand's c.i.f. price and imports volume were made public.

7.402 The Philippines contends that another breach of confidentiality occurred on 1<sup>st</sup> June 2009<sup>866</sup>, as Thai officials revealed PM Thailand's transaction values to the press.<sup>867</sup> This contradicts Thailand's argument that those claims concern past acts on which the Panel needs not make recommendations or findings.

7.403 **Thailand** considers that the Philippines' claim under Article 10 of the Customs Valuation Agreement relates to past completed acts. Hence the Panel should not make any finding thereof.<sup>868</sup>

7.404 With regards to import volumes and the declared transaction value, Thailand alleges that import statistics are generally not confidential and, therefore, in a situation in which an importer was the sole importer of a particular commodity, and this importer decides to reveal this information, its import volumes would not be confidential statistics.<sup>869</sup> More generally, Thailand claims that the Philippines has not discharged its burden of establishing that the information at issue had a confidential status at the time it was disclosed.<sup>870</sup>

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<sup>858</sup> Philippines' second oral statement, para. 55, citing Thailand's second written submission, para. 286.

<sup>859</sup> Exhibit PHL-180, para. 6. PM Thailand requested the Thai Government to "refrain from releasing any of the Company's confidential and price sensitive information to the media".

<sup>860</sup> Exhibit PHL-112, p. 10.

<sup>861</sup> "*Thailand Considers Pulling Wine, Cigarettes out of AFTA as Loopholes Exploited*", Bangkok Post, 9 August 2006. Exhibit PHL-54. "*Customs Agreed to Adjust Prices of Cigarettes - Wine*", Daily News, 9 August 2006. Exhibit PHL-64.

<sup>862</sup> "*A proposal will be made to the Cabinet to fix tax evasion by foreign cigarette importers*", Matichon, 29 August 2006. Exhibit PHL-85.

<sup>863</sup> "*Thanong presses to raise tax on imported cigarettes*", Khao Hun, 31 August 2006. Exhibit PHL-1.

<sup>864</sup> "*Excise Plans to Ban Importation of Cigarettes*", Krungthep Turakij, 27 September 2006. Exhibit PHL-86.

<sup>865</sup> "*Customs put pressure on 'Marlboro'*", Post Today, 10 August 2006. Exhibit PHL-48.

<sup>866</sup> Philippines first oral statement, para. 20. "*Authorities Plan to Plug Loopholes*", Bangkok Post, 1 June 2009. Exhibit PHL-159.

<sup>867</sup> Philippines first oral statement, para. 20.

<sup>868</sup> Thailand's first oral statement, para. 30.

<sup>869</sup> Thailand's response to question No. 35.

<sup>870</sup> Thailand's response to question No. 35.

(b) Analysis by the Panel

7.405 The Philippines claims that Thailand breached Article 10 of the Customs Valuation Agreement when Thai government officials disclosed the c.i.f. price, transaction values of PM Thailand for the year 2006, and PM Thailand's import volumes for the year 2005 to the press.<sup>871</sup> The Philippines argues that this information is confidential by nature within the meaning of Article 10 of the Customs Valuation Agreement.<sup>872</sup>

7.406 Article 10 of the Customs Valuation Agreement provides:

"All information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings."

7.407 We therefore understand that Article 10 of the Customs Valuation Agreement prohibits Customs authorities from disclosing information which is in essence confidential when an importer provided it for the purpose of customs valuation.

7.408 The Customs Valuation Agreement neither defines confidential information nor provides a specific list of information that qualifies as confidential information. We find useful guidance in the discussions of the Ad Hoc Group on Implementation in the Committee on Anti-Dumping Practices. The record of the discussions indicates that information can be considered as confidential if it is not in the public domain and if its disclosure would be likely *inter alia*: "to be of significant competitive advantage to a competitor ... , to have a significant adverse effect upon the party who submitted the information ... , to prejudice the commercial position of a person who supplied or who is the subject of the information, ...".<sup>873</sup>

7.409 Both parties agree that the PM Thailand's c.i.f. price, transaction values and imports volume were revealed to the press by Thai officials. The evidence before us shows that Thai government officials were involved in the revealing of this information to Thai newspapers, both in the months of August and September 2006, and in June 2009.<sup>874</sup> For instance, "unnamed sources from the Customs department" declared on 10 August 2006 to the *Post Today* that "Marlboro's import price is Bt.[xx.xxx.xx] and retail selling price Bt. 65 while L&M's import price [is] Bt.[xx.xxx.xx] per pack and retail selling price is Bt. 47 per pack. In 2005, [[xx.xxx.xx]] of Marlboro and [[xx.xxx.xx]] packs of L&M were imported to Thailand for domestic sale".<sup>875</sup> Ms. Kanyanuch Sorthip, the Thai Department of Special Investigation deputy director-general revealed on 29 August 2006 that "as for the imported cigarette L&M, the c.i.f. price is Bt[[xx.xxx.xx]], retail selling price is Bt47 each. Royal Deluxe's and Krongthip Deluxe's factory price is Bt7.946, with the retail selling price of Bt53. Marlboro is priced at Bt[[xx.xxx.xx]], retail selling price of Bt65".<sup>876</sup>

7.410 Thailand does not dispute that PM Thailand's c.i.f. price is classified as confidential information.<sup>877</sup> Thailand also admits that PM Thailand's customs value is confidential information.<sup>878</sup>

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<sup>871</sup> Philippines' first written submission, para. 386.

<sup>872</sup> Philippines' first written submission, para. 407.

<sup>873</sup> G/ADP/AHG/W/65

<sup>874</sup> Exhibits PHL-1, PHL-48, PHL-54, PHL-64, PHL-85, PHL-86, PHL-112, PHL-159 and PHL-180.

<sup>875</sup> "Customs put pressure on 'Marlboro'", *Post Today*, 10 August 2006. Exhibit PHL-48.

<sup>876</sup> Exhibit PHL-85, p. 2.

<sup>877</sup> Philippines' second written submission, para. 286 ("there is no dispute that c.i.f. prices for imported cigarettes are confidential information and that the disclosure of this information would prejudice the legitimate commercial interests of importers of cigarettes").

Concerning import volumes, however, Thailand submits that although import volumes *may* be confidential information, they would not be confidential either when a company is the sole importer of a given good, or when the company has agreed that the information shall be publicly disclosed.<sup>879</sup> In this regard, we note that PM Thailand is not the sole cigarette importer in Thailand.<sup>880</sup> Furthermore, at no point has PM Thailand agreed to make its confidential information available to the public. On the contrary, PMTL has insisted on multiple occasions that this information should be kept confidential.<sup>881</sup> Moreover, we agree that the very disclosure of PM Thailand's c.i.f. price, transaction values and imports volume information could cause commercial damages to PM Thailand by giving its competitors access to its sensitive business information. For example, the nature of such information could give competitors useful indications on PM Thailand's business strategy, including profit margins. Thailand did not specifically respond to this argument. Rather, it acknowledged that "the disclosure of [the c.i.f. price] information would prejudice the legitimate commercial interests of importers of cigarettes".<sup>882</sup>

7.411 Therefore, the Panel concludes that Thailand acted inconsistently with Article 10 of the Customs Valuation Agreement by disclosing confidential customs valuation information provided by PM Thailand to Thai Customs in the Thai media.

D. ARTICLE III:2, FIRST SENTENCE OF THE GATT 1994 – VAT FOR CIGARETTES

**1. Introduction**

7.412 The Philippines claims that Thailand acts inconsistently with Article III:2, first sentence, because Thailand imposes a VAT on imported cigarettes "in excess of" the VAT imposed on like domestic cigarettes by establishing a discriminatory tax base for VAT imposed on imported cigarettes.<sup>883</sup> Thailand argues that the tax base for a VAT is established in the same manner for both imported and domestic cigarettes and that the Philippines has not established a *prima facie* case that imported cigarettes are taxed "in excess of" domestic cigarettes.

7.413 Article III:2 of the GATT 1994 provides:

*"Article III*

*National Treatment on Internal Taxation and Regulation*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

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<sup>878</sup> Philippines' first oral statement, para. 197 ("With respect to imported cigarettes, the customs value is confidential and cannot be published").

<sup>879</sup> Thailand's response to Panel question No. 35.

<sup>880</sup> Exhibit PHL-77.

<sup>881</sup> Exhibit PHL-159 and PHL-112, p. 10.

<sup>882</sup> Philippines' first oral statement, para. 197 ("With respect to imported cigarettes, the customs value is confidential and cannot be published").

<sup>883</sup> Philippines' first written submission, paras. 458-459 and 493-516; first oral statement, paras. 208-220; second written submission, paras. 369-427; comments of 16 September 2009, para. 19; second oral statement, para. 74.



7.414 As clarified by the Appellate Body in *Canada – Periodicals*, the question of whether a measure is consistent with the first sentence of Article III:2 of the GATT 1994 requires a two-step analysis: first, whether imported and domestic products are like and, second, whether imported products are subject to an internal tax in excess of that applied to the domestic products. If the answers to both questions are affirmative, then there is a violation of Article III:2, first sentence.<sup>884</sup>

7.415 We will commence our analysis by identifying the specific VAT-related measure(s) that the Philippines claims are in violation of Article III:2, first sentence.

## 2. Measures at issue

7.416 In its panel request, the Philippines identifies the following as the measures through which the Thai VAT system operates:

- Sections 79/5, 81, 82/7, 88, 88/2, 88/5, 88/6, 89(4), and 89/1 of the Revenue Code of Thailand;
- Section 23 of the Tobacco Act B.E. 2509 (1966);
- Royal Decree, issued under the Revenue Code, Governing the Reduction of the Value Added Tax Rates (No. 479), B.E. 2551 (2008);
- Royal Decree issued under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (1991);
- Order of the Revenue Department No. Por 85/2542 (1999);
- Notification of the Director-General of the Revenue Department on VAT (No. 10);
- MRSP Notices issued by the Director-General for Excise. The currently applicable MRSPs are set out in the Notice B.E. 2550 (2007) of 29 August 2007 (for domestic products) and in the Notice B.E. 2551 (2008) of 19 August 2008 (for imported products); and
- any amendments, implementing measures, or other related measures.

7.417 The Philippines requests that the Panel finds that Thailand violates Article III:2, first sentence of the GATT 1994 by imposing a VAT on imported cigarettes "in excess of" the VAT imposed on like domestic cigarettes through the level of the MRSPs (i.e. the tax base for VAT). Specifically, the Philippines claims that the MRSP Notices issued for *Marlboro* and *L&M* on 7 December 2005, 18 September 2006, 30 March 2007, and 29 August 2007 violate Article III:2 of the GATT 1994.<sup>885</sup>

7.418 The Panel notes that the Philippines submitted in its comments of 9 November 2009 on Thailand's second oral statement, that by mistake, in its second oral statement, it omitted to include the MRSP Notice of 19 August 2008 as part of the MRSP Notices that form part of this proceeding.<sup>886</sup>

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<sup>884</sup> Appellate Body Report, *Canada – Periodicals*, pp. 22-23, DSR 1997-I, 449, at 468. The Panel in this case laid down the two step test, which was referred to and upheld by the Appellate Body (Panel Report, *Canada – Periodicals*, para. 5.21).

<sup>885</sup> Philippines' comments of 16 September 2009, para. 19; second oral statement, para. 75; response to Panel question No. 128. In Section VII.B.1(c) above, we explained that these notices are within our terms of reference.

<sup>886</sup> Philippines' comments on Thailand's second oral statement, para. 16.

The Panel observes that while this specific Notice is identified in the Philippines' Panel request and is referred to as an example of Thailand's MRSP calculation in certain parts of the Philippines' written submissions, the Philippines never put forward a claim, not to mention specific arguments, in this proceeding that the 19 August 2008 Notice itself violates Article III:2 until its comments of 9 November 2009. In its comments on the Interim Panel Report, the Philippines provided a table which presents an overview of all its submissions related to this MRSP Notice, we consider that the referred submissions can be divided into three types: (i) submissions referring to the marketing cost calculation for the 18 August 2008 MRSP Notice; (ii) submissions related to the absolute difference in MRSPs between domestic and imported cigarettes; and (iii) submissions referring to other aspects of the 18 August 2008 MRSP Notice.

7.419 We consider that submissions of type (ii) and (iii) are too general to be considered "arguments" or "evidence" specifically put forward in connection with the Philippines' claim under Article III:2, first sentence, as in those submissions the 2008 MRSP Notice is simply used as an example to endorse a different claim.<sup>887</sup> We agree that submissions of type (i), on the contrary, deal with the calculation of the marketing costs, and are of a more substantive nature. In these submissions, the Philippines puts forth that the December 2005 MRSP Notice is inconsistent with Article III.2 of the GATT 1994 because the marketing costs for this Notice have been incorrectly calculated, and since these costs are also used for the calculation of the 2008 (and 2009) MRSP, the 2008 MRSP is also in violation of Article III:2. However, despite the fact that the Philippines is referring several times to the August 2008 MRSP Notice and also provides information on the Notice in several exhibits,<sup>888</sup> we do not consider this information to consist of claims or arguments on the Notice, and accordingly, we are not in a position to make a finding on the consistency of the 19 August 2008 Notice with the obligations under Article III:2, first sentence.

7.420 During the Panel proceedings, in May 2009, a new MRSP Notice was issued. During the proceedings, the Philippines specifically requested the Panel *not* to rule on this MRSP Notice by stating that: "the Panel should not base its findings on the May 2009 MRSP Notices. WTO dispute settlement should not involve a moving target that changes through revised measures adopted during panel proceedings, possibly in light of argument and evidence presented to a panel".<sup>889</sup> Thailand did not contest this either. As the MRSP Notice was issued after the establishment of the Panel, and as the parties did not want the Panel to consider this new Notice in its analysis, the Panel decided to not include it.

7.421 As explained in Section VII.D.4(a)(iii) *au-dessous*, the specific methodology and procedural steps that Thai Excise follows to determine the MRSP is not set forth in the Thai law or regulations although the elements for the calculation of the MRSP are indicated in the MRSP Notices issued as from August 2007 onwards. In the course of this dispute, Thailand presented to the Panel the methodology that Thai Excise uses to establish the MRSP. As we understand, the Philippines has not challenged this general methodology that is allegedly used by Thai Excise in determining MRSPs *per se*. The Philippines states, for example, "the dispute concerns the MRSPs established on

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<sup>887</sup> Philippines' first written submission, paras. 493-502, including table 4 in para. 498, para. 708, item 19 and para. 712; first oral statement, paras. 208, 210 and 212-216; request of 15 June 2009, para. 6 and table of documents, item 19; question to Thailand following the first panel meeting, para. 2 and table of documents, item 19; response to Panel question No. 79; second written submission, paras. 414-424, including graphs 1-4; comments on Thailand's answers to Panel questions (second meeting), paras. 90, 117-121 and 126-130.

<sup>888</sup> Exhibits PHL-77, PHL-127, PHL-155, PHL-171, PHL-172, PHL-204, PHL-208, PHL-210, PHL-211, PHL-212, PHL-213, PHL-238, PHL-270 and PHL-208.

<sup>889</sup> Philippines' second written submission, para. 431.

7 December 2005, 18 September 2006, 30 March 2007, and 29 August 2007".<sup>890</sup> Therefore, the Philippines' claim under Article III:2, first sentence, is confined to these MRSP Notices.

### 3. Like product analysis

(a) Whether the like product analysis under Article III:2, first sentence, requires a comparison between "all" imported and "all" domestic products

(i) *Main arguments of the parties*

7.422 The **Philippines** submits that its primary claim under Article III:2, first sentence, pertains to *all* imported and *all* domestic cigarettes, across *all* price segments.<sup>891</sup> In the alternative, the Philippines argues that all domestic and imported cigarettes within each price segment are "like products".<sup>892</sup>

7.423 The Philippines is, however, of the view that a finding of a violation under Article III:2, first sentence, does not require a finding that all imported and domestic cigarettes are like.<sup>893</sup> Thailand violates Article III:2 whenever a given imported brand of cigarettes is "like" a given domestic brand, and the former is subject to taxation in excess of the latter. The Philippines points out that Thailand accepted in its first written submission that cigarettes in the same price bracket are "like" products.

7.424 **Thailand** understands that which categories of imported and domestic products need to be compared for the likeness analysis under the Article III:2 claim depends on how the complainant structures its claims.<sup>894</sup> To the extent that the Philippines' claim is that *all* imported cigarettes are like *all* domestic cigarettes and that any difference in taxation between the two constitutes a violation of Article III:2, the Panel cannot conclude that Thailand violates Article III:2 unless it finds that *all* imported cigarettes are like *all* domestic cigarettes. Nonetheless, Thailand does not dispute that particular pairs of imported and domestic cigarettes may be like products.<sup>895</sup>

(ii) *Analysis by the Panel*

7.425 The Philippines' primary claim on "like products" is that "all" imported cigarettes are like "all" domestic cigarettes. Thailand therefore submits that the Panel cannot conclude that Thailand violates the first sentence of Article III:2 unless it finds that all imported cigarettes are like all domestic cigarettes, to the extent that the Philippines' claim is structured in such a manner. The Philippines' claim in respect of likeness between imported and domestic cigarettes is, however, not confined to its primary claim. The Philippines also claims that domestic and imported cigarettes *within each price segment* are like products.<sup>896</sup> It submits that Thailand violates Article III:2 whenever

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<sup>890</sup> Philippines' second oral statement, para. 75. The Philippines also states that "the Philippines indicated that the dispute concerns MRSP Notices from the past 'two and a half years', which includes the December 2005 MRSP Notice, in force at the beginning of that period, and the 2006 and 2007 MRSP Notices, which were already contested in Thai proceedings when the Panel Request was prepared." The Philippines also refers to its panel request, para. 25.

<sup>891</sup> Philippines' first written submission, paras. 464-486; first oral statement 369; response to Panel question No. 39.

<sup>892</sup> Philippines' response to Panel question No. 39.

<sup>893</sup> Philippines' response to Panel question No. 48.

<sup>894</sup> Thailand's response to Panel question No. 48(2).

<sup>895</sup> Thailand's first written submission, para. 221.

<sup>896</sup> We note the Panel's statement in *Dominican Republic – Import and Sale of Cigarettes* that "imported cigarettes can generally be considered as like products to domestic Dominican Republic cigarettes within the meaning of the first sentence of Article III:2 of the GATT". In the light of the Panel's further elaboration on its like product analysis, however, we understand that the above statement was made more as a

a given imported brand of cigarettes is "like" a given domestic brand, and the former is subject to taxation in excess of the latter.<sup>897</sup>

7.426 Given the arguments above, the Panel will first identify the scope of imported and domestic products that are to be compared in the present dispute for the like product analysis under Article III:2, first sentence.

7.427 The first sentence of Article III:2 states that "the products ... imported ... shall not be subject ... to internal taxes or other internal charges ... in excess of those applied ... to like domestic products". Therefore, the language of Article III:2, first sentence, does not indicate that "all" imported products should be found like "all" domestic products. In previous disputes involving a likeness analysis under Article III:2, first sentence, panels found that the imported products concerned were "like" domestic products within the meaning of this provision, so far as the imported product[s] at issue in a given dispute was [were] considered "like" to *at least some* domestic products.<sup>898</sup>

7.428 In the light of the above, we do not consider that a comparison between "all" imported cigarettes and "all" domestic cigarettes is required for the analysis of likeness under Article III:2, first sentence. Although presenting evidence showing likeness between all imported and all domestic cigarettes will definitely satisfy the likeness requirement of Article III:2, first sentence, we do not find it necessary to conduct such an analysis for the purpose of this dispute. Therefore, we will proceed to examine whether the Philippines has established with supporting evidence that the imported cigarettes at issue are like at least some domestic cigarettes within the meaning of Article III:2, first sentence.

(b) Whether the imported and domestic cigarettes within particular price segments are "like" within the meaning of Article III:2, first sentence

(i) *Main arguments of the parties*

7.429 The **Philippines** submits that if the Panel does not make a finding with respect to all cigarettes, the Philippines maintains that all cigarettes *within particular price segments* are like.<sup>899</sup> The Panel must then assess which domestic brands are like imported *L&M* cigarettes, and which domestic brands are like imported *Marlboro* cigarettes. The Philippines also notes that Thailand concedes that domestic and imported cigarette brands within a price segment are "like" products.<sup>900</sup> In any event, the Philippines has adduced the necessary evidence to show that *all* imported and domestic cigarettes are like products.<sup>901</sup> Specifically, the Philippines relies on three pieces of

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general remark than as a finding on the likeness between the imported and domestic cigarettes at issue in that dispute (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.330). Specifically, the Panel stated in the following paragraph:

"However, for the purpose of the analysis within the first sentence of Article III:2 of the GATT, a narrowly construed interpretation of the likeness requirement, would require the Panel to additionally consider the fact that, within the general product description, cigarettes are presented to consumers distinguished by brands. Under the identification of these brands, cigarettes compete within specific price segments against each other. The distinction between different price segments may be particularly important for the analysis under Article III:2 of the GATT, since the Selective Consumption Tax was applied on an *ad valorem* basis, i.e. was related to the price of the product" (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.331).

<sup>897</sup> Philippines' response to Panel question No. 48.

<sup>898</sup> See, for example, Panel Report, *Indonesia – Autos*, para. 14.110.

<sup>899</sup> Philippines' second written submission, para. 388; response to Panel question Nos. 39 and 48.

<sup>900</sup> Philippines' second written submission, para. 388; response to Panel question No. 48, referring to Thailand's first written submission, para. 221.

<sup>901</sup> Philippines' response to Panel question No. 48.

evidence – (i) a TNS Market Study on switching rates between cigarette brands as well as the cross-price elasticity of demand<sup>902</sup>; (ii) research on the elasticity of substitution between cigarette brands<sup>903</sup>; and (iii) an expert statement on income-compensated cross-price elasticity of demand<sup>904</sup> – to demonstrate that all imported and all domestic cigarettes are like. The Philippines argues that this same evidence also supports its position that imported and domestic cigarettes within the same price segments are like.<sup>905</sup>

7.430 According to the Philippines, *L&M* cigarettes are priced similarly to *Krongthip*, *Gold City FF 90*, *Falling Rain*, *Krongthip FF 90*, *Royal Standard FF Regular*, *Samit FF 90*, and *Krongthip Lights*; and *Marlboro* cigarettes are priced similarly to *Krongthip FF Deluxe* and *Royal Standard FF Deluxe*.<sup>906</sup>

7.431 **Thailand** does not dispute that particular pairs of imported and domestic cigarettes *may* be like products.<sup>907</sup> Moreover, Thailand did not respond to the Philippines' argument that *L&M* and *Marlboro* cigarettes are like domestic cigarettes within their specific price segments. To the extent that the Philippines claims that all imported and all domestic cigarettes are like products, Thailand takes the view that the Philippines must establish that every possible pair of imported and domestic cigarette brands is "perfectly substitutable".<sup>908</sup> Thailand argues that the Philippines bears the burden of establishing that particular imported and domestic brands are "perfectly substitutable" and, therefore, "like products".

(ii) *Analysis by the Panel*

7.432 For the likeness analysis under Article III:2, first sentence, we decided to compare the likeness between the imported cigarette brands at issue (i.e. *Marlboro* and *L&M*) and the domestic cigarette brands that are within the same price segments. The Philippines submits that premium *Marlboro* cigarettes are priced similarly to two domestic cigarette brands, *Krongthip FF Deluxe* and *Royal Standard FF Deluxe*, and mid-priced *L&M* cigarettes are priced similarly to *Krongthip*, *Gold City FF 90*, *Falling Rain*, *Krongthip FF 90*, *Royal Standard FF Regular*, *Samit FF 90*, and *Krongthip Lights*. Thailand does not object to this categorization by the Philippines.<sup>909</sup> As noted above, Thailand agrees that particular pairs of imported and domestic cigarettes *may* be like products. We will therefore examine in this section whether the Philippines has established that *Marlboro* cigarettes are "like" *Krongthip FF Deluxe* and *Royal Standard FF Deluxe* cigarettes and whether *L&M* cigarettes are like *Krongthip*, *Gold City FF 90*, *Falling Rain*, *Krongthip FF 90*, *Royal Standard FF Regular*, *Samit FF 90*, and *Krongthip Lights* cigarettes.

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<sup>902</sup> Exhibit PHL-111(a) and PHL-111(b).

<sup>903</sup> Exhibit PHL-148.

<sup>904</sup> Exhibit PHL-149.

<sup>905</sup> Philippines response to Panel question Nos. 39 and 48.

<sup>906</sup> Philippines' response to Panel question No. 48, referring to Exhibits THA-19 and PHL-148; second written submission, para. 390, Table 2.

<sup>907</sup> Thailand's first written submission, para. 221.

<sup>908</sup> Thailand's second written submission, para. 126. Thailand argues that given that there were 19 domestic brands and 86 imported brands present in the Thai market at the time of the establishment of the Panel, there are 1,634 possible pairings of imported and domestic brands that the Philippines must demonstrate to be "perfectly substitutable".

<sup>909</sup> The Philippines submits that the only difference between the argument and evidence for likeness within price categories, and the argument and evidence for likeness across categories, concerns the retail price. The Philippines maintains that for all other likeness criteria, its argument and evidence is the same. (Philippines' second written submission, para. 389). Thailand has not objected to this characterization of the Philippines' argument and evidence.

7.433 We begin our analysis by recalling the Appellate Body's guidance on the like product analysis under Article III:2, first sentence. The Appellate Body considered that the proper test for a determination of like products for the purposes of Article III:2, first sentence must be construed narrowly, on a case-by-case basis, by examining relevant factors including the following: (i) the product's end-uses in a given market; (ii) consumers' tastes and habits; (iii) the product's properties, nature and quality; and (iv) tariff classification.<sup>910</sup> We are also mindful of the Appellate Body's observation in *EC – Asbestos* that "having adopted an approach based on the four criteria set forth in *Border Tax Adjustments*, the Panel should have examined the evidence relating to *each* of those four criteria and, then, weighed *all* of that evidence, along with any other relevant evidence, in making an *overall* determination of whether the products at issue could be characterized as 'like'".<sup>911</sup> We will therefore examine the evidence relating to the likeness of the imported and domestic cigarettes at issue based on each of the four criteria above, as well as on any other relevant evidence, and evaluate all the evidence in its entirety before reaching a final conclusion.

7.434 In this connection, we note Thailand's argument that only "perfectly substitutable products" fall within the definition of "like products" in Article III:2, first sentence. Thailand supports its position by referring to the Appellate Body's explanation in *Korea – Alcoholic Beverages*. The Appellate Body stated:

"Like products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'. The notion of like products must be construed narrowly but the category of directly competitive or substitutable products is broader. *While perfectly substitutable products fall within Article III:2, first sentence*, imperfectly substitutable products can be assessed under Article III:2, second sentence."<sup>912</sup> (emphasis added)

7.435 Thailand appears to rely on the last sentence in the paragraph quoted above to argue that only perfectly substitutable products will satisfy the like products standard under Article III:2, first sentence.

7.436 We find Thailand's reading of the Appellate Body's statement above unnecessarily restrictive. Although we agree that perfectly substitutable products will clearly be "like products" within the meaning of Article III:2, first sentence, we do not consider that the Appellate Body meant to restrict the scope of like products to *identical* products. While this interpretation may be consistent with the economic definition of "perfectly substitutable", it would render a finding of likeness under Article III:2, first sentence, almost impossible.

7.437 As noted above, a determination of like products must be carried out on a case-by-case basis taking into account, *inter alia*, the four criteria cited in *Border Tax Adjustments* as well as any other criteria that may also be relevant in a given case.<sup>913</sup> Our view is also supported by the Appellate Body's following statements:

"[W]e agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn ...

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<sup>910</sup> Appellate Body Reports on *Japan – Alcoholic Beverages II*, pp. 19-21, DSR 1996-I, 97, at 112-114; *Canada – Periodicals*, p. 21, DSR, 1997-I, 449, at 466.

<sup>911</sup> Appellate Body Report, *EC – Asbestos*, para. 109.

<sup>912</sup> Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118.

<sup>913</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-21, DSR 1996-I, 97, at 112-114.

How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis ..."<sup>914</sup>

"Panels can only apply their best judgment in determining whether in fact products are 'like'. This will always involve an unavoidable element of individual, discretionary judgment ... it is a discretionary decision that must be made in considering the various characteristics of products in individual cases."<sup>915</sup>

7.438 Therefore, while the scope of likeness between imported and domestic products is to be construed very narrowly, we understand that, as the Appellate Body indicated, the proper test for a panel's determination of like products for the purposes of Article III:2, first sentence requires a case-by-case analysis taking into account the factual circumstances in each case and discretionary decision by panels.

7.439 Bearing the above in mind, we will examine whether the Philippines has established that the imported cigarettes at issue are like the domestic cigarettes within the same price segments. We note that the parties tend to agree that all imported and domestic cigarettes are like at least in terms of physical characteristics, end-uses and classification under the Harmonized System. In the following paragraphs, we will therefore first evaluate the likeness of the imported and domestic cigarettes concerned based on these three criteria. We will then analyze the likeness based on consumer habits and preferences.

7.440 First, with respect to the physical properties and characteristics of cigarettes, the Philippines submits that imported and domestic cigarettes have the same essential physical characteristics: they are all composed of a paper tube; a mix of tobacco and additives that fills the tube ("filler"); a filter through which the smoke is inhaled<sup>916</sup>; and they are presented and packed in a virtually identical manner in all relevant aspects (i.e. the number of cigarettes contained in each pack and each carton and the size of the packs).<sup>917</sup> We find that an expert's statement based on a laboratory analysis on nature and composition of cigarettes, submitted by the Philippines, supports the view that physical characteristics of the imported and domestic cigarettes at issue are essentially the same.<sup>918</sup> Thailand has not provided any opposing views to this. While noting that, as a factual matter, different brands of cigarettes have different physical properties and qualities<sup>919</sup>, Thailand does not explain or support its observation with any evidence. Rather, Thailand argues that the physical differences caused by the varieties of tobacco and favouring agents used in cigarette brands are reflected in consumer preferences and in varying prices charged for different brands of cigarettes. In the light of this, Thailand's position appears to be that any differences in physical qualities or characteristics that exist between imported and domestic cigarettes will be elements relevant to consumer habits and preferences.

7.441 The very similar physical characteristics of all domestic and imported cigarettes then confirm, according to the Philippines, that cigarettes serve the same end-uses, namely smoking.<sup>920</sup> Furthermore, the imported and domestic cigarettes are classified under the same tariff heading of the

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<sup>914</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20, DSR 1996-I, 97, at 113.

<sup>915</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 20-21, DSR 1996-I, 97, at 113.

<sup>916</sup> Philippines first written submission, para. 465.

<sup>917</sup> Philippines first written submission, para. 469.

<sup>918</sup> Exhibit PHL-199. The Annex to the Exhibit shows the brands that have been analyzed for the comparison. The Panel notes that not all domestic cigarette brands are covered, but that a substantial part is (6 brands and 10 types are included), and therefore the Panel is of the opinion that the comparison in the Exhibit is representative for the Thai cigarette market as a whole.

<sup>919</sup> Thailand's response to Panel question No. 38.

<sup>920</sup> Philippines' first written submission, para. 470; second written submission, para. 379.

Customs Tariff of Thailand, namely heading 2402.20.90, "[c]igars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes ... cigarettes containing tobacco ... other".<sup>921</sup> The Philippines also points out that the imported and domestic cigarettes at issue in this dispute are all subject to not only the same types of tax (i.e. excise tax, VAT, health tax, and television tax), applied at the same nominal rate; but also to the same domestic regulations on advertising, marketing, distribution, as well as labelling; and to the same health regulations.<sup>922</sup> We see no reason to question that *Marlboro* and *L&M* cigarettes and the corresponding domestic cigarette brands have the same end-uses; are classified under the same tariff heading; and subject to the same types of tax and domestic regulations.

7.442 We find, based on the above analysis, that the imported and domestic cigarettes at issue are like in terms of (i) physical quality and characteristics; (ii) end-uses; (iii) tariff classification; and (iv) Thai internal taxes and regulations. As these four elements are not the only criteria that may be considered in the determination of likeness between the imported and domestic cigarettes at issue, and since the parties have also put forward arguments regarding consumer behaviour, we now turn to the question of whether the Philippines discharged its burden of proving that *Marlboro* and *L&M* brand cigarettes can be considered like the domestic counterpart cigarette brands in terms of consumer habits and preferences.<sup>923</sup> The Philippines presented three pieces of evidence – switching evidence and price elasticity<sup>924</sup> and two economic studies on the elasticity of substitution and the cross-price elasticity of demand<sup>925</sup> – to support its position that imported and domestic cigarettes are close substitutes, which in turn establishes that according to the consumer habits and preferences the imported and domestic cigarettes at issue are alike.<sup>926</sup>

7.443 The Philippines first refers to a study conducted by Taylor Nelson Sofres ("TNS").<sup>927</sup> According to the Philippines, this study shows: (i) a high degree of inter-changeability among all major cigarette brands in the light of the switch in and switch out rates for cigarette brands such as *Marlboro* [[xx.xxx.xx]], *L&M* [[xx.xxx.xx]] and certain domestic cigarette brands [[xx.xxx.xx]]<sup>928</sup>; (ii) a high degree of switching between imported and domestic cigarette brands based on the switching rates between imported and domestic cigarettes (e.g. the switching rates between *L&M* cigarettes and TTM cigarettes within the same price segments)<sup>929</sup>; (iii) close substitutability between imported and domestic cigarettes: when the price of an imported brand increases by 10 per cent, purchases of that brand decreases by 27.6 per cent, whereas when the prices of two domestic brands also increase by 8.7 per cent at the same time, purchases of the same imported brand decreases by 19.5 per cent. This mitigated response in demand for the imported brand suggests that the price of domestic cigarettes impacts demand for imported cigarettes and, hence, domestic and imported cigarettes are close substitutes.

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<sup>921</sup> Philippines' first written submission, para. 483, referring to Harmonized Tariff Schedule of Thailand, Chapter 24 (Exhibit PHL-29).

<sup>922</sup> Philippines' first written submission, para. 484.

<sup>923</sup> We note that given our approach to the scope of imported and domestic cigarettes that are compared for the like products analysis (i.e. comparison between those in the same price segments), it would not be necessary to address Thailand's argument that significant price differences between cigarette brands indicate that all of these brands cannot be deemed to be like products (Thailand's first written submission, para. 220).

<sup>924</sup> Philippines' first written submission, paras. 474-481; first oral statement, paras. 201-205; second written submission, para. 380.

<sup>925</sup> Philippines' first oral statement, paras. 206-207.

<sup>926</sup> Philippines' second written submission, paras. 380-381.

<sup>927</sup> Exhibit PHL-111a; PHL-111b; Philippines' response to Panel question No. 48.

<sup>928</sup> Exhibit PHL-111a. The *switch out* rate for cigarette brand A over a certain period of time is the percentage of consumers that regularly smoke brand A, but switch to regularly smoking another brand in that period. The *switch in* rate for cigarette brand A over a certain period of time is the percentage of consumers that regularly smoke another brand, but switch to regularly smoking brand A in that period (Philippines' first written submission, para. 475).

<sup>929</sup> Exhibit 111(b), p. 6.



7.444 Thailand criticizes the Philippines' interpretation of this study for the following reasons: (i) the switch in and switch out ratios are low, which makes it difficult to conclude that the five major cigarette brands are perfectly substitutable; (ii) significant price differences between cigarette brands makes it difficult to consider them being "like products"; (iii) the data on changes in demand for a particular brand of cigarettes following price increases is of limited value because it simply shows consumer perceptions of whether they would purchase *L&M* under these scenarios and does not contain measurements of actual changes in demand at given price points.<sup>930</sup>

7.445 Another study, submitted by the Philippines, allegedly shows the elasticity of substitution between domestic and imported cigarettes: if prices for imported cigarettes increase, purchases of domestic cigarettes would also increase.<sup>931</sup> Thailand questions the relevance of this evidence to the like product analysis with respect to all domestic and all imported cigarette brands on the grounds that all cigarettes are treated as a single unit.<sup>932</sup>

7.446 Finally, the Philippines relies on an economic study conducted by an economics professor, Jamie de Melo, on the cross-price elasticity between imported and domestic cigarettes in Thailand between 2007 and 2009.<sup>933</sup> The study concludes that "the estimate increase of market share of domestic cigarettes pursuant to an increase in the relative RSP of imported cigarettes strongly suggests that the two products are close substitutes in the eyes of Thai consumers".<sup>934</sup> Thailand is of the view that this evidence is of limited value because it treats all brands of domestic and imported cigarettes respectively as a single unit and uses a composite price index in its calculations.<sup>935</sup>

7.447 We will evaluate the above evidence in turn.<sup>936</sup> As noted earlier, the econometric studies put forward by the Philippines purport to prove the substitutability between all imported and all domestic cigarettes. The more convincing the evidence shows the substitutability between the cigarette brands concerned, the more likely that imported and domestic cigarettes are like within the meaning of Article III:2, because they show consumer habits and preferences that treat them alike.

7.448 First, the market study prepared by TNS allegedly showing the consumers' switching patterns between cigarette brands, although providing evidence compatible with substitutable products, it cannot *per se* be considered a sufficient proof that consumers consider these products to be interchangeable. The switching ratios calculated in the study could also have been obtained as the outcome of, for example, changes in consumers' income levels or in the conditions of distribution of a certain brand.

7.449 Similar concerns can be raised with respect to the study on the elasticity of substitution between domestic and imported cigarettes. The relationship shown by the figures in the study may be spurious because they are calculated without various controlling factors that may also have affected this relationship.

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<sup>930</sup> Thailand's second written submission, para. 128.

<sup>931</sup> Exhibit PHL-148; Philippines' response to Panel question No. 48.

<sup>932</sup> Thailand's second written submission, para. 128.

<sup>933</sup> Exhibit PHL-149.

<sup>934</sup> Exhibit PHL-149, p. 9.

<sup>935</sup> Thailand's second written submission, para. 128.

<sup>936</sup> The Appellate Body has clarified that in the context of an Article III:2, first sentence analysis, "substitution implies interchangeability" of the products. Article III:2 requires *direct* substitutability between products. (Appellate Body Report, *Canada – Periodicals*, p. 25, DSR 1997-I, 449 at 470). It has clarified that "the word 'substitutable' indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another" (Appellate Body Report, *Korea – Alcoholic Beverages*, para. 114). In this context, panels have recognized that quantitative studies of cross-price elasticity are relevant, but not exclusive or even decisive in nature (Panel Report, *Korea – Alcoholic Beverages*, para. 10.44).

7.450 The study on cross-price elasticity addresses some of the limitations of the other two studies by, for instance, taking income into account. In particular, since the overall price index is built by weighing each price by the market share, we consider that the results of the study may be driven by the pair of cigarette brands with the highest market share. This means that if the estimations made in the study are assumed to have been conducted correctly, the study can be understood as showing that at least one pair of imported and domestic cigarettes are substitutable.

7.451 In sum, we are of the view that the TNS market study and the study on the elasticity of substitution are inconclusive to show the substitutability between imported and domestic cigarettes because of the incomplete control of all relevant variables. The economic study on cross-price elasticity, although insufficient to show likeness between *all* imported and *all* domestic cigarettes, as the Philippines intended to show, indicates that at least *Marlboro* and *L&M* cigarettes are substitutable with like domestic cigarettes within the same price segments. Considered together with our conclusion above on the likeness between the imported and domestic cigarettes at issue related to their physical characteristics, end-uses and tariff classification, the Philippines has established a *prima facie* case that *Marlboro* and *L&M* cigarettes are at least like the domestic cigarettes within the same price segments. Therefore, given that Thailand did not prove otherwise, we conclude that *Marlboro* cigarettes are "like" *Krongthip FF Deluxe* and *Royal Standard FF Deluxe* cigarettes and that *L&M* cigarettes are like *Krongthip*, *Gold City FF 90*, *Falling Rain*, *Krongthip FF 90*, *Royal Standard FF Regular*, *Samit FF 90*, and *Krongthip Lights* cigarettes within the meaning of Article III:2, first sentence.

#### 4. Excess taxation analysis

7.452 The Philippines argues that Thailand imposes VAT on imported cigarettes in excess of VAT imposed on like domestic cigarettes because: (i) the tax base (the MRSP) for imported cigarettes in absolute terms is higher than for like domestic cigarettes<sup>937</sup>; and (ii) the tax base (the MRSP) for imported cigarettes is systematically higher than the actual retail selling price (the RRSP/RSP) for imported cigarettes, whereas the tax base (the MRSP) for domestic cigarettes is systematically equal to the actual retail selling price (the RSP).<sup>938</sup>

7.453 We will begin our analysis by examining the Thai VAT system as it is applied to cigarettes. We will then proceed to address the two arguments advanced by the Philippines in turn.

##### (a) The Thai VAT system

##### (i) Introduction

7.454 A value added tax can be defined as "a tax assessed at each step in the production of a commodity, based on the value added at each step by the difference between the commodity's production cost and its selling price. A value added tax ... effectively acts as a sales tax on the ultimate consumer".<sup>939</sup> The OECD defines it as follows: "value added taxes (VAT) are consumption taxes. They have three distinctive characteristics: they are levied on a broad base (as opposed to excise taxes which cover specific products), the collection system is organised in stages where each agent may deduct input taxes on purchases and must account for output tax on sales, and, ultimately, the burden

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<sup>937</sup> Philippines' first written submission, paras. 493-496; first oral statement, paras. 208-209 and 212-220; second written submission, paras. 392-393 and 397-424; second oral statement, paras. 83-84 and 87.

<sup>938</sup> Philippines' first written submission, paras. 497-502 and para. 498, Table 4; first oral statement, paras. 210-211; second written submission, paras. 394-396; second oral statement, paras. 83-84 and 87. The Panel notes that the Philippines initially submitted three reasons in this regard. The third reason was that in calculating the MRSP, Thailand applied a discriminatory calculation method (Philippines' first written submission, paras. 503-513; first oral statement, para. 212).

<sup>939</sup> *Black's Law Dictionary*, 7<sup>th</sup> ed., B.A. Garner (ed.) (West Group, 1999), p. 1472.

will be borne by consumers who, as end-users, cannot operate immediate deduction operations. In practice, three tax collection mechanisms are mainly used: (a) under a registration system, the vendor registers with the tax authorities and is responsible for paying/collecting the tax; (b) the tax may, alternatively, be collected directly by the customs authorities at the border; (c) under the reverse charge/self-assessment system, the customer pays directly to the tax authorities".<sup>940</sup>

7.455 The rules pertaining to the imposition and operation of the Thai VAT system are set forth in Title II (Revenue Taxes and Duties), Chapter IV (Value Added Tax) of the Thai Revenue Code B.E. 2481 (1938) (the "Revenue Code").<sup>941</sup> Chapter IV is then divided into 14 divisions according to the subject matter relating to the VAT system.

7.456 Section 77, Division 1 (General Provisions) of Chapter IV provides that "Value added tax is an assessment tax and duty". In accordance with Section 77/2, VAT under the provisions of Chapter IV is charged on the sale of goods or provision of a service by a supplier and the import of goods by an importer in Thailand.<sup>942</sup>

(ii) *Tax rate*

7.457 The tax rate for VAT is provided for in Section 80 of the Revenue Code, which in turn refers to the "Royal Decree Issued Under the Revenue Code Governing Reduction of Rate of Value Added Tax (No. 440) B.E. 2548 (2005)" ("Royal Decree 440") for new rates.<sup>943</sup> The Royal Decree prescribes two VAT tax rates – 7 per cent [6.3 per cent]<sup>944</sup> for the period of 1 October 2005 – 30 September 2007 and 9.0 per cent for the period of 1 October 2007 onwards. The parties do not dispute that the

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<sup>940</sup> Organisation for Economic Co-operation and Development, *International VAT/ GST Guidelines*, February 2006, p. 7.

<sup>941</sup> Exhibit PHL-94, Chapter IV (Value Added Tax) of Title II (Revenue Taxes and Duties) of the Revenue Code is divided into 14 divisions: General Provisions (Division 1 (Section 77-77/5)); Tax Liability (Division 2 (Section 78-78/2)); Tax Base (Division 3 (Section 79-79/7)); Tax Rates (Division 4 (Section 80-80/2)); Exemption from Value Added Tax (Division 5 (Section 81-81/3)); Persons Liable to Tax and Tax Computation (Division 6 (Section 82-82/18)); Filing of Returns and Payment of Tax (Division 7 (Section 83-83/10)); Tax Credit and refund of Value Added Tax (Division 8 (Section 84-84/4)); Value Added Tax Registration (Division 9 (Section 85-85/19)); Tax Invoice, Debit Note, Credit Note (Division 10 (Section 86-86/14)); Preparation of Records and Maintenance of Vouchers and Documents (Division 11 (Section 87-87/3)); Power of the Assessment Officer (Division 12 (Section 88-88/6)); Penalties and Surcharges (Division 13 (Section 89-89/2)); and Punishment (Division 14 (Section 90-90/5)).

<sup>942</sup> Thailand explains that VAT is administered by the Revenue Department. In the case of imports, however, VAT is collected by Thai Customs on behalf of the Revenue Department (Thailand's response to Panel question No. 41, citing to <http://www.rd.go.th> and <http://www.customs.go.th>). The Thai VAT system applicable to cigarettes differs from the system applied to other products in that for cigarettes every reseller collects VAT from the purchaser in respect of every stage of sale. Subsequently, the supplier deducts so-called "input tax" already paid to the previous seller, from "output tax" collected from the next purchaser of goods in each tax month. The VAT registrant supplier thus pays VAT equal to output tax deducted by input tax. However, this system only applies to the (re)sales of imported cigarettes, since for domestic cigarettes TTM directly pays all VAT liable to the Thai Government and resellers are exempted from VAT liability. See paras. 7.579-7.592 below.

<sup>943</sup> Exhibit PHL-93.

<sup>944</sup> Section 5 of Royal Decree 440 identifies 6.3 per cent as the VAT tax rate for 1 October 2005–30 September 2007 (Exhibit PHL-93). In a Note to Subscribers, however, Royal Decree 440 explains that the actual tax rate is 7 per cent:

*"Note to Subscribers: Section 80 of the Revenue Code fixes the value added tax at 10.0 per cent, which is exclusive of municipal tax at 1/9 thereof. Thus, when the value added tax is reduced to 6.3 per cent, the said rate must be added by the municipal tax at 1/9 thereof when collected. Therefore, the applicable rate is  $(6.3 + (6.3 \times 1/9)) = 7.00$  per cent."*

relevant VAT tax rate for cigarettes is 7 per cent ad valorem<sup>945</sup>, which is the rate applied in computing VAT on the sale of goods, the provision of services and imports, including imports of cigarettes and sales of both imported and domestic cigarettes, on the Thai market.

(iii) *Tax base – MRSP*

Overview

7.458 Division 3 of Chapter IV of the Revenue Code contains provisions relating to the tax base for the calculation of VAT. It contains separate sections for the tax base that applies in general and for the tax base that applies to cigarettes in particular. Section 79 defines the tax base that applies in general: "the tax base for sale of goods or provision of services means total value received or receivable by a supplier from such sales or provisions ...". As the Philippines explains, the total value received or receivable, used as the tax base for the vast majority of products, is the retailer's chosen selling price.<sup>946</sup>

7.459 The tax base for *cigarettes* is provided in Section 79/5 of the Revenue Code:

"[T]he tax base for the sale shall be the value of tobacco arrived at by deducting the amount of value added tax from the full amount of its retail price, such tax amount being computed at the rate of value added tax where the tax has been included in the full amount of the retail price."

7.460 The parties explain that the VAT tax base for cigarettes is the MRSP liability, a reference price fixed by the Thai government.<sup>947</sup> To be exact, as set out in Section 79/5, the VAT tax base is the MRSP minus the VAT because the MRSP is inclusive of VAT. This can be put in an equation as follows:

$$\text{VAT} = 7\% * (\text{MRSP} - \text{VAT}) \text{ or} \\ 7/107 * \text{MRSP}$$

7.461 For ease of reference, in this section, we will generally refer to the MRSP as the tax base for VAT, which in fact means the MRSP minus the VAT.

7.462 Although the exact term "MRSP" is not stipulated in Section 79/5 of the Revenue Code, we understand that "the full amount of its retail price" referred to in the provision means the MRSP. The concept of MRSP is provided for in Section 23 of the Tobacco Act B.E. 2509 (1966) (the "Tobacco Act").<sup>948</sup> Section 23 provides:

"The Director-General shall have the power to make announcements fixing the price of tobacco. It is forbidden to sell tobacco at prices exceeding those fixed in the announcement of the Director-General."

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<sup>945</sup> The parties refer to 7 per cent as the VAT tax rate in the following submissions: Philippines' first written submission, para. 415; Thailand's first written submission, para. 76; response to Panel question No. 41.

<sup>946</sup> Philippines' first written submission, para. 415.

<sup>947</sup> Philippines' first written submission, para. 416; Thailand's response to Panel question No. 41; Exhibit PHL-93. The difference between VAT imposed on cigarettes and VAT imposed on other products thus lies in the fact that for cigarettes, the VAT is based on the MRSP, which is set by the Thai Government, while for other products the VAT is based on the actual selling price of the product.

<sup>948</sup> Philippines' first written submission, para. 419; Exhibit PHL-119.

7.463 The text of Section 23 thus indicates that the Director-General of the Excise Department ("DG Excise") determines maximum prices (i.e. the definitive MRSP, which is here a price inclusive of the VAT amount) at which a particular brand of cigarettes may be sold on the Thai market.<sup>949</sup> This implies that although a brand of cigarettes cannot be sold at prices exceeding the MRSP, it may be sold at prices below the MRSP.

#### Establishment of the MRSP

7.464 Given that the MRSP is the tax base for VAT, the MRSP must be established first to calculate the VAT amount for a particular brand of cigarettes.

7.465 The text of Section 23 of the Tobacco Act does not set out the specific manner in which the MRSP is determined. The components comprising the MRSP are explained in the preambles of the MRSP Notices issued after August 2007.<sup>950</sup> The preambles read:

"[T]he Excise Department therefore fixes the [MRSP] ... by making a computation as based on the c.i.f. price, customs duty, tobacco stamp (i.e. excise tax), value added tax, contributions to the health promotion fund, contributions to the Thai Public Broadcasting of Sound and Picture Foundation, contributions to provincial administration organization development, and marketing margin combined."

7.466 In sum, the MRSP consists of the following eight variables:

MRSP = c.i.f. or ex factory price  
+ [Customs duties (c.i.f. price\*5%)]<sup>951</sup>  
+ Excise tax ((c.i.f. price + customs duties)\*400%)  
+ Health tax (excise tax\*2%)  
+ Television tax (excise tax\*1.5%)  
+ Local tax (currently 1.86 baht per pack)  
+ VAT  
+ Marketing costs<sup>952</sup>

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<sup>949</sup> Section 4 of the Tobacco Act provides that "Director-General" means the Director-General of the Excise Department. Philippines' first written submission, para. 420; Thailand's first written submission, para. 83; response to Panel question No. 41. Thailand states that "Thai Excise is responsible for the determination and publication of the MRSPs for all brands of cigarettes, both domestic and imported" and that "the MRSPs are determined by Thai Excise". Thailand also submits that it is within Thai Excise's discretion to administer the MRSPs, under Section 23 of the Tobacco Act, to accept suggestions as to revisions of the MRSPs from both TTM and importers (Thailand's first written submission, para. 89).

<sup>950</sup> Exhibits PHL-77, PHL-104, PHL-105, PHL-106 and PHL-118.

<sup>951</sup> Customs duties are added for the calculation of the MRSP for imported cigarettes only.

<sup>952</sup> Furthermore, Thailand submitted a sample calculation of how the amount of an MRSP is calculated in Exhibit THA-47. As the worksheet in Exhibit THA-47 shows, with the exception of marketing costs, all other variables comprising the MRSP (i.e. customs duties, excise tax, health tax, television tax) can be derived on the basis of the c.i.f. or ex factory price. The c.i.f./ex factory price therefore forms the starting points for the calculation of MRSPs for domestic and imported cigarettes (Thailand's first written submission, para. 85; Exhibit THA-48).

7.467 According to Thailand, new MRSPs are established and existing MRSPs are revised<sup>953</sup> in the following manner:<sup>954</sup>

7.468 The primary source of the MRSP is the importer's or the domestic manufacturer's proposed MRSP/RRSP. Importers and the domestic manufacturer inform Thai Excise of the proposed MRSP/RRSP when they want to introduce a new brand or revise an existing MRSP.<sup>955</sup>

7.469 Importers and domestic manufacturers may request changes in the MRSPs at any time to reflect changes in their c.i.f. or ex factory prices, desired retail prices, or other factors such as changed market conditions. Subject to a review as to whether the proposed MRSP/RRSP is consistent with Thai Excise's dual objectives of protecting consumers from excessive pricing and preventing any tax avoidance by the manufacturer/importer understating the proposed retail price, Thai Excise will then accept or reject the proposed MRSP/RRSP. If it accepts the proposed MRSP/RRSP, it publishes this price as the MRSP for that brand. Thai Excise may reject proposed changes or make other adjustments<sup>956</sup> consistent with the dual function of the MRSP as a maximum price to protect consumers and as the tax base for VAT.

7.470 Thai Excise may also, and normally does, calculate a new MRSP if any of the applicable tax rates changes, necessitating a revision in the MRSP. In these cases, Thai Excise calculates the new MRSP by changing the relevant c.i.f. or ex factory prices, updating the tax amounts that are based on those figures, and holding the so-called "marketing costs" constant. Thai Excise generally uses the same amount of "marketing costs" as included in the latest MRSP or in the MRSP previously requested by the domestic manufacturer or the importer, which is derived by subtracting all other elements (i.e. the c.i.f./ex factory price plus all applicable taxes) from the MRSP.<sup>957</sup>

7.471 Once a new MRSP is determined, Thai Excise publishes a notice, reflecting the new MRSP.<sup>958</sup>

7.472 The Philippines does not appear to take issue with the overall methodology to be applied to establish the MRSPs for cigarettes as described by Thailand above. To that extent and in the absence of any specific written rules in Thai law indicating how the MRSP is established, we will undertake our analysis of the parties' claims and arguments in this section on the understanding that the methodology set out above is the general methodology applied in determining the MRSP for a specific brand of cigarettes.<sup>959</sup>

7.473 We note in this connection that the parties contest how the "marketing costs" component of the MRSP is *determined*. Thailand defines the "marketing costs" as the total selling expenses and

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<sup>953</sup> Philippines' second written submission, paras. 324 and 326. The Philippines argues, in the context of its Article X:1 claim with respect to Thailand's alleged failure to publish rules for determining MRSPs, that the methodology used to *revise* an MRSP is more important than the methodology first used to establish an MRSP, because the MRSPs are regularly revised, usually at least once per year. It further states that for *Marlboro* and *L&M*, the initial MRSP was determined, respectively, approximately 20 and 10 years ago, and the MRSP revision methodology has determined the MRSPs ever since. The Philippines contends, however, that MRSPs have not been revised following the methodology that Thailand has presented to the Panel.

<sup>954</sup> Thailand's first written submission, paras. 83-96; Philippines' second written submission, para. 135.

<sup>955</sup> Exhibits THA-18, THA-31 and THA-100.

<sup>956</sup> Thailand's first written submission, para. 89.

<sup>957</sup> Thailand's first written submission, paras. 85-86 and 88; response to Panel question No. 41; second written submission, para. 245; comments of 25 September 2009, paras. 42 and 45.

<sup>958</sup> Thailand's first written submission, paras. 83 and 87; Exhibit THA-59 and THA-63. The MRSP is issued separately for each brand, for both domestic and imported cigarettes, which is for example shown in Exhibit THA-19, in which Thailand shows MRSP determinations for several foreign and domestic brands.

<sup>959</sup> See Section VII.G.1(c)(ii) below.

profits associated with selling the cigarettes to the final consumer in the Thai market.<sup>960</sup> This amount represents the selling expenses and profits of not just the manufacturer or importer (e.g. TTM or PM Thailand), but also of all the wholesalers and retailers in the chain of distribution until the cigarettes are sold to the final consumer (who ultimately pays the VAT).<sup>961</sup> We will address the parties' arguments on the determination of the marketing costs in the context of our analysis of whether imported cigarettes are subject to excess taxation through the alleged gap existing between the MRSP and the RRSP/RSP for imported cigarettes.

(b) Whether imported cigarettes are subject to excess taxation – the higher absolute level of the MRSPs for imported cigarettes than for domestic cigarettes

(i) *Main arguments of the parties*

7.474 The **Philippines** submits that Thailand applies a higher tax base for imported cigarettes than for like domestic cigarettes, while simultaneously maintaining an identical tax rate applicable to all cigarettes, resulting in the imposition of a tax on imported cigarettes in excess of like domestic cigarettes.<sup>962</sup> The data before the Panel indicate that the absolute MRSPs for imported cigarette brands (*i.e.* *Marlboro* and *L&M*) are almost always higher than the MRSPs for domestic cigarette brands (*i.e.* TTM).<sup>963</sup> The Philippines argues that this data illustrate that *Marlboro* and *L&M* are taxed in excess of their respective like domestic brands in absolute terms because the VAT for cigarettes in Thailand is based on the MRSP value.<sup>964</sup> Therefore, the Philippines claims that this excess tax burden for imported cigarettes in absolute terms violates Article III:2, first sentence, of the GATT 1994.<sup>965</sup>

7.475 **Thailand** argues that Article III:2, first sentence does not require that all imported cigarettes bear the same absolute tax amount as all domestic cigarettes.<sup>966</sup> Moreover, Members are permitted to use fixed price systems and *ad valorem* systems of internal taxation.<sup>967</sup> Thailand asserts that its *ad valorem* system explains the natural result of a differential tax basis (MRSP) for domestic and imported cigarettes.<sup>968</sup> Thailand references the Panel in *Dominican Republic – Import and Sale of Cigarettes*, which provided that the fact that different cigarette brands are priced differently may be especially important for the analysis under Article III:2 [of the GATT 1994].<sup>969</sup> Furthermore, if the Philippines' absolute taxation test were accepted, WTO Members would be precluded from applying *ad valorem* internal taxes altogether.<sup>970</sup> Thailand submits that a system of taxation where more expensive imported brands are taxed higher, in absolute terms, than less expensive domestic brands, may be consistent with WTO obligations.<sup>971</sup>

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<sup>960</sup> Thailand's first written submission, paras. 86 and 89.

<sup>961</sup> Thailand's first written submission, para. 86.

<sup>962</sup> Philippines' second written submission, para. 393.

<sup>963</sup> Philippines' first written submission, paras. 493-496; second written submission, para. 392.

<sup>964</sup> Philippines' second written submission, para. 390, see Table 2.

<sup>965</sup> Philippines' second written submission, para. 393.

<sup>966</sup> Thailand second written submission, para. 131.

<sup>967</sup> Thailand first written submission, para. 210, referring to the French VAT system in Exhibit THA-29; second written submission, para. 131.

<sup>968</sup> Thailand's first written submission, paras. 223-224.

<sup>969</sup> Thailand's first written submission, para. 223; referencing Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.331.

<sup>970</sup> Thailand's first written submission, para. 224.

<sup>971</sup> Thailand's second written submission, para. 132.

(ii) *Analysis by the Panel*

7.476 The Philippines argues that because the VAT is calculated on the basis of the MRSP, a higher MRSP translates into a higher VAT burden. Based on the data that shows higher absolute MRSP figures for imported cigarettes compared to domestic cigarettes, the Philippines asserts that Thailand imposes a higher tax burden on imported cigarettes by applying a higher MRSP to imported cigarettes than to domestic cigarettes.<sup>972</sup>

7.477 In Thailand's view, the MRSP numbers in absolute terms are irrelevant to the Panel's analysis.<sup>973</sup> This is because the determination of whether an internal tax discriminates against imported goods within the meaning of Article III:2 depends on whether the tax base for imported cigarettes is *established and applied* in a manner that affords protection to domestic cigarettes, and not on whether the tax base in itself is higher for imported cigarettes than domestic cigarettes. Thailand further points out that under an *ad valorem* tax system, the absolute amounts collected on differently-priced like products will be different; greater absolute amounts will be collected on higher-priced goods.<sup>974</sup>

7.478 The question before us is, therefore, whether the higher absolute MRSP figures for imported cigarettes can in themselves be considered as proving a VAT imposed on imported cigarettes in excess of that applied to domestic cigarettes within the meaning of Article III:2, first sentence.

7.479 Examining issues relating to the excess taxation of imported products under Article III:2, first sentence, the Appellate Body in *Japan – Alcoholic Beverages II* stated that "even the smallest amount of 'excess' is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard".<sup>975</sup> The Appellate Body's statement thus clarifies that an internal tax will be found discriminatory against imported products within the meaning of Article III:2, first sentence, if the tax imposed on imported products exceeds, even in the smallest amount, the tax imposed on domestic products.

7.480 Turning to the factual circumstances of the present dispute, the parties do not contest that higher MRSPs result in higher VAT amounts. We note that the data presented to us do indeed illustrate that the MRSPs, the tax base for VAT amounts, for *Marlboro* and *L&M* are higher than those for domestic cigarette brands. The table below shows a comparison between the MRSPs for *Marlboro* and *L&M* and those for the domestic cigarettes within the same price segments between 2005 and 2007.

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<sup>972</sup> As stated in paras. 7.417-7.421 above, the MRSP notices at issue are the ones of 7 December 2005, 18 September 2006, 30 March 2007 and 29 August 2007.

<sup>973</sup> Thailand's first written submission, para. 223.

<sup>974</sup> Thailand's first written submission, para. 223.

<sup>975</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23, DSR 1996:I, 97, at 115. The Appellate Body also found that, given the absence of a reference to Article III:1 (the provision setting forth a general principle and informing the rest of Article III) in the first sentence of Article III:2, "the presence of a protective application need *not* be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence" (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, 97, at 111-112). The Appellate Body further elaborates that "this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, ... the first sentence of Article III:2 is, in effect, an application of this general principle".



**MRSPs of domestic and imported brands in premium and mid-price segments**

[[The deleted table contains business confidential information<sup>976, 977</sup>]]

7.481 Specifically, the MRSPs for *Marlboro* in December 2005, September 2006 and March and August 2007 are respectively [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] baht, whereas the MRSPs for *Krongthip FF Deluxe* and *Royal Standard FF Deluxe* are [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] baht for the same time period. As for *L&M*, MRSPs were [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] baht, whereas MRSPs for *Gold City FF 90*, *Falling Rain*, *Kronthip FF 90* and *Royal Standard FF Regular*, *Samit FF 90* and *Krongthip Lights* were [[xx.xxx.xx]], [[xx.xxx.xx]], [[xx.xxx.xx]] and [[xx.xxx.xx]] baht. As noted above, higher MRSP figures will result in higher VAT amounts because the VAT is calculated on the basis of the MRSP. The question that we have to answer is whether higher MRSP figures in absolute terms can be interpreted as *excess* taxation within the meaning of Article III:2, first sentence. As described above, the MRSP is the tax base for the VAT and derived by adding up c.i.f. or ex factory prices, internal taxes and marketing costs. Among these components, the internal taxes are derived from the c.i.f. price plus customs duties for imported cigarettes and the ex factory price for domestic cigarettes. These figures are determined by the importer and the domestic manufacturer, not by the Thai government.<sup>978</sup> If an importer's c.i.f. price is therefore higher than the ex factory price of a domestic manufacturer, the higher c.i.f. price can contribute to a higher MRSP for an imported cigarette brand compared to the MRSP for a domestic cigarette brand to the extent that the marketing cost component is kept at the same level for both imported and domestic cigarettes. The evidence before us illustrates that the c.i.f. prices for imported cigarettes are usually higher than the ex factory prices for domestic cigarettes.<sup>979</sup> Moreover, in the case of the MRSP for imported cigarettes, customs duties, which are not added for domestic cigarettes, are also included in deriving the final MRSP and added to the c.i.f. price to provide a basis for the calculation of the internal taxes. This will also increase the absolute level of MRSPs for imported cigarettes.

7.482 In our view, a comparison of the absolute MRSP numbers for imported and domestic cigarettes, without considering the specific nature of the MRSP, including how MRSPs are established and/or revised under the Thai VAT system, is not sufficient to demonstrate an allegedly discriminatory VAT applied to imported cigarettes. Therefore, we do not consider that higher MRSPs, in absolute terms, for imported cigarettes compared to MRSPs for domestic cigarettes establish that imported cigarettes are taxed in excess of like domestic cigarettes within the meaning of Article III:2, first sentence.

(c) Whether imported cigarettes are subject to excess taxation – an alleged difference in the determination of the MRSPs for imported and domestic cigarettes

(i) *Legal standard*

Main arguments of the parties

7.483 The **Philippines** submits that the MRSPs for imported cigarettes have typically been higher than the RRSPs/RSPs, whereas the MRSPs for domestic cigarettes are always equal to the RSPs for those cigarettes.<sup>980</sup> This gap between the MRSPs and RRSPs for imported cigarettes results in a VAT

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<sup>976</sup> [[xxx.xx.xxx]].

<sup>977</sup> [[xxx.xx.xxx]].

<sup>978</sup> See para. 7.824.

<sup>979</sup> Exhibits THA-76, THA-81 and THA-82.

<sup>980</sup> Philippines' second written submission, paras. 394-396.

for imported cigarettes which is systematically in excess of the VAT for like domestic cigarettes. The Philippines emphasizes that the gap between the tax base (the MRSP) and the actual retail selling price (the RRSP/RSP) for imported products will result in a higher tax burden on imported products if the gap is not the result of a decision of the importer to sell at a lower price than the MRSP. The MRSP will exceed the RRSP/RSP if the Thai government uses an inflated starting-point for the MRSP calculation for imported products or adds an inflated amount for marketing costs for imported products.<sup>981</sup>

7.484 Specifically, the Philippines submits that there is a significant difference in the marketing costs used for the MRSP calculation, as the marketing costs used for the MRSP calculation for imported brands are typically higher than the marketing costs used in the MRSP calculations for like domestic brands.<sup>982</sup> In practice, when DG Excise rejects the proposed MRSP for *Marlboro* or *L&M*, it creates its own proxy for the actual marketing costs derived from the importer's information.<sup>983</sup> Assuming that DG Excise properly determines the other elements of the MRSP (i.e. c.i.f. price, customs duties and internal taxes), the difference between the proposed MRSP (i.e. the RRSP) and the imposed MRSP is the extra amount that DG Excise adds to the actual marketing costs. Moreover, the Philippines submits that Thailand has failed to offer a legitimate countervailing explanation that the excess taxation can be explained with objective factors relating to the methodology used to calculate the MRSPs.<sup>984</sup>

7.485 **Thailand** submits that the Philippines' claim does not establish a prima facie case that imported cigarettes are systematically taxed in excess of domestic cigarettes.<sup>985</sup> To the extent that the WTO Members are free to use both fixed price systems and *ad valorem* systems of internal taxation, the fact that an imported brand may pay more tax than a domestic brand cannot constitute discrimination within the meaning of Article III:2.<sup>986</sup> Rather, Thailand maintains that the proper test to determine whether Thailand's use of the MRSP as the tax base for its VAT, is inconsistent with Article III:2, first sentence, requires an examination of the measure's criteria, structure and overall application, to determine if it is applied in a way that affords protection to domestic products.<sup>987</sup> The key issue is therefore whether Thai Excise determines the MRSP for both domestic and imported cigarettes in the same manner.<sup>988</sup> Thailand submits that the same methodology is used to establish the MRSP for both domestic and imported cigarettes and that the Philippines failed to make a prima facie case that Thai Excise establishes the MRSPs differently for imported and domestic cigarettes *or* applies the methodology described in a manner that affords protection to domestic cigarettes.<sup>989</sup>

7.486 In this connection, the **Philippines** does not consider that Thailand's taxation of cigarettes can be examined on the basis that it is an *ad valorem* tax system because the Thai VAT system is not a

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<sup>981</sup> Philippines' response to Panel question No. 49.

<sup>982</sup> Philippines' first written submission, para. 498; first oral statement, para. 185; second written submission, para. 395.

<sup>983</sup> Philippines' comments on Thailand's response to Panel question Nos. 122 and 123.

<sup>984</sup> Philippines' first written submission, para. 498, Table 4; second written submission, para. 397. The Philippines also submits that in 2006 and 2007, Thailand used guarantees that exceeded the customs value as the starting point to calculate MRSPs; and the percentage amount added for marketing costs has been higher for imported cigarettes (Philippines' first oral statement, paras. 169-173 and 213-216; response to Panel question Nos. 49 and 128). The Philippines did, however, not effectively pursue this line of arguments in relation to its claim under Article III:2.

<sup>985</sup> Thailand's first written submission, paras. 222-233, second written submission, para. 130.

<sup>986</sup> Thailand's second written submission, paras. 131-133.

<sup>987</sup> Thailand's first written submission, para. 206, quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996-I, 97, at 120; second written submission, para. 134.

<sup>988</sup> Thailand's second written submission, paras. 135-136.

<sup>989</sup> Thailand's response to Panel question No. 41.

typical *ad valorem* system.<sup>990</sup> The Thai government fixes both the tax rate and the tax base since the tax base is not the seller's price or the manufacturer's RRSP, but rather the MRSP, which is a figure determined by the government using an unpublished methodology.<sup>991</sup> The Philippines does not dispute Thailand's right to impose VAT on the basis of a government-fixed price *per se*.<sup>992</sup> However, under Article III:2, imported goods cannot be subject to any "excess" taxation through a higher government-fixed tax base than the tax base applied to like domestic goods. For imported cigarettes, however, the government-fixed tax base – the MRSP – is systematically higher than the RRSP. By fixing both the tax rate and the tax base according to its own criteria, Thailand effectively imposes a specific tax that is differentiated by brand, and not an *ad valorem* tax based on the seller/manufacturer's chosen retail price. This specific tax effectively imposed on imported cigarettes is higher than the specific tax imposed on domestic cigarettes because of the Thai government's decision to fix a higher tax base for imports coupled with the same tax rate.

7.487 **Thailand** asserts that because PM Thailand, and not Thai Excise, initially determines the "marketing costs" element of the MRSP, stating the marketing costs as a percentage of the MRSP is not a measure of whether the MRSP methodology is applied so as to afford protection to the domestic industry.<sup>993</sup> Thailand points out that a request by PM Thailand for new MRSPs for certain *L&M* brands in 2008 was granted by Thai Excise and that the MRSPs for these brands were further updated in 2009 based on the 2008 Notice.<sup>994</sup> This evidence shows that the starting point for the determination of the MRSP is the manufacturer's RRSP/RSP and that Thai Excise does not independently determine the "marketing costs" element of the MRSP.<sup>995</sup> The same methodology is used for domestic cigarettes as demonstrated through the changes made to the MRSPs following requests by TTM.<sup>996</sup>

7.488 Furthermore, Thailand points out that, contrary to what the Philippines appears to suggest, in a fixed price tax system, the government is not required to automatically accept the manufacturer's proposed tax base. To prevent the manufacturers' potential avoidance or evasion of their tax liability, Thailand uses the *maximum* price as the tax base.<sup>997</sup> This means that the manufacturers cannot propose a low MRSP simply to minimize their taxes without also foregoing considerable sales revenue.

#### Analysis by the Panel

7.489 The Philippines' second ground for its claim under Article III:2, first sentence, with respect to the Thai VAT system can be summarized as follows: the imported cigarettes at issue are subject to excess VAT taxation through a *higher* government-fixed tax base than the tax base applied to like domestic cigarettes. A higher tax base for imported cigarettes is fixed by establishing marketing costs, one of the components of the tax base, in a manner discriminatory against imported cigarettes.

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<sup>990</sup> Philippines' response to Panel question Nos. 49; Exhibit PHL-188. The Philippines refers to the French system of taxation to exemplify *ad valorem* taxation systems. According to the Philippines, France prescribes a tax base for cigarettes, but *automatically* accepts the manufacturer/importer's recommended retail selling price as the prescribed price. Thailand rebuts this factual assertion, and claims that the French text, which states that the relevant Minister must "homologuer le prix", actually requires the minister to register the proposed price *after examination*.

<sup>991</sup> Philippines' response to Panel question No. 49.

<sup>992</sup> Philippines' second oral statement, para. 85.

<sup>993</sup> Thailand's second written submission, para. 138.

<sup>994</sup> Thailand's second written submission, para. 139.

<sup>995</sup> Thailand's first written submission, paras. 83-87; response to Panel question No. 41; second written submission, para. 139.

<sup>996</sup> Thailand's first written submission, paras. 236-237; response to Panel question No. 41; second written submission, para. 140; Exhibit THA-19 and THA-51. See also Exhibit THA-45 for a list of all changes in MRSPs having affected PM Thailand between 2003-2006.

<sup>997</sup> Thailand's second written submission, para. 137.

Thailand's position is that Thai Excise establishes the tax base for VAT in the same manner for both domestic and imported cigarettes and that the importers and the manufacturer, not the Thai government, initially determine the marketing cost component of the tax base. Thailand claims that the Philippines failed to make a prima facie case that Thai Excise establishes the MRSPs differently for imported and domestic cigarettes.

7.490 In support of its argument, the Philippines focuses on the fact that the MRSPs for imported cigarettes have typically been higher than the RRSPs/RSPs, whereas the MRSPs for domestic cigarettes are always equal to the RSPs of those cigarettes<sup>998</sup>, and this gap between the MRSPs and RRSPs for imported cigarettes results in a VAT for imported cigarettes systematically in excess of like domestic cigarettes. It is also not disputed that, for the MRSP Notices at issue, a gap exists between the MRSPs and the RRSPs for imported cigarettes only, but not for domestic cigarettes, as illustrated in the table below.

7.491 We observe that the parties have interchangeably referred to the terms "RRSPs" and "RSPs" in this dispute. We understand that for imported cigarettes, the RRSP figures are virtually the same as the RSP figures as the retailers will normally accept the retail selling price proposed by PM Thailand (i.e. the RRSP (Recommended Retail Selling Price)) as their actual retail selling price (i.e. the RSP (Retail Selling Price)). For domestic cigarettes, Thailand explained at the second substantive meeting with the Panel that TTM branded cigarettes only know an RSP, not an RRSP. Therefore, unless specified otherwise, our references in this Report to RRSP and RSP will relate to the same figure.

#### **MRSPs and RRSPs of domestic and imported brands in premium and mid-price segments**

[[The deleted table contains business confidential information<sup>999, 1000</sup>]]

7.492 Thailand argues that given that the VAT tax base can be a fixed price, which may not always be equal to the actual retail price, a difference in tax amounts caused by the gap between the actual retail price and the fixed-price tax base (e.g. MRSP) cannot, in itself, give rise to a violation of Article III:2.<sup>1001</sup> We are also of the view that the mere existence of a gap between such a fixed tax base and the actual retail price cannot be an automatic proof of an inconsistency with the obligation under Article III:2. This is because the company determines the RSP based on business considerations, which can be lower than the government-fixed MRSP.

7.493 However, what the Philippines contends in this dispute is that Thai Excise establishes the MRSP in a manner which discriminates against imported cigarettes by inflating the marketing cost element of the MRSP for imported cigarettes. Therefore, the question presented to us goes beyond the mere existence of a gap between the fixed-price VAT tax base (MRSP) and the actual retail price. The Philippines' claim raises issues relating to the manner in which Thai Excise establishes the government-fixed tax base, the MRSP, particularly in respect of its marketing cost component, for imported and domestic cigarettes.

7.494 Both parties do not dispute that a government is free to fix a tax base. It will be WTO-consistent as long as the government determines the tax base in the same manner for both imported and like domestic goods concerned. In Thailand, DG Excise has the authority to determine the tax base (MRSP) for VAT imposed on cigarettes. For the purpose of addressing the Philippines' claim in this section, therefore, we will have to examine whether DG Excise has equally applied the general methodology, as described by Thailand in this dispute, in determining the MRSPs for both imported

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<sup>998</sup> Philippines' second written submission, paras. 394-396.

<sup>999</sup> [[xx.xxx.xx]].

<sup>1000</sup> [[xx.xxx.xx]].

<sup>1001</sup> Thailand's response to Panel question No. 124.

and domestic cigarettes. Particularly, in the light of the parties' arguments, we will evaluate whether DG Excise determines the marketing cost component of the MRSP for imported cigarettes in a manner different from the general methodology, such that imported cigarettes are subject to a VAT liability in excess of that applied to domestic cigarettes.

7.495 We find support for our approach in the Panel's analysis in *Argentina – Hides and Leather*:

"Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens ... Thus, even where imported and domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products. This could be the case, for instance, where *different methods of computing tax bases* lead to a greater actual tax burden for imported products."<sup>1002</sup> (emphasis added)

7.496 We underline in this relation that in the light of the obligations under Article III:2, first sentence, a VAT system under which the tax base is determined by a government, is more susceptible to a potential violation of this provision than a system under which the tax base is determined solely by figures provided by a company.

7.497 Therefore, in order to determine whether Thailand acted inconsistently with Article III:2, first sentence, by subjecting imported cigarettes to a VAT in excess of that applied to domestic cigarettes, we must address the following questions: (i) how marketing costs are determined under the general methodology; (ii) whether DG Excise departed from the general methodology in establishing the marketing costs for the MRSPs of the imported cigarettes contained in the MRSP Notices at issue; and, if so, (iii) whether DG Excise's departure from the general methodology resulted in subjecting the imported cigarettes to excess taxation compared to like domestic cigarettes.

(ii) *Establishment of the "marketing costs" component of the MRSP*

7.498 We recall that "marketing costs" was the only component of the MRSP that was not based on the c.i.f. or ex factory price and/or any fixed formula. Provincial tax is also not based on the c.i.f./ex factory price, but it is a fixed-figure that is determined by the government. Thailand has maintained that marketing costs represent the absolute "residual difference" between the proposed MRSP and other known elements of the MRSP and that these costs are determined in the same manner for both imported and domestic cigarettes.<sup>1003</sup>

7.499 Thailand's further elaboration on the nature of the marketing costs informs us, however, that there are, in practice, two different ways of establishing the marketing costs: (i) from the top-down perspective, the marketing costs represent the difference between the MRSP or maximum price of a brand of cigarettes and the sum of the already-known components of the MRSP (which is Thailand's initial explanation above); and (ii) from the bottom-up perspective, the marketing costs represent the amounts incurred in bringing cigarettes to the consumer market in Thailand on top of the c.i.f./ex factory price and all applicable taxes.<sup>1004</sup> In other words, the marketing costs represent the selling expenses and profits of all entities in the sales distribution chain – including the importers/manufacturers, wholesalers, and retailers.<sup>1005</sup>

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<sup>1002</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.183, referring to GATT Panel Report, *Japan – Alcoholic Beverages I*, para. 5.8.

<sup>1003</sup> Thailand's response to Panel question No. 41.

<sup>1004</sup> Thailand's 4 September 2009 response, para. 11.

<sup>1005</sup> Thailand's response to Panel question No. 122.

7.500 Based on Thailand's explanation, we understand that the top-down perspective of establishing the marketing costs pertains to situations where Thai Excise revises an MRSP for a cigarette brand on its own initiative because of a change(s) in the tax rate(s). In such a case, Thai Excise calculates the new MRSP by changing the relevant c.i.f. and ex factory prices, updating the tax amounts that are based on those figures, and holding the so-called "marketing costs" constant. The same marketing costs are derived from the latest MRSP for that brand or the MRSP previously requested by the importers or the domestic manufacturer. The marketing costs of the revised MRSP are calculated by deducting the sum of the already-known components of the MRSP from the MRSP figure, which conforms to the so-called top-down perspective. If Thai Excise simply accepts a revised MRSP for a certain cigarette brand that is proposed by an importer or the domestic manufacturer, then there will be no need for any calculation.

7.501 On the other hand, however, the bottom-up perspective of explaining marketing costs, which appears to involve a consideration of various elements, may become relevant when Thai Excise rejects a revised MRSP figure proposed by an importer or the domestic manufacturer. Thai Excise may reject proposed changes or make other adjustments<sup>1006</sup> consistent with the dual function of the MRSP as a maximum price to protect consumers and as the tax base for VAT. Thailand explains that Thai Excise reviews the proposed MRSP in the light of the information provided by the importer or the domestic manufacturer to ensure that the proposed MRSP reflects the reasonable maximum selling price of those cigarettes in the light of the market conditions and the information provided.<sup>1007</sup> As the Philippines points out<sup>1008</sup>, Thailand has not specifically explained what market conditions it is referring to and how Thai Excise evaluates them.

7.502 Thailand submits that requests for *increases* in MRSPs are generally accepted, whereas requests for *reductions* in MRSPs are not automatically accepted.<sup>1009</sup> Requests for reductions in MRSPs are reviewed to ensure that they are justified and that the proposed reduced MRSP will not lead to cigarettes being illegally sold above the MRSP.<sup>1010</sup> In cases of a request for reduction of the MRSP, the commercial interests at stake are not just those of the importer or the domestic manufacturer because the ability of the reseller to make a profit on the sale of the cigarettes may also be affected.<sup>1011</sup> Thailand alleges that Thai Excise can ensure that it does not favour certain commercial interests over others by warranting that requests for reductions in MRSPs are supported by information about changes or reductions in costs, such as c.i.f. costs, selling expenses, or marketing strategies that properly reflect the reasonable maximum selling price of the cigarettes. Thailand submits that because the expenses and profits of wholesalers and retailers are not known, Thai Excise has only two possible sources of information for the marketing costs – the importers/manufacturers and the market itself.<sup>1012</sup>

7.503 Overall, we understand from Thailand's explanation above that Thai Excise does not automatically accept MRSPs proposed by the importers or the domestic manufacturer. When Thai Excise revises the existing MRSPs on its own initiative to reflect changes in the c.i.f. or ex factory prices and/or tax rates, Thai Excise calculates the new MRSP by changing the relevant c.i.f. or ex factory prices, updating the tax amounts that are based on those figures, and holding the so-called "marketing costs" constant. When it rejects an MRSP proposed by an importer or the domestic manufacturer, however, Thai Excise determines the marketing costs component of a new MRSP based

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<sup>1006</sup> See para. 7.469 above.

<sup>1007</sup> Thailand's response to Panel question No. 123(1).

<sup>1008</sup> Philippines' combined comments on Thailand's response to Panel question Nos. 122 and 123.

<sup>1009</sup> Thailand's response to Panel question No. 123(1).

<sup>1010</sup> Thailand's response to Panel question No. 123(1).

<sup>1011</sup> Thailand's response to Panel question No. 123(1).

<sup>1012</sup> Thailand's response to Panel question No. 122.

on the current MRSP/RRSP; or on the one previously proposed by an importer or by the domestic manufacturer; or on information from the market, as the starting point.

(iii) *Establishment of the MRSP for TTM brands*

Main arguments of the parties

7.504 The **Philippines** asserts that the methodology used to calculate TTM's marketing costs is different from the general methodology that Thailand claims is used to calculate the marketing costs for both imported and domestic cigarette brands.<sup>1013</sup> The DG Excise's description to the Thai Tax Court of the calculation of the marketing costs applied to TTM brands demonstrates that Thailand calculated marketing costs as a percentage (i.e. [[xx.xxx.xx]] per cent) of TTM's own "genuine income" for TTM brands.<sup>1014</sup> The Philippines argues that this is different from the methodology explained by Thailand in this proceeding that the marketing costs represent the absolute "residual difference" between the proposed MRSP and other known elements of the MRSP.<sup>1015</sup> According to the Philippines, this is another example of Thailand's failure to provide a coherent and objective explanation of its determination of MRSPs that might explain rationally the higher tax burden on imported cigarettes.<sup>1016</sup>

7.505 **Thailand** argues that its description before the Panel is correct and thus the marketing costs for TTM brands are calculated in the same way as for imported brands.<sup>1017</sup> This is proved by the fact that Thai Excise accepted TTM's proposed MRSPs without any adjustment to reflect a percentage of the marketing costs.<sup>1018</sup> The MRSPs for TTM have always been accepted because TTM has only requested increases in its MRSPs.<sup>1019</sup> There are no instances of TTM requesting a reduction in its MRSPs. The only instance in which PM Thailand's proposed MRSPs were not accepted, in December 2005, involved a request for a reduction in the MRSPs. This request was not accepted because the importer did not provide adequate support and its desire to "absorb" taxes does not justify reducing those taxes.<sup>1020</sup> Thai Excise's explanation before the Thai Tax Court was that marketing costs *can* be stated as a percentage of the MRSP after calculating the MRSP. Thailand does not interpret that statement as intended to state that Thai Excise has independently determined the marketing costs as a percentage of the genuine income and used these prospectively to establish MRSPs.<sup>1021</sup>

Analysis by the Panel

7.506 The Philippines argues that the DG Excise's description to the Thai Tax Court of the calculation of the marketing costs applied to TTM brands ("DG Excise's description to the Thai Tax Court") demonstrates that the methodology used to calculate TTM's marketing costs (calculating marketing costs as a percentage (i.e. [[xx.xxx.xx]] per cent) of TTM's own "genuine income" for TTM brands) is different from the general methodology applied to imported cigarettes.<sup>1022</sup> We will examine

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<sup>1013</sup> Philippines' second written submission, paras. 408-413.

<sup>1014</sup> Exhibit PHL-109.

<sup>1015</sup> Thailand's response to Panel question No. 41.

<sup>1016</sup> Philippines' second written submission, para. 413.

<sup>1017</sup> Thailand's response to Panel question No. 127.

<sup>1018</sup> Thailand's response to Panel question No. 127, referring to Exhibit THA-80 which contains the letters from TTM.

<sup>1019</sup> Thailand's response to Panel question No. 123(2).

<sup>1020</sup> Thailand's response to Panel question No. 123(2), also referring to Thailand's comments of 25 September 2009, paras. 23-25 and 42-45.

<sup>1021</sup> Thailand's response to Panel question No. 127, referring to Exhibit THA-49.

<sup>1022</sup> Philippines' second written submission, paras. 408-413.

whether the subject exhibit shows, as the Philippines argues, that Thai Excise did not follow the general methodology to determine the marketing costs for TTM.

7.507 The document at issue was DG Excise's submission to the Thai Tax Court in an appeal proceeding initiated by PM Thailand concerning the 2006 and 2007 MRSP Notices. Relevant parts of the DG Excise's description to the Thai Tax Court are as follows:

"3. Fact

3.1 Imported Cigarette  
Principle and Reason

...

- (4) The minimum margin percentage of 32.60 which is used for calculating the retail price of imported cigarettes, as per the Notification of the Excise Department ..., dated 18 September, has reflected the situation of the competition, cost and marketing of the imported cigarettes. This results in the increase of imported cigarette's market share (Attachment 6).

3.2 Domestic Cigarette  
Principle and Reason

...

- (2) The price for domestically produced cigarette at the manufacturer remains unchanged.
- (3) On 7 December 2005, Thailand Tobacco Monopoly increased the marketing margin of domestic cigarette. For example, Krongthip 90 brand was increased from baht [[xx.xxx.xx]] per pack to baht [[xx.xxx.xx]] per pack (Attachment 7)
- (4) In order to determine the maximum retail price as per Section 23, the Excise Department has inspected the marketing margin of the domestic cigarette and believed that the marketing margin which was adjusted on 7 December 2005 is still acceptable. There are 2 methods of inspection:

Method 1: Inspection of sale price at each particular selling period, it is found that the Notification ..., dated 9 March 2007 has been complied.

Method 2: Inspection of the marketing margin from the financial statement which was endorsed by the Office of the Auditor General of Thailand. In this regard, it is found that the percentage of the marketing margin to the income, as per the retail price structure, of Thailand Tobacco Monopoly is equivalent to [[xx.xxx.xx]]. This amount is [[xx.xxx.xx]] than the percentage of marketing margin, to the income as appeared in the financial statement of 2006 which is [[xx.xxx.xx]]. In this connection, if the maximum retail price was calculated from the percentage of marketing margin to the income as appeared in the financial statement, it will be lower than the price announced by the Excise Department.



By the way, the percentage of the marketing margin to the income each year can be changed depending on the quantity of production. In any case, the change should not exceed the percentage of marketing margin to the genuine income of the Thailand Tobacco Monopoly. Therefore, there is no ground to adjust the marketing margin (Attachment 8)."  
(underline added)

7.508 The text of DG Excise's explanation as cited above indicates that the percentage of the marketing costs<sup>1023</sup> to TTM's income was used as one of the two *methods of inspecting* the acceptability of the marketing margin at issue, *not the method of calculating* the marketing costs itself. This understanding is also confirmed by an additional statement on Method 2 that "if the maximum retail price was calculated from the percentage of marketing margin to the income as appeared in the financial statement, it will be lower than the price announced by the Excise Department". This illustrates that the actual calculation of marketing costs was not based on the percentage of marketing costs to TTM's income. In the light of this, we agree with Thailand that DG Excise's explanation before the Thai Tax Court should be interpreted as meaning that the marketing costs can be stated as a percentage amount after an MRSP is determined. Therefore, we are not persuaded that DG Excise's explanation before the Thai Tax Court proves that Thai Excise calculates marketing costs for domestic cigarettes in a manner different from the general methodology.<sup>1024</sup>

(iv) *Establishment of the 7 December 2005 MRSP for Marlboro and L&M*

Main arguments of the parties

7.509 The **Philippines** claims that the 7 December 2005 marketing costs for *Marlboro* and *L&M*, which were applied again in the 2008 and 2009 MRSPs, were not derived from the information PM Thailand provided to DG Excise and the marketing cost value was set four times higher than the appropriate requested level.<sup>1025</sup> This resulted in higher MRSPs for imported cigarettes than for domestic cigarettes, which in turn explains the gap between the MRSP and the RRSP for imported cigarettes.<sup>1026</sup> The Philippines submits that the December 2005 MRSPs therefore illustrate that Thailand does not apply its stated methodology in practice.

7.510 **Thailand** submits that the December 2005 MRSP Notice, the only instance in which PM Thailand's proposed MRSPs were not accepted, involved a request for a reduction in the MRSPs.<sup>1027</sup> The request was not accepted because PM Thailand did not provide adequate support and a desire to "absorb" taxes does not justify reducing those taxes.<sup>1028</sup> PM Thailand has not requested

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<sup>1023</sup> We understand "marketing margin" used in Exhibit PHL-109 to mean "marketing costs".

<sup>1024</sup> Additionally, we note from the above document submitted by DG Excise that Thai Excise relied on the percentage of a marketing margin to TTM's income to examine the acceptability of the marketing costs level for the concerned MRSP. It states that such a method is endorsed by the Office of the Auditor General of Thailand. Therefore, although Thai Excise did not use a percentage of TTM's genuine income *per se* to establish the marketing costs of TTM brand cigarettes, the evidence indicates that such a method was applied to inspect the adequacy of the "marketing costs" component of TTM's MRSP.

<sup>1025</sup> Philippines' second written submission, paras. 335-337 and 402 (*L&M*), paras. 346-350 and 403-404 (*Marlboro*); comments of 16 September 2009, paras. 17-23 and 45-49; second oral statement, paras. 63-67.

<sup>1026</sup> Philippines' second written submission, para. 402.

<sup>1027</sup> Thailand's response to Panel question No. 123(2).

<sup>1028</sup> Thailand's response to Panel question No. 123(2), referring to its 25 September 2009 comments, paras. 23-25 and 42-45. Thailand also points to examples of other instances in which importers have made properly-documented requests for and have duly received reductions of their MRSPs (Exhibit THA-80).

any change in its MRSPs for existing *Marlboro* and *L&M* brands since December 2005, although it has requested new MRSPs for two new *L&M* brands in August 2008.<sup>1029</sup>

7.511 The parties' arguments on the determination of marketing costs for the 7 December 2005 MRSP Notice of *Marlboro* and *L&M* are summarized below.

*Marlboro*

7.512 Regarding the MRSP calculated for *Marlboro* in December 2005, in its comments of 25 September 2009, **Thailand** explained that *Marlboro's* marketing costs were derived from the figure provided in PM Thailand's letter of 19 July 2005, in which PM Thailand proposed an MRSP of [[xx.xxx.xx]] baht for provinces without provincial tax.<sup>1030</sup> Following the Philippines' explanation that PM Thailand's letter of 19 July 2005 proposed an MRSP of [[xx.xxx.xx]] baht inclusive of provincial tax, Thailand submitted a second explanation that it calculated marketing costs based on *Marlboro's* current RRSP/RSP of [[xx.xxx.xx]] baht, which did not apply in provinces that imposed provincial tax.<sup>1031</sup> PM Thailand's current marketing costs for *Marlboro* are illustrated in the left-hand column on page 2 of the 19 July 2005 letter, which shows [[xx.xxx.xx]] baht as PM Thailand's selling price (the RSP) in provinces without provincial tax (e.g. Bangkok).<sup>1032</sup> In the absence of any grounds to reduce the marketing costs for *Marlboro* cigarettes, Thai Excise used the current marketing costs ([[xx.xxx.xx]] baht) based on current sales in areas without provincial taxes, such as Bangkok, as the basis for the marketing costs for the single nationwide MRSP by rounding it up to [[xx.xxx.xx]] baht.<sup>1033</sup> As a result, DG Excise issued an MRSP of 65 baht. DG Excise subsequently refused PM Thailand's request of 13 December 2005 for the MRSP to be reduced to [[xx.xxx.xx]] baht.

7.513 The **Philippines** argues that neither of these *ex post* explanations is supported by a contemporaneous explanation by DG Excise. The Philippines points out three key elements for Thailand's second explanation of the December 2005 marketing costs for *Marlboro*.<sup>1034</sup>

7.514 First, DG Excise did not follow its "normal practice" in choosing not to base the marketing costs on the importer's latest information. Under DG Excise's "normal practice", it should have adopted one of two approaches in determining the MRSP for December 2005: (i) carry over marketing costs derived from an MRSP for provinces with provincial tax that was based on a proposal by the importer; or (ii) rely on the marketing costs derived from a subsequent proposal by the importer. DG Excise followed neither approach. If DG Excise followed the first approach, it should have carried forward [[xx.xxx.xx]] baht, which is the actual marketing costs used in the previous *Marlboro* MRSP (i.e. December 2004 MRSP) inclusive of provincial tax of 1.86 baht for provinces with provincial tax. In the alternative, DG Excise could have relied on PM Thailand's July 2005 MRSP proposal of [[xx.xxx.xx]] baht inclusive of provincial tax for provinces with provincial tax, which would have resulted in marketing costs of [[xx.xxx.xx]] baht.<sup>1035</sup>

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<sup>1029</sup> Thailand's response to Panel question No. 123(2), referring to Exhibit THA-66.

<sup>1030</sup> Thailand's comments of 25 September 2009, paras. 42-47; Exhibit THA-82.

<sup>1031</sup> Thailand's response to Panel question No. 130.

<sup>1032</sup> Thailand's response to Panel question No. 130; Exhibit THA-18, pp. 6-7.

<sup>1033</sup> Thailand explains that a marketing cost of [[xx.xxx.xx]] baht was rounded up by approximately *one baht* to [[xx.xxx.xx]] baht, which resulted in a total pre-rounded up MRSP of [[xx.xxx.xx]] baht. To arrive at a published MRSP of 65 baht, a marketing cost of [[xx.xxx.xx]] was then further rounded up by [[xx.xxx.xx]] baht. The marketing cost of [[xx.xxx.xx]] therefore represents the sum of the marketing cost of [[xx.xxx.xx]].

<sup>1034</sup> Philippines' comments on Thailand's response to Panel question No. 130.

<sup>1035</sup> Philippines' comments on Thailand's response to Panel question No. 130; Exhibit PHL-282.

7.515 Instead, DG Excise chose to base the December 2005 *Marlboro* MRSP on *Marlboro's* RSP in July 2005 of [[xx.xxx.xx]] baht.<sup>1036</sup> Although this RSP equalled the MRSP proposed in July 2005, Thailand alleges a crucial difference between these two figures. Thailand argues that, although PM Thailand proposed an MRSP of [[xx.xxx.xx]] baht for provinces with provincial tax in July 2005, its actual retail price of [[xx.xxx.xx]] baht did not apply to provinces with provincial tax. The Philippines submits that it is not clear why DG Excise decided to base its calculation on a retail price (RSP) it believed applied exclusively to the one area without provincial tax especially given that, in December 2005, DG Excise sought to calculate a single *Marlboro* MRSP that was inclusive of provincial tax.

7.516 Specifically, the Philippines submits that Thailand is incorrect in stating that the marketing costs of an RSP of [[xx.xxx.xx]] baht did not apply to provinces with provincial tax, and applied solely to Bangkok. This allegation is not supported by any reference to evidence. PM Thailand's 19 July 2005 letter identifies a single, nationwide, retail price of [[xx.xxx.xx]] baht, and proposes a single, nationwide MRSP of [[xx.xxx.xx]] baht.<sup>1037</sup> There is no indication that the price of [[xx.xxx.xx]] baht applied solely to Bangkok, and that PM Thailand applied a second unidentified, retail price in all 75 provinces besides Bangkok. The Philippines alleges that PM Thailand has always maintained a single RRSP for Thailand as a whole, to ensure consistent retail pricing across the country.<sup>1038</sup>

7.517 The Philippines takes the view that Thailand's argument has one practical consequence for the calculation of marketing costs: if the RSP of [[xx.xxx.xx]] baht applied to provinces with provincial tax, it would have reduced the marketing costs from [[xx.xxx.xx]] baht to [[xx.xxx.xx]] baht because in such a case, DG Excise was required to deduct all internal taxes, including the provincial tax of 1.86 baht, from the MRSP (RSP in this case) to derive the marketing costs. Accordingly, by ignoring the importer's information on actual marketing costs in provinces with provincial tax, and instead alleging that the RSP of [[xx.xxx.xx]] baht did not apply to provinces with provincial tax, Thailand inflated the December 2005 *Marlboro* marketing costs by 1.86 baht.

7.518 In response to Thailand's position that PM Thailand failed to provide sufficient supporting information to warrant a reduction in marketing costs, the Philippines points to an alleged inconsistency in Thailand's statements regarding the calculation of the marketing costs.<sup>1039</sup> In the Philippines' view, this *ex post* argument by Thailand contradicts Thailand's earlier statements, such as "Thai Excise does not collect information from PM Thailand or any other manufacturer or importer regarding 'gross margin percentages' or any other profit or marketing expenses".<sup>1040</sup>

7.519 Further, regarding the rounding up of the *Marlboro* marketing costs of [[xx.xxx.xx]] baht to [[xx.xxx.xx]] baht, the Philippines does not consider that this involves any kind of rounding. The rounding would actually have reduced [[xx.xxx.xx]] baht to [[xx.xxx.xx]] baht, not increased to a

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<sup>1036</sup> Philippines' comments on Thailand's response to Panel question No. 130, also referring to Exhibit THA-18. The Philippines explains that PM Thailand's letter of 19 July 2005 showed a "retail price" of [[xx.xxx.xx]] baht for *Marlboro*, without distinguishing between the RRSP and the RSP. According to the Philippines, at the time, the difference between the two was marginal.

<sup>1037</sup> Exhibit THA-18.

<sup>1038</sup> Philippines' comments on Thailand's response to Panel question No. 130. In footnote 163, the Philippines refers to Exhibit PHL-270, claiming that the exhibit shows a single RSP of [[xx.xxx.xx]] baht in 2005, and also shows that the monthly *Marlboro* RSP in 2005 was no more than a fraction higher than the [[xx.xxx.xx]] baht RRSP.

<sup>1039</sup> Philippines' comments on Thailand's response to Panel question No. 130.

<sup>1040</sup> Thailand's response to Panel question No. 50(1). The Philippines also quotes Thailand's statement that "Thai Excise *never* requests any manufacturer or importer, of domestic or imported cigarettes, to provide information regarding marketing costs." (emphasis in original) (Thailand's response to the Philippines' question No. 2).

larger number that still included a fraction (i.e. [[xx.xxx.xx]] baht). This arbitrary rounding exercise served only to inflate the MRSP and the tax burden imposed on imported cigarettes.

*L&M*

7.520 As for *L&M*, as the Philippines points out<sup>1041</sup>, **Thailand** provided three different explanations: originally, Thailand presented the December 2005 *L&M* marketing costs as based on [[xx.xxx.xx]] baht, derived from PM Thailand's own proposal in October 2001, which were then simply added, *unchanged*, to the MRSPs calculated in December 2005 and August 2008<sup>1042</sup>; second, in response to the Panel's request for information under Article 13 of the DSU, Thailand explained that the December 2005 *L&M* MRSP was based on PM Thailand's proposed MRSP of [[xx.xxx.xx]] baht on 19 July 2005<sup>1043</sup>; and lastly, in the light of the Philippines' argument that in July 2005, PM Thailand proposed an MRSP of [[xx.xxx.xx]] baht, not [[xx.xxx.xx]] baht, inclusive of provincial tax (which results in the marketing costs of [[xx.xxx.xx]] baht, not [[xx.xxx.xx]] baht), Thailand then submitted that the marketing costs were derived from PM Thailand's current marketing costs for *L&M* included in the 6 October 2005 MRSP Notice, and not from PM Thailand's 19 July 2005 letter as previously explained.<sup>1044</sup>

7.521 According to Thailand, the 6 October 2005 MRSP Notice established an MRSP of [[xx.xxx.xx]] baht for provinces without provincial tax. A breakdown of this MRSP provides marketing costs of [[xx.xxx.xx]] baht, which is the same amount as previously explained in Thailand's comments of 25 September 2009 and as shown in the breakdown provided in Exhibit THA-82. Thailand used [[xx.xxx.xx]] baht, the MRSP for provinces without provincial tax, for the 7 December 2005 MRSP Notice to ensure that no entity in the distribution chain – importer, wholesaler, or retailer – was punished by or had to bear the burden of the switch to a single nationwide MRSP and to avoid the "market turbulence" referred to by the Philippines in its 19 July 2005 letter. The marketing costs of [[xx.xxx.xx]] baht were then rounded up in order to arrive at the marketing costs used in the December 2005 MRSP Notices (i.e. [[xx.xxx.xx]] baht).<sup>1045</sup>

7.522 The **Philippines** takes the position that none of these *ex post* explanations is supported by a contemporaneous explanation by DG Excise. Regarding Thailand's last explanation, the Philippines recalls that in July 2005, PM Thailand proposed a nationwide MRSP of [[xx.xxx.xx]] baht for *L&M*, inclusive of provincial tax.<sup>1046</sup> In October 2005, DG Excise accepted the proposed MRSP of [[xx.xxx.xx]] baht for the 75 provinces with provincial tax (and the actual marketing costs included in that proposal). However, on its own initiative, DG Excise also established an MRSP of [[xx.xxx.xx]]

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<sup>1041</sup> Philippines' comments on Thailand's response to Panel question No. 129.

<sup>1042</sup> Philippines' comments on Thailand's response to Panel question No. 129, referring to Thailand's first written submission, para. 93; Exhibit THA-18.

<sup>1043</sup> Philippines' comments on Thailand's response to Panel question No. 129, referring to Thailand's comments of 25 September 2009, paras. 42-47; Exhibit THA-82. PM Thailand's letter of 19 July 2005 is contained in Exhibit THA-18.

<sup>1044</sup> Thailand's response to Panel question No. 129; Exhibit THA-94.

<sup>1045</sup> Thailand's comments of 25 September 2009, para. 44, referring to Exhibit THA-82. Thailand explains that to consequently ensure that MRSPs were set at a level that would facilitate the provinces in collecting the full amount of the provincial taxes, Thai Excise rounded up the MRSP by approximately [[xx.xxx.xx]] baht for all major brands in the market. For *L&M* cigarettes, this resulted in a rounding up of the "marketing costs" element of the MRSP from [[xx.xxx.xx]].

If all the components comprising the December 2005 MRSP are added up, including the marketing costs of [[xx.xxx.xx]] baht as determined by Thai Excise, the total sum comes to [[xx.xxx.xx]] baht. We understand that Thai Excise then decided to round up the MRSP by approximately [[xx.xxx.xx]] baht to arrive at the MRSP of [[xx.xxx.xx]] baht. The difference of [[xx.xxx.xx]] baht between [[xx.xxx.xx]] baht and [[xx.xxx.xx]] baht was added to the marketing costs component of the MRSP.

<sup>1046</sup> Philippines' comments on Thailand's response to Panel question No. 129.

baht for Bangkok, the one area without provincial tax. The Philippines argues that in calculating the [[xx.xxx.xx]] baht MRSP in October 2005, DG Excise did not use the marketing costs of [[xx.xxx.xx]] baht taken from PM Thailand's July 2005 proposal as it should have done under the "normal practice", but increased them to [[xx.xxx.xx]] baht, which were then rounded up to [[xx.xxx.xx]] baht.<sup>1047</sup>

7.523 With respect to Thailand's reason for starting with the marketing costs of [[xx.xxx.xx]] baht (calculated for the one province without provincial tax – Bangkok), namely that it had to ensure that no entity in the distribution chain was punished by or had to bear the burden of the switch to a single nationwide MRSP, the Philippines argues that no entity, both in provinces with provincial tax and those operating in Bangkok, could have been punished by DG Excise's decision.<sup>1048</sup> As for provinces with provincial tax, the prior MRSPs had already been adjusted to account for the provincial tax of 1.86 baht/pack in order to ensure that importers and resellers operating in these provinces were not punished by the collection of the tax. Given Thailand's explanation that, when tax rates change, the MRSP is revised to add an updated amount for the tax concerned, but that other elements of the calculation, including the marketing costs, remain unchanged, DG Excise had no basis to increase the marketing costs for reasons related to provincial tax in calculating the MRSP for December 2005. Regarding Bangkok, the only province without provincial tax, the Philippines submits that because the MRSP for Bangkok was now calculated assuming that provincial tax of 1.86 baht/pack was paid, the additional amount in the increased MRSP consequently increased the marketing costs.

7.524 The Philippines stresses that the decisive element of the methodology applied by Thai Excise in determining the December 2005 MRSP for *L&M* was a "rounding" exercise because it added one baht to the MRSP, driving it above the prevailing RSP at the time: PM Thailand requested on 13 December 2005 that the December 2005 MRSP be reduced from 47 baht to [[xx.xxx.xx]] baht. Regarding the rounding up of the marketing costs of [[xx.xxx.xx]] baht to [[xx.xxx.xx]] baht (an additional [[xx.xxx.xx]] baht), the Philippines notes that if DG Excise had simply added marketing costs of [[xx.xxx.xx]] baht/pack to the other elements of the December 2005 MRSP, the resulting MRSP would have been [[xx.xxx.xx]] baht.<sup>1049</sup> In the Philippines' view, DG Excise would have rounded this overall amount to a final MRSP of [[xx.xxx.xx]] baht, which equalled PM Thailand's proposal of 13 December 2005. Instead, DG Excise rounded up the marketing costs to [[xx.xxx.xx]] baht to arrive at a final MRSP of 47 baht, which exceeded the RRSP by [[xx.xxx.xx]] baht. Therefore, DG Excise's decision to "round up" the marketing costs was the decisive factor that drove the *L&M* MRSP beyond the RRSP.

#### Analysis by the Panel

##### Overview

7.525 We clarified earlier that in order to determine whether Thailand violated its obligations under the first sentence of Article III:2 by subjecting imported cigarettes to excessive taxation, we need to examine whether Thai Excise departed from the general methodology that it has explained is normally applied in determining the MRSP for both imported and domestic cigarettes.

7.526 The Philippines argued that Thai Excise established the 7 December 2005 MRSP, in particular its marketing cost component for *Marlboro* and *L&M*, so as to arrive at a higher level of MRSP than would have been calculated if Thai Excise had followed the "normal" methodology that applies to both imported and domestic cigarettes. Thailand submits that PM Thailand's proposed

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<sup>1047</sup> Exhibit PHL-290.

<sup>1048</sup> Philippines' comments on Thailand's response to Panel question No. 129.

<sup>1049</sup> Philippines' comments on Thailand's response to Panel question No. 129, referring to Exhibit PHL-282.

MRSPs in December 2005 were not accepted because they involved a request for a reduction in the MRSPs and PM Thailand did not sufficiently justify its request.

7.527 We will begin our analysis by first recalling Thailand's description of how the marketing cost component of the MRSP is derived under the so-called normal methodology and then we will describe the nature of the 5 December MRSP Notices.

7.528 Thailand submitted that in revising the existing MRSPs because of changes in tax rates, Thai Excise generally uses the same amount of "marketing costs" as included either (i) in the latest MRSP or (ii) in the MRSP previously requested by the domestic manufacturer/importer.<sup>1050</sup> However, in situations where Thai Excise *rejects* MRSPs proposed by the importer/manufacturer, Thailand explained that the marketing costs needed to determine the MRSP will be calculated so that they represent the selling expenses and profits of all entities in the sales distribution chain. For this calculation, Thailand uses information provided by the importer/manufacturer and information of the market itself.<sup>1051</sup> This, in our view, is the general methodology used to derive the marketing cost component of MRSPs according to Thailand's explanation.

7.529 Regarding the December 2005 MRSP for TTM, TTM requested an increase in the current MRSPs because of the increase in the excise tax rate and proposed its own revised MRSPs for its brands, which were accepted by Thai Excise.<sup>1052</sup> Accordingly, it is uncontested that Thai Excise applied the general methodology to determine the new MRSPs for domestic cigarettes in December 2005 by simply *accepting* the new MRSPs/RRSPs proposed by TTM.

7.530 As for *Marlboro* and *L&M*, on the other hand, the evidence on the record shows that Thai Excise issued the revised MRSP Notices for *Marlboro* and *L&M* on 7 December 2005.<sup>1053</sup> The reason for the revised MRSPs is indicated as a change in the excise tax rate, which increased from 75 per cent to 79 per cent. Therefore, it appears that Thai Excise revised, on its own initiative, the current MRSPs for the *Marlboro* and *L&M* cigarette brands to reflect the changed excise tax rate in the MRSPs for imported cigarettes.

7.531 Thai Excise rejected, however, PM Thailand's subsequent request for the reduction of the level of MRSPs as revised by Thai Excise. Specifically, on 13 December 2005, about a week from the issuance of the 7 December 2005 MRSP Notices, PM Thailand submitted a letter to Thai Excise requesting a change of the MRSPs for *Marlboro* and *L&M*<sup>1054</sup>, referring to the 6 October 2005 MRSP Notice for *L&M* and the 7 December 2005 Notice for *Marlboro*.<sup>1055</sup> In the letter, PM Thailand proposes an MRSP of [[xx.xxx.xx]] baht for *Marlboro* and [[xx.xxx.xx]] baht for *L&M*. As its reasons for the proposals, PM Thailand states: as for *Marlboro*, "[t]he Company has always been conscious that *Marlboro* retail prices are already expensive in the current market according to a market survey by an independent consulting company. Therefore, the Company proposes a retail price of [[xx.xxx.xx]] baht/pack"; and concerning *L&M*, "[a]s the excise tax burden of *L&M* group cigarettes increased from [[xx.xxx.xx]] baht/pack to [[xx.xxx.xx]] baht/pack, the Company therefore proposes a retail price of [[xx.xxx.xx]] baht/pack".<sup>1056</sup>

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<sup>1050</sup> See paras. 7.498-7.501 above.

<sup>1051</sup> See para. 7.502 above.

<sup>1052</sup> Thailand's response to Panel question Nos. 123(2), 127 and 160.

<sup>1053</sup> Exhibits PHL-99 and THA-76.

<sup>1054</sup> Exhibit THA-18.

<sup>1055</sup> PM Thailand referred to these notices, so that Thai Customs could use the marketing costs used in these notices (Philippines comments on Thailand's response to Panel question No. 129; Exhibit PHL-190).

<sup>1056</sup> Exhibit PHL-221. The Exhibit shows a letter dated 23 December 2005, in which DG Excise rejected PM Thailand's request of 13 December 2005.

7.532 Against this factual background, we now turn to the parties' arguments on Thailand's determination of the marketing costs for the 7 December 2005 MRSPs for *Marlboro* and *L&M*.

*Marlboro*

7.533 The reason for a change of the current MRSPs for *Marlboro* in December 2005 was an increase in the excise tax rate. To reflect this change, Thai Excise revised the MRSPs for *Marlboro*. Under these circumstances, the general methodology used for determining marketing costs as described by Thailand would have required Thai Excise to base the amount of marketing costs for the 7 December 2005 MRSP for *Marlboro* on the marketing costs as included in either (i) the 27 December 2004 MRSP Notice, the latest MRSP for *Marlboro* prior to December 2005; or (ii) the MRSP previously requested by PM Thailand, which is the MRSP proposed in PM Thailand's letter of 19 July 2005.

7.534 It is clear, and Thailand does not dispute, that Thai Excise did not use the marketing costs included in the 27 December 2004 MRSP (i.e. [[xx.xxx.xx]] baht).<sup>1057</sup> Nor does Thai Excise appear to refer to the MRSP previously requested by PM Thailand because it relied on the *actual retail price* of *Marlboro* cigarettes as indicated in the 7 July 2005 letter from PM Thailand. To the extent that Thai Excise was revising the existing MRSPs to simply reflect the changes in tax rates, it is not clear to us why Thai Excise did not use the marketing costs as included in the current MRSPs or in the previously proposed MRSPs, which we understand is the normal rule for revising MRSPs under the general methodology.

7.535 Thailand submits that Thai Excise rejected PM Thailand's proposed MRSPs, which we understand as referring to those contained in the letter of 13 December 2005, because they involved a request for a reduction in the MRSPs. In this regard, we recall that if Thai Excise decides to reject the proposed MRSPs, it determines the marketing costs in the light of market conditions and the information provided by the importer/manufacturer.

7.536 Thailand argues that the marketing costs for the 7 December 2005 *Marlboro* MRSP were based on PM Thailand's *current* marketing costs for *Marlboro* as illustrated in the left-hand column on page 2 of the 19 July 2005 letter from PM Thailand.<sup>1058</sup> According to Thailand, this shows PM Thailand's selling price, which we understand to mean the actual RSP, in areas with no provincial tax, was [[xx.xxx.xx]] baht.<sup>1059</sup> A breakdown of the MRSP figure – [[xx.xxx.xx]] baht – into its components then results in marketing costs of [[xx.xxx.xx]] baht as provided in a worksheet contained in Exhibit THA-82.

7.537 Prior to the issuance of the 7 December 2005 MRSP Notice, PM Thailand proposed an MRSP figure of [[xx.xxx.xx]] baht for *Marlboro* in its letter of 19 July 2005. Although both parties refer to this letter as the basis for deriving the marketing costs for the December 2005 MRSP, they put forward different views on the MRSPs indicated in the letter.

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<sup>1057</sup> Exhibit THA-76.

<sup>1058</sup> Thailand's response to Panel question No. 130; Exhibit THA-18.

<sup>1059</sup> As pointed out by the Philippines, we note that Thailand initially submitted that the marketing costs for the 7 December 2005 Notice were based on an MRSP of [[xx.xxx.xx]] baht as proposed by PM Thailand for provinces that had no provincial taxes in its letter of 19 July 2005 (Thailand's comments of 25 September 2009, para. 45).

7.538 A table summarizing the relevant MRSPs leading to the 7 December 2005 is provided below.

[[The deleted table contains business confidential information<sup>1060, 1061, 1062, 1063, 1064, 1065, 1066</sup>]]

7.539 The Philippines has put forward several points to rebut Thailand's argument. The Philippines argues that Thailand's assertion that the marketing costs of an RSP of  $[[xx.xxx.xx]]$  baht applied only to provinces with no provincial tax is not supported by reference to any evidence. The Philippines alleges that PM Thailand's 19 July 2005 letter identifies a single, nationwide, retail price of  $[[xx.xxx.xx]]$  baht, and proposes a single, nationwide MRSP of  $[[xx.xxx.xx]]$  baht for all provinces, in which case the marketing costs will be  $[[xx.xxx.xx]]$  baht (i.e.  $[[xx.xxx.xx]]-1.86$ ).

7.540 The table contained in PM Thailand's letter of 19 July 2005 can be summarized as follows:<sup>1067</sup>

[[The deleted table contains business confidential information]]

7.541 At page 3 of the letter, PM Thailand notes that the table in the letter shows "current cigarette retail prices, retail prices according to the Excise Notice, and the increased retail prices that the company is requesting, respectively". We understand that the categories identified by PM Thailand refer to the three main columns in the table, as reproduced above.

7.542 Therefore, contrary to Thailand's argument, the column headings of the table as well as the explanation included in the letter do not suggest that the figure in the left-hand column of the table at page 2 of the letter, "retail price of authorized tobacco retailer type 3 at present", refers to the actual retail selling price of *Marlboro* cigarettes that was applied *only in Bangkok* (the only province in Thailand with *no* provincial tax). In fact, the evidence submitted by the Philippines (an overview table of the MRSP, RRSP and monthly RSP values for *Marlboro* and *L&M* for 2005-2009) also confirms that there was indeed a single RRSP/RSP ( $[[xx.xxx.xx]]$  baht) nationwide in 2005.<sup>1068</sup>

7.543 The Philippines points out that Thailand's position has one practical consequence for the calculation of the marketing costs, namely that, if the RSP of  $[[xx.xxx.xx]]$  baht applied to provinces with provincial tax, it would have reduced the marketing costs from  $[[xx.xxx.xx]]$  baht to  $[[xx.xxx.xx]]$  baht because in such a case, DG Excise was required to deduct all internal taxes, including the provincial tax of 1.86 baht, from the MRSP (RSP in this case) to arrive at the marketing costs (i.e.  $[[xx.xxx.xx]]-1.86= [[xx.xxx.xx]]$ , compare the second and third columns in the table above). The Philippines submits that by ignoring the importer's information on actual marketing costs in provinces with provincial tax, and instead alleging that the RSP of  $[[xx.xxx.xx]]$  baht did not apply to provinces with provincial tax, Thailand inflated the December 2005 *Marlboro* marketing costs by 1.86 baht.

7.544 We consider that the Philippines' view provides a mathematical explanation of the gap in the amount of the provincial tax (i.e. 1.86 baht/pack) between the marketing costs derived from the RSP applied to the provinces without provincial tax and that derived from the RSP applied to provinces with provincial tax. In the absence of any supporting documentary evidence, however, we are not

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<sup>1060</sup>  $[[xx.xxx.xx]]$ .

<sup>1061</sup>  $[[xx.xxx.xx]]$ .

<sup>1062</sup>  $[[xx.xxx.xx]]$ .

<sup>1063</sup>  $[[xx.xxx.xx]]$ .

<sup>1064</sup>  $[[xx.xxx.xx]]$ .

<sup>1065</sup>  $[[xx.xxx.xx]]$ .

<sup>1066</sup>  $[[xx.xxx.xx]]$ .

<sup>1067</sup> Exhibit THA-18.

<sup>1068</sup> Exhibit PHL-270.



able to conclude that Thailand used the MRSP/RSP that was allegedly applied to the area with no provincial tax with the intention of inflating the marketing costs for *Marlboro*.

7.545 Nonetheless, even if we were to follow Thailand's explanation as provided in this proceeding, it is not clear to us what the reason was for basing the marketing costs for the 7 December 2005 MRSP for *Marlboro* on the MRSP/RSP that was allegedly applied to Bangkok only. We do not see any particular logical link between DG Excise's decision to calculate a single national cigarette price that was inclusive of provincial tax and its decision to base the calculation of the marketing costs for *Marlboro* on the MRSP/RSP that allegedly applied to the area without provincial tax, and not the provinces with provincial tax. This is particularly so given that the provincial tax of 1.86 baht is already included in the calculation of the MRSP for the MRSP/RSP applied to provinces with provincial tax.<sup>1069</sup>

7.546 Thailand also explains that it rounded up the marketing costs of [[xx.xxx.xx]] baht, derived from the current RSP for *Marlboro* applied to Bangkok, to [[xx.xxx.xx]] baht to reflect the Thai government's decision to have a single nationwide MRSP by adding one baht to the MRSP. We first note that the difference between [[xx.xxx.xx]] baht and [[xx.xxx.xx]] baht – [[xx.xxx.xx]] baht – is more than the one baht that Thailand explains needed to be added. Furthermore, Thailand stated that the decision was to add one baht to the MRSP figure, not to the marketing costs. Therefore, we do not understand why this additional one baht was included in the *marketing costs* for the 7 December 2005 MRSP for *Marlboro*. This is particularly difficult to comprehend as the marketing costs is a component of the MRSP that may be carried over for the establishment of the subsequent MRSPs when such MRSPs need to be revised. In other words, a change in the marketing costs can have a consequential effect on the subsequent MRSPs. Moreover, as the table above shows, the provincial tax of 1.86 baht is already included in the 7 December 2005 MRSP for *Marlboro*. In this circumstance, Thailand has not sufficiently explained why an additional amount of one baht still had to be added.

7.547 In the light of the above considerations, we find that Thailand failed to use the general methodology in determining the marketing costs for the December 2005 MRSP for *Marlboro*. This resulted in increasing the marketing costs and consequently the MRSP for *Marlboro* so as to subject *Marlboro* to a VAT in excess of that imposed on the like domestic cigarettes.

#### *L&M*

7.548 Regarding the 7 December 2005 MRSP for *L&M*, Thailand submits that the marketing costs were derived from PM Thailand's current marketing costs as included in the 6 October 2005 MRSP Notice.<sup>1070</sup> According to Thailand, a breakdown of the 6 October 2005 MRSP – [[xx.xxx.xx]] baht for provinces without provincial tax – provides marketing costs of [[xx.xxx.xx]] baht with "0" provincial tax.

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<sup>1069</sup> Furthermore, if Thai Excise rejected the proposed MRSPs because they were a request for a reduction in the current MRSPs, a question arises as to why it did not simply test the percentage of the marketing costs of PM Thailand's genuine income, the method used by Thai Excise to test the acceptability of the marketing costs component of the proposed MRSPs for TTM brand cigarettes. In the context of Thai Excise's establishment of marketing costs for TTM brands above (Section VII.D.4(c)(iii)), we found that DG Excise's explanation before the Thai Tax Court showed that Thai Excise used the percentage of the marketing costs of TTM's genuine income based on its financial statement to inspect the acceptability of the marketing margin at issue. This also tends to show that Thai Excise did not apply the same methodology of establishing the marketing costs for the imported cigarettes at least in the circumstance in which the marketing costs included in the MRSPs proposed by the importer/manufacture were being questioned.

<sup>1070</sup> Thailand's response to Panel question No. 129.

7.549 We note that the 6 October 2005 MRSP Notices included two separate MRSPs – one for the provinces with provincial tax (i.e. [[xx.xxx.xx]] baht) and the other for Bangkok without provincial tax (i.e. [[xx.xxx.xx]] baht). The former – i.e. [[xx.xxx.xx]] baht – is the MRSP figure proposed by PM Thailand to be applied nationwide. Thai Excise then accepted this figure as the MRSP for the provinces with provincial tax while establishing on its own initiative [[xx.xxx.xx]] baht as the MRSP applied to Bangkok. The MRSP data before us provides a breakdown of the [[xx.xxx.xx]] baht calculation only. In the case of the 6 October 2005 MRSP for *L&M*, therefore, the "marketing costs" component of the MRSP of [[xx.xxx.xx]] baht is indicated as [[xx.xxx.xx]] baht.<sup>1071</sup> The Philippines argues that in deriving the marketing costs for the 5 December 2005 MRSP based on the October 2005 MRSP, Thai Excise should have used the marketing costs of [[xx.xxx.xx]] baht under the alleged "normal practice" because that is the marketing costs as included in the MRSP previously requested by the domestic manufacturer/importer (i.e. a nationwide MRSP of [[xx.xxx.xx]] baht) through PM Thailand's July 2005 letter.

7.550 A table summarizing the relevant MRSPs leading to the 7 December 2005 is provided below.

[[The deleted table contains business confidential information<sup>1072, 1073, 1074</sup>]]

7.551 Although we agree that [[xx.xxx.xx]] baht would have been the marketing costs if Thailand had relied on the marketing costs as included in the previously requested MRSP, namely [[xx.xxx.xx]] baht, we recall Thailand's explanation that the latest MRSP can also be referred to under the general methodology in order to derive the marketing costs for the MRSP to be revised. Thai Excise's reliance on the MRSP of [[xx.xxx.xx]] baht, the latest MRSP established by Thai Excise for Bangkok (the only province without provincial tax), therefore would not necessarily have been a deviation from Thai Excise's general methodology *per se*. This means that Thai Excise's decision to use [[xx.xxx.xx]] baht, derived from [[xx.xxx.xx]] baht as shown in the table above, as the value of the marketing costs for the December 2005 MRSP can be considered as compatible with its general methodology.

7.552 The Philippines stresses, however, that, in order to arrive at a final MRSP of 47 baht for the *L&M* December 2005 MRSP, instead of [[xx.xxx.xx]] baht, which was the MRSP/RRSP proposed by PM Thailand, Thai Excise unnecessarily rounded up the marketing costs of [[xx.xxx.xx]] baht to [[xx.xxx.xx]] baht. In the Philippines' view, if DG Excise had simply added marketing costs of [[xx.xxx.xx]] baht to the other elements of the December 2005 MRSP, the resulting MRSP would have been [[xx.xxx.xx]] baht<sup>1075</sup>, which would have been rounded to [[xx.xxx.xx]] baht. Instead, Thailand rounded up [[xx.xxx.xx]] baht to 47 baht. The difference of [[xx.xxx.xx]] baht (i.e. [[xx.xxx.xx]]) was subsequently added to the marketing costs of [[xx.xxx.xx]] baht to make it [[xx.xxx.xx]] baht.

7.553 In considering the Philippines' point on Thai Excise's rounding up of both the MRSP as well as the marketing costs, we recall Thailand's explanation that when revising an existing MRSP, Thai Excise would add all the elements comprising the MRSP (bottom up approach) to arrive at the value of the revised MRSP, including the marketing cost component that is derived by deducting all elements other than the marketing costs from either the current MRSP or the MRSP previously

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<sup>1071</sup> Thailand's response to Panel question No. 129, referring to Exhibit THA-82, providing a breakdown of the MRSP calculation for *L&M* in 2005. The calculation appears as a computation of the ex factory price (5.88), the Customs tax (0.29), the Tobacco Stamp (18.52), VAT (2.55), Health Tax (0.37), Marketing costs (11.38) resulting in an MRSP of 39 baht.

<sup>1072</sup> [[xx.xxx.xx]].

<sup>1073</sup> [[xx.xxx.xx]].

<sup>1074</sup> [[xx.xxx.xx]].

<sup>1075</sup> Philippines' comments on Thailand's response to Panel question 129; Exhibit PHL-282.

requested by the importers/manufacture (top down approach). As the Philippines points out, Thailand also explained that the marketing cost component, as included in the current MRSP or in the MRSP previously requested by the importer/manufacture, would remain *constant*.<sup>1076</sup>

7.554 Regarding the rationale behind rounding up the marketing costs and MRSP figures, Thailand asserts that both domestic manufacturers and importers of cigarettes expressed the concern that "different cigarette prices across various provinces" would cause "market turbulence" and proposed that a single national cigarette price should be achieved by a one baht increase in prices.<sup>1077</sup> To address these concerns, Thai Excise discontinued the practice of publishing two MRSPs for each brand – one for provinces that collected provincial taxes and one for provinces that did not. Thailand then decided to round up the MRSP by approximately one baht for all major brands in the market so that the change of its practice resulted in MRSPs being set at a level that would facilitate the provinces in collecting the full amount of the provincial taxes and discourage retailers from selling at prices in excess of the MRSP. We are not convinced by Thailand's explanation, however, as to why the MRSP needs to be rounded up by one baht to address such concerns when the provincial/local tax component is already included in calculating a single national MRSP.

7.555 In the light of the above considerations, we find that Thai Excise failed to properly follow the general methodology in establishing the marketing costs for the December 2005 MRSP for *L&M* by rounding it up. This resulted in increasing the marketing costs and consequently the MRSP for *L&M*, which forms the basis for a final VAT liability applied to *L&M*, which in turn led to taxation of *L&M* cigarettes in excess of like domestic cigarettes.

(v) *Establishment of the 2006-2007 MRSPs for Marlboro and L&M*

Main arguments of the parties

7.556 The **Philippines** claims that, under Article III:2 of the GATT 1994, Thailand's use of marketing costs of [[xx.xxx.xx]] per cent for the September 2006, March 2007, and August 2007 MRSPs is evidence supporting the Philippines' claims, because it helps to explain how the discrimination arose *vis-à-vis* PM Thailand's brands.<sup>1078</sup> According to the Philippines, these MRSPs demonstrate that DG Excise determined arbitrary and inflated marketing costs of [[xx.xxx.xx]] per cent that drove up PM Thailand's MRSPs. The Philippines points out that, based on PM Thailand's December 2005 information, proposing MRSPs of [[xx.xxx.xx]] baht and [[xx.xxx.xx]] baht respectively, the marketing costs in September 2006 – with unchanged RRSPs – were only [[xx.xxx.xx]] baht for *Marlboro* and [[xx.xxx.xx]] baht for *L&M*, whereas DG Excise added marketing costs of [[xx.xxx.xx]] baht and [[xx.xxx.xx]] baht for the imported cigarettes at issue respectively.

7.557 In contrast, the marketing costs used for TTM were much lower, at [[xx.xxx.xx]] per cent.<sup>1079</sup> Thailand calculated *Marlboro* and *L&M* marketing costs in September 2006, March 2007 and August 2007 through the use of price surveys conducted in other Asian countries instead of relying on PM Thailand's marketing cost figures<sup>1080</sup>, while calculating TTM's marketing costs as a percentage of its own genuine income.<sup>1081</sup> Compared to the marketing costs of TTM's brand at the time – i.e.

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<sup>1076</sup> Philippines' second written submission, para. 410, referring to Thailand's response to Panel question No. 41.

<sup>1077</sup> Thailand's comments of 25 September 2009, para. 43, referring to Exhibits THA-18 (p. 5) and THA-75 (pp. 11-13) for the concerns expressed in the letters from PM Thailand and TTM respectively.

<sup>1078</sup> Philippines' response to Panel question No. 128, also referring to Exhibit PHL-282.

<sup>1079</sup> The Philippines refers to DG Excise's explanation to the Thai Tax Court (Exhibit PHL-109).

<sup>1080</sup> Philippines' second written submission, para. 405.

<sup>1081</sup> Philippines' second written submission, para. 408; Exhibit PHL-109.

[[xx.xxx.xx]] per cent, the imported PM Thailand brands were generated with a discriminatory [[xx.xxx.xx]] per cent, which is 61.2 per cent higher than marketing costs for TTM.<sup>1082</sup>

7.558 The Philippines understands that Thailand derived the marketing cost figure for these three MRSP valuations as follows: Thailand took the *Marlboro* retail prices in 12 countries, including Thailand, and possibly also the Thai retail prices of non-PM International imported brands. Thailand then developed a methodology that effectively gave the various retail prices in different countries various weights, based on four different averaging groups. To produce the final Thai MRSP of [[xx.xxx.xx]] baht/pack, Thailand averaged the average retail prices derived from the four different groups. The [[xx.xxx.xx]] per cent marketing costs were then derived using the MRSP of [[xx.xxx.xx]] baht as the starting point in a deductive calculation.<sup>1083</sup> This percentage was then applied to calculate the September 2006 MRSP for *L&M* and the March and August 2007 MRSPs for *Marlboro* and *L&M*.

7.559 The Philippines argues that: (i) the Philippines fails to see the relevance of the *Marlboro* retail price in 11 countries other than Thailand in fixing the *Marlboro* and *L&M* MRSPs; (ii) it is unclear why three different groups (i.e. "ASEAN", "ASEAN+3", "ASEAN+3+Thailand") were chosen and then combined, which seems random<sup>1084</sup>; (iii) it is unclear why the *Marlboro* and *L&M* MRSPs should be based, even partly, on the retail prices of these other competing non-PM International brands; (iv) it is not clear why DG Excise calculated an average Thai retail price using the non-PM International imported brands to the apparent exclusion of TTM's domestic brands; and (v) Thailand did not apply this methodology to calculate the MRSPs for any other imported or domestic Thai cigarettes.<sup>1085</sup>

7.560 **Thailand** argues that the 2006-2007 MRSPs have little probative value, because the methodology used to determine those MRSPs varied significantly from the methodology used for the MRSPs within the Panel's terms of reference.<sup>1086</sup> Thailand has not provided detailed arguments regarding the Philippines' claim on the specifics of the concerned methodology. Thailand explains that the purpose of the methodology was to use retail price information from other countries in the region to determine "marketing costs" for imported cigarettes in Thailand for circumstances in which Thai Excise had determined, in a departure from its normal methodology, that the c.i.f. values (which were rejected by Thai Customs) and "marketing costs", as contained in the proposed MRSPs by the importers, could not be relied upon. Thai Excise used *Marlboro's* retail sales prices in the other countries for this purpose because *Marlboro* is a well-known brand that is sold throughout the region.<sup>1087</sup>

#### Analysis by the Panel

7.561 We will now examine whether the September 2006, March 2007, and August 2007 MRSPs, demonstrate that DG Excise determined arbitrary and inflated marketing costs of [[xx.xxx.xx]] per cent that drove up PM Thailand's MRSPs.

7.562 Thailand's main position in respect of the Philippines' claim has been that these MRSPs are outside the Panel's terms of reference and hence have little probative value in deciding whether Thailand violated Article III:2. We recall our finding above that the September 2006, March 2007,

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<sup>1082</sup> Philippines' second written submission, para. 405; Exhibit PHL-74 and PHL-109.

<sup>1083</sup> Exhibit THA-78.

<sup>1084</sup> Philippines comments on Thailand's Article 13 DSU response, paras. 59-93; Thailand's Article 13 DSU response, para. 17; response to Panel question 50; Exhibits THA-44 and THA-78.

<sup>1085</sup> Philippines' second written submission, para. 407.

<sup>1086</sup> Thailand's comments on the Philippines' Article 13 DSU response, paras. 52-58.

<sup>1087</sup> Thailand's comments on the Philippines' Article 13 DSU response, paras. 52-58.

and August 2007 MRSPs are within our terms of reference. Therefore, we will proceed with our examination of the Philippines' claim.

7.563 We note that Thailand does not dispute that the methodology used to determine these MRSPs significantly departed from the general methodology. It is also not disputed that this methodology was used for the determination of the MRSPs, particularly their "marketing cost" component, for the imported cigarettes concerned only, and not for domestic cigarettes. The evidence also shows that the resulting MRSPs were much higher than the RSPs for the imported cigarettes for the two year period during which these MRSPs were in effect (October 2006 – August 2008). During this period, we also note that the MRSPs for domestic cigarettes matched their RSPs. The gap between the MRSPs and the RSPs, existing for the imported cigarettes only, is translated into a higher VAT burden on the imported cigarettes than on the domestic cigarettes, because the VAT is based on the MRSP and not on the RSP.<sup>1088</sup>

7.564 In our view, therefore, this proves that the imported cigarettes were taxed in excess of the domestic cigarettes for the relevant period. We are not convinced by Thailand's explanation as to why a different methodology was used for the MRSPs for the imported cigarettes during this period. Thailand argues that because the c.i.f. values, which were being rejected by Thai Customs at that time, and "marketing costs" built into the proposed MRSPs by the importers could not be relied upon, it used retail price information from other countries in the region to determine "marketing costs" for imported cigarettes in Thailand in a departure from its normal methodology. Setting aside the c.i.f. values that were being questioned by Thai Customs at that time, it is not clear to us what was the basis for considering that the marketing cost component of the proposed MRSPs could not be relied upon.

7.565 Even if there was a legitimate basis for doubting the current marketing costs, the marketing costs determined based on the retail price survey ([[xx.xxx.xx]] baht for *Marlboro* and [[xx.xxx.xx]] baht for *L&M*) are drastically higher than the previous marketing costs. Thailand explains that Thai Excise used *Marlboro's* retail sales prices in the other countries for this purpose because *Marlboro* is a well-known brand that is sold throughout the region. In the light of Thailand's previous description of "marketing costs" as "the total selling expenses and profits associated with selling the cigarettes to the final consumer in the Thai market", we are not persuaded that *Marlboro's* retail sales prices in the other countries could have provided Thai Excise with the correct marketing costs for *Marlboro* in the Thai market, not to mention those for *L&M* in the Thai market.

7.566 For the foregoing reasons, we conclude that Thai Excise departed from the general methodology in determining the 2006 and 2007 MRSPs for the imported cigarettes. This in turn resulted in a VAT imposed on the imported cigarettes in excess of that on like domestic cigarettes inconsistently with Article III:2, first sentence.

## 5. Conclusion

7.567 In conclusion, with respect to the 7 December 2005, 18 September 2006, 30 March and 29 August 2007 MRSP Notices for the imported cigarettes, we consider that in fixing the VAT tax base for imported cigarettes, Thai Excise failed to follow its general methodology, which resulted in marketing costs for the imported cigarettes being higher than they would have been if the general methodology had been followed. This combined with the fact that no similar departure from the methodology was found with respect to the determination of the marketing costs for like domestic cigarettes, we find that the Philippines has established that the imported cigarettes were taxed in excess of like domestic cigarettes in violation of Article III:2, first sentence, with respect to the 7 December 2005, 18 September 2006, 30 March and 29 August 2007 MRSP Notices.

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<sup>1088</sup> See para. 7.460 above.

E. ARTICLE III:2 OF THE GATT 1994 – VAT EXEMPTION FOR RESELLERS OF DOMESTIC CIGARETTES

**1. Introduction**

7.568 The Philippines claims that Thailand acts inconsistently with Article III:2, first sentence, of the GATT 1994 because Thailand imposes a VAT on imported cigarettes in excess of that applied to like domestic cigarettes by exempting resale of domestic cigarettes from the VAT obligations. Thailand argues that the Philippines has not established a *prima facie* case that imported cigarettes are taxed "in excess" of domestic cigarettes.

7.569 As discussed in the previous section, the question of whether a measure is consistent with Article III:2, first sentence requires a two step analysis: (i) whether imported and domestic products are like; and (ii) whether the measure subjects the imported products to an internal tax or charge in excess of the domestic products. If the answers to these questions are affirmative, then there is a violation of the first sentence of Article III:2.<sup>1089</sup>

**2. Measures at issue**

7.570 In its panel request, the Philippines identifies the following as the measures through which the Thai VAT exemptions operate:

- Sections 81 and 82/7 of the Thai Revenue Code;
- Section 3(1) of Royal Decree No. 239;
- Order of Revenue Department No. Por. 85/2542; and
- any amendments, implementing measures or other related measures.

7.571 The Philippines claims that the VAT exemption provided for domestic cigarettes in the above-mentioned Thai regulations is a *de jure* violation of Article III:2. In addition to these provisions, which were listed in its panel request, in its written submissions to the Panel, the Philippines also referred to certain other provisions of the Thai regulations it considered relevant to its claims.

**3. Description of the Thai VAT system – application of VAT to cigarette resale**

7.572 In this section, we will describe how a VAT is *applied* to cigarette resale under the Thai VAT system.<sup>1090</sup> As indicated above, the Thai measures specifically identified in the Philippines' panel request are Sections 81 and 82/7 of the Thai Revenue Code, Section 3(1) of Royal Decree No. 239, and Order of Revenue Department No. Por. 85/2542.<sup>1091</sup> In the course of the dispute, however, the parties have also referred to other provisions pertaining to the imposition and exemption of the VAT liability. To the extent necessary to fully understand how the Thai VAT system operates with respect to cigarette resale, we will also describe these other relevant provisions.

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<sup>1089</sup> Appellate Body Report, *Canada – Periodicals*, pp. 22-23, DSR 1997-I, 449, at 468.

<sup>1090</sup> We addressed the Philippines' claim under Article III:2, first sentence, in respect of the manner in which the VAT, specifically, the tax base for VAT, is *calculated* in Section VII.D.4(a)(iii) above.

<sup>1091</sup> Exhibits PHL-94, PHL-217 and PHL-95, respectively.

7.573 Thai Revenue administers VAT pursuant to Chapter IV (Value Added Tax) of the Thai Revenue Code.<sup>1092</sup> We will first describe the general provisions governing VAT and then proceed to consider those relating to the application of VAT to cigarette resellers.

(a) General provisions

7.574 Thailand imposes VAT, *inter alia*, on the sale of goods. Under Thai law, suppliers of goods are liable for the actual payment of VAT.

7.575 Section 77/2 of Division 1 (General Provisions) sets out the general rule on the imposition of VAT:

"Value added tax under the provisions of this Chapter shall be charged on the following transactions that are performed in Thailand:

- (1) *Sale of goods* or provision of a service by a supplier.
- (2) *Import of goods* by an importer."<sup>1093</sup> (emphasis added)

7.576 Division 6 of the Thai Revenue Code then sets forth the rules on "Persons Liable to Tax and Tax Computation". Section 82 provides:

"The following persons shall be liable to value added tax under this Chapter:

- (1) a supplier,
- (2) an importer."

(b) Provisions on the imposition and the exemption of VAT

(i) *Imposition of VAT on cigarette resale*

7.577 Regarding cigarettes, Section 82/7 of Division 6 of the Thai Revenue Code provides:

"In the case of the sale of tobacco ... *every registrant* shall collect value added tax *from the purchaser* by reference to the tax base under Section 79/5(2) in Division 3 and the tax rates under Division 4 *in respect of every stage of sale*." (emphasis added)

7.578 Therefore, as a general rule, every cigarette reseller in the distribution chain incurs VAT liabilities.

7.579 Under Section 82/3 of the Thai Revenue Code, a VAT registrant<sup>1094</sup> supplier deducts the so-called "input tax" already paid to the previous seller, from the "output tax" collected from the next purchaser of goods in each tax month. The VAT registrant supplier thus pays VAT equal to the output tax deducted by the input tax. Division 1 (General Provisions) defines the terms "output tax" and "input tax" as follows:

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<sup>1092</sup> Exhibit PHL-94.

<sup>1093</sup> Exhibit PHL-94 (footnotes in original are omitted).

<sup>1094</sup> Exhibit PHL-94. "Registrant" is defined in Section 77/1 of Division 1: "'Registrant' means a supplier who has been recorded for value added tax registration under Section 85 or 85/1 or for temporary value added tax registration under Section 85/3." Section 85 provides:

"A supplier about to commence a business of selling goods or providing services shall file an application for value added tax registration before the date of commencing business ...".

"(17) "Output tax" means value added tax which a registrant collects or is liable to collect from a purchaser of goods or a recipient of services under the first paragraphs of Section 82/4...

(18) "Input tax" means value added tax which a registrant is called upon to pay to another registrant under Section 82/4, fourth paragraph, and includes-

(a) Value added tax paid by a registrant at the time of import; ..."

7.580 The VAT liability incurred by resellers of imported cigarettes in the distribution channel can thus be put in the following equation:

$$\text{VAT liability} = \text{Output tax (sale to purchaser)} - \text{Input tax (purchase from reseller)}$$

7.581 Section 82/3 of the Thai Revenue Code further sets forth that if the output tax liability, which arises by selling cigarettes in a given month, exceeds the input tax, which was already received in the form of a tax credit when cigarettes were purchased, the tax payable shall be equal to the difference between the two. If input tax exceeds output tax, the difference shall be treated as tax credit, and the supplier is entitled to receive a tax refund or to apply the credit for paying value added tax under Division 8 (Tax Credit and Refund of Value Added Tax).

7.582 In terms of collection of VAT, Section 82/4 of Division 6 provides:

"[A] registrant shall collect value added tax from a purchaser of goods ... at the time the liability to value added tax arises by reference to the tax base under Division 3 and the tax rates under Division 4...

The value added tax that a registrant [i.e. reseller of goods] collects from a purchaser of goods ... shall be taken as output tax of such registrant.

The value added tax that is collected from a registrant by another registrant under this section by reason of purchasing goods ... shall be taken as input tax of the first mentioned registrant [i.e. purchaser of goods]" (underline added)

7.583 Specifically, tax credit and refund of VAT is administered in the following manner under Division 8 of the Thai Revenue Code.

"Section 84. A registrant shall have the right to apply tax credit resulting from the computation of tax under Section 82/3 in each tax month for payment of value added tax according to the rules, procedures and conditions prescribed by a Royal Decree [No. 242], or to claim for a refund at the time of filing a tax return for the tax month under Section 83 or 83/1, ...

Section 84/1. A claim for refund of value added tax on sale of goods or provision of services may be made under the following conditions:

(1) In the case where a tax refund is due on sale of goods ..., but the registrant fails to claim a refund in accordance with Section 84, he is entitled to enter a claim for a tax refund within three years from the expiry of the time limit for filing a tax return for that tax month.

(2) In respect of sale of goods and provision of services in other cases, a claim for a tax refund shall be entered within three years from the date of paying tax."



(ii) *Exemption of VAT for domestic cigarette resale*

7.584 Section 81(1)(v) of Division 5 (Exemption from Value Added Tax) provides for VAT exemptions for sales of goods or services designated by Royal Decree No. 239.

7.585 Section 3(1) of Royal Decree No. 239 in turn provides for VAT exemptions for the sale of domestic cigarettes. It provides:<sup>1095</sup>

"Section 3. There shall be exempt from value added tax for the following businesses:

(1) Sale of cigarettes produced by a manufacturer which is an organization of a government where the seller is not such manufacturer who produces such cigarettes: provided that this shall not include the seller who is a bonded ware house duty free shop."

As noted above, TTM is the only manufacturer of cigarettes in Thailand and an organization of the Thai government. Therefore, the resellers of TTM brand cigarettes will be exempt from value added tax pursuant to the above provisions.

7.586 The Order of Revenue Department No. Por. 85-2542 provides, in relevant part, that a registered operator who buys cigarettes and receives a tax invoice from the tobacco industrial operator that is a State's organization is *exempted* from VAT in Section 81(1)(v) of the Revenue Code.<sup>1096</sup>

(c) *Operation of the Thai VAT system with respect to cigarette resale*

7.587 Based on the above provisions pertaining to the VAT liability under Thai law, the process of collecting and exempting VAT imposed on the resale of cigarettes can be explained as follows.

7.588 As for domestic cigarettes, when TTM sells cigarettes to the wholesaler, TTM incurs a VAT liability of 7 per cent of the MRSP (exclusive of VAT) to the Thai government.<sup>1097</sup> Upon resale of imported cigarettes, the importer also incurs a VAT liability of 7 per cent of the MRSP (exclusive of VAT) to the Thai government.

7.589 Given that both TTM and the importer incur a VAT liability of 7 per cent of the MRSP upon the sale of cigarettes to wholesalers and upon importation, it can be assumed that they would want to include this VAT amount in their sales price to the wholesaler. We can also assume that the wholesaler and the subsequent retailers of both domestic and imported cigarettes in the distribution chain would want to pass on the VAT to the next retailer by including it in their retail price. This is in line with the VAT system in general, namely that the VAT liability ultimately passes to the consumers. It is not inconceivable, however, that TTM, an importer, and an individual wholesaler or a retailer in the distribution chain can also make a business decision to not include the VAT amount in their retail price.

7.590 As noted above, however, Section 82/7 of Division 6 of the Thai Revenue Code *requires* that in the case of cigarettes, every registrant collects VAT from the purchaser in respect of every stage of sale. According to this provision, therefore, TTM as well as an importer and all the other resellers of cigarettes in the subsequent distribution chain are under an obligation to collect VAT from their

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<sup>1095</sup> Exhibit PHL-217.

<sup>1096</sup> Exhibit PHL-95, p. 6, No. 7.

<sup>1097</sup> Philippines' first written submission, para. 415; Thailand's response to Panel question No. 41; Exhibit PHL-93.

purchasers, independently from the VAT included in the actual sales price, until the transaction reaches the consumer level.

7.591 When the wholesaler sells *domestic* cigarettes to retailers and so forth under each subsequent transactional stage, however, these wholesaler and subsequent resellers incur *no* VAT liability because of the exemption given under Section 81(1)(v) of the Thai Revenue Code, Section 3(1) of Royal Decree No. 239 and the Order of Revenue Department No. Por. 85-2542 as mentioned above.<sup>1098</sup> No such exemption is available for imported cigarettes. As such, when the wholesaler subsequently resells imported cigarettes to the retailer, for example, the wholesaler incurs a VAT liability of 7 per cent of the MRSP. This VAT liability arises at each subsequent transactional stage until consumers purchase imported cigarettes. Each agent subject to VAT in the imported cigarettes distribution chain can claim a refund of the VAT amounts paid in excess, based on the amount of VAT credits acquired upon the purchase of cigarettes from a previous seller, by filing form Por.Por.30 with the Thai authorities.<sup>1099</sup>

7.592 The following chart explains the Thai VAT system for domestic manufacturers and importers respectively. The chart is based on the calculation examples provided by both parties.<sup>1100</sup> However, it should be noted that we are using this chart for the purpose of illustrating the Thai VAT system and that the figures shown in the graph are not based on real figures. Hence, for the purpose of explaining the difference in VAT liability between the resale of imported and domestic cigarettes under the Thai law, we assume that the MRSP including VAT is 107 baht/pack and equals the RSP for both imported and domestic cigarettes.<sup>1101</sup> This then results in a VAT of 7 baht/pack ( $107 \times (7/107)$ ), which means that the MRSP excluding VAT is 100 baht/pack.<sup>1102</sup> The transaction in the chart involves the sale of one cigarette pack for both imported and domestic cigarettes with the same VAT-inclusive transaction prices for resellers in the distribution chain, namely 67, 77 and 87 baht/pack.

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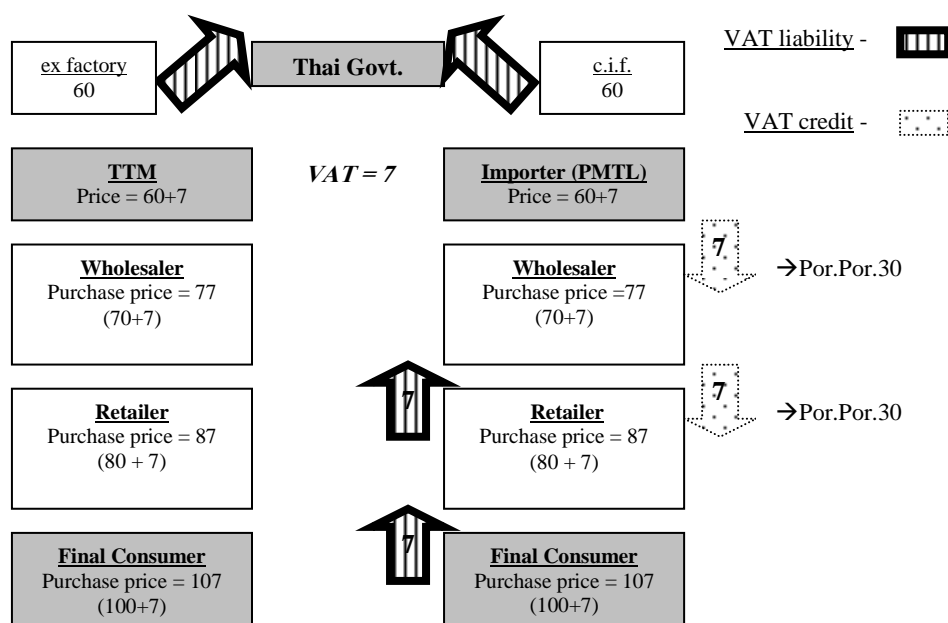
<sup>1098</sup> Philippines' first written submission, paras. 534-539; response to Panel question No. 138; Thailand's first written submission, para. 98; response to Panel question No. 41; Exhibits PHL-217 and PHL-95.

<sup>1099</sup> Philippines' first written submission, paras. 529-533; Thailand's first written submission, paras. 99-100; response to Panel question No. 41.

<sup>1100</sup> Philippines' response to Panel question No. 138; Exhibit THA-20.

<sup>1101</sup> The MRSP excluding VAT is made up of the c.i.f./ex factory price, customs duties, excise tax, health tax, television tax, local tax and marketing costs (Exhibit THA-47), see para. 7.466 above. The MRSP including VAT is the maximum price a retailer can charge a consumer. The RSP is the price which a retailer chooses to ask from a consumer, the actual retail price, this price cannot exceed the MRSP (parties' response to Panel question No. 119). Hence, as the Philippines submits, in reality the retailer can choose, for various reasons, to set the RSP at a lower level than the MRSP. Thailand does not contest this (Philippines' first written submission, para. 417; response to Panel question No. 52 and 119; Thailand's first oral statement, para. 11; response to Panel question No. 119; Exhibit THA-48).

<sup>1102</sup> Philippines' first written submission, para. 418; response to Panel question 138; Thailand's first written submission, para. 77; second oral statement, para. 61.



(d) Other relevant provisions

7.593 Section 82/5 of the Revenue Code notes six potential instances in which a VAT registrant reseller would not be allowed to deduct output tax paid to its previous seller in computing tax under Section 82/3: (i) a tax invoice is absent or cannot be produced to prove that input tax has been collected, except where there is a reasonable excuse according to the rules and conditions prescribed by the Director-General; (ii) a tax invoice contains information which is incorrect or inadequate in the matter of substance according to the rules and conditions prescribed by the Director-General; (iii) the input tax is not directly connected with the business carried on by a supplier according to the rules and conditions prescribed by the Director-General; (iv) the input tax originated from entertainment expenses or expenses of a similar nature according to the rules and conditions prescribed by the Director-General; (v) input tax under a tax invoice issued by a person not authorized to do so under Division 10; or (vi) input tax designated by the Director-General with the approval of the Minister.

7.594 Section 86/5(2) of the Thai Revenue Code, in relevant part, provides that the Director-General may vary the particulars in respect of a tax invoice for tobacco under Section 79/5.<sup>1103</sup> Moreover, Sections 89 and 90 provide for penalties, surcharges and punishment if forms and information to Thai authorities are incorrectly, inappropriately or fraudulently submitted.<sup>1104</sup>

#### 4. Like product analysis

(a) Main arguments of the parties

7.595 The **Philippines** claims that imported cigarettes and domestic cigarettes are like products for the same reasons that it presented in relation to its other claim under Article III:2, first sentence.<sup>1105</sup> Moreover, the Philippines submits that because of the distinctions between products purely based on national origin in the Thai law at issue, the Philippines, as a complainant, need not separately establish

<sup>1103</sup> Exhibit PHL-94, p. 93.

<sup>1104</sup> Exhibit PHL-94, pp. 101-103.

<sup>1105</sup> Philippines' first written submission, paras. 543-544; second written submission, paras. 370-390.

the likeness between imported and domestic cigarettes.<sup>1106</sup> Specifically, Section 2 of the Order of the Revenue Department refers expressly to tobacco and cigarettes "imported from abroad". In contrast, the Philippines points out that Section 7 of the Order of the Revenue Department refers to cigarettes "from the tobacco industrial operator that is a State [] organization", which refers exclusively to domestic cigarettes.

7.596 **Thailand** has not specifically responded to the likeness element of Article III:2, first sentence, in the context of the Philippines' claim concerning the VAT exemption.

(b) Analysis by the Panel

7.597 We recall our finding above that *Marlboro* and *L&M* cigarettes at issue are like the domestic cigarettes within the same price segments under Article III:2, first sentence, of the GATT.<sup>1107</sup> As such, we find that the imported cigarettes at issue, *Marlboro* and *L&M* are "like" domestic cigarettes within the same price segments.

## 5. Excess taxation analysis

7.598 We address in this section the question of whether the VAT exemption available only for domestic cigarette resellers under the Thai regulations subjects imported cigarettes to an excess VAT liability compared to domestic cigarettes and consequently leads to a *de jure* violation of the first sentence of Article III:2. In this regard, the Philippines submits that the VAT at issue under Thai law is an internal tax within the meaning of Article III:2 of the GATT 1994.<sup>1108</sup> Thailand has not disputed this either. We also find that value added taxes, and hence the VAT at issue imposed on cigarettes under the Thai law, are an internal tax covered by Article III:2. We will begin our analysis by first examining the VAT in general and Thailand's position that the scope of Article III:2, first sentence is confined to the VAT amount applied to cigarettes at the final consumer level.

(a) Whether the scope of Article III:2, first sentence is confined to the VAT amount applied to cigarettes at the final consumer level

(i) *Main arguments of the parties*

7.599 **Thailand** argues that the Panel should only examine whether domestic and imported cigarettes are ultimately subject to equal amounts of internal taxes at the final consumer level.<sup>1109</sup> Thailand argues that there is no basis on which to conclude that imported cigarettes are taxed in excess of domestic cigarettes within the meaning of Article III:2 because VAT is a tax on consumers, who pay exactly the same tax on imported and domestic cigarettes.<sup>1110</sup> The key issue is that the total tax on the imported and domestic product be the same, and not whether the tax is collected uniformly from different merchants at each stage of the distribution process.<sup>1111</sup> Thailand notes that the text of Article III:2(a) and Ad Article III of the GATT 1994 states that internal taxes can be imposed on imported products at the time of importation. Internal taxes on domestic products are however collected later in the distribution chain. Thailand therefore concludes that Article III:2 does not focus on *when* the taxes are collected, but rather on *how much* is collected. The fact that VAT for domestic cigarettes is collected at the manufacturer level, while VAT for imported cigarettes is passed on

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<sup>1106</sup> Philippines' first written submission, paras. 543-544.

<sup>1107</sup> See Section VII.D.3 above.

<sup>1108</sup> Philippines' first written submission, paras. 463 and 542.

<sup>1109</sup> Thailand's second written submission, para. 149.

<sup>1110</sup> Thailand's second oral statement, para. 59, referring to Thailand's second written submission, paras. 156-161; Exhibit THA-61.

<sup>1111</sup> Thailand's second oral statement, para. 60.

through the distribution chain to the consumer, therefore cannot constitute grounds for a violation claim under Article III:2, first sentence.<sup>1112</sup>

7.600 In this connection, Thailand argues that the OECD clarified that VAT is a consumption tax, which is ultimately paid by the final consumers.<sup>1113</sup> This, in turn, has the aim of achieving neutrality of taxation.<sup>1114</sup> As such, it is highly unlikely that many Members understood Article III:2 of the GATT 1994, to render multi-stage VAT systems WTO-inconsistent. Thailand is of the view that input tax credit constitutes a basic feature of every VAT system<sup>1115</sup>, and the practice of offsetting output tax liability against the input tax credit is a basic feature of Members' VAT systems.<sup>1116</sup> Thailand provides examples of several WTO Members using exactly the same system as its VAT system (*i.e.* the Philippines, Canada, France, Ireland, Peru and Australia).<sup>1117</sup> Thailand asserts that if the Philippines' argument concerning the WTO-inconsistency of the Thai VAT system was accepted, every WTO Member's VAT system which is based on input/output tax offsets would also be found inconsistent with WTO obligations where in "at least some circumstances" the reseller of an imported product does not obtain the credit.<sup>1118</sup>

7.601 The **Philippines** claims that, contrary to Thailand's assertions, the final consumer does not always bear the ultimate VAT burden.<sup>1119</sup> As a matter of Thai law, the VAT is imposed on importers and the domestic manufacturer of cigarettes, alike. However, VAT is automatically passed on to wholesalers, retailers and, ultimately, consumers in the commercial chain for *imported* products only. On the other hand, VAT may be imposed on *domestic* cigarette consumers only if TTM chooses to reflect its VAT burden in the retail price of the product. The Philippines argues that, from an economic perspective, and for a variety of commercial reasons, there might be instances where an importer, a manufacturer or a reseller may decide to absorb the VAT burden rather than to increase its RSP.<sup>1120</sup> As a consequence, the Thai consumers may not be ultimately liable to pay VAT.<sup>1121</sup>

7.602 The Philippines argues that, the taxation of the products at issue throughout the distribution chain should be assessed, not just at the consumer level.<sup>1122</sup> The Philippines agrees that both TTM and PM Thailand pay the same VAT amount on their initial sale transaction. The Philippines however points out that the relevant test is whether, through the chain of distribution, imported cigarettes are subjected to taxes in excess of those on domestic cigarettes. The Philippines argues that

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<sup>1112</sup> Thailand's second written submission, para. 149.

<sup>1113</sup> Thailand's second written submission, para. 156, referring to Exhibit THA-61.

<sup>1114</sup> Thailand's second written submission, para. 161.

<sup>1115</sup> Thailand's first written submission, para. 242, footnote 247; response to Panel question No. 54.

<sup>1116</sup> Thailand's second written submission, para. 160.

<sup>1117</sup> Thailand's response to Panel question No. 54; Exhibit THA-43.

<sup>1118</sup> Thailand's first written submission, para. 242, footnote 247; comments on the Philippines' response to Panel questions, para. 71. Furthermore, Thailand argues that PM Thailand adds the same amount for VAT in determining its RRSPs as Thai Excise uses to determine the MRSPs. Thailand uses the example of RRSPs for L&M since 2005, which is the same as MRSP, with the exception of the 2006-2007 period (Exhibit PHL-270). Therefore, there is no cumulative tax burden, as PM Thailand's practice is consistent with Thailand's calculation of the total VAT in the distribution chain (Thailand's comments on the Philippines' response to Panel questions, paras. 85-86).

<sup>1119</sup> Philippines' response to Panel question No. 52.

<sup>1120</sup> Philippines' response to Panel question No. 52. The Philippines notes that PM Thailand's commercial policy is to pass on the increases in the tax rate to consumers, which have affected domestic and imported cigarettes similarly, however, not to pass on increases in the tax base, which have typically affected only imported cigarettes (para. 335). The Philippines cites two examples (September 2006 and August 2007) where Thailand increased PM Thailand's MRSPs, and therefore the VAT amount due, and the company chose to absorb the increase in VAT rather than to pass it on to the consumer. As a result, PM Thailand, accepted a lower profit margin, and the tax increase burden was not ultimately borne by the consumer.

<sup>1121</sup> Philippines' response to Panel question No. 52.

<sup>1122</sup> Philippines' response to Panel question No. 138.

at each subsequent stage in the distribution chain, resellers of imported cigarettes, alone, are subject to a cascading VAT. Therefore the cumulative VAT burden on like imported and domestic cigarettes is not the "same", and imported cigarettes are taxed in excess of like domestic cigarettes.<sup>1123</sup>

7.603 The Philippines claims that none of the countries of which Thailand says it has a WTO-consistent system similar to its own, recognizes exemptions for domestic cigarettes. Thailand is the only country to apply different rules for the collection of VAT for domestic and imported cigarettes respectively: a single stage system where only the manufacturer bears VAT liability for domestic cigarettes, and a multi-stage system where VAT is passed on through all economic agents in the resale chain for imported cigarettes. The Philippines points out that normal multi-stage VAT systems are premised on the principle of fiscal neutrality, where all goods in the same situation are treated equally and any variation in tax burdens is due to factual variations of the goods and not *de jure* exemptions granted to domestic goods.<sup>1124</sup> The Philippines concludes first that the rules implemented in the countries mentioned by Thailand should have no bearing on the Panel's analysis of Thailand's exemption system.<sup>1125</sup>

7.604 **Thailand** submits that the Philippines' assertions are incorrect because TTM is also entitled to a tax credit on VAT paid on its purchases of raw materials and other VAT-liable inputs, in addition to the output payment on its sales of cigarettes.<sup>1126</sup> Even if the treatment of domestic cigarettes under the Thai VAT system is "single stage", Thailand's VAT system for both imported and domestic cigarettes is therefore consistent with the basic features common to VAT because a tax credit for input tax paid remains the same for imported and domestic cigarettes.<sup>1127</sup>

(ii) *Analysis by the Panel*

7.605 The Panel notes that, in general, VAT is included in the final price of the product because VAT is a consumption tax, which is ultimately paid by the final consumers. As referred to by Thailand, in the "International VAT/GST Guidelines (February 2006)", the OECD observes that although there are many differences in the way value added taxes are implemented around the world and across OECD countries, there are some common core features.<sup>1128</sup> These features include the following:

7.606 "Value added taxes are taxes on consumption, paid, ultimately, by final consumers. In principle, businesses should not bear the burden of the tax itself since there are mechanisms in place that allow for a refund of the tax levied on intermediate transactions between firms. The system is based on tax collection in a staged process, with successive taxpayers entitled to deduct input tax on purchases and account for output tax on sales. Each business in the supply chain takes part in the process of controlling and collecting the tax, ... . In general, OECD countries with value added taxes impose the tax at all stages and normally allow immediate deduction of taxes on purchases by all but the final consumer."

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<sup>1123</sup> Philippines' second oral statement, para. 95.

<sup>1124</sup> Philippines' second oral statement, para. 95; response to Panel question No. 140(1). The Philippines states that "[it] agree[s] with Thailand that non WTO-inconsistency arises in a multi-stage VAT system that has the following basic features: (1) domestic *and* imported goods are both subject to tax 'at each stage of distribution'; (2) the tax base is chosen by the seller or reseller and, hence, is non-discriminatory, and, (3) the tax rate is equal for all goods." The Philippines underlines that this, however, is *not* the VAT system that Thailand operates.

<sup>1125</sup> Philippines' second written submission, para. 458.

<sup>1126</sup> Thailand's second written submission, para. 164.

<sup>1127</sup> Thailand's second written submission, para. 164, referring to Exhibit THA-61, p. 1; response to Panel question No. 134.

<sup>1128</sup> Exhibit THA-61, paras. 1-2.

7.607 It is further stated that the above features give value added taxes their main economic characteristic, that of neutrality. According to the guidelines, the full right to deduction of input tax through the supply chain, with the exception of the final consumer, ensures the neutrality of the tax, whatever the nature of the product, the structure of the distribution chain and the technical means used for its delivery.

7.608 The Thai system as applied to *imported* cigarettes appears to fit within the general description of VAT systems as observed in the OECD guidelines. What distinguishes the VAT-related measures maintained by Thailand from other so-called normal VAT measures is, however, the VAT exemption accorded to domestic cigarette resale only. In our view, this distinguishing feature of the Thai VAT system for the cigarettes resale is directly relevant to the question of whether the concerned measure imposes excess taxation on imported cigarettes inconsistently with Article III:2, first sentence.

7.609 The Appellate Body has established a strict standard for the term "in excess of" found in Article III:2, first sentence, with even the smallest amount of excess taxation considered inconsistent with WTO obligations.<sup>1129</sup> The purpose of Article III:2, first sentence is to ensure the equality of competitive conditions between imported and like domestic products.<sup>1130</sup> The obligation to respect this most fundamental principle enshrined in Article III:2, first sentence is also well illustrated in GATT disputes. For example, the GATT panel in *US – Tobacco*, found a violation of Article III:2 because the measure concerned in that dispute "carried with it the risk of discriminatory treatment of imports in respect of internal taxes".<sup>1131</sup>

7.610 We do not therefore consider that the scope of scrutiny of a given measure for its consistency with Article III:2, first sentence, can simply be limited to whether the final consumer ultimately pays the same VAT for imported and domestic cigarettes. In our view, the fact that VAT is in principle a consumer tax that normally is passed on to the final consumer does not eliminate the possibility that imported cigarettes may still be exposed to potential excess taxation under a Member's specific VAT system through the manner in which resellers of imported cigarettes in the distribution chain are held liable for the VAT obligations. Further, we do not find that the VAT exemption granted only to the resale of domestic cigarettes under the Thai VAT system is a typical feature of VAT or a common practice shared by other countries.<sup>1132</sup>

7.611 Finally, we do not agree with Thailand's view that the obligations under Article III:2, first sentence, are not concerned with the issue whether the tax is collected uniformly from different merchants at each stage of the distribution process. We agree that the issue is not whether the tax is collected uniformly from distributors at each stage of the transaction chain. However, to the extent that the manner in which the tax is collected affects the tax liability applied to imported goods, we are of the opinion that a measure falls within the scope of Article III:2, first sentence. We also find support for our view from the statement of the Appellate Body in *Canada – Periodicals* that "[a]ny measure that indirectly affects the conditions of competition between imported and like domestic

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<sup>1129</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23 and 26, DSR 1996:I, 97, at 115 and 118; Panel Report, *Argentina – Hides and Leather*, para. 11.243.

<sup>1130</sup> Appellate Body Report, *Canada – Periodicals*, p. 18, DSR 1997:I, 449, at 468.

<sup>1131</sup> GATT Panel Report, *US – Tobacco*, para. 97 (emphasis added). In the context of Article III:4, the GATT Panel in *EC – Oilseeds I* also reasoned that the exposure of a particular imported product to simply the risk of discrimination within legal provisions constitutes, by itself, a form of discrimination (para. 141).

<sup>1132</sup> For instance, in the examples provided by Thailand in Exhibit THA-43 regarding VAT systems in the Philippines, Canada, France, Ireland, Peru and Australia, we find that although these countries have similar VAT systems to the Thai VAT system, they do not have an exemption system regarding domestic cigarettes as used by Thailand.

products would come within the provisions of Article III:2, first sentence, or by implication, second sentence, given the broader application of the latter".<sup>1133</sup>

7.612 We now proceed to examine whether Thailand's VAT exemption on the resale of domestic cigarettes subjects imported cigarettes to an excess VAT liability in violation of Article III:2, first sentence.

(b) Whether Thailand's VAT exemption on the resale of domestic cigarettes subjects imported cigarettes to an excess VAT liability in violation of Article III:2, first sentence

(i) *Main arguments of the parties*

7.613 The **Philippines** claims that the VAT exemption for resellers of domestic cigarettes contained in Thai law, which is not available to imported cigarette resellers, is a *de jure* violation of Article III:2, first sentence because the Thai Revenue Code explicitly calls for the taxation of imported cigarettes in excess of domestic cigarettes.<sup>1134</sup> Moreover, the fact that the Thai VAT law offers a tax credit, does not mean that resellers of imported cigarettes will always be left – in Thailand's words – "automatically and simultaneously" with a zero "net" VAT liability.<sup>1135</sup>

7.614 The Philippines contests that the input tax credit balances the net VAT liability to zero at the time the obligation to pay output tax VAT liability arises. There could be instances where the net VAT liability will be greater than zero after the output tax is levied on the resale of imported cigarettes, which would constitute excess taxation.<sup>1136</sup> The Philippines argues that even if there is a perfect match between the input tax credit and the output tax liability, the input tax credit could not occur if wholesalers/retailers do not comply with their obligations to submit Form Por.Por.30.<sup>1137</sup> According to the Philippines therefore, the tax credit mechanism is conditional, not available automatically and simultaneously to offset VAT liability imposed on foreign cigarettes resellers, which is never imposed on the resale of domestic cigarettes.<sup>1138</sup> The Philippines cites certain situations where an input tax credit shall not be allowed<sup>1139</sup>, and submits that these examples are sufficient to show that the VAT measures apply excess taxation to imported cigarettes.

7.615 Furthermore, the Philippines claims that providing a private party the opportunity to offset statutorily-imposed less favourable treatment cannot cure the government's failure to ensure the

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<sup>1133</sup> Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, at 464.

<sup>1134</sup> Philippines' first written submission, paras. 528, 541-542; second written submission, paras. 439-441; Exhibit PHL-94.

<sup>1135</sup> Philippines' second written submission, para. 442.

<sup>1136</sup> Philippines' second written submission, para. 448.

<sup>1137</sup> Thailand's response to Panel question No. 57.

<sup>1138</sup> Philippines' second written submission, para. 452.

<sup>1139</sup> Philippines' comments on Thailand's response to Panel question Nos. 137 and 138; Philippines' response to Panel question Nos. 133 and 138; referencing Exhibits PHL-94, Section 82/5 and PHL-271. The following are the relevant situations: (i) a tax invoice cannot be produced and there is no reasonable excuse; (ii) a tax invoice contains incorrect or inadequate information; (iii) output tax is not directly connected with the supplier's business; (iv) input tax originated from entertainment expenses; (v) input tax invoice issued by a non-authorized agent; and (vi) input tax designated by the DG with the approval of the Minister. The Philippines also notes that pursuant to Notification No. 42, Clause 1(2) and Section 82/5(6) of the Thai Revenue Code, a reseller of imported cigarettes who chooses to use retail business right to submit a summary tax invoice to ease the administrative burden, cannot deduct the input tax stated therein from the output tax in connection with resale of imported cigarettes; and regular tax invoices, under Section 86/4 of the Thai Revenue Code do not contain the word "Tax invoice" (Philippines' response to Panel question Nos. 133 and 138, para. 211, referencing Exhibits PHL-280 and PHL-271).



equality of competitive conditions. A Member's respect for the national treatment obligation cannot be contingent upon merely private party actions.<sup>1140</sup>

7.616 **Thailand** argues that TTM pays the entire VAT amount for resale up front and that in practice, imported cigarette resellers have the same VAT liabilities as domestic cigarette resellers.<sup>1141</sup> Thailand maintains that imported cigarettes do not bear a greater VAT burden than domestic cigarettes, since wholesalers and retailers do not pay any net VAT to the Thai government on sales of domestic or imported cigarettes.<sup>1142</sup> Moreover, wholesalers and retailers typically buy both domestic and imported cigarettes, which are all subject to the same administrative requirements.<sup>1143</sup> Thailand characterizes the Thai VAT system as a mere reporting requirement because the imported and domestic cigarettes are taxed equally in practice.<sup>1144</sup> Thailand argues that the VAT payable is automatically neutralized with a tax credit before the liability is due.<sup>1145</sup>

7.617 Thailand submits that a VAT exemption for the resellers of domestic cigarettes is balanced with a tax credit automatically available to the resale of imported cigarettes. The comparison of tax imposed on the cigarettes at issue under Article III:2, first sentence, should only be determined at the stage of the transaction when the final consumer purchases the cigarettes.<sup>1146</sup> The VAT is calculated as 7 per cent of the MRSP (output tax liability) minus 7 per cent of the MRSP (input tax credit) = 0 (net VAT liability) for imported cigarette resale and simply "0" for domestic cigarette resale.<sup>1147</sup> Thailand notes that the Philippines' own expert provided that the VAT calculation is achieved by crediting input tax against output tax liability<sup>1148</sup> and that VAT registrants are "entitled" to input tax credits as a "right" and the cumulative VAT tax burden would be calculated in connection with the supply of a pack of imported cigarettes.<sup>1149</sup> The VAT liability for the resale of imported cigarettes would therefore be equal to that of domestic cigarettes.<sup>1150</sup>

7.618 Thailand argues that a private party does not have to take any additional steps to receive the tax credit. Thailand maintains that the right to an input tax credit arises when the goods are purchased, at the same time or before the liability to pay an output tax is incurred, therefore the liability to pay an output tax can never pre-date the entitlement to an input tax credit.<sup>1151</sup>

(ii) *Analysis by the Panel*

7.619 The Philippines claims that the VAT exemption for the resale of domestic cigarettes under Thai law is a *de jure* violation of Article III:2, first sentence. Thailand asserts that the Philippines misinterprets the Thai VAT system and that there is no excess taxation for imported cigarettes because the VAT payable by imported cigarette resellers is automatically neutralized with a tax credit before the liability is due.

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<sup>1140</sup> Philippines' response to Panel question No. 52.

<sup>1141</sup> Thailand's first written submission, para. 99; Exhibit THA-20.

<sup>1142</sup> Thailand's first written submission, para. 101.

<sup>1143</sup> Thailand's first written submission, para. 102.

<sup>1144</sup> Thailand's first written submission, paras. 99, 101 and 242-243; Exhibit THA-20.

<sup>1145</sup> Thailand's first written submission, para. 103.

<sup>1146</sup> Thailand's second written submission, para. 147; first written submission paras. 241-244; Exhibit THA-20.

<sup>1147</sup> Thailand's first written submission, para. 103.

<sup>1148</sup> Thailand's comments on the Philippines' response to Panel questions, para. 86.

<sup>1149</sup> Thailand's comments on the Philippines' response to Panel questions, para. 86, referencing the Philippines' response to Panel question Nos. 133 and 138.

<sup>1150</sup> Thailand's comments on the Philippines' response to Panel questions, para. 86, referencing the Philippines' response to Panel question Nos. 133 and 138.

<sup>1151</sup> Thailand's comments on the Philippines' response to Panel questions, para. 72; response to Panel question No. 132(3).

7.620 A *de jure* inconsistency of a measure with the WTO obligations can be demonstrated if the relevant legal instrument explicitly provides for the words that result in a violation of certain obligations.<sup>1152</sup> For the purpose of the obligation under Article III:2, first sentence, of the GATT 1994, the Panel in *Indonesia – Autos* recognized that origin-based distinctions for internal taxes leading to excess taxation for imported goods is in itself inconsistent with Article III:2 of the GATT 1994:

"[A]n origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products. This is directly in accord with the broad purposes of Article III:2, as outlined by the Appellate Body."<sup>1153</sup>

7.621 Turning to the facts of this dispute, it is not disputed that imported cigarette resellers are liable for VAT under Section 82/7 of the Thai Revenue Code and that an exemption from this VAT liability is provided only to the resale of domestic cigarettes pursuant to Section 3(1) of Royal Decree No.239 and the Order of Revenue Department No. Por. 85-2542. To recall, Section 3(1) of Royal Decree No.239 reads:

"Section 3. There shall be exempt from value added tax for the following businesses:

(1) Sale of cigarettes produced by a manufacturer which is an organization of a government where the seller is not such manufacturer who produces such cigarettes: provided that this shall not include the seller who is a bonded ware house duty free shop."<sup>1154</sup>

7.622 The Order of Revenue Department No. Por. 85-2542 also provides, in relevant part, that a registered operator who buys cigarettes and receives a tax invoice from the tobacco industrial operator that is a State organization is exempted from VAT in Section 81(1)(v) of the Revenue Code.<sup>1155</sup>

7.623 The text of the above measures pertaining to the VAT exemption therefore specifically refers to cigarettes produced by a manufacturer which is an organization of a government, namely TTM – the only domestic cigarette manufacturer in Thailand. Consequently, if the VAT liability arises only with respect to the resale of imported cigarettes because of the exemption given to domestic cigarette resale under the relevant provisions, the Thai measures at issue, on their face, lead to applying a VAT to imported cigarettes *in excess of* that imposed on like domestic cigarettes.

7.624 Thailand, however, argues that the resellers of imported cigarettes are *not* subject to excess taxation because the tax credit is available automatically and simultaneously on the submission of a required form (Form Por.Por.30): the VAT registrant reseller is automatically entitled to deduct VAT paid on purchases in calculating its VAT liability for the month.<sup>1156</sup> The Philippines contends that a *de jure* VAT exemption for the resellers of domestic cigarettes cannot be cured by the availability of a tax credit that is contingent upon an action from a private party and that does not necessarily offset the tax liability in a given tax period.

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<sup>1152</sup> In the context of an export subsidy under the Subsidies Agreement, the Appellate Body in *Canada – Aircraft* stated on *de jure* export contingency: "... There is difference, however, in what evidence may be employed to prove that a subsidy is export contingent. *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument ..." (underline added) (Appellate Body Report, *Canada – Aircraft*, para. 167).

<sup>1153</sup> Panel Report, *Indonesia – Autos*, para. 14.113; noting Appellate Body Report, *Canada – Periodicals*, pp. 21-22, DSR 1997-I, 449 at 468; see also Panel Report, *Colombia – Ports of Entry*, para. 7.182.

<sup>1154</sup> Exhibit PHL-217.

<sup>1155</sup> Exhibit PHL-95, p. 6, No. 7.

<sup>1156</sup> Thailand's response to Panel question No. 137.

7.625 We recall our earlier discussion that the obligation under Article III:2, first sentence, not to tax imported products in excess of like domestic products, prohibits even the smallest amount of excess taxation on imported products. We further recall the statement by the GATT Panel in *US – Tobacco*:

"[T]he Panel thus considered that the system for calculation of the BDA on imported tobacco itself, not just the manner in which it was currently applied, was inconsistent with Article III:2 because it carried with it *the risk of discriminatory treatment of imports* in respect of internal taxes."<sup>1157</sup> (emphasis added)

7.626 The obligation not to tax imported products in excess of like domestic products under the first sentence of Article III:2 therefore extends to a potential risk of excess taxation. By definition, the existence of a mere possibility or potential risk of such excess taxation under a given measure cannot be equated to a real risk. The Appellate Body's finding in *US – Section 211 Appropriations Act* provides guidance in this regard. By first noting that the jurisprudence on Article III:4 of the GATT 1994 [in particular, the Panel report on *US – Section 337 Tariff Act*] may be useful in interpreting the national treatment obligation in the TRIPS Agreement, the Appellate Body agreed with a previous panel's view that the national treatment obligation must be interpreted strictly:

"And that panel [Panel on *US – Section 337 Tariff Act*], importantly for our purposes, concluded that:

...while the likelihood of having to defend imported products in two fora is small, *the existence of the possibility* is inherently less favorable than being faced with having to conduct a defense in only one of those fora.

...

again echoing that panel, even the *possibility* that non-United States successors-in-interest face two hurdles is *inherently less favorable* than the undisputed fact that United states successors-in-interest face only one."<sup>1158</sup>

7.627 We are of the view that the standard set for the national treatment obligation in the context of Article III:4 and the TRIPS Agreement could therefore be equally relevant to the national treatment obligation under Article III:2. Under Article III:4, a violation of the obligation not to treat imported products less favourably than like domestic products will be found if the measure concerned negatively affects the conditions of competition of the imported products in the importing Member's market. Given that the existence of the mere possibility of less favourable treatment was considered sufficient to find a violation of Article III:4, the mere risk of discriminatory treatment of imported products in respect of "internal taxes" would be sufficient to find a violation of the national treatment obligation under Article III:2, first sentence. With this principle in mind, we will examine VAT tax credits granted to the resellers of imported cigarettes under the Thai law.

7.628 The Thai Revenue Code allows the resellers of imported cigarettes to offset their VAT liability arising from the resale of imported cigarettes against VAT input tax already paid to a previous reseller. As explained above, this can be put into an equation:

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<sup>1157</sup> GATT Panel Report, *US – Tobacco*, para. 97.

<sup>1158</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 261-265, referencing the GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.19.

VAT liability = Output tax (sale to a next purchaser) – Input tax (purchase from a previous reseller)

7.629 Tax amounts are calculated by multiplying the VAT amount (i.e. 7%\*(MRSP-VAT)) by the number of cigarette packs sold. Section 82/3 of the Thai Revenue Code then provides that if output tax exceeds input tax, the tax payable shall be equal to the difference. If input tax exceeds output tax, the difference shall be treated as a tax credit, and the supplier is entitled to receive a tax refund or to apply the credit for paying value added tax later on.

7.630 Thailand argues that the entitlement to deduction of an input tax under the Thai Revenue Code is automatic and simultaneous with the obligation to pay output tax, which arises at the time of submission of a VAT return form, Form Por.Por.30. Thailand asserts that no additional step by a reseller is involved in this process for the tax credit to be granted to the reseller. Based on this, Thailand maintains that the net VAT liability is the same – i.e. "zero" – for resellers of both domestic and imported cigarettes. Therefore, according to Thailand, the resellers of imported cigarettes can never incur a net liability on the resale of a particular pack of cigarettes for the year to date or for the total amount of cigarettes sold because the credit for input tax paid on the purchase of a pack of cigarettes will always come before the liability for output tax payable on the sale of the pack.<sup>1159</sup>

7.631 The Philippines, however, points to instances where the net VAT liability will be greater than zero for imported cigarette resellers, which amounts to an excess tax for imported cigarettes.<sup>1160</sup> Specifically, the Philippines' position is that the input tax credits are not automatically available and thus a reseller of imported cigarettes will be subject to excess taxation under certain circumstances, including when any of the administrative requirements linked to the input and output VAT mechanism for imported cigarette resale are not met.

7.632 In these circumstances, we must clarify whether input tax credits under the Thai regulations are granted automatically and simultaneously with the obligation to pay output taxes in every case so as not to create even the potential risk of an excess tax for imported cigarettes.

7.633 We note Thailand's explanation that the reseller of imported cigarettes can never incur a net liability on the resale of a particular pack of cigarettes: the input tax credit always precedes the liability because the credit is provided at the time of the purchase of imported cigarettes. Although the text of the relevant provisions of the Thai Revenue Code does not explicitly spell out that the input tax credit "always precedes" the liability, it is logical to understand that the purchase, entailing an input tax credit, occurs before the sale of imported cigarettes, resulting in an output tax liability. However, in our view, this does not mean that a reseller of imported cigarettes can never incur a net liability on the resale of a particular pack of cigarettes for the following reasons.

7.634 As addressed in more detail in the following section relating to the Philippines' claim under Article III:4, certain administrative requirements are imposed on imported cigarette resellers in obtaining tax credits for the tax liability arising from sales of imported cigarettes. For example, resellers of imported cigarettes must submit a VAT return form, Por.Por.30; this is also the form through which they can request a tax credit.<sup>1161</sup> As the Philippines has submitted, and Thailand acknowledges, the reseller of imported cigarettes would not receive a tax credit to which it was entitled if it did not file the form or if the reseller files the form but subsequently cannot prove that the

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<sup>1159</sup> Thailand's response to Panel question No. 123(3).

<sup>1160</sup> Philippines second oral statement, paras. 92 and 96.

<sup>1161</sup> Exhibit THA-42. DG Notification No. 65 re: Prescription of VAT Forms, dated 22 November BE2538 (1995) requiring the use of Form Por.Por.30, pursuant to paragraph 1 of Section 83 of the Thai Revenue Code.

purchase took place, for example, by losing the purchasing invoice.<sup>1162</sup> These resellers are also obliged to complete and maintain tax invoices, tax input/output reports and goods and raw material records for VAT purposes.<sup>1163</sup> A tax credit will also not be available if a reseller is unable to produce an invoice as proof of purchase or if its invoices are incomplete or inaccurate.<sup>1164</sup> Further, as described above in paragraph 7.593, Section 82/5 of the Thai Revenue Code sets forth six specific situations where a reseller of imported cigarettes would not be allowed to deduct output tax paid to its previous seller in computing tax under Section 82/3.

7.635 Therefore, we are not persuaded by Thailand's argument that the tax credit granted to imported cigarette resellers is automatically granted under the Thai law, without the need for resellers to take any procedural steps.

7.636 Thailand argues that, as the only conceivable instances of alleged excess taxation relied on by the Philippines do not depend on the law, but rather on the reseller's own failure to exercise its right to claim a tax credit, this cannot give rise to a violation of Article III:2. We do not find Thailand's argument convincing. It is the Thai laws and regulations at issue that give rise to certain obligations on resellers of imported cigarettes, which the Panel describes at paragraph 7.634 above and in Section VII.F of its report. The failure to comply with these obligations will in turn deprive importers of tax credits necessary to offset their VAT liability; yet, this potential liability for VAT payment does not exist for resellers of domestic cigarettes under the measures at issue due to the tax exemption described in paragraph 7.623.

7.637 As emphasized by the Appellate Body in *Korea – Various Measures on Beef*, what is relevant in assessing the consistency of a measure with the WTO obligations is whether the concerned measure itself imposes "the legal necessity" of certain action on private parties.<sup>1165</sup> In that case, the Appellate Body underlined that given the restrictive nature of a choice given to retailers, "the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product".<sup>1166</sup> In Thailand, the law imposes VAT on resellers of imported cigarettes for the sale of imported cigarettes. This liability is not offset automatically and requires resellers to satisfy certain administrative requirements. Failure to satisfy these requirements means that the reseller of imported cigarettes remains subject to VAT. In our view, the fact that this potential liability does not exist for domestic cigarette resellers under the Thai law, by virtue of a *de jure* exemption of resale of domestic cigarettes, leads to excess taxation for imported cigarettes and consequently a *de jure* violation of the first sentence of Article III:2.

(c) Whether the VAT exemption for domestic cigarette resellers is otherwise justified

(i) *Main arguments of the parties*

7.638 **Thailand** argues that the different regulatory treatment of resale of imported and domestic cigarettes serves an important role in ensuring tax collection and preventing fraud such as black market sales, contraband and counterfeiting in the Thai cigarette market.<sup>1167</sup>

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<sup>1162</sup> Thailand's response to Panel question No. 138; the Philippines' response to Panel question Nos. 133 and 138.

<sup>1163</sup> See paras. 7.669-7.776.

<sup>1164</sup> Thailand's response to Panel question No. 137, referencing Section 82/5(1) and (2) of the Thai Revenue Code (Exhibit PHL-94).

<sup>1165</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

<sup>1166</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

<sup>1167</sup> Thailand's response to Panel question No. 135.

7.639 Thailand contends that there is no risk of underpayment of tax for domestic cigarettes resale as TTM is a government entity responsible for all taxes on the cigarettes they sell. As a practical matter, a state owned cigarette manufacturer will always pay its taxes, since its revenues ultimately rest in the government accounts.<sup>1168</sup>

7.640 Further, smuggling of cigarettes is a significant problem in Thailand with some estimates showing that consumption of contraband imported cigarettes is three times larger than consumption of legally imported cigarettes.<sup>1169</sup> Since imported brands may enter the market illegally, less VAT may be paid on the resale of those imported cigarettes overall.<sup>1170</sup> There is no equivalent risk of smuggling VAT free domestic cigarettes because VAT for domestic cigarettes is acquitted by the sole domestic manufacturer.<sup>1171</sup> Furthermore, TTM monitors Thailand's public health objectives, but has no bearing on such objectives in exporting countries.<sup>1172</sup>

7.641 The **Philippines** argues that under WTO law, a Member's justification for subjecting imported goods to discriminatory taxation must be assessed under the specific exceptions listed in Article XX of the GATT 1994.<sup>1173</sup> The respondent, Thailand in this case, bears the burden of proving that its measures are justified pursuant to one of those exceptions. Thailand has, however, elected not to advance its arguments under Article XX.

(ii) *Analysis by the Panel*

7.642 We note that the applicability of the first sentence of Article III:2 is not conditional upon the policy purposes of the tax measures at issue.<sup>1174</sup> Article XX of the GATT 1994 exists to cover certain public policy exceptions including measures necessary to secure compliance with domestic law. However, Thailand has not raised Article XX in this dispute for us to assess the policy goals that would be achieved by the VAT exemption under the Thai law.

7.643 In our view, therefore, Thailand's justifications as cited above for its *de jure* VAT exemption for domestic cigarette resellers do not bear on the decision of the Panel that such an exemption results in imposing a VAT on imported cigarettes in excess of that on domestic cigarettes in violation of Article III:2, first sentence.

(d) *Conclusion*

7.644 For the foregoing reasons, we conclude that the measures at issue subject imported cigarettes to excess taxation compared to like domestic cigarettes in violation of Article III:2, first sentence, of the GATT 1994. Under the relevant provisions of Thai laws and regulations, resellers of domestic cigarettes are *de jure* exempt from the VAT liability, whereas the same exemption is not granted to resellers of imported cigarettes as tax credits do not automatically and irrevocably offset tax liabilities incurred by retailers of imported cigarettes in every case.

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<sup>1168</sup> Thailand's first written submission, paras. 21-30; response to Panel question No. 61.

<sup>1169</sup> Thailand's first written submission, para. 29; Exhibit THA-1, p. 26.

<sup>1170</sup> Thailand's first written submission, paras. 21-30 and 254-255; response to Panel question No. 61.

<sup>1171</sup> Thailand's first written submission, para. 24.

<sup>1172</sup> Thailand's first written submission, paras. 21, 25, 27 and 30; response to Panel question No. 61.

<sup>1173</sup> Philippines' comments on Thailand's response to Panel question No. 135 and to the Philippines' question No. 1.

<sup>1174</sup> Panel Report, *US – Superfund*, para. 5.2.4, Panel Report, *EEC – Parts and Components*, para. 5.6; Panel Report, *Argentina – Hides and Leather*, paras. 11.143-11.144.

F. ARTICLE III:4 OF THE GATT 1994 – VAT EXEMPTION FOR RESELLERS OF DOMESTIC CIGARETTES

**1. Introduction**

7.645 The Philippines claims that Thailand violates Article III:4 of the GATT 1994 because its VAT system accords less favourable treatment to imported cigarettes by imposing more onerous administrative requirements on resellers of imported cigarettes than on resellers of domestic cigarettes. Thailand argues that resellers of both imported and domestic cigarettes are subject to the same regulatory treatment and that the minor difference that exists in relation to the VAT reporting requirements does not modify the conditions of competition for imported cigarettes in the Thai market.

7.646 Article III:4 of the GATT 1994 provides:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ... "

7.647 The Appellate Body clarified that three requirements must be satisfied to establish a violation of Article III:4: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.<sup>1175</sup>

7.648 We will examine the Philippines' claim under Article III:4 on the basis of the three elements identified above.

**2. Measures at issue**

7.649 In its request for the establishment of a panel, the Philippines identified the following as the relevant measures in connection with Thailand's VAT-related administrative requirements for wholesale and retail sellers of cigarettes:

- Sections 81 and 82/7 of the Thai Revenue Code;
- Royal Decree issued under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (1991);
- Order of Revenue Department Por 85/2542; and
- any amendments, implementing measures, or other related measures.

7.650 The Philippines claims that these Thai regulations are as such in violation of Article III:4.<sup>1176</sup>

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<sup>1175</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

<sup>1176</sup> Philippines' first written submission, para. 553.

### 3. Description of the measures at issue

7.651 Chapter IV (Value Added Tax) of the Thai Revenue Code provides for the administrative requirements that businesses subject to VAT must comply with. Specifically, Divisions 7-14 of Chapter IV include provisions concerning the filing of VAT tax returns and invoices and describe the auditing and sanctioning procedures in case of non-compliance with the requirements. The specific obligations included in Chapter IV are as follows:

7.652 VAT registrants<sup>1177</sup> must obtain, complete, and file the VAT Filing Form (VAT Form, Por.Por.30). Division 7, Section 83 of the Thai Revenue Code states that the form must be sent monthly "whether or not goods are sold or services are provided in the tax month", and must be filed locally at each place of business unless the Director-General has authorized joint filing with the central authority<sup>1178</sup>; this same form is also used to obtain a VAT credit<sup>1179</sup>, provided the credit is claimed at the time of filing the VAT form. Otherwise, an additional form (Kor. 10) would have to be filed for tax credit purposes.<sup>1180</sup>

7.653 VAT registrants must prepare, for every resale, a detailed tax invoice<sup>1181</sup>, which must be delivered to the purchaser of the good. A copy thereof must be kept for a period of no less than five years from the date of filing of returns or preparing the records.<sup>1182</sup>

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<sup>1177</sup> Exhibit PHL-94, Chapter IV, Division 1, Section 77/1 defines "registrants" as "a supplier who has been recorded for value added tax registration under Section 85 or 85/1 or for temporary tax registration under Section 85/3". The same section defines "supplier" as "a person who sells goods or provides a commercial service whether in doing so he receives any benefit or consideration". Sections 85 and 85/1 explain that persons commencing or carrying on a business of selling goods or providing a commercial service in Thailand are required to register for VAT purposes. Exhibit PHL-94 ("Thai Revenue Code, B.E. 2481 (1938)").

<sup>1178</sup> Exhibit PHL-94, Chapter IV, Division 7, Section 83.

<sup>1179</sup> Exhibit PHL-94, Chapter IV, Division 8, Section 84 to 84/4 sets out the requirements to claim tax credits and VAT refunds:

"A registrant shall have the right to apply tax credit resulting from the computation of tax under Section 82/3 in each tax month for payment of value added tax according to the rules, procedures or conditions prescribed by a Royal Decree, or to claim for a refund at the time of filling a tax return for the tax month under Section 83 or 83/1, except in the cases where a supplementary tax return is filed because of an incorrect or inadequate filling under Section 83/4, a refund may be claimed at the time of filing such a supplementary tax return."

<sup>1180</sup> Exhibit THA-89.

<sup>1181</sup> Exhibit PHL-94, Chapter IV, Division 10, Section 86/4:

"Subject to Section 86/5 and 86/6, a tax invoice shall contain at least the following particulars:

- (1) the word, "Tax invoice", in a conspicuous spot,
- (2) name, address and tax-payer identification, number of the registrant issuing a tax invoice, ...
- (3) name, address of the purchaser of the goods and the recipient of services,
- (4) serial number of the tax invoice, and of the pad, if any,
- (5) name, type, category, quantity, and value of the goods and services, which shall be clearly separated from such a value,
- (7) date of issuance of the tax invoice,
- (8) Any other information specified by the Director-General."

Division 10, Section 86/5 of the Thai Revenue Code states that the Director-General may "vary the particulars in respect of [tax invoices for imported tobacco]". Division 10, Section 86/6 of the Thai Revenue Code reserves the possibility that the Director-General authorize VAT registrants selling by retail to a large number of customers to file only a summary tax invoice.



7.654 VAT registrants must prepare tax records:<sup>1183</sup> a tax input record (recording VAT amounts which a registrant pays when purchasing goods or acquiring services in the course of his business) and a tax output record (recording VAT amounts a registrant collects/is liable to collect from a purchaser of goods or a recipient of services); a goods and raw materials record (required only from VAT registrant selling goods). In addition, Division 11, Section 87/1 of the Thai Revenue Code states that the Director-General may require that a "registrant prepare records other than or at variance with" the documents hereinabove, where necessary or appropriate. Those records must be maintained for a period of at least 5 years from the filing.<sup>1184</sup>

7.655 VAT registrants may be subject to audit procedures. The powers of the assessment officer include both asking the administered to "do any act as necessary for the examination of the various pertinent documents", and "seizing those documents for examination".<sup>1185</sup>

7.656 VAT registrants may be subject to penalties, criminal sanctions, surcharges, and/or denial of a VAT credit in the event of non-compliance with the provisions of Chapter IV of the Thai Revenue Code.<sup>1186</sup>

7.657 Unless specifically exempted under the relevant Thai law, businesses selling *any* good liable to VAT are required to comply with the VAT-related administrative requirements.

7.658 Neither party disputes that the measure at issue – Chapter IV of the Thai Revenue Code - is a "law, regulation, or requirement" within the meaning of Article III:4.

#### 4. Like product analysis

##### (a) Main arguments of the parties

7.659 The **Philippines** submits that the distinction drawn by Thailand with respect to the VAT-related administrative requirements are based purely on the origin of the cigarettes.<sup>1187</sup> The Philippines relies on the principle established in *Argentina – Hides and Leather* that where domestic legislation draws distinctions between products purely on the basis of national origin, it is not incumbent on the complainant to compare specific products or to address the criteria relevant to determining likeness.<sup>1188</sup> The Philippines notes that the distinction is evidenced in section 2 of the Order of the Revenue Department where it refers expressly to imported tobacco and cigarettes<sup>1189</sup> and

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<sup>1182</sup> Exhibit PHL-94, Chapter IV, Division 10, Section 86.

<sup>1183</sup> Exhibit PHL-94, Chapter IV, Division 11, Section 87.

<sup>1184</sup> Exhibit PHL-94, Chapter IV, Division 11, Section 87/1.

<sup>1185</sup> Exhibit PHL-94, Chapter IV, Division 12, Sections 88-88/6 enumerates the powers of the assessment officer. The list includes the power to conduct periodic tax audits if doubts exist as to the accuracy of the information declared in Form Por.Por.30.

<sup>1186</sup> Exhibit PHL-94, Chapter IV, Division 13 and 14, Sections 89-90/5.

<sup>1187</sup> Philippines' first written submission, para. 544.

<sup>1188</sup> Philippines' first written submission, paras. 543 and 550, citing Panel Report, *Argentina – Hides and Leather*, para. 11.168.

<sup>1189</sup> Order of the Revenue Department No.Po.85/2542 Re Computation of Tax Base for Importation and Sale of Tobacco According to Category and Type Prescribed by Director-General and Approved by Minister Under Section 79/5 of Revenue Code, and Preparation of Tax Invoice in Case of Sale of Tobacco Under Section 86/5/2) of Revenue Code. Section 2 of the Order of the Revenue Department states:

"In case the registered operator has sold tobacco imported from abroad to a buyer, irrespective of whether it be the registered operator who imports the tobacco himself or the registered operator who buys same from the importer or the sellers of every level, the tax base of the value added tax shall be computed."

Section 7 of the Order where it refers to cigarettes "from the tobacco industrial operator that is a State organization".<sup>1190</sup>

7.660 **Thailand** did not provide any counterargument in this regard.

(b) Analysis by the Panel

7.661 As the Philippines submits, in previous disputes, products that are distinguished solely on the basis of their origin were found to be "like" products within the meaning of Article III:4.<sup>1191</sup> As we concluded above<sup>1192</sup>, the Thai measures at issue do distinguish between cigarettes based on their origin. In the light of this and in the absence of any counterarguments from Thailand, the Panel concludes that imported and domestic cigarettes are like products.

7.662 Furthermore, we also recall our finding above that *Marlboro* and *L&M* cigarettes at issue are like the domestic cigarettes within the same price segments under Article III:2, first sentence, of the GATT. The Appellate Body clarified that the scope of "like" in Article III:4 is broader than that in the first sentence of Article III:2.<sup>1193</sup> Accordingly, to the extent that the imported and domestic products compared are found "like" within the meaning of the first sentence of Article III:2, they can also be deemed to meet the likeness requirement under Article III:4. Therefore, we find that *Marlboro* and *L&M* are "like" domestic cigarettes within the meaning of Article III:4.

**5. "Affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported cigarettes"**

(a) Main arguments of the parties

7.663 The **Philippines** refers to the statement by the Appellate Body in *US – FSC (Article 21.5)* that the term "affecting" is to be interpreted so as to have a "broad scope of application" and to the finding of the Panel in *India – Autos*, which stated that the term "affecting" covers any laws or regulations "which might adversely modify the conditions of competition between domestic and imported products".<sup>1194</sup> **Thailand** did not respond to the Philippines' argument in this regard.

(b) Analysis by the Panel

7.664 The second element under Article III:4 concerns whether the VAT requirements imposed on imported cigarettes which are laws, regulations or requirements under Article III:4 are "affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of" imported cigarettes.

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<sup>1190</sup> According to Section No.7 of the Order of the Revenue Department:

"The registered operator who buys cigarette and receives a tax invoice from the tobacco industrial operator that is a State's organization under No.6, when selling cigarette, shall be exempted from the value added tax under Section 81(1)(v) of the Revenue Code. Likewise, it needs not prepare tax invoice and shall have no right to collect value added tax from the buyer thereof."

<sup>1191</sup> See, for example, Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.164; Panel Report, *China – Publications and Audiovisual Products*, para. 7.1446.

<sup>1192</sup> See Section VII.D.3 above.

<sup>1193</sup> Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>1194</sup> Philippines' first written submission, para. 551, referring to Appellate Body Report, *US – FSC (Article 21.5)*, para. 210 and Panel Report, *India – Autos*, para. 7.196; second written submission, paras. 477-479, referring to Panel Report, *India – Autos*, para. 7.196.

We recall that the word "affecting" is understood to mean "to have an effect on, which indicates a broad scope of application".<sup>1195</sup> The Appellate Body also stated that "the word 'affecting' assists in defining the types of measure that must conform to the obligation not to accord 'less favourable treatment' to like imported products, which is set out in Article III:4. The word 'affecting' ... does not, in itself, impose any obligation ...".<sup>1196</sup> The Panel in *Dominican Republic – Import and Sale of Cigarettes* also found that a tax stamp imposed on the sale of imported cigarettes qualified as a measure affecting the sale of the cigarettes.<sup>1197</sup>

7.665 In the light of the term "affecting" as understood by the Appellate Body and previous panels and given the absence of any objection from Thailand, we find that the Thai regulations at issue, which concern the VAT-related administrative requirements, can be considered as affecting the internal sale of imported cigarettes within the meaning of Article III:4.

## 6. "Less favourable treatment"

7.666 As regards the "less favourable treatment" requirement in Article III:4, the Appellate Body states:

"A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products."<sup>1198</sup>

7.667 In addressing the question of whether the imported cigarettes are subject to treatment less favourable than the like domestic cigarettes, therefore, we will examine the following three issues: (i) whether the Thai regulations at issue impose an extra-administrative burden on resellers of imported cigarettes; (ii) whether this alleged extra-burden, if found to exist, has any negative impact on the competitive conditions for imported cigarettes in the Thai market, and; (iii) whether Thailand demonstrated that this alleged modification of the competitive conditions could still be justified under Article III:4.

(a) Whether an additional administrative burden is imposed on resellers of imported cigarettes

(i) *Main argument of the parties*

7.668 The parties disagree on the existence of an alleged additional administrative burden imposed on the resellers of imported cigarettes. The **Philippines** argues that Thailand violates Article III:4 on the grounds that only resellers of imported cigarettes are subject to the VAT-related administrative requirements.<sup>1199</sup> **Thailand** submits that the Philippines ignores that wholesalers and retailers of imported and domestic cigarettes are all subject to equivalent treatment. In Thailand's view, the minor differences of treatment existing under Thai law do not amount to unequal treatment.<sup>1200</sup> Thailand further argues that the Philippines has not provided any actual evidence of the forms or records required to be maintained by sellers of imported cigarettes other than lawyers' statements describing the administrative requirements of Thai law.<sup>1201</sup> According to Thailand, without any direct

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<sup>1195</sup> Appellate Body Report, *EC – Bananas III*, para. 220.

<sup>1196</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 208-210.

<sup>1197</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.170 and 7.171.

<sup>1198</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>1199</sup> Philippines' first written submission, paras. 553 and 555; Philippines' response to Panel question No. 59; Philippines' second oral statement, para. 101.

<sup>1200</sup> Thailand's first written submission, paras. 250-251; second written submission para. 169.

<sup>1201</sup> Thailand's second oral statement, para. 65.

evidence regarding the administrative burdens alleged by the Philippines, the Panel cannot evaluate whether these alleged burdens constitute less favourable treatment under Article III.4.<sup>1202</sup>

VAT Form Por.Por.30

7.669 **The Philippines** submits that Section 81/2 of the Thai Revenue Code exempts VAT registrants from complying with *all* VAT administrative requirements in connection with the resales of VAT-exempt goods and services, and it underlines that only sales of imported cigarettes are subject to the obligation to file Form Por.Por.30.<sup>1203</sup> Resellers are spared the burden of completing and filing the said form if they carry only domestic cigarettes. Even if a supplier carries both imported and domestic cigarettes, such a supplier does not report sales of domestic cigarettes in Form Por.Por.30.<sup>1204</sup> In support of its position, the Philippines has presented expert testimony on Thai law<sup>1205</sup> and a 2002 DG Revenue's ruling on the requirement to file Form Por.Por.30.<sup>1206</sup> Filing Form Por.Por.30 is all the more burdensome because one form must be completed for each individual place of business operation.

7.670 **Thailand** explains that the legal obligation to file Form Por.Por.30 arises under Section 83, paragraph 1 of the Thai Revenue Code and Notification No. 65 re: Prescription of VAT Forms, dated 22 November BE2538 (1995) ("Notification No. 65").<sup>1207</sup> Thailand argues that in accordance with the instructions for Form Por.Por.30, all VAT registrants (i.e. entities with sales of more than 1.8 million baht) are required to file Form Por.Por.30.<sup>1208</sup>

7.671 Thailand further submits that sales of both imported and domestic cigarettes must be reflected on Form Por.Por.30 – the sales of domestic cigarettes (as all other VAT exempted goods) both under line 1 ("sales amount this month") and 3 ("exempted sales"), and the sale of imported cigarettes under line 1 only.<sup>1209</sup> Thailand also presented an excerpt from the textbook on the Thai Revenue Code as well as a 1995 DG Revenue ruling to support its position.<sup>1210</sup> Therefore, the compliance burden associated with the filing of Form Por.Por.30 is very similar for both imported and domestic cigarette resellers. The requirement to file Form Por.Por.30 depends on the entity's total sales, not on whether it sells imported and domestic cigarettes.<sup>1211</sup> As an example, Thailand submitted samples of Form Por.Por.30 filed by TTM and by a convenience store that sells both imported and domestic cigarettes as well as other products.<sup>1212</sup> According to Thailand, these forms show amounts for both VAT and VAT-exempt sales. In response to the 2002 DG Revenue filing put forward by the Philippines<sup>1213</sup>, Thailand explains that regarding certain advocacy services the ruling stated, correctly, that income from such services is exempt from VAT and is, therefore, not included in the calculation of the company's VAT liability. However, the ruling does *not* go on to say that this VAT-exempt sales need not be reported as VAT-exempt sales on line 3 of Form Por.Por.30. In fact, the portion of the ruling

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<sup>1202</sup> Thailand's second written submission, para. 176.

<sup>1203</sup> Philippines' first written submission, para. 525; response to Panel question No. 59; second written submission, paras. 467-468; second oral statement, para. 102.

<sup>1204</sup> Philippines' first written submission, para. 554-555; second oral statement, para. 102.

<sup>1205</sup> Exhibits PHL-207 and PHL-254.

<sup>1206</sup> Exhibit PHL-253.

<sup>1207</sup> Thailand's response to Panel question No. 142(1); Exhibit PHL-94. Section 83, paragraph 1 of the Thai Revenue Code provides that "a VAT registrant shall file taxes using the form prescribed by the Director General." Thailand submits that pursuant to this authority, the Director General issues the above-mentioned Notification.

<sup>1208</sup> Thailand's second oral statement, para. 66; response to Panel question Nos. 62 and 142.

<sup>1209</sup> Thailand's response to Panel question No. 51.

<sup>1210</sup> Thailand's response to Panel question No. 142(1); Exhibit THA-95, para. 1.

<sup>1211</sup> Thailand's second oral statement, para. 66.

<sup>1212</sup> Exhibit THA-89.

<sup>1213</sup> Exhibit PHL-253.

titled "Ruling" makes no reference whatsoever to Form Por.Por.30. Thailand therefore does not understand how this ruling can be construed to support the proposition that VAT-exempt sales need not be reported on the line on Form Por.Por.30 for "exempted sales".<sup>1214</sup>

Tax invoices and other record-keeping requirements

7.672 The **Philippines** submits that VAT registrants reselling imported cigarettes are required to prepare and maintain a detailed tax invoice and a copy thereof for every resale. Under Section 3(1) of Revenue Order No. Por. 85/2542, the tax invoice to be drafted when reselling imported tobacco is *even more detailed* than the standard one provided for under Chapter IV, Division 10 of the Thai Revenue Code.<sup>1215</sup> The additional complexity stems from the use of MRSP as the VAT base applicable to imported cigarettes pursuant to Section 79/5 of the Thai Revenue Code.<sup>1216</sup> More information is required to calculate the MRSP price in the first place. Therefore, the administrative burden on the reseller of imported cigarettes is higher than the one resellers of domestic cigarettes have to bear.

7.673 **Thailand** responds that reporting procedures applying to resellers of domestic cigarettes mirror the ones that resellers of imported cigarettes must comply with. Resellers of domestic cigarettes must provide a receipt to the purchaser.<sup>1217</sup> Resellers of imported cigarettes must provide a receipt *and* a tax invoice to the purchaser (which must be filed by all VAT registrants), but both may be filed on the same form.<sup>1218</sup> Moreover, Revenue Department's Instruction No.Paw.86/2542<sup>1219</sup> states that sales receipts may serve as tax invoices, thereby avoiding duplication of requirements under the Accounting Acts and the Revenue Code. Thailand therefore considers that resellers of domestic cigarettes and resellers of imported cigarettes face a similar administrative burden with regard to tax invoices.<sup>1220</sup>

Income tax reports, input/output reports, goods and raw material records, alternative records, and books and records for accounting purposes

7.674 The **Philippines** relies on an expert's opinion to argue that individual resellers of domestic cigarettes are exempt from income tax.<sup>1221</sup> It takes the view that the income from such sales does not qualify as "assessable income" under the Ministerial Declaration No.126.<sup>1222</sup> As a consequence,

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<sup>1214</sup> Thailand's response to Panel question No. 142(2).

<sup>1215</sup> Philippines' second written submission, para. 474; Exhibit PHL-95.

<sup>1216</sup> Exhibit PHL-207, p. 4.

<sup>1217</sup> Exhibit PHL-94, Section 105, 105*bis* and 105*ter*.

<sup>1218</sup> Thailand's first written submission, para. 251, referring to Exhibit PHL-94, Sections 86/5(2) 105, 105*bis*, 105*ter*, and Exhibit PHL-95.

<sup>1219</sup> Exhibit THA-90. Clause 6 of the Departmental Instruction No.Paw.86/2542 states:

"The registrant under Clause 4 may prepare tax invoices together with other commercial documents such as receipts, invoices or debit notes, which are comprised of many documents in the same set."

<sup>1220</sup> Thailand's second oral statement, para. 67.

<sup>1221</sup> Philippines' second oral statement, para. 104; comments on Thailand's response to Philippines' question No. 2.

<sup>1222</sup> Exhibit PHL-254, p. 3; Exhibit PHL-94. The Philippines states that income earned from the sale of domestic cigarettes is not "assessable" income under Section 42(17) of the Thai Revenue Code, which reads:

"Section 42. The assessable income of the following description shall be excluded for the purpose of computing income tax: (17) Income specified for exemption by Ministerial Regulations (See M.R. No.126,230 and 254)."

resellers of domestic cigarettes do not have to fill out and maintain either revenue/expense reports or books and records for accounting purposes.<sup>1223</sup> If the Panel does not find the exemption from income tax, the Philippines' subsidiary argument is that the reports required from resellers of imported cigarettes (input/output, raw materials) are more "onerous" than the revenue/expense reports required from resellers of imported cigarettes.<sup>1224</sup>

7.675 The Philippines underlines that resellers of imported cigarettes, who are liable to VAT, have to maintain books and records for VAT auditing purposes, and tax input/output records.<sup>1225</sup> As stated above, resellers of domestic cigarettes are exempt from this requirement. The Philippines therefore concludes that a heavier administrative burden is imposed on resellers of imported cigarettes.

7.676 **Thailand** submits that no one may be exempt from the obligation to fill tax input/output reports.<sup>1226</sup> It stresses that reports required from resellers of imported cigarettes are "virtually identical"<sup>1227</sup> to revenue/expense reports that resellers of domestic cigarettes must provide under Section 17(1) of the Revenue Code<sup>1228</sup> and Revenue's DG Notification No. 161 on Income Tax. The only discrepancy lies in the fact that input/output tax report must include the registrant's amount of VAT payable and tax invoice number.<sup>1229</sup>

7.677 In relation to books and records to be maintained for accounting and auditing purposes, Thailand alleges that they are identical, whether one is subject to VAT or to income tax. In both cases, books and records consist of the sale journals and ledgers, purchase records, and other normal accounting records maintained by most commercial businesses in most countries that rely on generally-accepted accounting principles.<sup>1230</sup> In addition, Thailand stresses that many businesses resort to software programs which automatically prepare income tax and VAT reports and may

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Article 2(19) of the Ministerial Regulation No.126 provides:

"Clause 2. The following income shall be income under (17) of Section 42 of the Revenue Code as amended by the Revenue Code Amendment Act (No.10) BE. 2496: (19) Income from sale of tobacco products on which the Thai Tobacco Monopoly has paid taxes for all stages of the sellers under Section 48 *bis* of the Revenue Code."

<sup>1223</sup> Philippines' first written submission, para. 525, referring to Exhibit PHL-94, Section 87.

<sup>1224</sup> Exhibit PHL-182, footnote 2.

<sup>1225</sup> Exhibit PHL-182, para. 15.1. According to the Philippines:

"[b]ecause the resale by subsequent sellers of cigarettes purchased from the Thai Tobacco Monopoly (TTM) are exempted from VAT (Section 81(v) of the Revenue Code, in conjunction with Section 3(1) of the Royal Decree No.239), such seller is outside the scope of the VAT provisions. Such seller would only be required to comply with VAT reporting and book-keeping requirements if they sold goods other than domestic cigarettes."

<sup>1226</sup> Thailand's second written submission, para. 175.

<sup>1227</sup> Thailand's second written submission, para. 175.

<sup>1228</sup> Exhibit PHL-94. Section 17(1) establishes that individual sellers must maintain revenue/expense

report:

"For the purpose of administration of taxes and duties: (1) The Director-General with the approval of the Minister shall have the power to issue a general order requiring persons to keep any special books of account and to make any required entries therein. Such order shall be published in the Government Gazette."

<sup>1229</sup> Thailand's second written submission, para. 175.

<sup>1230</sup> Thailand's second written submission, para. 175.

process the related records and books as well.<sup>1231</sup> In any case, Thailand considers that the Philippines has failed to demonstrate how the books and records to be maintained respectively by resellers of imported and domestic cigarettes vary. Hence no evidence was brought to show that a greater administrative burden is imposed on resellers of imported cigarettes.

Preparation and maintenance of documents for auditing

7.678 The **Philippines** argues that VAT registrants re-selling imported cigarettes are subjected to an auditing requirement that resellers of domestic cigarettes are not subject to.<sup>1232</sup>

7.679 Comparing the reporting requirements for domestic and imported cigarettes, **Thailand** submits that both obligations are the same: "sellers are subject to audit".<sup>1233</sup>

Consequences of failure to comply with the administrative requirements

7.680 The **Philippines** puts forward that, should resellers of imported cigarettes fail to comply with the administrative requirements referred to hereinabove<sup>1234</sup>, high penalties, fines and surcharges will be imposed.<sup>1235</sup> In the same vein, the failure to claim a VAT credit at the time of the Por.Por.30 filing results in additional requirements for resellers of imported cigarettes: a supplementary form then has to be filed. On the contrary, resellers of domestic cigarettes are exempt from such penalties, fines and surcharges because they are not subject to VAT. The risk of sanction associated to the VAT administrative requirements constitutes a burden which is imposed only on resellers of imported cigarettes.<sup>1236</sup>

7.681 In **Thailand's** view it is not clear why a difference in penalties between VAT registrants and non-VAT registrants would constitute excess taxation within the meaning of Article III:4 and therefore give rise to a violation of this article. Thailand argues that the penalties imposed for failure to comply with VAT related administrative requirements cannot be qualified as "internal taxes or other internal charges" within the meaning of Article III:2, as they are only an administrative penalties.<sup>1237</sup> Furthermore Thailand contends that those penalties are applied to all VAT registrants, not to resellers of imported cigarettes only.<sup>1238</sup>

7.682 In the same line of argument, Thailand explains that the penalties are both gradual (the later one pays, the higher the amount) and flexible (fines may be reduced or waived by the Director General with the approval of the Minister of Finance).<sup>1239</sup>

(ii) *Analysis by the Panel*

7.683 In this section, we must determine whether Thailand's VAT-related requirements impose an additional administrative burden on resellers of imported cigarettes compared to resellers of domestic cigarettes. We will examine whether each administrative requirement as referred to by the parties as relevant to cigarette sales, separately and/or as a whole, impose an additional administrative burden on the resellers of imported cigarettes.

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<sup>1231</sup> Thailand's second written submission, para. 175.

<sup>1232</sup> Philippines' second written submission, para. 467; comments on Thailand's response to Philippines' question No. 2; Exhibit PHL-94.

<sup>1233</sup> Thailand's first written submission, para. 251.

<sup>1234</sup> Paras. 7.669-7.679.

<sup>1235</sup> Philippines' response to Panel question No. 59.

<sup>1236</sup> Philippines' response to Panel question No. 59.

<sup>1237</sup> Thailand's second written submission, para. 174.

<sup>1238</sup> Thailand response to Panel question No. 139.

<sup>1239</sup> Thailand's second written submission, para. 175. Exhibit PHL-94, Section 89, para. 2.

VAT form Por.Por.30

7.684 The main contention between the parties regarding the administrative requirements relating to the filing of a VAT return form (Form Por.Por.30) concerns the scope of businesses subject to the requirement to submit the form and whether sales of domestic cigarettes must be reported in the form. Given that the issue here concerns obligations under Thailand's own domestic law, Thailand should normally be in a position to explain the nature of such obligations.<sup>1240</sup> However, to the extent that the parties disagree on the interpretation of relevant provisions, we are required to objectively examine the question at issue based on the text of the concerned provision[s] as well as on the evidence before us.<sup>1241</sup>

7.685 As Thailand has explained, paragraph 1 of Section 83 of the Thai Revenue Code, read in conjunction with Notification No. 65, is the legal authority that gives rise to the obligation to file Form Por.Por.30. Paragraph 1 of Section 83 provides:

"Every registrant shall file a tax return in the form prescribed by the Director-General every tax month and pay tax, if any, at the same time, whether or not goods are sold or services are provided in the tax month."<sup>1242</sup>

7.686 The text of paragraph 1 of Section 83 clearly indicates that it is "every [VAT] registrant" who has the obligation to file a tax return in Form Por.Por.30. We do not see any language in the provision that limits the obligation to specific types of goods. Therefore, the obligation to file a tax return applies to all VAT registrants regardless of the type of goods sold and/or services provided.

7.687 "Registrant" is defined in Section 77/1(6) as "a supplier who has been recorded for value added tax registration under Section 85 or 85/1 or for temporary value added tax registration under Section 85/3". Section 85 of Division 9 (Value Added Tax Registration) in turn provides:

"Section 85. A supplier about to commence a business of selling goods or providing services shall file an application for value added tax registration before the date of commencing business."

7.688 Therefore, any supplier who wishes to commence a business of selling goods is required to apply for VAT registration under Section 85 regardless of the kind of goods it carries. In this connection, however, Section 81/2 provides as follows:

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<sup>1240</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.106; Panel Report, *US – Section 301 Trade Act*, paras. 7.17-7.20 stating "It follows that in making factual findings concerning the meaning of Sections 301-310 [of the US Trade Act of 1974], we are not bound to accept the interpretation presented by the US. That said, any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law".

<sup>1241</sup> Article 11 of the DSU. Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 110-115; As the Panel on *Columbia – Ports of Entry* noted (at para.7.93):

"In making an 'objective assessment' of municipal legislation, a panel should begin its analysis by considering the very terms of the law. This examination should also include a reading of the provisions in their proper context. A panel is not however required to limit its examination solely to the text or wording of the norm under review. A panel's analysis should be complemented, whenever necessary, with additional sources, which may include proof of the consistent application of such laws, the pronouncements of domestic courts of the meaning of such laws, the opinions of legal experts and the writings of recognized scholars"

<sup>1242</sup> Exhibit PHL-94, Section 83 (emphasis added, footnote in original omitted).



"Section 81/2. If a business is exempt from value added tax under the provisions of this Division or of any other law, the supplier carrying on such business shall be exempted from compliance with the provisions of *this Chapter*, ..." (emphasis added)

7.689 Section 81/2 therefore provides VAT-exempt businesses<sup>1243</sup> under Division 5 with total exemption from compliance with the obligations under Chapter IV (Value Added Tax) of the Thai Revenue Code. In the light of the language "exempted from compliance with the provisions of this Chapter", we consider that the scope of exemption under Section 81/2 extends to all obligations under Chapter IV, including the requirement to apply for VAT registration before the date of commencing business under Section 85. Therefore, if a business is qualified for exemption from VAT under Division 5, then such a business is also exempt from the requirement to become a VAT-registrant before commencing its business.

7.690 In this connection, we recall that certain businesses, including domestic cigarette resellers, are exempt from VAT under Division 5 of the Thai Revenue Code. The above-mentioned provisions of the Thai Revenue Code, read together, indicate that a supplier falling within the scope of VAT-exemption under Section 81 will be exempt from the obligation to apply for VAT registration before commencing its business if that supplier decides to carry only the VAT-exempt goods and/or services exclusive of other VAT-liable goods and/or services. In our view, however, once a supplier becomes a VAT registrant in accordance with Section 85 of the Thai Revenue Code, the obligation under Section 83 to file a VAT tax return in Form Por.Por.30 will remain regardless of the goods and/or services the supplier subsequently carries and/or provides unless the supplier can qualify for withdrawal of VAT registration under Section 85/10(3).

7.691 With the above understanding of the relevant provisions of the Thai Revenue Code in mind, we will now consider the parties' specific arguments on Form Por.Por.30.

7.692 The Philippines' position has been that sales of domestic cigarettes do not need to be reported in Form Por.Por.30 because they are exempt from VAT.<sup>1244</sup> Thailand insists that, regardless of the VAT exemption, sales of both imported and domestic cigarettes must be reflected on Form Por.Por.30.

7.693 Our examination of the Thai Revenue Code shows that under Section 83, paragraph 1 of the Thai Revenue Code, the obligation to file Form Por.Por.30 hinges on the supplier's status as a VAT-registrant, not the specific type of goods. The introductory statement contained in "the instructions for filling in and the filing of Por.Por.30" attached to Form Por.Por.30 also confirms this understanding. It states that "[p]ersons required to file Por.Por.30 – Por.Por.30 is a tax return to file particulars on a monthly basis for *VAT registrant* who is subject to calculate tax by offsetting Output

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<sup>1243</sup> Businesses exempted from VAT under Division 5 are categorized into two types – (i) specific transactions and import of certain goods and export of certain goods and provision of services as listed in Section 81 and (ii) small businesses (i.e. businesses with sales of more than 1.8 million baht) pursuant to Section 81/1.

<sup>1244</sup> Philippines' second written submission, paras. 472 and 475; Exhibit PHL-94. The Philippines first references a combination of Section 81(1)(v) and 81/2 of the Thai Revenue Code, and Section 3(1) of Royal Decree No 239 to explain that resellers carrying exclusively domestic cigarettes are exempt from all VAT administrative requirements. In addition, the Philippines refers to the expert statement by Mr. Piphob Verahpong dated 17 July 2009 (Exhibit PHL-207, para.12) to assert that resellers carrying both domestic and imported cigarettes are subject to VAT administrative requirements only in relation to imported products. Domestic products are exempted of all VAT administrative requirements pursuant to Section 81/2 of the Revenue Code. Specifically, this expert argues that domestic cigarettes do not fall under the heading "3. exempted sales" of Form Por.Por.30 because this category rather refers to the products exempted under Section 79 of the Revenue Code, read in conjunction with DG Revenue Notification Re: VAT (No 40), which do not mention domestic cigarettes.

tax by Input tax arising in a tax month regardless of the status of the registrant be it individual, group of persons, ..." <sup>1245</sup>

7.694 Therefore, for example, there could indeed be a situation where a certain supplier decides to start a business carrying only domestic cigarettes or any other VAT-exempt goods and/or services falling within the scope of Section 81. In such a case, we consider that Section 81/2 renders that supplier exempt from the obligation to apply for VAT registration and consequently the requirement to file Form Por.Por.30. We also note that domestic cigarette sales are not covered by Section 81/3 either – a provision that gives suppliers carrying on exempt businesses the right to elect to register and pay VAT on exempt businesses.<sup>1246</sup> While Thailand's position has been that both imported and domestic cigarette sales must be reported in Form Por.Por.30, it has never addressed a situation where a supplier sells only domestic cigarettes. Similarly, sample Por.Por.30 forms completed by resellers that sell *both* imported and domestic cigarettes, and other goods, as provided by Thailand in Exhibit THA-89, do not address the situation where a reseller only carrying domestic cigarettes gets exempted even from the obligation to apply for VAT registration.<sup>1247</sup> In our view, the fact that only resellers of domestic cigarettes can enjoy an exemption from VAT registration and consequently are exempted from the obligation to file Form Por.Por.30, subjects resellers of imported cigarettes to an additional administrative burden.

7.695 We now turn to the question of whether a supplier must report income from domestic cigarette sales in Form Por.Por.30 when that supplier also carries VAT-liable goods (e.g. imported cigarettes). It is not disputed that the supplier carrying both VAT-exempt and VAT-liable goods must register for VAT purposes under Section 85 and become a VAT-registrant. This will consequently subject the supplier to the obligation to file Form Por.Por.30. The Philippines argues that such a supplier must report only the sale of goods subject to VAT in the form, but not VAT-exempt goods such as domestic cigarettes. Thailand disagrees with the Philippines' position and submits that the sale of VAT-exempt items must be reported in line 3 of Form Por.Por.30.

7.696 Form Por.Por.30 comprises of, *inter alia*, the following items:

1.	Sales amount this month, or, in case of additional filing, (1.1) Under-declared sales (1.2) Over-declared sales
2.	Less sales subject to 0% tax rate (if any)
3.	Less exempted sales (if any)
4.	Taxable sales amount (1-2-3-)
5.	This month's output tax
6.	Purchase amount that is entitled to a deduction of input tax from output tax in this month's tax computation or (6.1) Under-declared purchases (6.2) Over-declared purchase
7.	This month's input tax (according to invoice of purchase amount in 6)
8.	This month tax payable (if 5 is greater than 7)
9.	This month excess tax payable (if 5 is greater than 7)

<sup>1245</sup> Exhibit THA-42 (emphasis added).

<sup>1246</sup> Section 81/3 provides that "a supplier carrying on the following exempt businesses may notify the Director-General in the form prescribed by the Director-General of his intention to be recorded for value added tax registration and to pay the tax under this Chapter by computing tax in accordance with Section 82/3: (1) sale of goods specified under Section 81(1)(a) through (f); (2) a small business under Section 81/1; and (3) other businesses designated by a Royal Decree [No. 241] ...". Sale of domestic cigarettes is exempted from VAT under Section 81(1)(v) in conjunction with Royal Decree No. 239 and therefore not covered by Section 81/3. See also Exhibit PHL-254, para. 10.

<sup>1247</sup> We note that sample Por.Por.30 forms have been submitted by Thailand (Exhibit THA-89) and the Philippines (Exhibit PHL-181).

10.	Excess tax payment carried forward from last month
11.	Net Tax Payable (if 8 is greater than 10)
12.	Net Excess Tax Payable (if 8 is greater than 10) or (9 plus 10)

7.697 We first observe that line 3 "less exempted sales amount (if any)" of Form Por.Por.30, read in light of the instructions to Form Por.Por.30 as also noted above in paragraph 7.693, does not inform us which exempted sales must be recorded. In other words, even if we were to understand line 3 "Less exempted sales amount (if any)" as requiring that VAT exempted sales must be reported on Form Por.Por.30, it is still not clear to us *which* exempted sales must be recorded. The instructions included in Form Por.Por.30, particularly the part stating that "a taxpayer shall fill the amount of exempted sales [that] were reported in the Revenue account", do not clarify whether the sale of domestic cigarettes falls within the scope of the category to be reported in line 3 of Form Por.Por.30. Neither do the sample Por.Por.30 forms completed by TTM and resellers that sell *both* imported and domestic cigarettes, and other goods, answer the question before us.<sup>1248</sup>

7.698 In this connection, Thailand further relies on additional evidence to demonstrate that *all* exempted sales must also be reported in Form Por.Por.30. First, Thailand relies on an excerpt from a *Textbook on the Revenue Code*, published in 2006, to explain that sales exempted from VAT should generally be reported, whereas sales "not within the scope of VAT" (e.g. the sale of goods or the provision of services outside Thailand) need not be reported in Form Por.Por.30.<sup>1249</sup> A second piece of evidence submitted by Thailand is a 1995 DG Revenue ruling in which it was decided that a company that conducts agency and shipping services is "required to include income arising from the transport of goods, which is a VAT-exempt activity, in the gross sales to be shown in item 1 of Form Por.Por.30", and "to be listed as exempted sales under item 3 of Form Por.Por.30".<sup>1250</sup>

7.699 On the other hand, the Philippines holds the view that businesses selling exempted domestic cigarettes *never* have to report their sales in Form Por.Por.30.<sup>1251</sup> It relies on the expert opinion that the sale of VAT-exempt goods, such as domestic cigarettes, must not be reported in line 3 of Form Por.Por.30 because income from sale of VAT-exempt goods is not included either in line 1 as the VAT base in the monthly sale or in line 3 of the Form which is reserved for the item that is deducted from the VAT base. It has also submitted a DG Revenue ruling issued in 2000 which indicates that income from provision of VAT-exempt services need not be included as income for VAT calculation.<sup>1252</sup>

7.700 Regarding the two different rulings provided by DG Revenue on whether VAT-exempt sales must be included in Form Por.Por.30 as noted above, the Philippines explains that this difference exists because of a change in DG Revenue's approach to the requirements for completing Form Por.Por.30.<sup>1253</sup> According to the Philippines, DG Revenue initially required that income from VAT-exempt sales under Section 81 be included in Form Por.Por.30, which explains a DG Revenue

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<sup>1248</sup> Exhibits THA-89 and PHL-181. We do not find a copy of the Form Por.Por.30 filled out by TTM relevant because, *inter alia*, TTM is a domestic manufacturer of cigarettes, not a reseller of domestic cigarettes. In any event, while the sample Por.Por.30 form filled out by TTM shows that TTM reports certain amounts corresponding to exempted sales in the form, it does not indicate that these amounts correspond to the retail sale of domestic cigarettes. The sample Por.Por.30 form filled out by a reseller of domestic cigarettes and other goods does not indicate either whether the exempted sales reported in the form correspond to the sale of domestic cigarettes or to other goods exempted from VAT.

<sup>1249</sup> Exhibit THA-95.

<sup>1250</sup> Exhibit THA-96.

<sup>1251</sup> Exhibits PHL-253 and PHL-254, para. 10.

<sup>1252</sup> Exhibit PHL-253.

<sup>1253</sup> Philippines' comments on Thailand's response to Panel question No. 142; Exhibit PHL-289.

ruling in 1995 as submitted by Thailand. DG Revenue, however, subsequently changed the rule so that VAT registrants need not include income from VAT-exempt sales under Section 81.

7.701 Thailand argues that the 2000 DG Revenue ruling only addressed whether income exempted from VAT by virtue of Article 81 should be included in the calculation for VAT, not whether this income should be reported in Form Por.Por.30. The text of this ruling, however, indicates that DG Revenue was answering the question whether, in submitting and paying VAT by filing Form Por.Por.30 in each tax month, the company does not have to include the income from the [sale of the VAT-exempt service at issue] for calculation in order to pay for value added tax.<sup>1254</sup> Thus, we understood that DG Revenue was not only addressing the question whether certain amounts should in fact be included in the calculation of the total VAT liability, but also whether those amounts must be reported in Form Por.Por.30. Given that Form Por.Por.30 is entitled "VAT Calculation", the 2000 DG Revenue ruling effectively clarified that income exempted under Section 81 need not be reported in Form Por.Por.30 for the calculation of VAT.

7.702 The Philippines also points out that the authors of the textbook referred to by Thailand do not refer to this later ruling by DG Revenue and fail to explain the alleged change in DG Revenue's approach.<sup>1255</sup> Specifically, this textbook states that "the VAT registrant must report all sales occurring in a tax month in form Por.Por.30 ... and then subtracting ... sales exempted from VAT. ... However sales that are not within the scope of VAT (for example, the sale of goods or provision of services outside Thailand) need not be reported on the form Por.Por.30".<sup>1256</sup> This excerpt therefore fails to address specifically the sale of domestic cigarettes or other Section 81 VAT-exempt product, and does not define "not within the scope of VAT". According to the Philippines, therefore, the textbook is insufficient to rebut its interpretation of the 2000 DG Revenue ruling, even though it was published later than the subject ruling. The Philippines' arguments therefore indicate that under the *current* requirement relating to Form Por.Por.30, income from sales of domestic cigarettes need not be included in Form Por.Por.30.

7.703 While we are not presented with any official document issued by the Thai government, we are nevertheless, based on our careful examination of all the evidence in its totality, convinced by the Philippines' argument that the resellers of domestic cigarettes and other goods subject to VAT need not report their sales of VAT-exempted domestic cigarettes in Form Por.Por.30. This tends to further demonstrate that an additional administrative requirement is imposed on VAT registrant suppliers by reason of selling imported cigarettes.

7.704 We therefore conclude that resellers of imported cigarettes are subject to a heavier administrative burden in respect of the obligation to complete and submit Form Por.Por.30 because: (i) a supplier who carries exclusively domestic cigarettes and therefore is not required to register for VAT purposes, is exempted from the obligation to file Form Por.Por.30, whereas the same exemption is not provided to imported cigarette suppliers; and (ii) a supplier who is a VAT-registrant need not include information on sales of domestic cigarettes in completing Form Por.Por.30.

#### Tax invoices and other record-keeping requirements

7.705 The Philippines' arguments relating to the requirement to prepare and keep tax invoices are two-fold: first, resellers of imported cigarettes have to satisfy an additional formality<sup>1257</sup> ("tax invoice"); and, second, a tax invoice to be prepared by resellers of imported cigarettes is more

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<sup>1254</sup> Exhibit PHL-253.

<sup>1255</sup> Philippines' comments on Thailand's response to Panel question No. 142.

<sup>1256</sup> Exhibit THA-95.

<sup>1257</sup> Exhibit PHL-182, table in para. 15.2.

burdensome than the standard tax invoice that other VAT registrants must provide because the MRSP, which allegedly requires more information, is the tax base for resellers of imported cigarettes.<sup>1258</sup>

7.706 With regards to the Philippines' first point, Thailand argues that sales receipts, which both VAT and non-VAT registrants must equally maintain under the Accounting Code, could serve as a tax invoice.<sup>1259</sup> The Philippines has not responded to this argument. In the absence of any counterargument from the Philippines in this regard, therefore, resellers of imported cigarettes do not appear to be subject to any extra burden at least with respect to the requirement to maintain tax invoices in itself.

7.707 Regarding its second point, the Philippines has not fully explained how the use of the MRSP as the tax base would make the requirement to prepare a tax invoice more difficult for resellers of imported cigarettes. Even if the use of the MRSP as the tax base did make the preparation of a tax invoice more difficult compared to other businesses that do not use the MRSP as the tax base, we found above that sales receipts can also be used for fulfilling the requirement to maintain tax invoices.

#### Various records to be maintained

7.708 Thailand argues that although domestic cigarette resellers are exempt from VAT liability, they are still subject to the requirement to file revenue and expense reports that are linked to their income tax liability. In response to this argument, the Philippines submits that domestic cigarette resellers are exempt from income tax. As a consequence, the Philippines argues that they need not prepare and maintain revenue and expense reports. Resellers of imported cigarettes on the other hand must prepare input/output tax reports and goods/raw material reports because of VAT liability.<sup>1260</sup> To support its position in this regard, the Philippines relied exclusively on an expert opinion that an individual who resells domestic cigarettes is exempt from personal income tax by virtue of Article 2(19) of the Ministerial Regulation No. 126, which in turn exempts such an individual from the obligation to fill revenue/expenses reports under Section 17(1) of the Revenue Code and Director's General Notification.<sup>1261</sup>

7.709 Although presentation of further evidence in addition to its own expert's opinion would have made the Philippines' position more convincing, we are not presented with any evidence and/or arguments from Thailand that can rebut the expert opinion referred to by the Philippines. Thailand submits without any supporting evidence that the expert opinion relied on by the Philippines is incorrect and that an individual who resells *exclusively* domestic cigarettes is not exempted either from income tax or from the corollary obligation to complete revenue/expense reports.<sup>1262</sup> Thailand also argues that all corporate resellers, including resellers of exclusively domestic cigarettes, have to maintain accounts under the Accounting Act (BE 2543)<sup>1263</sup>, which the Philippines does not contest.<sup>1264</sup> However, we are not able to compare this obligation with the VAT-related record keeping requirements because no evidence has been presented as to the content of the accounts to be maintained under the Accounting Act. In particular, there is no basis for us to decide whether the

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<sup>1258</sup> Philippines' second written submission, para. 474; Exhibit PHL-95.

<sup>1259</sup> Thailand's first written submission, para. 251, referring to Exhibit PHL-94, Sections 105, 105*bis* and 105*ter*.

<sup>1260</sup> Exhibit PHL-94, Sections 87(1) and 87(3) of the Revenue Code requires VAT registrants to maintain input/output tax records and goods/raw material reports.

<sup>1261</sup> Exhibit PHL-254, p. 3 (the expert declared "I ... can confirm that an individual who resells domestic cigarettes is exempt from personal income tax by virtue of Article 2(19) of the Ministerial Regulation No.126, [as this] is not assessable income") and Exhibit PHL-182, p. 9, combined; Exhibit PHL-256.

<sup>1262</sup> Thailand's second written submission, para. 175.

<sup>1263</sup> Thailand's first written submission, para. 251.

<sup>1264</sup> Philippines' second written submission, para. 494, footnote 467; Exhibit PHL-182, table under para. 15.2, p. 9.

requirement to maintain accounts would constitute a burden on resellers of domestic cigarettes which is similar to the VAT-related requirements imposed on resellers of imported cigarettes. Finally, Thailand also submitted a copy of an output tax report filled by a reseller of *both* VAT-exempt and VAT-subject products.<sup>1265</sup> Thus, as explained in paragraph 6.165 of the interim review section, this excerpt does not address the specific situation of resellers of *exclusively* domestic cigarettes. We are therefore not convinced that this report proves that resellers of exclusively domestic cigarettes bear the same administrative burden as resellers of imported cigarettes.

7.710 Therefore, in the light of the expert opinion, considered together with the text of the provisions, we find that resellers of domestic cigarettes are exempt from income tax and consequently from the obligation to file revenue/expense reports. Resellers of imported cigarettes are therefore subject to additional administrative requirements (i.e. preparing and maintaining both input/output reports and books and records for accounting purposes) compared to domestic cigarette resellers.

7.711 Even if domestic cigarette resellers were *not* exempt from income tax liability, however, we find that imported cigarette resellers are still subject to additional administrative requirements because of the extent of the information to be provided in relation to the concerned reports. Input/output tax reports for imported cigarette sales require information on the VAT amount payable and the tax invoice number, whereas revenue/expense records do not require this information.<sup>1266</sup>

7.712 Specifically, under the Notification of Director-General No.89, the data required for the purpose of the input/output tax reports, to be filed monthly by imported cigarettes resellers, is as follows: (i) tax month and year; (ii) name, tax I.D. of the VAT business operator, and check the box if the VAT business operator is the head office or branch (and the branch number, if any); (iii) tax invoice's date and number; and (iv) name of the costumer for the purpose of the output record (subject to certain exceptions in respect of the requirement in (iv)) or name of the seller/ service provider for the purpose of the input record; (v) value of goods/services being sold (output record) or purchased (input record); and (vi) VAT amount.

7.713 The Notification of Director-General Re: Income Tax No.161, in contrast, illustrates that the data required for the purpose of the *revenue/expenses* report requirement imposed on the sale of domestic cigarettes are limited to: (i) name and I.D. number of the business operator; and (ii) date, items and amount of each receipt of income and payments relevant to the business.<sup>1267</sup>

7.714 Furthermore, Thailand does not deny that only resellers of imported cigarettes have to file goods/raw material reports. These reports must contain the following data: (i) tax month and year; (ii) name, tax I.D. of the VAT business operator, and check the box if the VAT business operator is the head office or branch (and the branch number, if any); (iii) name, type and size of goods/materials; (iv) number of the document that evidences the purchase and distribution of goods or raw materials (e.g. the tax invoice or the receipt); (v) date of goods/raw materials receipt and distribution; and (vi) quantity of the goods/raw materials being received/distributed and their balance.<sup>1268</sup>

7.715 Overall, after careful examination of the evidence before us, we are of the view that resellers of imported cigarettes have the obligation to fill and file reports that resellers of domestic cigarettes need not file. This tends to show that an additional VAT-related administrative burden is imposed on the resellers of imported cigarettes.

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<sup>1265</sup> Exhibit THA-30.

<sup>1266</sup> Thailand's second written submission, para. 175.

<sup>1267</sup> Exhibit PHL-182, p. 10.

<sup>1268</sup> Exhibit PHL-182, p. 10.

#### Preparation and maintenance of documents for auditing

7.716 The Philippines submits that resellers of imported cigarettes must keep books and records relating to VAT, which can be used in the context of auditing, for five years pursuant to Section 87(3) of the Thai Revenue Act.<sup>1269</sup> Thailand however argues that those books consist of the sale journals and ledgers, purchase records, and other normal accounting records maintained by most commercial businesses in most countries that rely on generally-accepted accounting principles. Thailand also noted that many businesses prepared accounts using readily available accounting software to produce both income tax and VAT reports.<sup>1270</sup>

7.717 We note that the type of documents that must be maintained by resellers of imported cigarettes are normal accounting materials that commercial businesses in most countries readily possess. We also note Thailand's argument that most of this information is processed electronically, through accounting software. Nevertheless, to the extent that resellers of domestic cigarettes are exempt from VAT liability, the books and records that resellers of domestic cigarettes must maintain under Article 87(3) for accounting and auditing purposes would require less information than that required from resellers of imported cigarettes.

7.718 In terms of auditing procedures themselves, however, the Philippines does not dispute that resellers of both imported and domestic cigarettes are subject to similar procedures. The expert opinion cited to by the Philippines also recognizes that auditing procedures are "a provision of general application" in Thailand.<sup>1271</sup>

#### Penalties and other sanctions

7.719 The Philippines points at various penalties and sanctions that a VAT registrant faces under Division 13 of the Thai Revenue Act, when he fails to comply with the relevant VAT-related administrative requirements. Thailand does not dispute that in case of failure to comply with the relevant VAT-related administrative requirements, penalties and sanctions can indeed be imposed on VAT registrants pursuant to Division 13 of the Thai Revenue Act.<sup>1272</sup> Thailand only contests the extent of the said sanctions.<sup>1273</sup>

#### Overall assessment

7.720 Overall, the Philippines points to five aspects of the Thai VAT system in support of its position that imported cigarette resellers are subject to additional administrative requirements compared to domestic cigarette resellers. The following table summarizes those specific administrative requirements.

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<sup>1269</sup> Exhibit PHL-182, p. 9 and Exhibit PHL-94.

<sup>1270</sup> Thailand's second written submission, para. 174.

<sup>1271</sup> Exhibit PHL-182, p. 11.

<sup>1272</sup> Exhibit PHL-94, p. 52.

<sup>1273</sup> Thailand's second written submission, para. 175.

	<b>Resellers of Domestic Cigarettes</b>	<b>Resellers of Imported Cigarettes</b>
<b>Filing Form Por.Por 30, pursuant to Section 83 of the Revenue Code</b>	No obligation to file.	Obligation to file except for small businesses. If domestic cigarettes are also sold, obligation to report them under item 3 of the Form.
<b>Filing and maintaining of various reports pursuant to Section 87 of the Revenue Code</b>	No revenue/expense report must be filed.	Input/output tax reports must be filed (note: more burdensome than revenue/expense reports).
	Goods and raw materials reports do not have to be prepared.	Goods and raw material reports must be prepared.
	Books and records for accounting purposes must be prepared and maintained.	Books and records for accounting purposes must be prepared and maintained, including VAT-related information.
<b>Potential penalties, surcharges, and sanctions pursuant to Divisions 13 and 14 of the Thai Revenue Code</b>	No risk to be sanctioned due to general VAT exemption.	Risk of undergoing sanctions and surcharges for violation of VAT related administrative requirements: (i) monetary penalties in case of late or incomplete filing; (ii) submission of a supplementary form for VAT refund purposes in case of late filing; (iii) submission of supplementary forms for VAT recording purposes in case of late filing.
<b>Auditing Procedures</b>	Obligation to submit to auditing procedures.	Obligation to submit to auditing procedures.
<b>Tax Invoice pursuant to Revenue Order No Por. 85/2542</b>	No need to prepare tax invoices, but sales receipts must be submitted.	The sales receipt, which must be submitted, can also serve a tax invoice.

7.721 In relation to the obligation to submit to audit procedures pursuant to Division 12 of the Thai Revenue Code, and to prepare a tax invoice pursuant to Revenue Order No Por. 85/2542, we do not find any additional requirements imposed only on the resellers carrying imported cigarettes only.

7.722 However we agree with the Philippines that under Thai law, imported cigarettes are subject to additional administrative requirements in the following three aspects: First, resellers of imported cigarettes must file form Por.Por 30 pursuant to Section 83 of the Revenue Code, whereas resellers carrying only domestic cigarettes are exempted from this obligation. Second, the obligation to file and maintain various reports under Section 87 of the Revenue Code such as input/output reports, goods and raw material reports, and books and records for accounting purposes is more complicated for imported cigarette resellers. Specifically, we find that domestic cigarette resellers are exempt from filing revenue and expense reports and need not maintain VAT-related information for accounting and auditing purposes. Resellers of imported cigarettes, on the other hand, must file both input/output tax reports and goods/raw materials reports and must maintain books and records for accounting and auditing purposes which include VAT-related information. Finally, only resellers of imported cigarettes are potentially subject to penalties and surcharges for failure to comply with VAT-related requirements pursuant to Division 14 of the Thai Revenue Code.

7.723 We now turn to the question of whether these additional administrative requirements negatively affect the conditions of competition for the imported cigarettes at issue in the Thai market.



- (b) Whether imported cigarettes are subject to less favourable treatment than domestic cigarettes within the meaning of Article III:4

(i) *Main arguments of the parties*

7.724 The **Philippines** argues that Thailand's imposition of an additional administrative burden on suppliers of imported cigarettes violates Article III:4 because such an additional burden modifies the conditions of competition for imported cigarettes in the Thai market. The Philippines relies on the Appellate Body's statement in *Korea – Various Measures on Beef* that a finding of less favourable treatment under Article III:4 "should be assessed ... by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of the imported product".<sup>1274</sup> The Philippines considers that government regulation is a factor that typically impacts the competitive position of a firm<sup>1275</sup> by influencing the terms and conditions of supply and demand.<sup>1276</sup> According to the Philippines, Article III:4 requires that those regulations be neutral, which entails that they do not influence the choice made by consumers and suppliers in favour of domestic goods competing with imported goods. The Philippines argues that Thailand's regulations fail to be perfectly neutral in this regard<sup>1277</sup>, as they impose "extra-hurdles" on resellers of imported cigarettes.<sup>1278</sup> This in turn works as a disincentive for the supply/sale of the imported cigarettes, which is a negative modification of the competitive conditions.

7.725 Furthermore, the Philippines underlines that resellers of *any* good subject to VAT are required to complete Form Por.Por.30.<sup>1279</sup> As a result, stores that are not yet subject to VAT reporting requirements avoid selling *any* imported cigarettes. This mechanism harms the competitive conditions of the imported cigarettes in the Thai market. As an illustration, the Philippines notes that, out of 310,389 cigarette retailers operating in the Thai market, 68,000 have elected not to sell imported cigarettes. One of the factors behind their decision is "that re-sales of imported cigarettes give rise to additional VAT burdens that do not arise when they sell exclusively domestic cigarettes".<sup>1280</sup> The Philippines concludes that "for these retailers at least ... the competitive conditions [are modified] in a very tangible way".<sup>1281</sup>

7.726 Finally, the Philippines is of the view that the overall tax-related administrative burden imposed on TTM is irrelevant to a determination of the consistency of VAT measures with Article III:4. In any event, the Philippines denies that TTM bears a heavier overall burden.<sup>1282</sup>

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<sup>1274</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 (emphasis in original). The Philippines also relies on the *Japan – Alcoholic Beverages II* Appellate Body confirmation that only the conditions of competition must be examined, not the actual market effects (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1997:1, 97, at 109-110).

<sup>1275</sup> Philippines' response to Panel question No. 59. The Philippines states that

"Government regulation imposes burdens on all aspects of the development, production, and marketing and sale of goods. The relative impact of these burdens on competing goods influences the behaviour of suppliers and consumers of goods in the marketplace."

<sup>1276</sup> Philippines' second written submission, footnote 459.

<sup>1277</sup> Philippines' second written submission, para. 481.

<sup>1278</sup> Philippines' first written submission, para. 558, referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 264.

<sup>1279</sup> As an illustration, a seller of domestic cigarettes who would also like to sell (even marginally) imported cigarettes would have to file Por.Por.30.

<sup>1280</sup> Philippines' response to Panel question No. 59; Exhibit PHL-185.

<sup>1281</sup> Philippines' response to Panel question No. 59.

<sup>1282</sup> Philippines' second written submission, para. 494, footnote 83.

7.727 **Thailand** submits that the Philippines clearly failed to demonstrate that the small discrepancy observed in VAT filing requirements between resellers of domestic and foreign cigarettes had any negative impact on the competitive conditions of the latter product. In particular, it brought no convincing evidence to relate the assertion that 68,000 Thai cigarette retailers do not sell imported cigarettes due to the VAT regulations at issue.<sup>1283</sup> Thailand argues that the regulatory difference alleged by the Philippines could conceivably affect the conditions of competition only when a wholesaler/retailer (i) stocks only domestic cigarettes (and other VAT exempt goods), and (ii) has an annual turnover of over 1.8 million THB. The Philippines has adduced no evidence that there are any wholesaler/retailer falling within this category in the Thai market or evidence that the alleged difference in regulatory treatment creates an incentive for those agents to specialize in selling exclusively VAT-exempt goods.<sup>1284</sup>

7.728 In addition, Thailand emphasizes that, looking beyond the VAT requirements, the overall tax-related administrative burden imposed on TTM far exceeds the one imposed on resellers of imported cigarettes. Thailand submits a table showing that TTM is subject to more demanding procedures with regards to income tax, corporate tax, withholding tax and audit obligations.<sup>1285</sup> Moreover, Thailand's reporting requirements confer clear advantages on imported cigarette resellers with respect to the availability of input tax credits on purchase of service and equipment.<sup>1286</sup>

(ii) *Analysis by the Panel*

7.729 The Philippines claims that the VAT-related measures imposing additional administrative requirements on resellers of imported cigarettes are *as such* inconsistent with the obligations under Article III:4 because they have a general impact on the conditions of competition for imported cigarettes. The task before us is therefore to determine whether the additional administrative requirements for imported cigarettes, as found above, confer a negative impact on the competitive conditions of imported cigarettes in the Thai market.

7.730 The Appellate Body in *US – FSC (Article 21.5 – EC)* states:

"The examination of whether a measure involves less favorable treatment of imported products under Article III:4 of the GATT 1994 must be grounded in close scrutiny of the 'fundamental thrust of the measure itself'. This examination cannot rest on simple assertion, but must be found on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace."<sup>1287</sup>

The Appellate Body's statement clarifies that the implications of the contested measure in the marketplace can be assessed on its *potential* effects on the competitive conditions of the imported product concerned.<sup>1288</sup> Referring to this statement for the purpose of its analysis under Article 3.1 of the TRIPS Agreement, the Appellate Body in *US – Section 211 Appropriations Act* (under Article 3.1 of the TRIPS Agreement) clarified that:

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<sup>1283</sup> Thailand's second written submission, para. 172.

<sup>1284</sup> Thailand's response to Panel question No. 62.

<sup>1285</sup> Thailand's response to Panel question No. 63.

<sup>1286</sup> Thailand's second oral statement, para. 66.

<sup>1287</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215, emphasis in original.

<sup>1288</sup> The GATT Panel in *US – Section 337 Tariff Act* also found in the context of Article III:4 analysis that "to provide the complainant with the choice of forum where imported products are concerned and to provide no corresponding choice where domestically-produced products are concerned is in itself less favourable treatment of imported products". (GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.18).

"The US may be right that the likelihood to overcome [both administrative] hurdles ... may be small. But again echoing [the Panel in *US – Section 337 Tariff Act*], even the possibility that non-United States successors in interest face two hurdles in *inherently less favorable* than the undisputed fact that United States successors in interest face only one"<sup>1289</sup>

7.731 The Panel in *Canada – Wheat Exports and Grain Imports* also elaborated that there is "no de minimis exception to Article III:4" and therefore, even practices not "very onerous in commercial and/or practical terms" may be banned where they are likely to put the imported product at a competitive disadvantage.<sup>1290</sup>

7.732 In previous disputes, therefore, a wide array of measures were found to impose an additional hurdle on imported products so as to modify the competitive conditions of such products in the marketplace in violation of Article III:4. In *US – Section 211 Appropriations Act*, the Appellate Body stated that any kind of "limitation"<sup>1291</sup> or "obstacle"<sup>1292</sup> could be qualified as to modify the competitive conditions of imported products.<sup>1293</sup> The finding by the GATT panel in *US – Tobacco* is also relevant to the issues presented in our dispute: "determining that damages, fines, or imprisonment, which are imposed on persons, may accord less favorable treatment to imported products [in the Article III:4 context] is not *a priori* impossible".<sup>1294</sup> In this manner, (i) a simple administrative authorization scheme<sup>1295</sup>; (ii) a differentiated distribution scheme<sup>1296</sup>; or (iii) the mere possibility that non-US nationals have to defend patent claims in front of two jurisdictions rather than only one were all found to constitute additional administrative burdens triggering a modification of competitive conditions of imported products within the meaning of Article III:4.

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<sup>1289</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 265.

<sup>1290</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.190 and footnote 281.

<sup>1291</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 264.

<sup>1292</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 268.

<sup>1293</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.76, and GATT Panel Report, *United States – Section 337 Tariff Act*, para. 5.10.

<sup>1294</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.76 referring to GATT Panel Report, *United States – Section 337 Tariff Act*, para. 5.10. The Panel found in relevant parts that "determining that damages, fines, or imprisonment, which are imposed on persons, may accord less favourable treatment to imported products [in the Article III:4 context] is not *a priori* impossible".

<sup>1295</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 6.184-6.213. Section 57(c) of the Canada Grain Act required subjected elevator operators to a prior authorization scheme to process imported grain, while no similar requirement existed for domestic grain. The panel found that this modified the conditions of competition in favour of domestic grain, notwithstanding the fact that the authorization had never been refused by Canadian authorities, or that advance authorization schemes were available.

<sup>1296</sup> GATT Panel Report, *US – Malt Beverages*, paras. 5.32 and 5.35. The panel found that "the requirement that beer imported into the United States be distributed through in-state wholesalers and other middlemen, when no such obligation to distribute through wholesalers exists with respect to in-state like domestic products results in treatment ... less favourable than that accorded to like domestic products from domestic producers, inconsistent with Article III:4"; Appellate Body Report, *Korea – Various Measures on Beef*, paras. 143-151. Korea implemented a dual retail system for beef products, whereby retail distributors had to choose between selling imported or foreign beef. The Appellate Body observed that eight years after the measure was taken:

"the consequent reduction of commercial opportunity [for imported beef] was reflected in the much smaller number of specialized imported beef shops (approximately 5000 shops) as compared with the number of retailers (approximately 45 000) selling domestic beef. We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decision of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted ..."

7.733 We consider that the findings by the Appellate Body and previous panels above support the position that the VAT-related requirements under the Thai law may potentially modify the conditions of competition for the imported cigarettes in the Thai market.

7.734 We recall our finding above that under Thai law, resellers of imported cigarettes are subject to the additional administrative requirements for VAT liabilities such as the filing of Form Por.Por.30, other various reporting requirements, and penalties and sanctions in case of non-compliance. Although those individual requirements considered separately may not themselves be found to have an adverse effect on the conditions of competition of imported cigarettes in the Thai market, the accumulation of all those requirements could potentially affect those conditions in a negative manner. This, in our view, will lead to according less favourable treatment to imported cigarettes under Article III:4 than to like domestic cigarettes.

7.735 According to the parties' submissions, 96 per cent of the market shares are divided between five brands: two foreign and three domestic brands.<sup>1297</sup> TTM holds 78 per cent of the market shares while imported cigarettes account for the remaining 22 per cent.<sup>1298</sup> Econometric evidence produced by the Philippines suggests a certain degree of price elasticity and switching patterns between imported and domestic cigarettes.<sup>1299</sup> In our view, this would also indicate that additional administrative requirements, albeit slight, imposed only on imported cigarettes can potentially have a negative impact on the competitive position of these cigarettes in the market.

7.736 For example, additional administrative requirements imposed on resellers of domestic cigarettes and resellers of imported ones could affect business decisions of cigarette suppliers because an additional administrative burden can be linked to the operating costs of their businesses. This could in turn result in modifying the competitive conditions of the subject cigarettes in the Thai market by limiting business opportunities for the cigarettes concerned if certain suppliers base their decision on which items to carry on potential operating costs associated with the additional administrative requirements.<sup>1300</sup>

7.737 We note Thailand's argument in this regard that despite a slight extra VAT burden imposed on resellers of imported cigarettes, resellers of imported cigarettes were not treated less favourably because the overall *tax* burden on the imported cigarettes was not higher. We do not consider that the actual tax burden on the imported cigarettes is relevant to the question we are examining here. As noted above, we are obliged to scrutinize the "fundamental thrust of the measure itself", which are, for the purpose of the Article III:4 claim, *the administrative requirements* associated with the fiscal burden imposed in the form of VAT.

7.738 We therefore conclude that Thailand acted inconsistently with Article III:4 by subjecting imported cigarettes to less favourable treatment compared to like domestic cigarettes through the VAT-related administrative requirements imposed only on resellers of imported cigarettes.<sup>1301</sup>

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<sup>1297</sup> Thailand's response to Panel question No. 45.

<sup>1298</sup> Philippines' first submission, para. 480.

<sup>1299</sup> See Section VII.D.3 above. Thailand however observes that switching patterns are uneven across various pairs of domestic and foreign brands.

<sup>1300</sup> We are, however, of the view that the Philippines has not provided sufficient evidence to demonstrate that these additional administrative requirements were the sole factor that made the 68,000 businesses decide not to sell imported cigarettes in their stores. As Thailand points out, there could be other bases on which these resellers are exempt from VAT and consequently the VAT-related administrative requirements. In particular, the Philippines could not rebut Thailand's argument that many of those businesses are exempt by virtue of their turnover falling under 1.8 million baht.

<sup>1301</sup> Philippines' second written submission, para. 484, footnote 75.

(c) Whether an additional administrative burden can otherwise be justified under Article III:4

(i) *Main arguments of the parties*

7.739 **Thailand** refers to the *Dominican Republic – Import and Sale of Cigarettes* standard<sup>1302</sup> that Article III:4 only protects against differences of treatment based on the origin of the product. Thailand claims that, even if the Panel concluded that there was modification of the competitive conditions in favour of domestic cigarettes, this would not be related to the origin of the products.<sup>1303</sup>

7.740 Thailand argues that the alleged difference of treatment between imported and domestic products can be explained by the unique regulatory status of TTM as the government's tax collector.<sup>1304</sup> Thailand explains that subjecting importers of foreign cigarettes to VAT requirements was aimed at combating tax evasion, fraud, and counterfeiting of foreign cigarettes.<sup>1305</sup> By contrast, the Thai government underlines TTM's specific role as a state enterprise and the government's tax collector in the cigarettes market. The Thai government retains all tax income related to TTM's sales at the source, a system which is efficient in combating tax evasion, fraud and counterfeiting. In this regard, imposing VAT obligations on TTM is useless. On the other hand, Thai authorities chose to impose VAT on importers of foreign cigarettes, since taxation at the source would have been too burdensome.<sup>1306</sup> Thai authorities have not referred to or used the foreign origin of the product as a basis for differential treatment. Hence, the above standard is not met.<sup>1307</sup>

7.741 Thailand also asserts that subjecting imported cigarettes to VAT is legal on the grounds that they face "the normal tax burdens and normal VAT reporting requirements" that any other VAT liable good is subject to.<sup>1308</sup> By the same token, Thailand stresses that other states impose similar requirements on imported cigarettes.

7.742 The **Philippines** "fails to see TTM's unique regulatory status".<sup>1309</sup> But for the VAT exemption, TTM and other entities are indeed subject to similar taxation treatment by the government.<sup>1310</sup> The Philippines argues that, as illustrated in *Dominican Republic – Import and Sale of Cigarettes* standard, the competitive disadvantage imposed on imported cigarettes is exclusively based on their foreign origin because under the relevant Thai legislation only resellers of domestic cigarettes benefit from a VAT exemption.<sup>1311</sup> Thus, the Philippines argues that the origin of the cigarettes is the only applicable criterion in conferring administrative advantages to resellers of domestic cigarettes.

7.743 The Philippines claims that under Article III:4, the "normative benchmark is the treatment currently afforded to like domestic products"<sup>1312</sup> on the same market. Neither the treatment of like products in other countries, nor the treatment of unlike products in the same country are relevant in this regard.

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<sup>1302</sup> Thailand's first written submission, para. 249, referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 93-96.

<sup>1303</sup> Thailand's first written submission, para. 256.

<sup>1304</sup> Thailand's first written submission, para. 256.

<sup>1305</sup> Thailand's response to Panel question No. 135.

<sup>1306</sup> Thailand's response to Panel question No. 135.

<sup>1307</sup> Thailand's first written submission, para. 256.

<sup>1308</sup> Philippines' second written submission, para. 493.

<sup>1309</sup> Philippines' second written submission, para. 491.

<sup>1310</sup> Philippines' first oral statement, para. 227.

<sup>1311</sup> Exhibit PHL-217.

<sup>1312</sup> Philippines' second written submission, para. 493.

(ii) *Analysis by the Panel*

7.744 Thailand asserts that the VAT regime imposed on resellers of imported cigarettes is unrelated to their origin. Thailand argues that the approach in *Dominican Republic – Import and Sale of Cigarettes* must be followed. In that case, the Panel had to evaluate a tax measure (a bond) which, although non-discriminatory on its face, resulted in foreign products being taxed at a higher rate. This stemmed from the fact that "the importer of [foreign] cigarettes [had] a smaller market share than two domestic producers (the per-unit cost of the bond requirement being the result of dividing the cost of the bond by the number of cigarettes sold on the Dominican Republic market)".<sup>1313</sup> The Appellate Body confirmed the Panel's findings that the difference in taxation was "unrelated" to the foreign origin of the product and therefore not in violation of Article III:4.<sup>1314</sup>

7.745 The factual circumstances in the current dispute, however, must be distinguished from those in *Dominican Republic – Import and Sale of Cigarettes*. As the Philippines submits, the regulatory exemption from the VAT requirements applies only to domestic cigarettes under the Thai law. Therefore, it is the foreign origin of the imported cigarettes that distinguishes them from like domestic cigarettes for the purpose of applying the VAT-related requirements at issue. For this reason, we are not convinced by Thailand's argument.

7.746 Further, Thailand contends that the differentiated VAT regime is legal because it serves the legitimate purpose of combating tax evasion, fraud, and counterfeiting of foreign cigarettes. A state enterprise, TTM, is subject to a specific regime which is designed to promote those objectives. Thailand hence asserts that the grounds, motivations and purposes behind the VAT regime make the regime legal under Article III:4. However, the consistency of the contested measure with Thailand's obligations under Article III:4 cannot be determined based on the purpose and intent behind the measure as clarified by Thailand.<sup>1315</sup> As we have explained above, imported products must not be subject to less favourable treatment through a measure that negatively modifies the conditions of competition, regardless of the intent behind the measure. We consider that the alleged purposes of the measures such as combating tax evasion, fraud and counterfeiting of foreign products as listed by Thailand, could be more properly addressed under Article XX of the GATT 1994.

7.747 Finally, Thailand explains that the VAT requirements applicable to imported cigarettes do not constitute "less favourable treatment" because they mirror "normal" VAT requirements imposed on other domestic products and similar procedures implemented by other countries in respect of imported cigarettes. In examining the consistency of Thailand's VAT requirements on imported cigarettes with Article III:4, our analysis is confined to the treatment afforded to imported cigarettes and "like" domestic cigarettes, not other domestic products. Likewise, measures or practices maintained by other countries are irrelevant to our analysis of Thailand's treatment of imported cigarettes. Therefore, neither the treatment afforded by Thailand to other products, nor treatment afforded by other states to imported cigarettes, is relevant for the purpose of our analysis.

7.748 We conclude that Thailand has failed to produce sufficient elements to justify that imported cigarettes be treated less favourably than domestic cigarettes within the meaning of Article III:4 of the GATT 1994.

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<sup>1313</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96.

<sup>1314</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96.

<sup>1315</sup> Panel Report, *Canada – Periodicals*, para. 5.37, referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p.18, DSR 1996:I, 97, at 111-112. The Report states: "The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs". We understand that Article III:4 is not an intent test *per se*. However, Article III:1 serves as a contextual element to Article III:4 so that where a discriminatory measure is taken so as to afford protection, it is contrary to the obligations under Article III:4.

(d) Whether an additional administrative burden can be justified under Article XX(d) of the GATT 1994

(i) *Main arguments of the parties*

7.749 **Thailand** argues that, even if the Panel found that the VAT administrative requirements imposed on resellers of foreign cigarettes modify the conditions of competition to their detriment, and therefore constitute less favourable treatment under Article III:4, those requirements would still be GATT consistent by virtue of Article XX(d) of the GATT 1994.<sup>1316</sup>

7.750 In particular, Thailand submits that the rules requiring resellers of imported cigarettes to submit reports (input/output and Por.Por.30) to the Thai authorities are necessary to secure compliance with the VAT laws.<sup>1317</sup> Indeed, Thailand fails to see how it could administer its VAT system *without* requiring VAT payers to maintain and submit reports.<sup>1318</sup>

7.751 The **Philippines** claims that Thailand's defence under Article XX(d) must fail because it would only justify that all resellers subject to VAT must file the appropriate form. This is not addressing the Philippines' concern that resellers of domestic cigarettes are exempt from VAT filing requirements, and hence benefit from better conditions of competition.<sup>1319</sup> The Philippines contends that Thailand has not demonstrated that the *de jure* exemption from VAT administrative requirements is "necessary" to secure compliance with any WTO-consistent domestic law as required under Article XX(d).<sup>1320</sup>

7.752 **Thailand** "notes" that Article XX(d) can justify that penalties be imposed on resellers of imported cigarettes for failure to comply with VAT filing requirements.<sup>1321</sup> Thailand disagrees with the Philippines that those penalties qualify as excess taxation within the meaning of Article III:2, first sentence.<sup>1322</sup> However, were the Panel to find that those penalties fall under the scope of Article III:2, Thailand considers that they are authorized under Article XX(d), as they are necessary to impose compliance with normal reporting requirements. Thailand notes that the reporting requirements contribute to the fight against cigarettes smuggling, and therefore fall within the scope of the objectives contemplated under Article XX(d).<sup>1323</sup>

7.753 The **Philippines** claims that Thailand fails to show how imposing an additional tax liability on resellers of domestic cigarettes (i.e. the penalty for failure to comply with VAT filing requirements) was necessary to combat tax evasion and smuggling. The Philippines underlines first that the measures implemented by Thailand are not properly designed to address this risk.<sup>1324</sup> In particular, they fail to address the smuggling of *domestic* cigarettes, which is also a concern according to newspaper and TTM issued sources.<sup>1325</sup> In the same vein, the Philippines stresses that other less

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<sup>1316</sup> Thailand's first written submission, paras. 258-261; Thailand's second written submission, paras. 176 and 177.

<sup>1317</sup> Thailand uses the definition in Appellate Body Report, *Brazil – Retreated Tyres*, para. 150: a measure is necessary if it is "apt to make a material contribution to the achievement of its objective".

<sup>1318</sup> Thailand's first written submission, para. 260.

<sup>1319</sup> Philippines' first oral statement, para. 228.

<sup>1320</sup> Philippines' second written submission, para. 500.

<sup>1321</sup> Thailand's response to Panel question No. 139.

<sup>1322</sup> Thailand's response to Panel question No. 139.

<sup>1323</sup> Thailand's response to Panel question No. 139.

<sup>1324</sup> Philippines' combined comments on Thailand's responses to Panel question No. 135 and to Philippines' question No. 1.

<sup>1325</sup> Compare Exhibit THA-1, which includes an analysis of the risks posed by smuggling of imported cigarettes only, to Exhibit PHL-284, p. 2 (Article Published in the Economist) and Exhibit PHL-285, pp. 11

restrictive means were available to Thai authorities such as tracking and tracing requirements.<sup>1326</sup> Overall, additional penalties imposed on resellers of imported cigarettes for failure to comply with VAT filing requirements constitutes a disguised restriction on trade under the *chapeau* of Article XX.<sup>1327</sup>

(ii) *Analysis by the Panel*

7.754 Article XX provides:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement ..."

7.755 In *US – Gasoline*, the Appellate Body enunciated the appropriate method for applying Article XX of the GATT 1994:

"In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*"<sup>1328</sup> (emphasis added)

7.756 As the Appellate Body also stated in *US – Gasoline*, the burden of proof to show that a given measure falls within the scope of one of the sub-paragraphs of Article XX rests on the party invoking the defence under Article XX.<sup>1329</sup> Here, Thailand therefore bears the burden of proving that both the additional VAT filing requirement on resellers of imported cigarettes and the penalties imposed on non-compliant resellers constitute measures necessary to secure compliance with WTO-consistent laws within the meaning of Article XX(d).

7.757 The Appellate Body in *Korea – Various Measures on Beef* has stated that two elements must be shown by the invoking party under Article XX(d): "First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance".<sup>1330</sup>

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and 22 (Excerpt from TTM's annual report 2008) which illustrate concerns related to the smuggling of domestic cigarettes.

<sup>1326</sup> Philippines' combined comments on Thailand's response to Panel question No. 135 and to Philippines' question No. 1.

<sup>1327</sup> Philippines' combined comments on Thailand's response to Panel question No. 135 and to Philippines' question No. 1.

<sup>1328</sup> Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3 at 20.

<sup>1329</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3 at 21.

<sup>1330</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.



7.758 Regarding both the administrative requirements imposed on resellers of imported cigarettes as well as penalties imposed in case of failure to meet such administrative requirements, Thailand alleges that these requirements and penalty provisions are necessary to secure compliance with the Thai VAT laws. According to Thailand, this is because the filing obligations are the only way to verify that importers comply with the VAT laws. As addressed in Section VII.F.6(b)(ii) *au-dessus*, however, we found that the Thai VAT laws that Thailand purports to secure compliance with through the administrative requirement at issue, were *not* WTO consistent. Therefore, we find that Thailand has not discharged its burden of showing that the administrative requirements and the imposition of penalties for failure to complete VAT filing requirements are necessary to secure compliance with the Thai VAT laws within the meaning of Article XX(d) of the GATT 1994.

G. CLAIMS UNDER ARTICLE X OF THE GATT 1994

1. Claims under Article X:1 of the GATT 1994

(a) Introduction

7.759 Under Article X:1 of the GATT 1994, the Philippines advances three claims: Thailand acts inconsistently with Article X:1 by failing to publish (i) the methodology for determining MRSPs; (ii) the methodology for determining ex factory prices for TTM cigarettes; and (iii) laws and regulations governing the release of guarantees for potential liability arising from health, excise and television taxes. Thailand argues that the Philippines has failed to discharge its burden of proving the elements required to demonstrate a breach of Article X:1 of the GATT 1994 for each of these claims.

(b) Obligations under Article X:1 of the GATT 1994

7.760 Article X:1 of the GATT 1994 provides:

"Article X

*Publication and Administration of Trade Regulations*

1. "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them ... The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."

7.761 The obligations under Article X:1 to publish trade regulations largely consist of the following elements: (i) the existence of laws, regulations, judicial decisions and administrative rulings of general application made effective by a WTO Member that pertain to, *inter alia*, the classification or the valuation of products for customs purposes; and (ii) the obligation to publish such laws and regulations promptly in such a manner as to enable governments and traders to become acquainted with them.

7.762 We note that depending on the particular factual circumstances of each case, the obligations under Article X:1 can be considered in more detailed terms. For the purpose of this dispute, however, the parties have focused on the above two elements, namely whether the concerned measures are laws or regulations *of general application* within the meaning of Article X:1; and whether Thailand

*published* such laws and regulations promptly in such a manner as to enable governments and traders to become acquainted with them.

7.763 Furthermore, Article X:1 does not require WTO Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private. In this dispute, Thailand's argument on the disclosure of confidential business-derived data has given rise to the additional question of whether the publication of the concerned measures would indeed result in disclosing confidential information which would prejudice the legitimate commercial interests of particular enterprises, public or private, within the meaning of Article X:1.

(c) Methodology for determining MRSPs

(i) *Introduction*

7.764 In Thailand, MRSPs for imported and domestic cigarettes are determined by DG Excise.<sup>1331</sup> Thailand alleges that the elements used by DG Excise in its calculation are published in the preamble of all MRSP notices issued after August 2007. The language used in all MRSP notices is identical and states that:

"[T]he Excise Department therefore fixes the [MRSP] ... by making a computation as based on the c.i.f. price, customs duty, tobacco stamp (i.e. excise tax), value added tax, contributions to the health promotion fund, contributions to the Thai Public Broadcasting of Sound and Picture Foundation, contributions to provincial administration organization development, and marketing margin combined."<sup>1332</sup>

7.765 Thailand also considers that the published information enables the importers to calculate the VAT applicable to imported cigarettes. According to Section 79/5 of the Revenue Code<sup>1333</sup> and Revenue Department Notification No. Por 85/2542<sup>1334</sup> (relating to VAT imposed on cigarettes) the VAT can simply be calculated as 7 per cent of all other elements of the MRSP (i.e. VAT-exclusive price).<sup>1335</sup>

7.766 The Philippines claims that Thailand failed to sufficiently publish the methodology for determining the tax base for domestic and imported cigarettes (i.e. the MRSP). Specifically, the Philippines bases its claim on Thailand's alleged failure to publish the following two elements: (i) the overall methodology for determining MRSPs, including any revision to its overall methodology; (ii) the data relied upon in order to calculate the MRSP for individual cigarette brands and any revisions to that data, including the methodology and results of price surveys conducted in various countries that were used for determining the MRSPs for *Marlboro* and *L&M* in 2006-2007.<sup>1336</sup> We will evaluate the parties' arguments concerning these two elements in turn to determine whether Thailand acted inconsistently with Article X:1 by failing to publish the laws, regulations, judicial decisions and administrative rulings of general application used to determine the MRSP.

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<sup>1331</sup> See Section VII.D.4(a) for the explanations on the establishment of the MRSP under the Thai VAT system.

<sup>1332</sup> Exhibit THA-45, PHL-105 (Imported Cigarettes); and PHL-77 (Domestic Cigarettes).

<sup>1333</sup> Exhibit PHL-94.

<sup>1334</sup> Exhibit PHL-95.

<sup>1335</sup> Thailand's second written submission, paras. 271-272.

<sup>1336</sup> Philippines' first written submission, para. 456.

(ii) *Methodology for determining the MRSP*

Whether the methodology for determining the MRSP falls within the scope of "laws, regulations or administrative rulings of general application" under Article X:1

Main arguments of the parties

7.767 The **Philippines** claims that Thailand acts inconsistently with its transparency obligations under Article X:1 of the GATT 1994 by failing to publish the general rules governing the determination and revision of MRSPs.<sup>1337</sup> The Philippines argues that the general methodology followed by Thailand to determine and revise MRSPs falls within the scope of Article X:1 because it involves a general rule pertaining to the determination of various tax bases.

7.768 The Philippines notes that Thailand has disclosed before the Panel a methodology which it allegedly applies to determine and revise MRSPs. In particular, the following set of rules has been identified as constituting Thailand's methodology to determine MRSPs: (i) the primary source for the MRSP is the manufacturer's recommended retail price<sup>1338</sup>; (ii) an alternative source for the MRSP is a guarantee determined by DG Excise<sup>1339</sup>; (iii) DG Excise exercises a review of the MRSP, and the criteria thereof<sup>1340</sup>; (iv) DG Excise "normally" revises the MRSP after tax changes impacting the MRSP<sup>1341</sup>; (v) when MRSPs are revised, Thailand calculates a new MRSP computing the c.i.f. price, the latest tax amounts and the marketing costs<sup>1342</sup>; and (vi) the marketing costs calculation is based on information given by the importer, unless this information is doubtful, in which case it is established by Thai Excise.<sup>1343</sup>

7.769 The Philippines underlines that this set of rules applies generally and prospectively to the establishment and revision of the MRSP for any brand of cigarettes, either sold or to be sold in Thailand.<sup>1344</sup> Therefore, it constitutes a regulation of general application pertaining to taxes within the meaning of Article X:1 of the GATT 1994.

7.770 The Philippines asserts that publication of this methodology is necessary as Thailand has punctually departed from it, leaving the importers with doubts as to how the rules applied. For instance, Thailand has argued that it based its MRSP determinations on information provided by the importer. But in 2006 and 2007 it periodically used guarantees as starting points, both for the *Marlboro* and *L&M* MRSP calculation.<sup>1345</sup> The Philippines argues that this alternative starting point should be published.<sup>1346</sup> Secondly, Thailand argues that it bases the marketing cost calculations on information provided by the importer and that it recycled the information provided in 2001 for the purpose of all later determinations. The Philippines asserts that Thailand often departed from those alleged rules. In particular, MRSP calculations for *L&M* in March 2001, and for *L&M* and *Marlboro* in December 2005, August 2008, and May 2009 were not derived from PM Thailand's information

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<sup>1337</sup> Philippines' first written submission, paras. 456-457; first oral statement, para. 163; second written submission, paras. 317-357; second oral statement, para. 59.

<sup>1338</sup> Philippines' second written submission, para. 318, Table 1, referring to Thailand's first written submission, paras. 83 and 87.

<sup>1339</sup> Philippines' second written submission, para. 327.

<sup>1340</sup> Philippines' second written submission, para. 318, Table 1.

<sup>1341</sup> Philippines' second written submission, para. 318, Table 1.

<sup>1342</sup> Philippines' second written submission, para. 318, Table 1, referring to Thailand's first written submission, paras. 86-88; Thailand's response to Panel question No. 41.

<sup>1343</sup> Philippines' first written submission, paras. 166-173.

<sup>1344</sup> Philippines' second written submission, para. 317.

<sup>1345</sup> Philippines' second written submission, para. 327.

<sup>1346</sup> Philippines' response to Panel question Nos. 157 and 158.

timely submitted before each determination.<sup>1347</sup> Furthermore, Thailand admits that it departed from the 2001 data in 2006 and 2007.<sup>1348</sup> By the same token, the information provided by Thailand shows that there is a divergence in marketing costs across brands.<sup>1349</sup> The Philippines complains that marketing costs for international brands are systematically higher than those for domestic brands. The Philippines argues that the publication of the methodology followed to determine those marketing costs is therefore necessary.<sup>1350</sup>

7.771 **Thailand** accepts that the overall methodology utilized by the Thai Excise Department to calculate MRSPs for imported and domestic cigarettes can be described as a "regulation" of "general application" within the meaning of Article X:1 because it is consistently used by Thai Excise to determine binding maximum price levels and tax bases for all cigarette manufacturers.<sup>1351</sup>

7.772 Thailand however contends that the six elements listed by the Philippines<sup>1352</sup> do not constitute DG Excise's methodology, as the Philippines argues, but rather stand as an enumeration of the explanations given by Thailand in its submissions to the Panel of how MRSPs are set. Thailand therefore argues that those elements do not constitute regulations or administrative rulings of general application within the meaning of Article X:1.<sup>1353</sup> Thailand argues that Article X:1 does not require every statement that was made before a panel to be published.<sup>1354</sup>

#### Analysis by the Panel

7.773 The parties agree that the methodology used to determine MRSPs for importers constitutes "regulations ... of general application" within the meaning of Article X:1. As the Appellate Body underlined in *EC – Poultry*, Article X only applies to rules of "general application".<sup>1355</sup> In *US – Underwear*, the Appellate Body clarified that measures of general application are those which "affect ... an unidentified number of economic operators".<sup>1356</sup> The panel in *Japan – Film* found that even "administrative rulings in individual cases [fall within the scope of Article X:1] where such rulings establish or revise principles or criteria applicable in future cases".<sup>1357</sup> In this dispute, the parties do not contest that the methodology for determining MRSPs applies prospectively and generally to all MRSP determinations and revisions, for all cigarettes sold in Thailand.<sup>1358</sup> As the methodology applies to all potential sales of cigarettes, we agree that the methodology used to calculate MRSPs falls within the scope of Article X:1.

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<sup>1347</sup> Philippines' second written submission, paras. 333-344.

<sup>1348</sup> Philippines' first oral statement, para. 183.

<sup>1349</sup> Philippines' first oral statement, para. 185, referring to Exhibit THA-19.

<sup>1350</sup> Philippines' first oral statement, para. 186.

<sup>1351</sup> Thailand's second written submission, para. 266.

<sup>1352</sup> Philippines' second written submission, para. 318, Table 1.

<sup>1353</sup> Thailand's response to Panel question No. 155, referring to Philippines' second written submission, para. 318 (Table 1).

<sup>1354</sup> Thailand's response to Panel question No. 155, referring to Philippines' second written submission, para. 318 (Table 1).

<sup>1355</sup> Appellate Body Report, *EC – Poultry*, para. 111.

<sup>1356</sup> Panel Report, *US – Underwear*, para. 7.65; Appellate Body Report, *US – Underwear*, p. 21, DSR 1997:I, 11, at 29. The Appellate Body upheld the Panel's reasoning, which provided in relevant parts:

"[T]he mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. ... to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application."

<sup>1357</sup> Panel Report, *Japan – Film*, para. 10.388.

<sup>1358</sup> Philippines' second written submission, para. 317; Thailand's second written submission, para. 266.

7.774 The parties however disagree on the scope of the methodology that must fall within the scope of laws and regulations of general application under Article X:1.

7.775 The Philippines argues that all elements presented by Thailand before the Panel to explain how MRSP determinations were conducted form a general methodology within the meaning of Article X:1. In Thailand's view, the term methodology only requires that importers know what data are taken into account towards the MRSP determination.<sup>1359</sup>

7.776 The term "methodology" is defined as "noun. 2. A body of methods used in a particular branch of study or activity".<sup>1360</sup> "Method" in turn is defined as "noun. I. Procedure for attaining an object. 2. A mode of procedure; a (defined or systematic) way of doing a thing, esp. (with specifying word or words) in accordance with a particular theory or as associated with a particular person".<sup>1361</sup> Based on the ordinary meaning, we understand "methodology" to mean a set of procedures that lay down a defined or systematic way of doing things.

7.777 In the course of this Panel proceeding, particularly in the context of the Philippines' claim under Article III:2 in respect of the determination of MRSPs, Thailand described to the Panel the methodology it generally applies for the determination of MRSPs.<sup>1362</sup> Thailand stated:

"MRSPs are determined according to generally-applicable criteria. For the sake of clarity, the methodology bears repeating:

- The primary source of the MRSP is the manufacturer's/importer's recommended retail price. When the manufacturer/importer wants to introduce a new brand or revise an MRSP, the manufacturer/importer informs Thai Excise of the proposed MRSP.
- Thai Excise publishes a notice reflecting the new MRSP.
- If any of the applicable tax rates changes, necessitating a revision in the MRSP, Thai Excise calculates the new MRSP by changing the relevant tax rates and holding all other elements of the MRSP, including the so-called 'marketing costs', constant. The 'marketing cost' is derived by subtracting all other elements from the existing MRSP.
- Manufacturers/importers may request changes in the MRSPs at any time to reflect changes in their c.i.f./ex factory prices, desired retailed prices, or other factors. In these cases also, Thai Excise calculates the new MRSP by changing the relevant c.i.f./ex factory prices, updating the tax amounts that are based on those figures, and holding the so-called 'marketing costs'

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<sup>1359</sup> Thailand's second written submission, paras. 355-356.

<sup>1360</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 1762 (2002).

<sup>1361</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 1762 (2002).

<sup>1362</sup> We note that in its second written submission (para. 245), Thailand described its methodology as comprising all the elements listed by the Philippines in its second written submission (para. 318, Table 1), including the methods and procedures thereof, and not just the eight elements examined by Thai excise for the purpose of the MRSP determination.

constant. Again, the 'marketing cost' is derived by subtracting all other elements from the existing MRSP."<sup>1363</sup>

7.778 Thailand also explained that when it rejected requests for changes in the MRSP, Thai Excise could make adjustments consistent with the dual function of the MRSP as a maximum price to protect consumers and as the tax base for the VAT.<sup>1364</sup> In our view, the general methodology, as described in detail above, that Thailand alleges is used for determining the MRSPs, falls within the scope of the laws and regulations of general application under Article X:1.

7.779 We note Thailand's argument in this relation that Article X:1 does not require every statement that was made before the Panel to be published. In concluding that Thailand's explanation in this proceeding of how the MRSPs are determined qualifies as a rule of general application under Article X:1, we are not saying that every statement that a party makes in a panel proceeding falls within the scope of Article X:1. The factual circumstances of this case, particularly the absence of written rules and Thailand's detailed explanation of such rules for the first time in this proceeding, confirm that what Thailand itself alleges to be its general methodology for determining the MRSPs must be considered as a rule of general application within the meaning of Article X:1.

7.780 Moreover, we note that DG Excise relied on average price surveys conducted in neighbouring countries to determine the marketing cost component of MRSPs in 2006 and 2007.<sup>1365</sup> This shows that Thailand resorted to alternative sources of information to determine the marketing cost component of the MRSP when information provided by the importer was rejected. In our view, to the extent that DG Excise has the systemic discretion to deviate from its general methodology in determining the MRSPs as illustrated in the instances in 2006 and 2007, such a fact should also form part of the general methodology under Article X:1.<sup>1366</sup>

Whether Thailand "published" the general methodology for determining the MRSP in such a manner as to enable governments and traders to become acquainted with it

#### Main arguments of the parties

7.781 The **Philippines** claims that in order to satisfy the transparency requirements of Article X:1, Thailand cannot merely publish the final MRSP values determined by DG Excise because Article X:1 requires, *inter alia*, that *all* laws and regulations pertaining to taxes or other charges be published promptly in such a manner as to enable governments and traders to become acquainted with them.<sup>1367</sup> The methodology used to determine the MRSP is central to the calculation of the final MRSP and the failure to publish the methodology does not permit governments and traders to become acquainted with the process by which the cigarette tax base is established, nor does it allow them to verify that taxes imposed on domestic cigarettes are appropriate in comparison with taxes imposed on imported cigarettes.<sup>1368</sup>

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<sup>1363</sup> Thailand's second written submission, para. 245. All but the introductory sentence is also found in Thailand's first written submission, paras. 83-89 and 135.

<sup>1364</sup> Thailand's first written submission, para. 89.

<sup>1365</sup> Thailand's first written submission, para. 96.

<sup>1366</sup> We find support for our view in this regard in the Panel's analysis in *Dominican Republic - Import and Sale of Cigarettes*. That panel considered that when another method of determination was used by the Dominican Republic authorities, Article X:1 required the publication of both the decision not to conduct the surveys, and the alternative method used to determine the cigarette tax base (Panel Report, *Dominican Republic - Import and Sale of Cigarettes*, para. 7.414).

<sup>1367</sup> Philippines' first written submission, paras. 447-448.

<sup>1368</sup> Philippines' first written submission, para. 448.

7.782 The Philippines continues that none of the following elements, which are part of DG Excise methodology, were subject to publication: (i) the manufacturer's recommended retail price, which is the primary source for the MRSP; (ii) a guarantee determined by DG Excise, which is an alternative source for the MRSP; (iii) DG Excise's review of the MRSP, and the criteria thereof; (iv) DG Excise's "normal" revision of the MRSP after tax changes impacting the MRSP; (v) DG Excise's calculation of a new MRSP, after a revision, including the c.i.f. price, the latest tax amounts and the marketing costs; and (vi) the marketing costs calculation based on information given by the importer, or when this information is considered doubtful, the marketing costs as established by Thai Excise.<sup>1369</sup>

7.783 The Philippines also notes that out of 38 MRSP Notices for imported cigarettes issued between 2001 and 2009, five MRSP Notices only included a rudimentary description of the MRSP calculation. It was only explained that DG Excise computed the c.i.f. price, customs duty, tobacco stamp, VAT, contribution to the health, TV and provincial taxes, and marketing margin. However, it remains unclear how the VAT or marketing costs are calculated.<sup>1370</sup> Moreover, none of the MRSP notices actually sets forth the methodology that Thailand has stated it is applying.<sup>1371</sup>

7.784 **Thailand** argues that the overall methodology used by DG Excise to determine MRSPs has been published in conformity with Article X:1 of the GATT 1994 through: (i) the preamble to all MRSP notices issued after August 2007 (these notices mention all of the eight components used to calculate MRSPs)<sup>1372</sup>, read in conjunction with (ii) Section 79/5 of the Revenue Code and Revenue Department Notification No. Por 85/2542 (relating to VAT imposed on cigarettes).<sup>1373</sup>

7.785 Thailand asserts that, contrary to the Philippines' allegations, the published rules enable importers to correctly calculate the VAT and marketing costs. Regarding the VAT amount included in the MRSP, Thailand submits that the VAT can simply be calculated as 7 per cent of all other elements of the MRSP (i.e. VAT-exclusive price in this case).<sup>1374</sup> Thailand has published an enactment (Section 79/5 of the Revenue Code)<sup>1375</sup> and a notification (Revenue department notification No. Por 85/2542)<sup>1376</sup> that clearly indicate that VAT on cigarettes is to be calculated in this way.<sup>1377</sup> Regarding the marketing costs, Thailand asserts that Thai Excise makes no "accounting choice" in its determination. The marketing costs are calculated by deducting all other known elements from the MRSP. The MRSP is based on information provided by the importer. Thus, Thailand argues that DG Excise does not make any choice which could influence the determination of the marketing costs.

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<sup>1369</sup> Philippines' second written submission, para. 318, Table 1, referring to Thailand's first written submission, paras. 83 and 87 and response to Panel question No. 41.

<sup>1370</sup> Philippines' first oral statement, paras. 164-181; second written submission, para. 320; MRSP Notices of the Excise Department are in Exhibits PHL-61 (18 September 2006), PHL-77 (19 August 2008), PHL-99 (7 December 2005), PHL-100 (30 March 2007), PHL-104 (29 August 2007), PHL-106 (17 August 2007), PHL-117 (8 March 2007), PHL-118 (18 December 2007), PHL-134 (13 May 2005), PHL-168 (14 May 2009) and PHL-204 (Overview of MRSP Notices).

<sup>1371</sup> Philippines' second written submission, para. 321.

<sup>1372</sup> Exhibit THA-45, PHL-105 (MRSP Notice of 19 August 2008 for imported cigarettes), and PHL-77 (MRSP Notice of 29 August 2007 for domestic cigarettes). The language used in all MRSP notices is identical and states that: "the Excise Department therefore fixes the [MRSP] ... by making a computation as based on the c.i.f. price, customs duty, tobacco stamp (i.e. excise tax), value added tax, contributions to the health promotion fund, contributions to the Thai Public Broadcasting of Sound and Picture Foundation, contributions to provincial administration organization development, and marketing margin combined".

<sup>1373</sup> Thailand's second written submission, para. 272; Exhibits THA-94 and THA-95.

<sup>1374</sup> Thailand's second written submission, para. 271.

<sup>1375</sup> Exhibit PHL-94.

<sup>1376</sup> Exhibit PHL-95.

<sup>1377</sup> Thailand's second written submission, para. 272.

Thailand therefore maintains that it is not under an obligation to publish or disclose anything, as it is not DG Excise who determines the marketing costs.<sup>1378</sup>

7.786 More generally, Thailand maintains that PM Thailand and other importers were sufficiently familiar with the said methodology to enable them to request and obtain changes to the MRSPs.<sup>1379</sup> In fact, PM Thailand requested a change to its MRSP just weeks before its request for establishment of this Panel.<sup>1380</sup> Moreover, the Philippines demonstrated its familiarity with determining its RRSP for imported cigarettes, which uses the same elements as the MRSP determination.<sup>1381</sup>

#### Analysis by the Panel

7.787 We concluded above that the methodology used by Thai Excise for determining the MRSP, as described and explained by Thailand in this proceeding, constitutes rules of general application under Article X:1. Having so determined, the next question for us is whether that methodology has been published in such a manner as to enable importers to become acquainted with it as required by Article X:1.

7.788 It is not disputed that Thailand does not publish the methodology used by Thai Excise for determining the MRSP, as described and explained by Thailand in this proceeding. Instead, Thailand argues that it fulfilled its obligation to publish the concerned rules of general application under Article X:1 by listing in the MRSP notices the eight components comprising a given MRSP. These eight components are: (i) c.i.f. or ex factory price; (ii) customs duties (for importers only); (iii) excise tax; (iv) health tax; (v) television tax; (vi) local taxes; (vii) VAT; and (viii) marketing costs.

7.789 We do not find, however, the publication of these eight components sufficient to fulfil Thailand's obligations under Article X:1. The listing of the components consisting of the MRSP would not enable importers to become acquainted with the detailed rules pertaining to the general methodology within the meaning of Article X:1. We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted.

7.790 We note Thailand's argument that importers, including PM Thailand, have sought, and successfully obtained, MRSP revisions since 2007.<sup>1382</sup> This does not prove, however, that importers were apprised of the specific principles and methods that Thailand explained in this proceeding as the general methodology. On the contrary, while PM Thailand regularly requested MRSP modifications and submitted information thereof, PM Thailand had only a limited understanding of the methodology actually applied by DG Excise.<sup>1383</sup>

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<sup>1378</sup> Thailand's second written submission, para. 273.

<sup>1379</sup> Thailand's second written submission, para. 269.

<sup>1380</sup> Thailand's second written submission, para. 269; response to Panel question No. 155.

<sup>1381</sup> Thailand's comments on the Philippines' response to Panel questions, para. 134, referring to Philippines' response to Panel question No. 120.

<sup>1382</sup> Thailand's comments on the Philippines' response to Panel questions, para. 134, referring to Philippines' response to Panel question No. 120.

<sup>1383</sup> Philippines' first written submission, para. 449. The Philippines explains that, including the September 2006 MRSPs, DG Excise has issued six MRSP Notices for PM Thailand's brands since August 2006. PM Thailand has run numerous calculations using data available to it, but cannot reproduce the MRSPs as calculated by DG Excise. Even with the benefit of the descriptions given by DG Excise in its administrative ruling and rebuttal submission, PM Thailand still cannot recreate or otherwise verify the September 2006



7.791 We therefore conclude that Thailand failed to publish the general methodology for determining the MRSP, and to enable governments and traders to become acquainted with it under Article X:1.

(iii) *Data used to calculate MRSPs for individual cigarette brands*

Whether the data used for determining the MRSP for individual cigarette brands falls within the scope of "laws, regulations or administrative rulings of general application" under Article X:1

Main arguments of the parties

7.792 The **Philippines** relies on the Panel's reasoning in *Dominican Republic – Import and Sale of Cigarettes* to substantiate its claim that the data used to determine the MRSP for both imported and domestic brands should be published, together with all laws, regulations and administrative rulings of general application.

7.793 The Philippines alleges that, in *Dominican Republic – Import and Sale of Cigarettes*, the Panel interpreted Article X:1 to require the publication of an imported cigarette average-price survey. The panel explained that this survey had been used to determine the tax base for imported cigarettes, and was essential to this determination.<sup>1384</sup> It reasoned that tax base decisions for imported cigarettes were administrative rulings of general application within the meaning of Article X:1, which requires their publication. The panel considered that all elements which were essential to the determination of these tax base decisions shall also be published, so that traders and governments become acquainted with the process of establishing the tax base for cigarettes.<sup>1385</sup> The panel added that when another method of determination was used by the Dominican Republic authorities, Article X:1 required the publication of both the decision not to conduct the surveys, and the alternative method used to determine the cigarette tax base.<sup>1386</sup>

7.794 The Philippines claims that similar to the facts in *Dominican Republic – Import and Sale of Cigarettes*, data used by DG Excise towards MRSP calculations constitute "essential elements" of the MRSP Notice, which is an administrative ruling within the meaning of Article X:1 of the GATT 1994.<sup>1387</sup> In this regard, the Philippines explains that the nature and content of the MRSP Notices are fundamentally dependent on a particular data set. According to the Panel statements in *Dominican Republic – Import and Sale of Cigarettes* therefore, the data itself must be published as an essential part of the administrative ruling, to enable importers to understand the rule properly.<sup>1388</sup>

7.795 Regarding imported cigarettes, the Philippines submits that Thailand must publish the average retail price surveys used by DG Excise to determine the marketing costs for imported cigarettes when it refused information provided by PM Thailand in 2006 and 2007.<sup>1389</sup>

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MRSPs, because it lacks the necessary data, even though the data allegedly relates to one of its own cigarette brands, *Marlboro*.

<sup>1384</sup> Philippines' first written submission, paras. 451-457 referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.405, 7.407 and 7.414.

<sup>1385</sup> Philippines' first written submission, para. 453, referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.407.

<sup>1386</sup> Philippines' first written submission, para. 454, referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.414.

<sup>1387</sup> Philippines' first oral statement, para. 188.

<sup>1388</sup> Philippines' response to Panel question No. 69.

<sup>1389</sup> Philippines' first oral statement, paras. 188-198; second written submission, paras. 358-368. The Philippines however accepts that (i) the c.i.f. price for imported cigarettes; (ii) the customs duties and internal

7.796 Regarding domestic cigarettes, the Philippines claims that Thailand must publish the taxes and marketing costs applicable to the determination of the MRSP for domestic cigarettes. The Philippines declares that the taxes for domestic cigarettes should be published because they can already be derived from published tax rates and published tax bases.<sup>1390</sup> The Philippines similarly alleges that marketing costs for domestic cigarettes can be derived from information already published.<sup>1391</sup>

7.797 **Thailand** contests that the essential elements doctrine as set forth by the Panel in *Dominican Republic – Import and Sale of Cigarettes* triggers an obligation to publish data necessary to the determination of MRSPs.

7.798 Thailand first submits that the Panel on *Dominican Republic – Import and Sale of Cigarettes* only required that the "results"<sup>1392</sup> and the methodology of the marketing costs study be published, not the underlying data. In the same manner, Article X:1 does not require that Thailand reveal the data used for the purpose of its marketing costs calculation, but only the results of this calculation.

7.799 In addition, and more fundamentally, Thailand is of the view that the Panel's decision in *Dominican Republic – Import and Sale of Cigarettes* finds no justification in either the covered agreements or the GATT/WTO case law.<sup>1393</sup> Thailand underlines that the main objective of Article X:1 is that laws, regulations and administrative decisions of general application be published so that importers can adapt their business behaviour.<sup>1394</sup> Article X:1 does not require other elements to be made public. Hence, WTO Members are not required to publish data on which the administration relied for its determination, even when this data is an essential element of the determination, unless the data itself can be characterized as a law, regulation or administrative ruling of general application.<sup>1395</sup>

7.800 In this connection, Thailand argues that the data used by DG Excise in the MRSP determination process is company-specific. Since it lacks the level of generality required by Article X:1, it is not covered by this Article, and no obligation lies on Thailand to publish it.<sup>1396</sup> According to Thailand, the marketing costs used by DG Excise were derived, at least in part, from company specific information.<sup>1397</sup> Thailand therefore distinguishes the current set of facts from the *Dominican Republic – Import and Sale of Cigarettes* case where (i) the data used to conduct the price surveys were obtained from public external sources, not from the companies themselves<sup>1398</sup>; and (ii) the marketing cost studies conducted by the Dominican Republic authorities were applied to an unidentified number of companies generally.<sup>1399</sup>

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taxes applicable to imported cigarettes; and (iii) the marketing costs for imported cigarettes when they are based on the importer's information, cannot be published by Thai Excise for confidentiality reasons (Philippines' first oral statement, para. 197; combined response to Panel question Nos. 157 and 158).

<sup>1390</sup> Philippines' first oral statement, para. 194 and footnote 211.

<sup>1391</sup> Philippines' second written submission, para. 367.

<sup>1392</sup> Thailand's second written submission, para. 284, referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.404.

<sup>1393</sup> Thailand's second written submission, paras. 277-283.

<sup>1394</sup> Thailand's response to Panel question No. 66.

<sup>1395</sup> Thailand's second written submission, para. 281. Thailand recalls the Appellate Body statements in *India – Patents*, (Appellate Body Report, *India – Patents*, para. 45) cautioning panels against imputing into a treaty "words that are not there", and "concepts that were not intended".

<sup>1396</sup> Thailand's response to Panel question No. 67.

<sup>1397</sup> Thailand's comments on the Philippines' response to Panel questions, para. 136.

<sup>1398</sup> Thailand's response to Panel question No. 66; second written submission, paras. 276-278.

<sup>1399</sup> Thailand's first written submission, para. 322, referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.404-7.408.

7.801 Thailand further asserts that price surveys used by the Thai administration in 2006 and 2007 are not covered by Article X:1 of the GATT 1994, and therefore are not required to be published.

7.802 The **Philippines** argues that it is doubtful that actual company data were used to calculate the marketing costs for the MRSPs, because the costs appear to have been calculated indirectly, without data.<sup>1400</sup> The Philippines also submits that for the September 2006, March 2007 and August 2007 MRSPs, the marketing costs for both *L&M* and *Marlboro* were based on international price surveys<sup>1401</sup> regarding the cigarette markets in neighbouring countries. These surveys were delivered by a private, independent commercial research organization (i.e. PricewaterhouseCoopers Worldtrade Management Services) and nothing indicates that it had access to information provided by PM Thailand.<sup>1402</sup> This suggests that for 2006-2007, the marketing costs used to calculate MRSPs for both *L&M* and *Marlboro* were not derived from information provided by PM Thailand.<sup>1403</sup>

Analysis by the Panel

7.803 We now address the question of whether the data used to calculate the MRSPs constitute rules of general application within the meaning of Article X:1.

7.804 As recalled earlier, the Appellate Body underlined in *EC – Poultry*<sup>1404</sup> that Article X only applies to rules of "general application". We also found that the methodology for determining the MRSP is a rule of general application under Article X:1.

7.805 The Philippines claims that data used by DG Excise to calculate MRSPs for both imported and domestic cigarettes must be published because they are *essential elements* for the MRSP determination and thus an administrative ruling of general application under Article X:1.

7.806 As Thailand submits, however, we find that data necessary for determining an MRSP, such as the c.i.f. price, customs duties, and internal taxes and marketing costs, are essentially company-specific, rather than generally applicable to all companies. We also note that the Philippines acknowledges that these four specific items are business-derived confidential data, which are by definition company-specific. As such, the data used for such components of the MRSP cannot be considered as rules generally and prospectively applicable.

7.807 Regarding the Philippines' contention that we should nonetheless follow the essential element test adopted by the Panel in *Dominican Republic – Import and Sale of Cigarettes*<sup>1405</sup> to find that the average price surveys conducted in 2006 and 2007 were essential to the MRSP determination, we consider that the factual circumstances under which such a test was used in that dispute must be distinguished from the factual circumstances presented in the current dispute. In *Dominican Republic – Import and Sale of Cigarettes*, the average price surveys used by the Dominican Republic Central Bank to determine the tax base for domestic cigarettes were based on publicly available information and could potentially be used to determine the tax base for all domestic cigarettes.<sup>1406</sup> Specifically,

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<sup>1400</sup> Philippines' first oral statement, para. 195, referring to Exhibit THA-19.

<sup>1401</sup> Philippines' second written submission, para. 352.

<sup>1402</sup> Thailand's response to Panel question No. 50; Exhibit THA-44.

<sup>1403</sup> Philippines' second written submission, para. 352, referring to Thailand's response to Panel question No. 41.

<sup>1404</sup> Appellate Body Report, *EC – Poultry*, para. 111.

<sup>1405</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.400-7.406. The panel found that "while the [average price] surveys may have not been, in themselves, laws, regulations, judicial decisions or administrative rulings of general application, they would constitute an essential element of an administrative ruling: the determination of the tax base for cigarettes" (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.405).

<sup>1406</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.318.

Article 367(b) of the Dominican Republic tax code authorized the central bank to resort to price surveys for this purpose.

7.808 In this dispute, as Thailand submits, the price surveys conducted in 2006 and 2007 were tailored based on the data concerning *Marlboro* cigarettes in the neighbouring countries.<sup>1407</sup> Thus, the surveys were conducted on a company-specific basis, listing the average retail prices only for *Marlboro* cigarettes in the neighbouring countries. Furthermore, Thai Excise used the results of the price surveys to determine the marketing costs applied to the calculation of the MRSPs for *Marlboro* and *L&M*, but not the marketing costs generally applicable to the MRSPs for all cigarettes.<sup>1408</sup>

7.809 For the foregoing reasons, we find that the data used for determining the MRSPs are not an administrative ruling of general application within the meaning of Article X:1.

7.810 Regarding the data necessary for the determination of the MRSP for domestic cigarettes, the Philippines argues that Thailand must publish the taxes and marketing costs applicable to TTM. The Philippines alleges that publication of this information should not be an issue because the relevant data was either published or could be derived from publicly available information.<sup>1409</sup> The Philippines however failed to demonstrate that the data currently published was insufficient to satisfy the obligations under Article X:1. In the absence of such arguments and as the data necessary for determining the MRSPs for domestic cigarettes are already available, either directly through publication or through simple deductions, we conclude that the data for domestic cigarettes are sufficiently published. We therefore do not find it necessary to examine whether this data constitutes "laws, regulations, judicial decisions or administrative rulings of general application" within the meaning of Article X:1.

Whether the publication of the data used to calculate MRSPs for individual cigarette brands would amount to disclosing "confidential information" within the meaning of Article X:1

#### Main arguments of the parties

7.811 **Thailand** claims that even if the data used to determine the MRSPs fall within the scope of rules of general application under Article X:1, none of the data mentioned by the Philippines should be published because Article X:1, third sentence carves out confidential information from the requirements of Article X:1 first and second sentence.<sup>1410</sup> In response to the Philippines' argument that Article X:1 imposes on Thailand the obligation to publish data related to imported and domestic cigarettes that form an essential part of the determination of specific MRSPs<sup>1411</sup>, Thailand argues that publication of such data would result in a confidentiality breach, in violation of Article X:1, third sentence.

7.812 In particular, Thailand distinguishes the price surveys at issue here from the ones examined by the Panel in *Dominican Republic – Import and Sale of Cigarettes*. Thailand first underlines that

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<sup>1407</sup> Philippines' first written submission, para. 437.

<sup>1408</sup> In this connection, we recall our conclusion in para. 7.780 above that the use of price surveys, such as those conducted in 2006 and 2007, and the method adopted for such price surveys may fall under the scope of rules of general application to the extent that they form part of the general methodology for determining the MRSP.

<sup>1409</sup> Philippines' first oral statement, para. 194; second written submission, para. 367. The Philippines declares that the ex factory price for domestic cigarettes is already published, and that the taxes for domestic cigarettes could be derived from published tax rates and published tax bases. The Philippines also observes that marketing costs for domestic cigarettes can be derived from information already published.

<sup>1410</sup> Thailand's response to Panel question No. 66, paras. 188-190; Thailand's second written submission, paras. 276-278.

<sup>1411</sup> Philippines' first oral statement, paras. 188-198; second written submission, paras. 358-368.

the sources of the data respectively used for the purpose of the price surveys vary. Unlike the price surveys at issue in *Dominican Republic – Import and Sale of Cigarettes*, which consisted of data obtained from public external sources; in this dispute the data used to establish the MRSPs is provided by the companies themselves and access to other companies' confidential data is not necessary to enable traders to become acquainted with the process of determining the MRSP.<sup>1412</sup> Thailand explains that Thai Excise derives marketing costs by subtracting the c.i.f. price and duties and taxes paid to the government from the MRSP proposed by the manufacturer/importer.<sup>1413</sup>

7.813 Thailand also points out the consequences of publishing the price surveys used by DG Excise, even in indexed format as required by the Philippines. Thailand names three main confidentiality risks connected with such publication. First, the figures in the surveys could still be used to derive confidential information, such as previously-published marketing costs, and show trends and changes in those costs. Second, since ex factory/c.i.f. prices and the marketing costs are the only unknown variables in the MRSP calculation, the publication of marketing costs, even in indexed format, could allow competing firms to back into the calculation of the c.i.f. values. Finally, the fact that some importers had their determined marketing costs replaced by a government-fixed proxy *in itself* would show a disagreement with the government about the tax base and could cause competitive harm to the importer.<sup>1414</sup>

7.814 Regarding Thailand's position on the confidential nature of the data used to determine the MRSPs, the **Philippines** argues that for imported cigarettes, Thailand should publish the amount of the proxy it uses, at the very least in indexed format when the marketing cost information given by the importer is refused by DG Excise.<sup>1415</sup> The Philippines however accepts that (i) the c.i.f. price for imported cigarettes<sup>1416</sup>; (ii) the customs duties and internal taxes applicable to imported cigarettes<sup>1417</sup>; and (iii) the marketing costs for imported cigarettes when they are based on the importer's information<sup>1418</sup>, cannot be published by Thai Excise for confidentiality reasons.

7.815 The Philippines also argues that a non-confidential version of an administrative ruling can still be characterized as a ruling under Article X:1 of the GATT 1994.<sup>1419</sup> Therefore, even though it is in a different form than the original one, the non-confidential version of the administrative ruling must be published.<sup>1420</sup> Hence, the Philippines argues that non-confidential versions of MRSP determinations should be published, which would serve both the interests of transparency and the need to protect confidential business information.<sup>1421</sup>

7.816 As for domestic cigarettes, the Philippines argues that Article X:1 of the GATT requires that taxes and marketing costs in relation to domestic cigarettes must be published, as this information can be drawn from data already made public.<sup>1422</sup>

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<sup>1412</sup> Thailand's second written submission, para. 283.

<sup>1413</sup> Thailand's responses to Panel question No. 114.

<sup>1414</sup> Thailand's comments on the Philippines response to Panel questions following the second substantive meeting, para. 136.

<sup>1415</sup> Philippines' combined response to Panel question Nos. 157 and 158.

<sup>1416</sup> Philippines' first oral statement, para. 197.

<sup>1417</sup> Philippines' first oral statement, para. 197.

<sup>1418</sup> Philippines' combined response to Panel question Nos. 157 and 158.

<sup>1419</sup> Philippines' combined response to Panel question Nos. 157 and 158.

<sup>1420</sup> Philippines' combined response to Panel question Nos. 157 and 158.

<sup>1421</sup> Philippines' combined response to Panel question Nos. 157 and 158.

<sup>1422</sup> Philippines' first oral statement, para. 194; second written submission, para. 367. The Philippines underlined that the ex factory price for imported cigarettes, and the tax rates and tax bases for imported cigarettes are already published.

Analysis by the Panel

7.817 As we found above that the data used to determine the MRSP do not fall within the scope of administrative rulings of general application, it is not necessary for us to continue with an examination of the question of whether the publication of such data would amount to disclosing "confidential information" within the meaning of Article X:1.

7.818 However, even if we were to proceed to examine the parties' arguments in this regard, we do not find, for the following reasons, that the Philippines has established its *prima facie* case that even if Thailand were exempted from the obligation to publish the relevant data based on the confidential nature of such data, Thailand is nonetheless obliged to publish such data under Article X:1.

7.819 Thailand essentially argues that given that the third sentence of Article X:1 provides that the provisions of Article X:1 shall not require any WTO Member to disclose confidential information, Thailand is not obliged to publish the data used for determining the MRSPs because such data are confidential information. The Philippines also appears to accept Thailand's position as it acknowledges that data such as the c.i.f. price, internal taxes, the marketing costs, even in indexed format, are confidential information.<sup>1423</sup> In our understanding, the Philippines' sole remaining argument in this connection is that a non-confidential version of an administrative ruling still must be published. We, however, do not find such an obligation in the text of Article X:1.

(d) Methodology and data for determining ex factory prices

(i) *Introduction*

7.820 The Philippines claims that Thailand must publish the methodology and data for determining ex factory prices, one of the components of the MRSP for domestic cigarettes, because the methodology and data are essential elements for determining ex factory prices, which are themselves administrative rulings of general application within the meaning of Article X:1. The Philippines' claims with respect to the methodology and data used for the determination of the MRSPs for domestic cigarettes are therefore premised on its position that ex factory prices are administrative rulings of general application under Article X:1. Thailand argues that ex factory prices do not fall within the scope of Article X:1.

7.821 We will therefore first examine whether ex factory prices fall within the scope of Article X:1. If they are found to fall outside the scope of Article X:1, the Philippines' claim with respect to the methodology and data necessary for the establishment of ex factory prices will also fail.

(ii) *Ex-factory prices – whether the ex factory price determination is an administrative ruling of general application within the meaning of Article X:1*

Main arguments of the parties

7.822 The **Philippines** submits that the ex factory price falls within the scope of Article X:1, because it is a "regulation" or "administrative ruling" pertaining to "taxes or other charges".<sup>1424</sup> The Philippines relies on the Appellate Body statement in *EC – Poultry* that a ruling has general

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<sup>1423</sup> Philippines' combined response to Panel question Nos. 157 and 158.

<sup>1424</sup> Philippines' first written submission, para. 641; first oral statement, para. 254.

application within the meaning of Article X:1 if it establishes "principles or criteria applicable in future cases ... [that] affect ... an unidentified number of economic operators".<sup>1425</sup>

7.823 The Philippines argues that the ex factory price establishes, on a general and prospective basis, a tax base for the imposition of the excise, health and television taxes on domestic cigarettes.<sup>1426</sup> In addition, the ex factory price serves as a basis for the MRSP applicable to domestic cigarettes.<sup>1427</sup> By impacting the tax rates applicable to domestic cigarettes, the determination of the ex factory price prospectively "affects a large and undefined number of economic operators" within the meaning of the *EC – Poultry* statement above. The affected agents include wholesalers, retailers, and consumers of TTM's cigarettes.<sup>1428</sup>

7.824 **Thailand** contests that the ex factory price falls within the scope of Article X:1. According to Thailand, ex factory prices are not administrative rulings of general application. Rather, they constitute private determinations both in their origin and application. First, ex factory prices only have a company-specific, private application. They only apply to and set the excise, health and television tax base for a single entity, TTM.<sup>1429</sup> The Appellate Body has clarified that company-specific measures are not measures of general application within the meaning of Article X:1 of the GATT 1994.<sup>1430</sup> Thailand asserts that ex factory prices therefore fall outside the scope of Article X:1. Second, regarding their origin, Thailand underlines that TTM itself, not the Thai administration, calculates the ex factory price.<sup>1431</sup> TTM is only required to maintain its accounts in accordance with generally-accepted accounting principles ("GAAP").<sup>1432</sup> Thai Excise is nowhere involved and does not have any methodology or rules prescribing a particular accounting method or standard for TTM in determining the ex factory price.<sup>1433</sup> Thus, the determination of ex factory prices cannot be qualified as an "administrative" act, and there cannot be an obligation to publish it, or its underlying methodology.

#### Analysis by the Panel

7.825 To determine whether ex factory prices are administrative rulings of general application within the meaning of Article X:1, we will start our analysis with the ordinary meaning of the term. "ex factory" is defined in the ICC guide to Incoterms as follows: "Ex works means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e.: works, factory, warehouse) not cleared for exports and not loaded on any collecting vehicle".<sup>1434</sup> The ex factory price is therefore the price, exclusive of customs clearance and transportation costs, applicable to the merchandise when the manufacturing process is completed and the goods are ready to be handed over to a buyer.

7.826 The ex factory price, as a general concept, thus can be understood as the price of a good being decided by each individual firm in accordance with its own costs and business strategies.<sup>1435</sup> In other words, it is the result of an internal decision-making process, conducted on a firm-by-firm basis.

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<sup>1425</sup> Philippines' second oral statement, para. 126, referring to Appellate Body Report, *EC – Poultry*, para. 113.

<sup>1426</sup> Philippines' first written submission, para. 641; first oral statement, para. 254.

<sup>1427</sup> Philippines' first oral statement, para. 251.

<sup>1428</sup> Philippines' response to Panel question No. 162.

<sup>1429</sup> Thailand's second written submission, para. 287.

<sup>1430</sup> Thailand's first written submission, para. 317 referring to Appellate Body Report, *EC – Poultry*, para. 110, citing Panel Report, *EC – Poultry*, para. 269.

<sup>1431</sup> Thailand's response to Panel question No. 160(1); Exhibit THA-24.

<sup>1432</sup> Thailand's response to Panel question No. 160(1).

<sup>1433</sup> Thailand's response to Panel question No. 161.

<sup>1434</sup> Exhibit THA-23, p. 69.

<sup>1435</sup> Thailand's second written submission, para. 288.

Therefore, unless it can be shown, by supporting evidence, that a government is somehow involved in determining the ex factory price of certain goods, the ex factory price cannot be characterized as an administrative ruling of general application under Article X:1 as it is a business decision made by an individual company.

7.827 In Thailand, TTM is the only domestic cigarette manufacturer whose MRSP determination is based on, *inter alia*, the ex factory price figure. While TTM is a state enterprise, that does not in itself constitute a proof that the Thai government determines ex factory prices of TTM's cigarettes. Neither are we presented with evidence suggesting that this is the case or TTM is bound by guidelines or rules imposed by the Thai administration in making its ex factory price *determination*. On the contrary, the role of the Thai administration appears to receive and process ex factory prices declared by TTM.<sup>1436</sup>

7.828 We note the Philippines' argument that the ex factory price determination falls under Article X:1 because it affects entities and consumers active in the cigarettes market. The concerned determination indeed serves as a basis for the MRSP and the taxes applicable to domestic cigarettes. We are, however, of the view that this interpretation goes beyond the intended scope of the Appellate Body's statement in *US – Underwear* that measures of general application are those which "affect ... an unidentified number of economic operators".<sup>1437</sup> The Philippines' interpretation would impermissibly broaden the scope of this argument to virtually all administrative determinations falling under Article X:1. In this connection, we note that the MRSP, not the ex factory price, is the basis for taxes applicable to domestic cigarettes. The ex factory price is only one component in the calculation leading to the MRSP determination. The Philippines has not clarified the consequential link between the ex factory price and its impact on operators active in the Thai domestic market for cigarettes.

7.829 For the foregoing reasons, we conclude that ex factory prices are not administrative rulings of general application within the meaning of Article X:1. Having so found, we need not address the Philippines' claim under Article X:1 that the methodology and data used for determining ex factory prices, as essential elements to such a determination, must be published in accordance with the obligations under Article X:1.

(e) Rules relating to the release of guarantees placed for health, excise and television taxes

(i) *Introduction*

7.830 As explained in Section VII.I.2 au-dessous, in situations where it becomes necessary to delay the final determination of the customs value, Thailand enables an importer to withdraw its goods from customs if the importer provides sufficient guarantees for payment of potential customs duty and excise, health, and television tax liabilities.<sup>1438</sup>

7.831 The amount of these guarantees is based on a guarantee value assigned by Thai Customs to each brand of imported cigarettes.<sup>1439</sup> The importer pays the customs duties and internal taxes due on the declared customs values, and provides a guarantee for the duties and internal taxes due on the difference between the declared transaction value and the guarantee value.<sup>1440</sup> The guarantees remain

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<sup>1436</sup> Clause 1 of the Excise Department Notification on the "Declared Prices of Shredded Tobacco or Tobacco at the Tobacco Factory" states in this regard: "The tobacco manufacturer shall declare prices of shredded tobacco or tobacco at [the] tobacco factory to the Director-General of the Excise Department on the form attached hereto" (Exhibit THA-24).

<sup>1437</sup> Panel Report, *US – Underwear*, para. 7.65; Appellate Body Report, *US – Underwear*, p. 21, DSR 1997:I, 11, at 29.

<sup>1438</sup> Philippines' first written submission, para. 633; Exhibit PHL-20.

<sup>1439</sup> Philippines' first written submission, para. 634.

<sup>1440</sup> Philippines' first written submission, para. 634; first oral statement, para. 264, referring to Exhibit PHL-147.



in place until Thai Customs has assessed the customs value for a given shipment.<sup>1441</sup> The definitive liability for customs duties, as well as for the excise, health and television taxes, is then calculated on the basis of the assessed customs value.<sup>1442</sup> When the assessed customs value is lower than the guarantee value, the importer's final liability for customs duty and internal taxes will be lower than the amount secured by the guarantee.<sup>1443</sup>

7.832 The Philippines claims that Thailand violates Article X:1 because it fails to publish its rules of general application relating to the release of guarantees. To examine the Philippines' claim in this regard, we must consider the following two questions. First, whether the Philippines proved the existence of laws, regulations, judicial decisions or administrative rulings of general application relating to the release of guarantees made effective by Thailand; and second, if they do exist, whether Thailand has promptly published these rules of general application in such a manner as to enable governments and traders to become acquainted with them.

(ii) *Whether Thailand maintains rules of general application relating to the release of guarantees*

Main arguments of the parties

7.833 The **Philippines** argues that a general rule on the release of guarantees appears to exist in Thailand.<sup>1444</sup> The Philippines argues that although Thailand recognizes a right to a release of guarantees placed for excise, health, and television taxes, it fails to publish its rules of general application relating to such a release.<sup>1445</sup> The Philippines points to Thailand's admission that Thai Customs does process the requests for the release of guarantees through a departmental practice.<sup>1446</sup> This, according to the Philippines, suggests that a rule of general application is generally being followed by Thai Customs in the release process, which under Article X:1 of the GATT 1994 must be published.

7.834 In particular, the Philippines submits that the basic procedural steps that an importer should follow to exercise its right to the release of those guarantees should be published.<sup>1447</sup> Specifically, the Philippines requests the Panel to contrast the lack of published rules and procedures on the release of guarantees with the very detailed rules published on the refunds of customs duties which provide the following information: (i) the customs office to which a refund request must be made; (ii) the personal identification documents the requesting person or entity must present; (iii) the circumstances in which the person or entity can issue a power of attorney for third person representation; (iv) the documents and additional information that must be presented; (v) the form of the customs authority's response; and (vi) the precise manner in which the refund is transferred to the requesting person or entity.<sup>1448</sup>

7.835 The Philippines argues that if Thai law does not provide a general rule on the release of guarantees, Thailand would violate its WTO obligations for an unreasonable and non-uniform administration.<sup>1449</sup>

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<sup>1441</sup> Philippines' first written submission, para. 635.

<sup>1442</sup> Philippines' first written submission, para. 635.

<sup>1443</sup> Philippines' first written submission, para. 635.

<sup>1444</sup> Philippines' first oral statement, para. 259.

<sup>1445</sup> Philippines' first written submission, para. 651.

<sup>1446</sup> Philippines' response to Panel question No. 166; second oral statement, para. 128, referring to Thailand's second written submission, para. 296. The Philippines notes that a series of routine administrative decisions also constitutes a "measure" within the meaning of Article 6.2 of the DSU.

<sup>1447</sup> Philippines' first written submission, para. 652; second written submission, para. 524.

<sup>1448</sup> Philippines' first oral statement, para. 259; response to Panel question No. 72.

<sup>1449</sup> Philippines' first oral statement, para. 258.

7.836 **Thailand** claims that the release of guarantees is governed by the provisions of the Customs Act governing the final assessment of customs duties, namely Sections 112*bis* and 112*quater* of the Customs Act.<sup>1450</sup> In Thailand's view, because the release of guarantees takes place in the context of the final assessment, there is no need for a provision of law other than the provisions governing final assessment to address separately the release of guarantees.

7.837 Thailand argues that for an obligation under Article X:1 to publish a rule of general application to arise, there must exist a rule of general application. Article X:1 does not require WTO Members to promulgate particular laws; it requires only that WTO Members publish existing laws of general application. Thailand submits that the Philippines, as a complainant, must meet the standard established by the panel in *Japan – Film* to "clearly demonstrate the existence of ... unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases".<sup>1451</sup> Thailand considers that the Philippines has failed to identify an existing rule of general application under Thai law that Thailand has failed to publish.<sup>1452</sup>

7.838 Thailand argues that while, "as a general matter", the guarantees are to be refunded on the final assessment of the goods<sup>1453</sup>, the release of guarantees is not governed by detailed rules of general application. In particular, it has not promulgated any law or regulation of general application setting out the procedural steps that an importer must follow to claim a release of guarantees.<sup>1454</sup> Rather, Thai customs administers the release of guarantees through departmental practice and through the exercise of administrative discretion as part of the process of final assessment of duties. In the overwhelming majority of cases, the release of guarantees occurs without incident.<sup>1455</sup> Thailand thus claims that the Philippines has failed to demonstrate the existence of a law or regulation of general application made effective by the Thai administration.<sup>1456</sup>

7.839 In Thailand's view, the Philippines' claim rather requires the adoption or promulgation of a norm of general application concerning the release of guarantees.<sup>1457</sup> Thailand takes the position that this claim falls outside the scope of Article X:1, which only requires the publication of existing norms of general application.<sup>1458</sup>

#### Analysis by the Panel

7.840 As observed above, Article X:1 requires WTO Members to promptly publish their trade laws and regulations of general application in such a manner as to enable governments and traders to become acquainted with them.

7.841 Regarding the release of guarantees deposited by importers for excise, health, and television taxes, the Philippines claims that Thailand should publish both a rule concerning "an unambiguous right to the release of guarantees" as well as the specific "procedural rules providing sufficient guidance on how guarantees are released".<sup>1459</sup> Thailand submits that it does not maintain specific procedures or rules applied generally to the release of guarantees. It argues that the Philippines, as a complainant bringing a claim under Article X:1, must first demonstrate the existence of the relevant rules of general application in Thailand that the Philippines argues Thailand failed to publish.

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<sup>1450</sup> Thailand's first written submission, para. 325.

<sup>1451</sup> Panel Report, *Japan – Film*, para. 10.388.

<sup>1452</sup> Thailand's first written submission, para. 326; response to Panel question No. 74.

<sup>1453</sup> Philippines' first oral statement, para. 259 referring to Thailand's first written submission, para. 111.

<sup>1454</sup> Thailand's second written submission, para. 296.

<sup>1455</sup> Thailand's second written submission, para. 296.

<sup>1456</sup> Thailand's response to Panel question No. 74.

<sup>1457</sup> Thailand's response to Panel question No. 74.

<sup>1458</sup> Thailand's first written submission, para. 326; second written submission, para. 296.

<sup>1459</sup> Philippines' first oral statement, paras. 415-420.

7.842 We first recall the Appellate Body's statement in *US – Wool Shirts and Blouses* regarding the burden of proof principle in WTO dispute settlement proceedings that "a party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof [...] If the party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".<sup>1460</sup> In the context of the Philippines' claim under Article X:3(a) relating to the release of guarantees, the Philippines is asserting that Thailand does maintain rules of general application governing the procedures for the release of guarantees. Therefore, the Philippines, as a party asserting this specific claim, must demonstrate the existence of the unpublished rules or procedures that Thailand generally applies in releasing the guarantees.

7.843 First, we will address whether the Philippines has proved that Thailand maintains a general rule concerning *a right to the release of guarantees* within the meaning of Article X:1. To support its position that Thailand maintains a general rule in this regard, the Philippines refers to, *inter alia*, Thailand's statement that the "guarantees are to be refunded on the final assessment of the goods."<sup>1461</sup> Thailand does not dispute the existence of this general rule, namely a rule governing the right to the release of guarantees, either. Thailand specifically submits that Sections 112*bis* and 112*quater* of the Customs Act constitute laws of general application that govern the release of guarantees.<sup>1462</sup> Therefore, Thailand's contention is rather that its rules on the release of guarantees are already "specifically" published in the provisions of the Customs Act governing the final assessment of customs duties. This is a question that we address in the subsequent part of this section regarding whether the relevant provisions in the Thai Customs Act are sufficient to enable traders to become acquainted with the rules on guarantee release.

7.844 We now move on to the parties' arguments on the question of whether Thailand maintains specific *procedural rules* applied generally to the release of guarantees. The Philippines submits that basic procedural steps that an importer should follow to exercise its right to the release of those guarantees should be published. Thailand argues that it has not promulgated any law or regulation of general applications setting out the procedural steps that an importer must follow to claim a release of guarantees and so consequently there are no generally applicable procedural steps to be published.<sup>1463</sup>

7.845 The Philippines submits that PM Thailand has obtained the release of bank guarantees for excise, health and television taxes in the past, for example, in July 2008.<sup>1464</sup> However, the Philippines does not explain the procedural steps that PM Thailand in fact followed in the process of obtaining the release of guarantees in such instances, while it exemplified the specific procedural rules that it alleges Thailand must publish in relation to the release of guarantees.<sup>1465</sup> Therefore, we are not presented with any evidence enabling us to identify the procedural rules of general application

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<sup>1460</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 335.

<sup>1461</sup> Philippines' first oral statement, para. 259, referring to Thailand's first written submission, para. 111.

<sup>1462</sup> Thailand's first written submission, para. 325; response to Panel question No. 74.

<sup>1463</sup> Thailand's second written submission, para. 296.

<sup>1464</sup> Philippines' first written submission, para. 651.

<sup>1465</sup> The Philippines, for example, contrasts the lack of rules and procedures on the release of guarantees with the detailed procedural rules that exist for refunds of customs duties as laid out in the "Notification of Department of Customs No. 97/2542, Re: The procedures to receive the check refund, tax and duty and other income" provides published rules governing the refund of customs duties (Philippines' response to Panel question No. 72; Exhibit PHL-184). The Philippines notes that the above Notification sets forth rules governing the refund of customs duties only.

The only reference by the Philippines to an actual action taken by Thai Customs in relation to the release of guarantees for the internal taxes is the instance where Thai Customs handed over to PM Thailand the original document containing certain bank guarantees when it returned such guarantees (Philippines response to Panel question No. 73, footnote 26).

currently maintained by Thailand regarding the release of guarantees that should be subject to the publication requirement under Article X:1.

7.846 In this connection, we also take note of certain Philippines' statements such as the following: "there are no procedural rules providing sufficient guidance on how guarantees are released"; "it was instructive to contrast the lack of rules and procedures on *the release of guarantees* with the very detailed procedural rules that exist for *refunds of customs duties*."<sup>1466</sup> Expert opinions produced by the Philippines also tend to confirm that there is no provision in Thai law that governs the process for the release of guarantees.<sup>1467</sup> Although it is not entirely clear to us, we assume the Philippines' arguments to imply that no *written* rules exist on the procedures governing the release of guarantees. If that was the Philippines' position, however, it should have at least drawn our attention to the "practice" relied on by Thai Customs in previous instances where the guarantees were released. This, in our view, would have helped to establish the existence of procedural rules of general application maintained by Thailand in releasing the guarantees.<sup>1468</sup>

7.847 The Philippines points to Thailand's statement that its operation of the release of guarantees is based on departmental practice which is routine and applied without incident in the overwhelming majority of cases.<sup>1469</sup> The Philippines considers that this statement highlights Thailand's admission that a rule of general application is being followed by Thai Customs in the releasing process, which must be published under Article X:1.<sup>1470</sup> Thailand did not, however, elaborate on its statement in this regard by, for example, specifying the content of its departmental practice. Neither has the Philippines put forth any specific examples of such practice. In the absence of evidence showing a practice or repeated actions that can be considered as constituting a general rule, Thailand's reference to a "departmental practice" appears to mean that decisions on the release of guarantees for the internal taxes are made, in practice, on a discretionary basis.

7.848 In our view, as the Philippines itself acknowledges, if its own claim pertains to the *absence* of the specific procedural rules generally applicable to the release of guarantees for the internal taxes, such a claim should have been brought more properly under Article X:3(a). For instance, referring to the procedural rules governing the refund of customs duties, provided in the "Notification of Department of Customs No. 97/2542, Re: The procedures to receive the check refund, tax and duty and other income", the Philippines submits that the existence of such detailed and explicit rules and procedures for customs duty refunds further highlights the absence of equivalent provisions for

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<sup>1466</sup> Philippines' response to Panel question No. 72 (*italics in original, underline omitted*).

<sup>1467</sup> Philippines' first oral statement, para. 259, referring to Exhibit PHL-151; response to Panel question 165, referring to Exhibits PHL-183 and PHL-265. See "Revised Expert Opinion of Mr. Piphob Verahpong", PHL-182, para.11.2 ("Based upon my review of the Tobacco Act, Heath Tax Act and Television Tax Act, I find that there are no provisions governing the legal process by which release of guarantees for excise, health and television tax can be secured."), and "Revised Expert Opinion of Professor Dr. Prasit Aekaputra", PHL-183, para. 5 ("Based upon my review of the Tobacco Act, Heath Tax Act and Television Tax Act, I find that there are no provisions governing the legal process by which release of guarantees for excise, health and television tax can be secured.").

<sup>1468</sup> We find support for our view in this regard in the Appellate Body's statement in *US – Zeroing (EC)* that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in a form of written document." (Appellate Body Report, *US – Zeroing (EC)*, para. 196).

<sup>1469</sup> Philippines' response to Panel question No. 166; comments on Thailand's response to Panel question No. 171(2). The Philippines underlines that in the context of its defence under Article III:2 and X:3(a), Thailand has also referred to the rules governing the release of guarantees as the "normal practice". Thailand's response to Panel question No. 74; second written submission, para. 296.

<sup>1470</sup> Philippines' response to Panel question No. 166; second oral statement, para. 128, referring to Thailand's second written submission, para. 296. The Philippines notes that a series of routine administrative decisions also constitutes a "measure" within the meaning of Article 6.2 of the DSU.

guarantee values. We also note the Philippines' emphasis on the need for precise published rules for guarantee releases. The obligation under Article X:1 is, however, to promptly publish rules of general application *made effective* by a Member in such a manner as to enable traders to become acquainted with them. In fact, the Philippines submits that if the Panel finds that Thai law does not provide a general rule on the release of guarantees, the Panel should find that Thailand violates Article X:3(a) by failing to provide rules that allow importers to secure, on a predictable basis, the release of guarantees collected when final liability proves to be less than the guarantee.<sup>1471</sup> However, the Philippines never developed a claim under Article X:3(a) in respect of Thailand's failure to provide rules relating to the release of guarantees.

7.849 Therefore, in respect of its claim that Thailand failed to publish both a rule concerning "an unambiguous right to the release of guarantees" as well as the specific "procedural rules providing sufficient guidance on how guarantees are released", we conclude that the Philippines did not discharge its burden of proving the existence of the specific procedural rules generally applied to the release of guarantees within the meaning of Article X:1. Accordingly, in the following section, we will examine only the question of whether Thailand published its general rule concerning the right to the release of guarantees consistent with Article X:1 of the GATT 1994.

(iii) *Whether the rules relating to the release of guarantees were published within the meaning of Article X:1*

Main arguments of the parties

7.850 The **Philippines** submits that Sections 112*bis* and 112*quater* of the Customs Act do not provide sufficient guidance with respect to the release of guarantees for customs duties and the applicable taxes because these provisions, *inter alia*, do not establish an unambiguous right to the release of the guarantee.<sup>1472</sup> The Philippines argues that the last paragraph of Section 112*quater* in particular refers only to cash guarantees, and does not refer to other forms of guarantees collected by Thailand, such as bank guarantees. In the Philippines view, Thailand's proposition that Sections 112*bis* and 112*quater* provide for a general rule for guarantee release undermined its own assertion that "in order for there to be an obligation to publish a rule of general application, there must exist a rule of general application." The Philippines argues that this suggests that Sections 112*bis* and 112*quater* cannot be read to contain a general rule governing the release of guarantees.

7.851 The Philippines further contends that Thailand has not published its rules of general application concerning the release of guarantees as required by Article X:1. The Philippines argues that relevant Thai laws do not include provisions duly informing importers of the rules governing the release of guarantees once the final customs determination is reached.<sup>1473</sup> Publication of those rules would have practical importance as, in this dispute, Thailand has failed to release guarantees for the health tax regarding [[xx.xxx.xx]] out of [[xx.xxx.xx]] transactions that occurred between August 2006 and March 2007<sup>1474</sup>; for the same period, Thailand has cleared a total of [[xx.xxx.xx]] entries, but has not released the guarantee concerning [[xx.xxx.xx]] entries whose final customs value was lower than the guarantee posted; out of those [[xx.xxx.xx]] cases, Thailand has also failed to release guarantees given for health tax in [[xx.xxx.xx]] cases.<sup>1475</sup>

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<sup>1471</sup> Philippines' response to Panel question No. 166, referring to its statements to this effect in its first oral statement, para. 258.

<sup>1472</sup> Philippines' response to Panel question No. 71.

<sup>1473</sup> Philippines' first oral statement, paras. 259-260; response to Panel question No. 72; second written submission, para. 525.

<sup>1474</sup> The Philippines submits that the health tax guarantees for these [[xx.xxx.xx]] entries were released by Thai Customs on 3 August 2009, after these WTO proceedings were prompted.

<sup>1475</sup> Philippines' second written submission, paras. 526-528, referring to Exhibit PHL-195.

7.852 **Thailand** states that Sections 112*bis* and 112*quater* of the Customs Act constitute laws of general application that govern the release of guarantees.<sup>1476</sup> Those Sections, which govern the final duty assessment, also provide that the excess guarantees are to be refunded upon final assessment of the good.<sup>1477</sup> Section 112*bis* states that upon payment of a guarantee, "where cash has been deposited as a security and the cash deposit is sufficient to cover the amount of duty assessed, the assessed amount of duty shall be paid from such amount immediately". Section 112*quater* provides that in cases where the "duty paid or the cash deposit is to be *refunded on account of it being demanded in excess of the amount or additional amount payable*", interest will be payable on the amount to be refunded.<sup>1478</sup> Thailand claims that it has also produced notices of assessment which were published, and which show that refunds are available. For instance, column 6 of the Notice of Assessment dated 16 March 2007 shows that amounts are to be refunded to importers upon final assessment.<sup>1479</sup> Thailand considers that Sections 112*bis* and 112*quater* of the Customs Act and those notices of assessment together provide enough transparency on the *existing* rules followed by the DG Excise.<sup>1480</sup>

7.853 The **Philippines** contends that Sections 112*bis* and 112*quater* of the Customs Act do not establish an unambiguous right to the release of guarantees, noting that the last paragraph of Section 112*quater* refers only to cash guarantees, and not to other forms of guarantees, such as bank guarantees.<sup>1481</sup> This point is of practical relevance because between 11 August 2006 and 28 March 2008 PM Thailand posted bank guarantees to clear shipments of imported cigarettes.<sup>1482</sup>

#### Analysis by the Panel

7.854 In this section, we evaluate whether Thailand has published the general rules relating to the right to the release of guarantees, as identified by the Philippines, consistently with its obligations under Article X:1.

7.855 Thailand alleges that it has satisfied its obligations through the Thai Customs Act and published notices of assessment. In Thailand's view, these legal instruments provide sufficient guidance to allow traders and governments to become acquainted with the rules governing the release of guarantees after a final customs determination is issued by the Thai Customs administration.

7.856 The Philippines argues that Sections 112*bis* and 112*quater* of the Customs Act do not provide sufficient guidance with respect to the release of guarantees for customs duties and the applicable taxes because these provisions, *inter alia*, do not establish an unambiguous right to the release of the guarantee. Section 112*bis* of the Thai Customs Act provides:

"In the case where a guarantee of the amount of duty is given under Section 112 and the Competent Officer has assessed the amount of duty payable and notified the importer or the exporter, as the case may be, the importer or the exporter shall pay the notified amount of duty within thirty days after the date of receiving the notice.

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<sup>1476</sup> Thailand's first written submission, para. 325; response to Panel question No. 74.

<sup>1477</sup> Thailand's response to Panel question No. 165.

<sup>1478</sup> Thailand's response to Panel question No. 165, referencing Exhibit PHL-20.

<sup>1479</sup> Thailand's response to Panel question No. 165, referring to Exhibit PHL-129.

<sup>1480</sup> Thailand's first written submission, para. 325; Exhibit PHL-20.

<sup>1481</sup> Philippines' response to Panel question No. 72; second written submission, para. 524.

<sup>1482</sup> Philippines' response to Panel question No. 72, referring to its first written submission, footnote 145 explaining that Prior to 28 March 2007, PM Thailand posted bank guarantees for the customs duties and excise tax due on the difference between the declared transaction value and the guarantee value. For the health and television taxes (first imposed in January 2008) that were due on this difference, PM Thailand posted cash guarantees. From 28 March 2007, PM Thailand posted cash guarantees for all items, that is, customs duties, excise tax, health tax and, after January 2008, also television tax.

In the case where cash has been deposited as security and the cash deposit is sufficient to cover the amount of duty assessed by the Competent Officer, the assessed amount of duty shall be paid from such cash deposit immediately, and the importer or exporter shall be deemed to have paid the notified amount or duty within the period specified in paragraph one."<sup>1483</sup>

7.857 Section 112*quater* of the Thai Customs Act provides:

"In the case where the duty paid or the cash deposit is to be refunded on account of it being demanded in excess of the amount or additional amount payable, the interest shall be paid together with the refund at the rate, not on compound basis, of 0.625 per cent a month on the refund from the date of payment of duty or latest deposit of cash to the date of approval of the refund. In the case where cash has been deposited in substitution for guarantee after the release or exportation of goods, the interest on the cash deposit to be refunded shall be calculated from the date of latest deposit of cash to the date of approval of the refund. In the calculation of the interest under this paragraph, a fraction of one month shall be counted as one month, and the interest to be paid shall be treated as duty to be refunded."<sup>1484</sup>

7.858 The text of the Customs Act, cited above, indicates that a guarantee may be requested towards the payment of the customs duty (Section 112*bis*) and that in the case of releasing cash guarantees, interest shall be paid at a fixed rate (Section 112*quater*). Therefore, they refer only to guarantees made in cash and do not specify whether guarantees placed in other forms are also subject to these provisions in situations warranting such a release.

7.859 The notices of assessment which Thailand alleges clarify that a refund for guarantee is available to importers only contain a column which states the "refund(+)" or "shortfall(-)" amounts for the importer. In our view, this document does not indicate whether such refunds are for guarantees placed in relation to excise, health and television taxes. Therefore, these notices of assessment produced by Thailand do not establish a sufficient link between importers' entitlement to a "refund" and the guarantees paid for excise, health and television taxes.

7.860 Therefore, despite Thailand's acknowledgment that "in essence, guarantees are to be refunded on the final assessment of the goods", the relevant documents referred to by Thailand in this dispute do not clearly indicate a definite right to the release of guarantees for the internal taxes upon final assessment of the goods. In such circumstances, importers will not be able to become acquainted with the exact nature of the right they have in respect of the release of guarantees for the internal taxes within the meaning of Article X:1.

7.861 In light of the foregoing, we conclude that the general rules on the right to the release of guarantees as currently published by Thailand in the Customs Act are not sufficient to satisfy the requirements under Article X:1 in relation to the guarantees for the excise, health and television taxes.

H. ARTICLE X:3(A) OF THE GATT 1994

# **1. Overview of the Philippines' claims under Article X:3(a)**

7.862 The Philippines advances four claims under Article X:3(a): (i) Thailand acts inconsistently with the obligations under Article X:3(a) to administer its customs and internal tax rules in a "reasonable" and "impartial" manner by appointing certain senior Thai government officials to serve

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<sup>1483</sup> Exhibit PHL-20.

<sup>1484</sup> Exhibit PHL-20.

on the board of directors of TTM; (ii) undue delays in the BoA's decision-making process are an "unreasonable" administration of the customs laws under Article X:3(a); (iii) the determination of the tax base for VAT (MRSP) for imported cigarettes is administered in a "non-uniform", "unreasonable" and "partial" manner; and (iv) the establishment of the excise, health and television taxes in relation to imported cigarettes is administered in a "non-uniform", "unreasonable" and "partial" manner.

7.863 We will first review the general nature and the scope of Article X:3(a) and then proceed to examine the Philippines' claims with respect to the specific Thai government's acts of administration of its laws and regulations as described above. We recall our conclusion that the third claim concerning the determination of the tax base for VAT is outside our terms of reference, as discussed in Section VII.B.1(a).

## **2. Nature and scope of the obligations under Article X:3(a)**

7.864 Article X:3(a) provides:

Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.865 Article X:1 in turn reads:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports ...

7.866 To establish a violation of Article X:3(a), a complaining party must therefore show that the responding Member *administers* the legal instruments of the kind described in Article X:1 in a manner that is *non-uniform, partial and/or unreasonable*.

7.867 The obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements.<sup>1485</sup> This means that, as the Panel in *Dominican Republic – Import and Sale of Cigarettes* noted, a violation of any of the three obligations will lead to a violation of the obligations under Article X:3(a).

7.868 In this regard, it is important to recall the Appellate Body's observation that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.<sup>1486</sup> In examining the Philippines' claims under Article X:3, we will therefore bear in mind that it is the principle of transparency, procedural fairness and due process that underpins the obligations embodied in Article X:3(a).

7.869 Turning to the scope of Article X:3(a), it is well established that the obligations under Article X:3(a) apply to the *administration* of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but *not* to such laws and regulations *themselves*.<sup>1487</sup> The

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<sup>1485</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.86.

<sup>1486</sup> Appellate Body Report, *US – Shrimp*, para. 183. The Appellate Body also underlined that "inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of *due process* should be required in the application and administration of a measure ... " (Appellate Body Report, *US – Shrimp*, para. 182) (emphasis added).

<sup>1487</sup> Appellate Body Reports on *EC – Bananas III*, para. 200; *EC – Poultry*, para. 115. The Panel in *Argentina – Hides and Leather* also stated that "Article X:3(a) refers specifically to the *method of application* of



Appellate Body states that to the extent that such laws and regulations are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.<sup>1488</sup> Further elaborating on the scope of Article X:3(a), the Appellate Body clarified that a government's act of administration subject to the provisions of Article X:3(a) includes not only acts of administering the laws and regulations of the kind in Article X:1, but also legal instruments that regulate the application or implementation of such laws and regulations.<sup>1489</sup> In other words, in determining the proper scope of Article X:3(a), the relevant question is, as the Panel in *Argentina – Hides and Leather* correctly noted, "whether the substance of such a measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".<sup>1490</sup>

7.870 In this connection, it has also been clarified that the term "administer" in Article X:3(a) may include in its scope "administrative processes", which in its broadest sense may be understood as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision.<sup>1491</sup> In *EC – Selected Customs Matters*, the Appellate Body had an opportunity to address the obligation to administer laws and regulations in a "uniform" manner, and it expressed the view that the term "administer" in Article X:3(a) may include in its scope "administrative processes". However, the Appellate Body considered that given that the term "administer" in Article X:3(a) refers to "putting into practical effect", or "applying", a legal instrument of the kind described in Article X:1, it is the *application* of a legal instrument of the kind described in Article X:1 that is required to be uniform under Article X:3(a), but *not the processes* leading to administrative decisions, or the tools that might be used in the exercise of administration.

7.871 The Appellate Body then added that the characteristics of an administrative process were nonetheless relevant for purposes of assessing whether a legal instrument of the kind described in Article X:1 is uniformly applied or put into practical effect in particular cases. Specifically, it states:

"[T]he features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1 may constitute *relevant evidence* for establishing uniform or non-uniform administration of that legal instrument. The probative value of such evidence will, however, depend on the circumstances of each case and will necessarily vary from case to case. Thus, we may conceive of cases where a panel might attach much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, the non-uniform application of the legal instrument at issue. On the other hand, a panel might conclude, after an overall assessment of the evidence, that the consistent nature of the results of the application of the legal instrument shows that the measure at issue is administered in a uniform

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measures identified in Article X:1." (emphasis added) (Panel Report, *Argentina – Hides and Leather*, para. 11.73) The Panel in the same dispute further elaborated that "the relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994." (para. 11.70; also referred to in the Panel Report, *US – Byrd Amendment*, para. 7.143).

<sup>1488</sup> Appellate Body Report, *EC – Bananas III*, para. 200.

<sup>1489</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 200. The Appellate Body states, "[u]nder Article X:3(a), a distinction must be made between the *legal instrument being administered* and the *legal instrument that regulates* the application or implementation of that instrument. While the substantive content of the legal instrument being administered is *not* challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument".

<sup>1490</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.70 (emphasis added).

<sup>1491</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 224.

manner, even though differences may exist at the level of the administrative process."<sup>1492</sup>

7.872 We note that the Appellate Body's analysis above was made in the context of the uniformity requirement in Article X:3(a). Although it is not entirely clear whether the Appellate Body intended its consideration of the scope of the term "administer" in the above context to also be extended to the obligations of reasonableness and impartiality under Article X:3(a), the subsequent statement by the Appellate Body tends to support the view that it should also be applicable to these other two obligations. While noting that evidence relating to the features of an administrative process can be adduced in support of a claim of a violation of Article X:3(a), the Appellate Body made the following concluding statement:

"[I]n order to substantiate a claim of violation based on an administrative process, it is not sufficient that the complainant merely recites the features of the administrative processes; it will also have to show how and why those features necessarily lead to a lack of *uniform, impartial, or reasonable* administration of a legal instrument of the kind described in Article X:1".<sup>1493</sup> (emphasis added)

7.873 In sum, the guidance provided by the Appellate Body suggests that Article X:3(a) dictates the disciplines governing the *administration* of the legal instruments of the kind described in Article X:1. The scope of administration that is subject to a challenge under Article X:3(a) includes both the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation. Further, administrative processes leading to administrative decisions may also be included in the scope of the term "administer" and hence Article X:3(a). However, to the extent that a claim of violation under Article X:3(a) is based on an administrative process, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of *uniform, impartial, or reasonable* administration of a legal instrument of the kind described in Article X:1.

7.874 As a final note, we are mindful of the Appellate Body's statement that as allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances, such allegations should not be brought lightly, or in a subsidiary fashion.<sup>1494</sup> The Appellate Body therefore cautioned that "a claim under Article X:3(a) of the GATT 1994 must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3(a) of the GATT 1994". Overall, our examination of the Philippines' claims under Article X:3 requires us to exercise a balanced judgment between the traders' fundamental right to procedural fairness and the sovereign right afforded to the Member governments in managing the manner in which they administer their own laws and regulations.

7.875 Bearing the above in mind, we will begin our analysis of the Philippines' claims under Article X:3(a) relating to the dual function of Thai government officials as TTM directors.

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<sup>1492</sup> Appellate Body Report, *EC – Selected Customs Matters*, paras. 224-225.

<sup>1493</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 226.

<sup>1494</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

### 3. Appointment of certain Thai government customs and tax officials as TTM directors

#### (a) Introduction

7.876 The Philippines claims that Thailand violates Article X:3(a) because Thailand administers its customs and tax laws and regulations in a partial and unreasonable manner by appointing government officials responsible for administering Thailand's customs and tax rules to TTM directors' position. Thailand argues that the Philippines has not established that Thailand actually fails to administer particular laws in a reasonable and impartial manner given, *inter alia*, the existence of safeguards against the improper use of the authority to get involved in relevant customs and tax decisions as well as the improper use of confidential information on imported cigarettes.

7.877 In examining the Philippines' claim, we will first evaluate whether the Thai government act of administration at issue, namely the appointment of dual function officials, falls within the scope of "administration" in Article X:3(a). If so, we will then proceed to assess whether this act leads to unreasonable and/or partial administration of the Thai customs and tax laws and regulations.

#### (b) Whether the appointment of selected customs and tax officials as TTM directors is an act of "administration" under Article X:3(a)

##### (i) *Main arguments of the parties*

7.878 The **Philippines** claims that vesting government officials that are TTM directors with decision making powers over imported and domestic cigarettes<sup>1495</sup> and giving them access to business confidential information<sup>1496</sup> on TTM's direct competitors is administration contrary to Article X:3(a). The Philippines argues that dual function officials are "directly involved" in many decisions related to the application of the measures at issue. The Philippines cites a number of tax/customs decisions where dual function individuals had a prominent role.<sup>1497</sup> The Philippines argues that those officials who also act as TTM directors, achieve their administrative mission in a way favourable to TTM. Hence, their nomination as TTM directors has an impact on the administration of the customs/tax measures at issue.

7.879 **Thailand** submits that the Philippines has failed to produce elements to show that TTM directors are directly involved in the decision-making processes at issue, such as the determination of the customs value, and the tax base for VAT imposed on cigarettes and excise, health and TV taxes.<sup>1498</sup> Thailand relies on *Argentina – Hides and Leather* to argue that the mere fact of granting dual functions to customs officials is not conclusive as "it all depends on what such persons are permitted to do".<sup>1499</sup> Therefore, Thailand asserts that nominating customs/tax officials as TTM directors does not constitute "administration" of the customs/tax measures at issue within the meaning Article X:3(a).

##### (ii) *Analysis by the Panel*

7.880 The Philippines claims that certain Thai government officials serving at the same time as TTM directors (also referred to as "dual function officials") have a decision making role in administering the Thai customs and tax laws. Thailand accepts that the Minister of Finance has nominated selected government officials as members of the board of TTM.<sup>1500</sup> However, Thailand

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<sup>1495</sup> Philippines' first written submission, para. 77.

<sup>1496</sup> Philippines' first written submission, para. 83.

<sup>1497</sup> Philippines' second written submission, paras. 30-35.

<sup>1498</sup> Thailand's response to Panel question No. 75; second written submission, para. 192.

<sup>1499</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.99.

<sup>1500</sup> As suggested in Thailand's first written submission, paras. 18, 115 and 270; Exhibit PHL-10.

disagrees that those dual function officials are involved sufficiently in the administration of the tax and customs measures for their nomination as TTM directors to qualify as "administration" under Article X:3(a).

7.881 The first question we need to examine in respect of the Philippines' claim regarding dual function officials is thus whether the appointment of certain high-ranking Thai government officials as TTM directors constitutes "administration" within the meaning of Article X:3(a).

7.882 Before beginning our analysis, we will first briefly address whether the Philippines, as a complainant claiming that Thailand administers legal instruments of the kind described in Article X:1 in a manner contrary to Article X:3(a), has demonstrated that the relevant legal instruments are "of the kind described in Article X:1". The Philippines submits that the legal instruments of the kind described in Article X:1 for its claim with respect to the dual function of Thai government officials are Thai measures pertaining to customs valuation, VAT and other tax measures.<sup>1501</sup> Specifically, the Philippines challenges the manner in which the Thai government administers the following laws and regulations:<sup>1502</sup>

- Customs Act, B.E. 2469 (1926), including all amendments; the Tobacco Act B.E. 2509 (1966), Section 5*ter*; Health Promotion Foundation Act, B.E. 2544 (2001), in particular Sections 11, 12, and 13 thereof, and any amendments, implementing measures or other related measures; Thai Public Broadcasting Service Act 2551 (2008), in particular Sections 12, 13, and 14 thereof, and any amendments, implementing measures or other related measures;
- Ministerial Regulation No. 132 B.E. 2543 (1990) issued under authority of the Customs Act B.E. 2469 (1926) and the amending Ministerial Regulation No. 145 B.E. 2547 (2004) and Ministerial Regulation No. 146 B.E. 2550 (2007); Customs Regulation No. 2/2550 (2007) Re: amendment of the Customs Formalities and Guidelines Code B.E. 2544 (2001) re: Customs formalities to prevent Customs value duty evasion, and amendment of Customs Department Regulation No. 14/2549 (2006) re: Guideline for Fixing of Customs Value; Customs Regulation No. 14/2549 (2006), re Guideline for Fixing of Customs Value, as amended by Customs Regulation No. 2/2550 (2007);
- Royal Decree, issued under the Revenue Code, Governing the Reduction of the Value Added Tax Rates (No. 465), B.E. 2550 (2007); Royal Decree issued under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (1991);
- Notification No. 23/2549 (2006) of Thai Customs, containing guidelines on customs valuation; Customs Notification No. 29/2549 (2006) Procedure in requesting duty fee assessment; Notification of the Director-General of the Revenue Department on VAT (No. 10);
- Sections 79/5 and 81 of the Revenue Code of Thailand;
- Order of the Revenue Department No. Por 85/2542 (1999);

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<sup>1501</sup> Philippines' first written submission, paras. 63, 65 and 67.

<sup>1502</sup> Philippines' first written submission, paras. 61-67.

- MRSP Notices issued by the Director-General for Excise. The currently applicable MRSPs are set out in the Notice B.E. 2550 (2007) of 29 August 2007 (for domestic products) and in the Notice B.E. 2550 (2007) of 29 August 2007 together with Notice B.E. 2550 (2007) of 18 December 2007 (for imported products); and
- Notices of Director-General for Excise, setting out *ex factory* prices of domestic cigarettes. The currently applicable *ex factory* prices are set out in the Notice B.E. 2550 (2007) of 29 August 2007.

7.883 Thailand does not object to the qualification of the above-listed Thai laws and regulations as the legal instruments of the kind falling under Article X:3(a). We find that the subject measures do therefore fall within the scope of the laws, regulations, decisions and rulings of the kind described in Article X:1.

7.884 Now turning to the main question in this section, we note that the Philippines takes the position that the appointment of government officials who allegedly have the authority to make decisions relating to the subject customs and fiscal laws as TTM directors, constitutes the administration of such laws within the meaning of Article X:3(a). The Philippines appears to base its position on the understanding that the appointment of government officials as TTM directors affects the administration of the Thai customs and tax rules, such as the customs valuation of imported cigarettes and the determination of the tax base for VAT as well as other taxes, in a manner inconsistent with the obligations under Article X:3(a). Thailand disagrees with the Philippines because, in its view, dual function officials are *not* sufficiently involved in the administration of the tax and customs measures for their nomination as TTM directors to qualify as "administration" under Article X:3(a).

7.885 We recall that Article X:3(a) governs the *administration* of laws and regulations, not the substance of the laws and regulations themselves. We also observed the Appellate Body's clarification that "administration" within the meaning of Article X:3(a) may also include in its scope *administrative processes*.

7.886 Considered against the standard of "administration" under Article X:3(a) as set out by the Appellate Body, we understand that the appointment of dual function officials as TTM directors may not be an *application* of the Thai customs and fiscal laws and regulations because it is not an act of *applying* the substance of the customs and tax provisions. Nonetheless the broad scope of administrative processes falling within the scope of Article X:3(a) suggests that the appointment of government officials to the director position of TTM (the only domestic company competing against imported cigarettes in the Thai market) may well be considered as part of the administrative process leading to the application and implementation of the customs and fiscal measures insofar as these government officials are sufficiently involved in applying or implementing the Thai customs and tax laws.<sup>1503</sup>

7.887 To prove the substantial involvement of these dual function officials in the relevant decision-making procedures, the Philippines points to the fact that in seven out of eight cases since 1995, the Chairman of TTM has been nominated as DG Customs, DG Excise, or DG Revenue.<sup>1504</sup> The

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<sup>1503</sup> To recall, administrative processes can be defined as "a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision" (Appellate Body Report, *EC – Selected Customs Matters*, para. 224).

<sup>1504</sup> Philippines' first written submission, para. 49. The only exception is the current chairperson, Mrs. Chantima Sirisaengtakin, who is an IT Consultant for the Revenue Department of the Ministry of Finance.

appointed DG Excise, DG Customs and DG Revenue are responsible for determining and administering customs and tax rules applicable to importers of cigarettes under the Thai law.<sup>1505</sup>

7.888 The Philippines has also submitted evidence showing that these dual function officials all have a degree of influence ranging from signature to substantive contribution authority. The following are examples of the participation by the subject dual function officials in the matters concerning customs and tax decisions for imported cigarettes: (i) the MRSP increase in September 2006 was signed by Mr. Utid Tamwatin, then acting both as Chairman of the TTM Board and as DG of Excise<sup>1506</sup>; (ii) a few days later, Mr. Tamwatin threatened to impose an import ban unless importers raised their RSPs to the level of the new MRSPs<sup>1507</sup>; (iii) the March 2007 and August 2007 MRSP Notices were signed by TTM Chairman Mr. Wisudh Srisuphan, who was also DG of Excise; (iv) the August 2008 MRSP Notice was issued when TTM Chairman Mr. Wisudh Srisuphan was the Deputy Permanent Secretary for Finance (Ministry of Finance); (v) the MRSP Notices in May 2009, were issued when Ms. Chantima Sirisaengtaksin was both TTM Chairman and consultant for the Revenue Department at the Ministry of Finance and when Arthon Keesiri, TTM Director, was Director of the Audit Prevention and Suppression at the Excise Department (Ministry of Finance); (vi) the decisions to reject the declared transaction values and to impose guarantees, concerning shipments cleared between 11 August and 30 September 2006, were taken by Thai Customs when TTM Director Manus Kampakdee was Deputy-Director General for Customs (Ministry of Finance); (vii) the decisions to reject the declared transaction value, to impose guarantees on shipments cleared between 1 October 2006 and 13 September 2007, as well as the definitive assessments of shipments cleared between 11 August 2006 and 13 September 2007, were taken when TTM Director Manus Kampakdee was the "Principal Advisor on Duty Collection Management & Development" at the Customs Department (Ministry of Finance); and (viii) the delays in the BoA decision-making, and in particular the BoA's alleged inaction since July 2006, have occurred while TTM Director Manus Kampakdee was Deputy-Director General of Customs or, alternatively, was "Principal Advisor on Duty Collection Management & Development", at the Customs Department (Ministry of Finance).<sup>1508</sup>

7.889 The set of evidence as listed above, in our view, suggests the dual function officials' sufficient involvement in the process of applying and implementing the Thai customs laws and regulations. As such, we consider that the appointment of government officials as TTM directors constitutes an administrative process leading to the administration of the Thai customs and fiscal laws and regulations and consequently qualifies as "administration" under Article X:3(a).

(c) Whether Thailand administers the laws, regulations, decisions and rulings of the kind described in Article X:1 in a "partial and unreasonable" manner through the appointment of dual function officials

(i) *"Impartial" administration*

Main arguments of the parties

7.890 The **Philippines** claims that TTM directors' dual role constitutes partial administration under Article X:3(a) as they are given both "the right to participate in an administrative process involving

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<sup>1505</sup> Philippines' first written submission, para. 48; Exhibit PHL-20. Chapter 1*bis*, Section 2*bis* states that "there should be a Customs Duty Ruling Commission composed of the under- Secretary of the Ministry of Finance as Chairman, the Director-General of the Customs Department, the Director-General of the Revenue Department, the Director-General of the Excise Department, the Director- General of the Fiscal Economics Office, the Secretary General of the Royal Decrees Commission and three other qualified persons appointed by the Minister to be members".

<sup>1506</sup> Exhibit PHL-86.

<sup>1507</sup> Philippines' first written submission, para. 393.

<sup>1508</sup> Philippines' first written submission, para. 48, Table 1 "Overview of TTM directors 1995-2009".

TTM's competitors [and] *decision making authority* in that administrative process".<sup>1509</sup> TTM directors have the ability to affect the conditions of competition of PM Thailand cigarettes in many ways.<sup>1510</sup> In particular, they may and do request a wide range of confidential information from all market participants.<sup>1511</sup> Using this information, they also have the incentive to take partial decisions since they are eligible for annual financial bonuses when TTM's net profit increases.<sup>1512</sup> Therefore the *role* and *powers* they are given, rather than simply their position itself, qualify as partial administration. In support of its position, the Philippines relies on *Argentina – Hides Leather*, where the Panel found that the presence of representatives of the domestic tanning industry in the customs clearance process was partial because it allowed administrators *potential* access to commercially sensitive information and it failed to provide for *adequate safeguards* against inappropriate use of this information.<sup>1513</sup>

7.891 Furthermore, the Philippines contends that no safeguards against undue use of the information obtained are put in place.<sup>1514</sup> In particular, the Philippines argues that the safeguards put forward by Thailand, namely the sanctions provided for in the Thai Civil Service Act and the Thai Criminal Code, will not apply to TTM by virtue of the *Ethical and Moral Guidebook of TTM*. This guidebook requires TTM Directors to maximise TTM benefits under all circumstances.<sup>1515</sup> In other words, TTM directors are under the obligation to favour TTM, to the detriment of its direct competitors. As part of the regulatory framework applicable to official authorities<sup>1516</sup>, this guidebook trumps other Thai laws<sup>1517</sup>, thereby shielding TTM directors from the sanctions of the Civil Service Act and Criminal Code. Regarding the evidence produced by Thailand to show that administrative officers were sometimes sanctioned under the Civil Service Act and the Thai Criminal Code, the Philippines argues that Thailand has not explained how those sanctions could be related to the specific acts at issue here.<sup>1518</sup> In any event, according to the Philippines, they have proved inefficient in halting the flow of confidential information to TTM directors, and do not prevent numerous acts of partial administration.<sup>1519</sup>

7.892 The Philippines also underlines the general lack of transparency in the deliberative process with respect to important aspects of Thailand's customs and tax laws. As a result, administrative officers generally remain unchecked.<sup>1520</sup> The Philippines concludes that no adequate safeguard is

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<sup>1509</sup> Philippines' response to Panel question No. 79.

<sup>1510</sup> Philippines' first written submission, para. 78.

<sup>1511</sup> Philippines' first written submission, para. 85; second written submission, para. 10. This information includes: pricing and expense information, details of PM Thailand's agreements with suppliers and purchasers, sales data, and internal accounting records and documents.

<sup>1512</sup> Philippines' first written submission, para. 79; Exhibit PHL-6, Section 1, p. 1.

<sup>1513</sup> Philippines' second written submission, paras. 44-47, referring to Panel Report, *Argentina – Hides and Leather*, para.11.99.

<sup>1514</sup> In its response to Panel question No. 151, the Philippines states that "the terms reasonable and impartial as interpreted and applied in the case-law suggests that access to business confidential information by TTM directors simultaneously serving as Thai Customs and tax officials makes Thailand's administration unreasonable while the lack of safeguards to prevent the flow of such information to TTM Directors makes unreasonable administration also impartial".

<sup>1515</sup> Philippines' response to Panel question No. 75. The Guidebook requires that TTM Directors must "make any determination for the utmost benefit of [TTM]"; Exhibit PHL-4.

<sup>1516</sup> Philippines' response to Panel question No. 75; Exhibit THA-35. The Civil Service Act compels government officials expressly to "perform official duties in accordance with laws, regulations, rules of official authorities, Council of Ministers resolutions, government policies, and act in accordance with the regulatory framework of official authorities." The Philippines considers that the Ethical and Moral Guidebook of TTM is one of the regulations thereof.

<sup>1517</sup> Philippines' response to Panel question No. 75.

<sup>1518</sup> Philippines' response to Panel question No. 153.

<sup>1519</sup> Philippines' response to Panel question No. 153; second oral statement, para. 12; second written submission, paras. 31-34 and 48.

<sup>1520</sup> Philippines' first written submission, paras. 81-82.

implemented by Thailand, in spite of the provisions contained in its own laws. Hence, Thailand's administrative process applicable to imports of foreign cigarettes is partial under Article X:3(a).

7.893 Further, the Philippines points out that although the Thai Civil Service Act<sup>1521</sup> could provide for an adequate safeguard as it bars government officers from holding managing positions in either *public or private* companies, Thailand chose not to apply these provisions to TTM, on the grounds that the prohibition under the Civil Service Act applies with regards to *private* companies only.<sup>1522</sup> The Philippines disagrees and alleges that the Civil Service Act also prohibits government officers from managing *public* entities, like TTM.<sup>1523</sup>

7.894 **Thailand** argues that the Philippines failed to prove that Thailand administers its customs and tax rules in a partial manner contrary to the obligations under Article X:3(a) through the appointment of government officials as TTM directors. Thailand recalls that under the *Argentina – Hides and Leather* test for impartiality, the mere presence of individuals at potentially conflicting positions is not enough to conclude that administration of laws is impartial within the meaning of Article X:3(a) and, as the Panel noted in that case, "it all depends on what such persons are permitted to do".<sup>1524</sup> Thailand also adds that the financial incentives for TTM directors are modest and based as much on attendance at meetings as on profits.<sup>1525</sup>

7.895 Thailand argues that the Philippines has not shown that directors were directly involved in making decisions on customs and tax matters. While Thailand does not deny that dual function individuals may also have access to confidential information on TTM's direct competitors, Thailand nevertheless asserts that it has enacted and implemented the relevant safeguards to prevent biased decision making as well as improper use of confidential information by TTM directors. Further, Thailand points out that the Philippines failed to show that the allegedly biased decisions referred to by the Philippines are linked to the concerned government officials with a dual function.

7.896 Thailand submits that under the Thai Civil Service Act heavy sanctions are imposed on government officials breaching their duties (including confidentiality) and provides statistical evidence of adequate implementation of these provisions.<sup>1526</sup> Second, civil servants are fully subject to the disciplines and penalties of the Criminal Code<sup>1527</sup> while they serve on the TTM Board. These include a possible ten years imprisonment for self-interested actions<sup>1528</sup> and wrongful exercise of duties<sup>1529</sup>, as well as possible life imprisonment for dishonesty in collection of duties or taxes.<sup>1530</sup>

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<sup>1521</sup> Exhibit THA-35. Section 83(6) of the Thai Civil Service Act prohibits government officials from serving as "a managing director or manager or hold any other position entailing a similar nature of work in a partnership or a company".

<sup>1522</sup> Philippines comments on Thailand's responses to Panel questions (second meeting), para. 369.

<sup>1523</sup> Philippines comments on Thailand's responses to Panel questions (second meeting), para. 380.

<sup>1524</sup> Thailand's first written submission, para. 274 referencing the Panel Report, *Argentina – Hides and Leather*, para. 11.99.

<sup>1525</sup> Thailand's second oral statement, para. 83; Thailand's second written submission, footnote 171; Exhibits THA-3, pp. 44-45, PHL-6 and PHL-7.

<sup>1526</sup> Thailand's response to Panel question No. 153.

<sup>1527</sup> Thailand's second oral statement, para. 80; Exhibit THA-84.

<sup>1528</sup> Section 152 of the Criminal Code (where "an official having the duty of managing or looking after any activity, takes the interest for the benefit of himself", the official "shall be punished with imprisonment of one to ten years and fine of two thousand to twenty thousand baht") (Exhibit THA-84).

<sup>1529</sup> Section 157 of the Criminal Code (where "an official, wrongfully exercises or does not exercise any of his functions to the injury of any person, or dishonestly exercises or omits to exercise any of his functions" that official "shall be punished with imprisonment of one to ten years or fined of two thousand to twenty thousand baht, or both") (Exhibit THA-84).

<sup>1530</sup> Section 154 of the Criminal Code (where "an official having the duty ... of collecting or checking taxes, duties, fees or any other money, dishonestly collects ... such taxes, duties, fees or money" the official



Furthermore, the Ministerial Regulation Edition 145 (B.E. 2547)<sup>1531</sup> provides that "the public authorities shall not disclose the confidential information or [information] which is provided on a confidential basis for the benefit of customs valuation without the specific permission of the person or government agency providing such information".<sup>1532</sup> Thailand denies that the Ethical and Moral Guidebook of TTM should protect TTM directors from legislative sanction regimes: it is only an internal code for the company's use, and cannot therefore supersede any legislative or regulatory act. Thailand asserts that the sanction regime applicable to administrative officers provides adequate safeguards *as such*, and has been implemented accordingly. Thailand concludes that as adequate safeguards are implemented to prevent undue use of the confidential information obtained by dual function officials, its administration of the customs and tax laws at issue is therefore not partial.

Analysis by the Panel

7.897 The Philippines claims that a dual role performed by certain Thai government officials as TTM directors constitutes partial administration under Article X:3(a) because they have the authority to make customs and fiscal determinations in respect of the cigarette imports at issue in this dispute; have access to confidential information on TTM's competitors; and are given financial incentives to promote TTM's profits. Moreover, the Philippines argues that there are no safeguards appropriate to prevent the abuse of their capacity as government officials in making these decisions pertaining to customs and tax rules. Thailand argues that the Philippines failed to prove that Thailand administers its customs and tax rules in a partial manner contrary to the obligations under Article X:3(a) through the appointment of government officials as TTM directors. In particular, according to Thailand, the Philippines has not shown that directors were directly involved in making decisions on customs and tax matters. Thailand has also enacted safeguards sufficient to prevent improper use of confidential information by TTM directors.

7.898 In order to determine whether the Thai government's act of appointing certain government officials as TTM directors is an *impartial* administration of the Thai customs and tax laws, we first recall our conclusion above that the Thai government act at issue may constitute part of the *administrative processes* leading to the administration of various customs and tax rules, while it may not constitute the administration of such rules *per se*. In the light of the Appellate Body's guidance concerning a claim under Article X:3(a) based on an *administrative process*, our task is to examine whether the Philippines has demonstrated how and why the features of the administrative process at issue, namely certain Thai government officials' dual role as TTM directors, necessarily leads to a lack of impartial administration. We are also mindful of the Appellate Body's statement that given the gravity of the accusations inherent in claims under Article X:3(a), a complaining party must support its claim with solid evidence.

7.899 The term "impartial" can be defined as "*adjective* 1. not favouring one party or side more than other; unprejudiced, unbiased; fair".<sup>1533</sup> The word "partial" means "*A. adjective.* 1. Inclined beforehand to favour one party in a cause, or one side of a question, more than the other, prejudiced, biased. *Opp.* Impartial".<sup>1534</sup> Based on the ordinary meaning, therefore, *impartial* administration would appear to mean the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.

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"shall be punished with imprisonment of five to twenty years or imprisonment for life, and fine of two thousand to forty thousand baht") (Exhibit THA-84).

<sup>1531</sup> Exhibit THA-85.

<sup>1532</sup> Thailand's second oral statement, paras. 84-86.

<sup>1533</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 1325 (2002).

<sup>1534</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 2107 (2002).

7.900 *Argentina – Hides and Leather* is the only WTO dispute to date in which the impartiality requirement under Article X:3(a) was addressed. In that dispute, the feature of the administrative process at issue was the presence of a private party with conflicting commercial interests in the customs process. The panel considered that the consistency of the customs process with the impartiality requirement of Article X:3(a) would depend on what that party is permitted to do<sup>1535</sup> That panel found that the answer to this question was related directly to the question of access to information as part of the product classification process. It was the view of the Panel that whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in the customs process, there is an inherent danger that the customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.<sup>1536</sup> The panel nevertheless considered that this situation could be remedied by adequate safeguards to prevent an inappropriate flow of one private person's confidential information to another as a result of the administration of the implemented customs law at issue.

7.901 We will now turn to the specific factual circumstances presented in this dispute. As noted above, the Philippines describes the following four elements as the relevant features of the dual roles that the Thai government has granted to certain government officials by simultaneously appointing them as TTM directors: (i) government officials with a dual function have the authority to make decisions relating to the Thai customs and tax laws with respect to imported and domestic cigarettes; (ii) they have access to confidential information of imported cigarette companies, which are TTM's direct competitors in the Thai market; (iii) their role as TTM directors gives them financial incentives to maximize TTM's profits; and (iv) there are no safeguards appropriate to prevent any improper use of their capacity as government officials in making customs and tax determinations for cigarettes.

7.902 Following the approach of the Panel in *Argentina – Hides and Leather*, we consider that the relevant question is what these dual function government officials arguably with an interest to promote TTM's profit level are permitted to do. As submitted by the Philippines, and illustrated in the evidence before us, their capacity as senior government officials holding high ranking positions in three divisions of the Ministry of Finance (i.e. DG Excise, DG Customs and DG Revenue) legally allows them to be involved in the decision making process for customs and fiscal matters and to have access to confidential information of imported cigarette companies. These factors, in conjunction with the financial incentives for TTM directors to maximize TTM's profits, as addressed below, would initially illustrate the circumstances that may lead to a lack of impartial administration of customs and fiscal matters in respect of imported cigarettes.

7.903 In support of its position, the Philippines points to instances where in its view partial administrative decisions were taken under the authority or with the active contribution of these dual function government officials.<sup>1537</sup> In these instances, the Philippines has cited to a number of decisions that did not necessarily reflect the commercial interests of PM Thailand, which were made while dual government officials were serving as TTM directors.<sup>1538</sup> The Philippines also points to confidential information that was unveiled to the Thai press between 2006 and 2009.<sup>1539</sup>

7.904 We agree that at a theoretical level, evidence of this kind, if properly substantiated, would help demonstrate that the administrative process at issue necessarily leads to a lack of an impartial

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<sup>1535</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.99.

<sup>1536</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.100 (emphasis added).

<sup>1537</sup> Philippines' second written submission, paras. 30-35; response to Panel question No. 79.

<sup>1538</sup> Philippines' response to Panel question No. 79; second written submission, para. 34.

<sup>1539</sup> Philippines' first written submission, para. 386; Exhibits PHL-1, 48, 54, 64, 85, 86 and 159. The information on the c.i.f. price and the import volume for PM Thailand cigarettes was revealed to the press by certain Thai government officials both in August- September 2007 and in June 2009. See para. 7.926.

administration. This is particularly so given that the allegation under Article X:3(a) of a Member government's biased administration requires the presentation of solid evidence. For example, therefore, a pattern of decisions would tend to show a lack of impartial administration.<sup>1540</sup> However, we are not convinced that the determinations referenced by the Philippines can necessarily be related to what the dual function officials do and/or what they are permitted to do in administering the Thai customs and tax rules. In other words, unless it can be shown that these determinations are made because of the very presence of the government officials serving also as TTM directors, we are not in a position to find that the appointment of dual function officials led to a partial administration of customs and tax rules. Moreover, it is also questionable whether these determinations can be considered consistent enough to show a pattern of decisions amounting to a partial administration of customs laws and regulations.

7.905 As regards financial incentives, we understand the Philippines' position to be that in the process of making customs and/or tax decisions, dual function officials would act in a manner in which TTM's profits would be maximized, for example, by negatively influencing the decisions for imported cigarettes, which in turn would increase the amount of bonuses granted to them as TTM directors. We recognize that financial bonuses for TTM directors are indeed related to TTM's net profit results.<sup>1541</sup> This is still the case even if, as Thailand submits, only 50 per cent of the bonus is function of TTM's net result and the other 50 per cent is granted upon attending board meetings.<sup>1542</sup> As such, financial incentives could indicate that the dual function officials may be motivated to maximize TTM's profit level. However, we are not presented with solid evidence suggesting that the existence of such motivation itself would necessarily lead to an administration of the customs and tax rules which would favour TTM's cigarettes.<sup>1543</sup>

7.906 Furthermore, the Philippines submits that Thailand does not provide adequate safeguards against the alleged partial administration. The Philippines bases its position on the argument that the *Ethical and Moral Guidebook of TTM* shields dual function officials from legislative sanctions that may be imposed when they act contrary to the disciplines provided for in the Thai Civil Service Act and the Criminal Code.<sup>1544</sup> Thailand responds that the *Ethical and Moral Guidebook of TTM* does not

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<sup>1540</sup> Panel Report, *US – Hot Rolled Steel*, para. 7.268.

<sup>1541</sup> Philippines' first written submission, para. 79; Exhibit PHL-6, Section 1, p.1.

<sup>1542</sup> Thailand's second written submission, footnote 171; see also Exhibits THA-3, pp. 44-45; PHL-6 and PHL-7.

<sup>1543</sup> In addition, we note that the Appellate Body has recognized that the good faith principle has an implication for the Panels' interpretation of the Members obligations. (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 297). The Panel in *Canada – Continued Suspension* also found that one aspect of the good faith principle applied to the context of WTO disputes was to grant members a presumption of WTO consistency in the application of their domestic laws:

"It is implicit from the duty to perform treaty obligations in good faith that a party to an international agreement should be deemed to have acted in good faith in the performance of its treaty obligations. More generally, even though Article 26 provides for an obligation and not a presumption, *pacta sunt servanda* is but only one expression of the principle of good faith. Good faith is a general principle of international law that governs all reciprocal actions of States. We are therefore inclined to agree with the European Communities that every party to an international agreement must be presumed to be performing its obligation under that agreement in good faith." (Panel Report, *Canada – Continued Suspension*, para. 7.317)

In the absence of solid evidence to prove the contrary, there is no reason to assume that TTM directors, who are Thai government officials, would act in contradiction to their WTO obligations.

<sup>1544</sup> Philippines' response to Panel question No. 75, para. 439. The Guidebook requires that TTM Directors must "make any determination for the utmost benefit of [TTM]". For example, the Philippines submits that, they would be exempt from the Thai Civil Service Act and Criminal Code provisions regarding the undue use of confidential information and impartial administration.

supersede any law in the sense that it is inferior to all statutes and codes in the hierarchy of norms. It is a TTM's internal document and, as such, does not carry with it any regulatory authority.

7.907 We note that the Philippines does not dispute that safeguards do exist in the form of Thai Civil Service Act and the Criminal Code. The Philippines contention is that no sanction can be adequately implemented under the Thai Civil Service Act and the Criminal Code against dual function officials because the TTM's *Ethical Guidebook* allegedly supersedes these legal instruments. To prove that safeguards are available and effectively implemented, Thailand presented a table showing the instances where sanctions were imposed on government officials under the Civil Service Act and the Criminal Code.<sup>1545</sup> In our view, although these examples show that the concerned legal instruments are indeed enforceable, they fail to clarify the issue raised by the Philippines, namely the applicability of the provisions under those legal instruments to dual function officials who are simultaneously governed by TTM's *Ethical Guide*.<sup>1546</sup> Nevertheless, we accept Thailand's explanation that the *Ethical Guidebook* is a TTM internal document and, as such, does not carry with it any regulatory authority to supersede legal authorities such as the Thai Civil Service Act and the Criminal Code. Based on the hierarchy of norms as commonly established in states, and in the absence of any convincing argument or evidence presented by the Philippines to prove otherwise, we find that the Thai Civil Service Act and the Criminal Code are the legal instruments that provide ethical disciplines to be respected by government officials including those with a dual function as TTM directors.

7.908 Finally, the Philippines argues that Thailand does not apply the Thai Civil Service Act to TTM<sup>1547</sup>, while this Act prohibits government officials from holding managing positions in companies like TTM. Thailand submits that the said Act applies only to *private* companies, and *not* to public companies.<sup>1548</sup> The text of the Thai Civil Service Act does not specify whether the concerned prohibition applies to both public and private companies. We, however, consider the parties' arguments on this point irrelevant to our consideration of the impartiality requirement. This is because, even if the Thai Civil Service Act were to apply to TTM so as to prohibit the appointment of government officials to TTM, whether Thailand complied with its own domestic law is not relevant for the purpose of this dispute.

7.909 In the light of the foregoing, we are of the view that the Philippines has *not* proved that the features relating to the appointment of certain government officials as TTM directors necessarily lead to a lack of *impartial* administration of the Thai customs and fiscal rules. In reaching this conclusion, we are mindful of the seriousness of the allegation concerning a sovereign government's administration of its laws and regulations. We recognize that there may be situations where a government's measure or act is so egregiously flawed that the unfairness inherent in such a measure or act may be sufficient to demonstrate an impartial administration without the need to illustrate it with a concrete example(s) of decisions resulted from the concerned administration. However, under the circumstances of this dispute, we do not find that the appointment of government officials as TTM directors, considered in the light of the implemented safeguards present, amounted to such a situation.

7.910 At the same time, however, we wish to emphasize that the principle of transparency and procedural fairness that permeates the obligations under Article X:3(a) and consequently the trading

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<sup>1545</sup> Thailand's response to Panel question No. 153.

<sup>1546</sup> Thailand's response to Panel question No. 153; Thailand's second written submission, paras. 193-198; Thailand's second oral statement, paras. 77-82. Civil servants are subject to the obligations in the Civil Service Act (i) "to perform official duties faithfully, honestly and fairly"; (ii) not to use one's position for personal gain; and (iii) not to engage in prejudicial or unfair acts or acts that dishonour the official's position (Sections 82-83 of the Civil Service Act).

<sup>1547</sup> Exhibit THA-35. Section 83(6) of the Thai Civil Service Act prohibits government officials from serving as "a managing director or manager or hold any other position entailing a similar nature of work in a partnership or a company".

<sup>1548</sup> Thailand's response to the Philippines' questions Nos. 4a and b.

system in general must be respected by the Members with utmost effort. Particularly, we are aware of the Philippines' concern that the general lack of transparency in the deliberative process with respect to important aspects of Thailand's customs and tax laws result in administrative officers generally remaining unchecked.<sup>1549</sup> In the light of the unusual factual circumstances in Thailand that certain government officials in charge of customs and tax determinations also serve on the board of directors for TTM, the only domestic competitor against imported cigarettes, it would be only prudent for Thailand to ensure that the administration of its customs and fiscal laws is carried out in a transparent and impartial manner.

(ii) "reasonable" administration

Main arguments of the parties

7.911 The **Philippines** claims that TTM directors' dual role constitutes unreasonable administration because they are in a position where they may gather and reveal confidential information on their direct competitor.<sup>1550</sup> In this regard, the Philippines relies on *Argentina – Hides and Leather*, where the Panel found that the presence of representatives of the domestic tanning industry in the customs clearance process was unreasonable because it "inherently contain[ed] the possibility of revealing confidential business information".<sup>1551</sup>

7.912 Furthermore, the Philippines points to the actual instances in which several customs officials disclosed PM Thailand's declared transaction value to the Thai media in 2006.<sup>1552</sup> On 29 August 2006, Mr. Varathep Ratanakorn, then Deputy Finance Minister, was quoted in the newspaper *Matichon* as stating that "the estimated price of *Marlboro* cigarette has been adjusted from Bt[[xx.xxx.xx]] to Bt[[xx.xxx.xx]] a pack".<sup>1553</sup> Two days later, the Finance Minister himself, Dr. Thanong Bidaya, provided information on the basis of which the newspaper *Khao Hun* could write that "L&M declared the imported price (c.i.f.) at only Bt[[xx.xxx.xx]] per pack, while *Marlboro* is declared only Bt[[xx.xxx.xx]]".<sup>1554</sup> On 27 September 2006 Mr. Utid Tamwatin, then DG Excise, discussed a potential import ban explaining how this threat impacted the import price of *Marlboro* cigarettes which "had been at [[xx.xxx.xx]] baht per pack [and] was changed to [[xx.xxx.xx]] per pack for the past two to three months".<sup>1555</sup>

7.913 In August 2006, three other breaches of confidentiality occurred when (i) the *Daily News* and the *Bangkok Post* both reported statements made by V. Ratanakorn (Deputy Finance Minister)

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<sup>1549</sup> Philippines' first written submission, paras. 81-82.

<sup>1550</sup> Philippines' first written submission, para. 85. The Philippines puts forward that the following confidential information can be accessed by dual role officials: pricing and expense information (Exhibit PHL-16); details of PM Thailand's agreements with suppliers and purchasers (Exhibit PHL-16); sales data (Exhibits PHL-17 and PHL-18); and internal accounting records and documents (Exhibit PHL-19). The Notification of the Customs Department No. 23/2549 of 7 April 2006 (Exhibit PHL-21) also lists the information to be filed upon along with the import declaration including two copies of invoice, a packing List (if any), an insurance premium or other documents indicating the insurance premium, a release order (Customs Form 100/1 or Form 469), a Bill of Lading or air waybill as the enclosed Attachment 1, a Customs Value-Declaration Form (Customs Form No 170), an import license if the imported goods are restricted, a certificate of analysis, specifications of goods, material data sheet detailing sufficient information for Customs purpose, including production processes (if any), and guidelines on application of the goods where necessary, a certificate of origin, and other documents as required by Customs e.g. documents detailing product mixtures, characteristics, guidelines on application of goods, catalogue, etc.

<sup>1551</sup> Panel Report, *Argentina – Hides and Leather*, para.11.94 (italics added).

<sup>1552</sup> Philippines' first written submission, paras. 387-399; response to Panel question No. 152.

<sup>1553</sup> Exhibit PHL-85.

<sup>1554</sup> Exhibit PHL-1.

<sup>1555</sup> Exhibit PHL-86.

revealing that the price of imported cigarettes would be increased<sup>1556</sup> and discussing the impact of this measure on DG Customs revenues<sup>1557</sup>; (ii) the *Post Today* reported information provided by an unnamed "source from Customs Department" which revealed PM Thailand's import prices and import quantities for both *L&M* and *Marlboro* brands in 2005; and (iii) the 29 August 2006 edition of *Matichon* published an Article containing the following table that reveals the "c.i.f." price of three brands of cigarettes: *Marlboro*, *L&M*, and *Mild Seven*.<sup>1558</sup>

7.914 **Thailand** explains that it could legally grant dual functions to government officials on two grounds. First, Thailand was not constrained by the prohibition under Article 83(6) of the Thai Civil Code since it only prohibits government officials from also managing *private* companies. Government officials may however be appointed to managing positions in public companies as is common practice.<sup>1559</sup>

7.915 In addition, Thailand argues that granting dual positions to selected administrative officials is relevant as it promotes legitimate administrative objectives. Thailand distinguishes the facts in *Argentina – Hides and Leather* from the circumstances of this case. In *Argentina – Hides and Leather*, the Panel found the appointment of private specialists as customs officials to be unreasonable administration under Article X:3(a) because the private specialists were direct competitors to the importer and "had no legal relationship" to the custom operations.<sup>1560</sup> On the other hand, Thailand emphasizes that that Panel recognized that, the "government has a relevant legal interest in the transaction based on the sovereign rights to regulate and tax [imports]".<sup>1561</sup> Accordingly, Thailand argues, a government may appoint *any public agent* to the administrative process relating to cigarettes imports.<sup>1562</sup> Nominating the *same* agents as TTM directors also makes sense for three reasons: (i) they "have expertise relevant to the management of a state-owned enterprise" importing tobacco and collecting the related taxes; (ii) they can "play a role in ensuring that *TTM itself* complies efficiently" with the Thai legislation<sup>1563</sup>; and (iii) they are making sure that TTM's activities are consistent with Thai public health policy (TTM Board includes an individual of the Ministry of Health).<sup>1564</sup>

7.916 Thailand also observes that the Philippines has not proffered any evidence to link the 2006 confidentiality breach to an institutional "problem" of the Thai administrative system as a whole. Thailand concludes that the Philippines has not discharged its burden of proof under Article X:3(a).

7.917 Thailand also draws the Panel's attention to the fact that there are "several policy reasons" why the Panel should not rule in favour of the Philippines.<sup>1565</sup> According to Thailand if "a mere fact of public officials having dual roles or supervisory authority over competing interests was sufficient to establish a violation of Article X:3(a) [then] the regulatory capacity of governments would be severely impaired".<sup>1566</sup> In particular, Thailand maintains that finding a violation of Article X:3(a) under these facts would make it impossible for Members to continue with the relatively common practice of having the same departments and officials conduct internal reviews of administrative decisions made by those same departments and officials.<sup>1567</sup>

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<sup>1556</sup> Exhibit PHL-64.

<sup>1557</sup> Exhibit PHL-54.

<sup>1558</sup> *Mild Seven* is a brand marketed by Japan Tobacco International (JTI).

<sup>1559</sup> Thailand's response to Panel question No. 154; Exhibit THA-98.

<sup>1560</sup> Panel Report, *Argentina – Hides and Leather*, para.11.98.

<sup>1561</sup> Panel Report, *Argentina – Hides and Leather*, para.11.98 (replacing "exports" by "imports").

<sup>1562</sup> Thailand's response to Panel question No. 151.

<sup>1563</sup> Thailand's second written submission, para. 200.

<sup>1564</sup> Thailand's second written submission, para. 200, footnote 175; response to Panel question No. 75.

<sup>1565</sup> Thailand's second written submission, para. 183.

<sup>1566</sup> Thailand's second written submission, para. 183.

<sup>1567</sup> Thailand's second written submission, para. 183.

Analysis by the Panel

7.918 The Philippines claims that the appointment of dual function officials as TTM directors constitutes *unreasonable* administration under GATT Article X:3(a) because they are in a position where they may gather and reveal confidential information on their direct competitors. Thailand argues that granting dual functions to government officials is consistent with the reasonable administration requirement under Article X:3(a) because it is allowed in Thailand's domestic law<sup>1568</sup> and promotes Thailand's legitimate administrative objectives.

7.919 The term "reasonable" is defined as "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".<sup>1569</sup> The panel in *Argentina – Hides and Leather* considered in the light of the factual circumstances in that dispute that "the requirement of reasonableness ... turns on the question of information flows and whether it is reasonable to allow persons access to certain information which is irrelevant to the stated purpose of the legislation in question".<sup>1570</sup> It added that a feature of administration is unreasonable when it "*inherently* contains the possibility of revealing confidential business information".<sup>1571</sup>

7.920 We recall the Appellate Body's consideration in *US – Shrimp* that the provision of Article X:3 of the GATT 1994 bears upon the chapeau of Article XX, which requires the application of a measure justifiable under one of the Article XX provisions *not* to be arbitrary or unjustifiable. This may be linked to the fact that, as the Appellate Body in *Brazil – Retreaded Tyres* states, the chapeau of Article XX also deals with the *manner of application* of the measure at issue.<sup>1572</sup> As such, we do not see why the principles underlying the requirements in the chapeau of Article XX would not equally be relevant to Article X:3(a), a provision also governing *the manner* in which WTO Members *administer* the legal instruments of the kind falling under Article X:1.

7.921 To the extent that the obligations under the chapeau of Article XX and Article X:3(a) can be considered as informing each other, the Appellate Body's clarification of the principles underlying the chapeau of Article XX provide guidance on the analysis of the reasonableness requirement under Article X:3(a). For example, in examining whether an import ban provisionally justified under Article XX(b) for the purpose of protecting human health and life was applied in an unjustifiable or arbitrary manner, the Appellate Body in *Brazil – Retreaded Tyres* reasoned that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the *cause* of the discrimination, or the *rationale* put forward to explain its existence".<sup>1573</sup> We consider that the rationale that can explain the granting of dual functions to selected customs and tax

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<sup>1568</sup> Exhibit THA-35. Thailand explains that Article 83(6) of the Thai Civil code only prohibits administrative officials from also holding managing positions in private companies. They may however hold simultaneous managing positions in public companies. Thailand also refers to Exhibit THA-98 listing 63 administrative officials holding managing position in public companies. The list is non-exhaustive.

<sup>1569</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385 referring to the *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. II, p. 2482 (2002).

<sup>1570</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.86.

<sup>1571</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.94 (emphasis added).

<sup>1572</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 230.

<sup>1573</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (emphasis added). The Appellate Body explains, "the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US – Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure ... was 'difficult to reconcile with the declared objective of protecting and conserving sea turtles'" (para. 227, referring to the Panel Report, *US – Shrimp*, para. 7.287).

officials is also relevant to evaluating the question of whether it is an administrative process that leads to unreasonable administration of the Thai tax laws and regulations.

7.922 Under the factual circumstances in this case, we consider that all three features, not just the information flow, of the dual function officials, as described in the context of the impartiality requirement, are relevant to the question before us.<sup>1574</sup> We found that the Thai government officials with a dual function as TTM directors have the authority to make decisions relating to the Thai customs and tax laws with respect to imported and domestic cigarettes, not to mention access to confidential information on imported cigarettes, which is information on TTM's direct competitors in the Thai market. We also observed that their role as TTM directors gave dual function officials financial incentives to maximize TTM's profits. These features, in our view, present an environment in which these dual function officials, when acting in their capacity as customs and tax officers, could affect the manner in which they administer the rules given their simultaneous position at TTM, an entity with competing commercial interests to imported cigarette brands. Therefore, granting dual function officials the power to make customs and fiscal decisions concerning cigarettes, both imported and domestic, as well as access to confidential information on imported cigarettes would appear to constitute an act of *inappropriate* and/or *not* sensible administration unless there is a particular rationale that can explain the concerned act.

7.923 Thailand nonetheless points out that granting dual positions to selected government officials promotes legitimate administrative objectives: (i) they "have expertise relevant to the management of a state-owned enterprise" importing tobacco and collecting the related taxes; (ii) they can "play a role in ensuring that *TTM itself* complies efficiently" with the Thai legislation<sup>1575</sup>; and (iii) they are making sure that TTM's activities are consistent with Thai public health policy (TTM Board includes an individual of the Ministry of Health).<sup>1576</sup>

7.924 A sovereign state has the discretion and authority to structure its government and manage and administer its own laws and regulations as it deems fit. Accordingly, we can envision a situation where a government wants to utilize its resources to the maximum extent possible by, for example, granting officials dual functions. To that extent, we are not in a position to second guess the specific needs of the Thai government in assigning selected customs and tax officials with a dual role as a director of a state enterprise, TTM. We therefore recognize that the Thai government officials serving as DG Excise, DG Revenue, DG Commerce may indeed be well equipped to apply their expertise in laws and regulations relating to customs and internal taxes to the management of TTM.

7.925 The Philippines argues that, even though those objectives were legitimate, other avenues were available to reach identical results. We agree that there might be other means and ways to achieve Thailand's stated administrative objectives than the current administrative process at issue. However, as noted above, it is our view that Thailand, as a sovereign state, may administer its laws and regulations in the way it considers most appropriate in the particular circumstances in which it is situated. It should be noted though, that a WTO Member's discretion to administer its own laws, must be exercised in a manner consistent with its obligations under the WTO Agreement. Our task is, therefore, not to find the best administrative means to achieve a Member's goal.

7.926 The Philippines also draws the Panel's attention to the instances in which PM Thailand's confidential information was revealed by Thai government officials. By way of example, the Philippines points to the instances in 2006 in which several customs officials disclosed PM Thailand's declared transaction value to the Thai media.<sup>1577</sup> On 29 August 2006, Mr. Varathep Ratanakorn, then

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<sup>1574</sup> See para. 7.901.

<sup>1575</sup> Thailand's second written submission, para. 200.

<sup>1576</sup> Thailand's second written submission, para. 200, footnote 175; response to Panel question No. 75.

<sup>1577</sup> Philippines' first written submission, paras. 387-399; response to Panel question No. 152.



Deputy Finance Minister, was quoted in the newspaper *Matichon* as stating that "the estimated price of *Marlboro* cigarettes has been adjusted from Bt[[xx.xxx.xx]] to Bt[[xx.xxx.xx]] a pack".<sup>1578</sup> Two days later, the Finance Minister, Dr. Thanong Bidaya, provided information on the basis of which the newspaper *Khao Hun* wrote that "*L&M* declared the imported price (c.i.f.) at only Bt[[xx.xxx.xx]] per pack, while *Marlboro* is declared only Bt[[xx.xxx.xx]]".<sup>1579</sup> On 27 September 2006 Mr Utid Tamwatin, the then DG Excise discussed a potential import ban explaining how this threat impacted the import price of *Marlboro* cigarettes which "had been at [[xx.xxx.xx]] baht per pack [and] was changed to [[xx.xxx.xx]] per pack for the past two to three months".<sup>1580</sup> Thailand does not dispute these occurrences either.

7.927 However, we find that the Philippines failed to make a connection between the concerned instances of the unauthorized publication of confidential information and the dual function government officials. In other words, we are not presented with evidence indicating that such unauthorized publication of PM Thailand's confidential information can necessarily be related to the concerned government officials' dual role as TTM's directors.

7.928 Furthermore, we recall our consideration above that these selected government officials with a dual function are subject to the obligations under the Thai Civil Service Code and the Criminal Code. The Philippines argues that they are ineffective in preventing acts of unreasonable administration on the same grounds that safeguards could not prevent impartial administration.<sup>1581</sup> However, the instances of the alleged breach of confidentiality would not necessarily disprove of the fact that these legal instruments can and do function as safeguards against the inappropriate use of their positions, access to confidential information, and financial incentives to maximize TTM' profits.

7.929 In conclusion, given the rationale behind it, and considered in conjunction with safeguards in the system, we find that the Philippines has not established that the features of Thailand's granting selected customs and tax officials with a dual function as TTM directors necessarily lead to an unreasonable administration of the Thai customs and tax laws and regulations within the meaning of Article X:3(a).

#### **4. Delays in the BoA's decision-making concerning PM Thailand's appeals against Thai Customs' determinations**

##### **(a) Introduction**

7.930 In Thailand, DG Customs takes customs valuation decisions. These decisions can be appealed, which entails a two-step process: appeals are first examined by the Sub-Committee for customs valuation, which then transmits the file to the Board of Appeals ("BoA") for a decision.<sup>1582</sup> Determinations of the BoA may then be appealed to the Tax Court.<sup>1583</sup>

7.931 The Philippines argues that undue delays are observed in the processing of a certain number of appeals lodged by PM Thailand against Thai Customs' determinations. The Philippines claims that this delay in the BoA's processing amounts to an *unreasonable* administration within the meaning of Article X.3(a). Thailand claims that Article X:3(a) was not intended to impose absolute deadlines on Members for the completion of such administrative proceedings, and therefore the Panel should not interpret the term "unreasonable" to impose specific deadlines on Members' administrative

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<sup>1578</sup> Exhibit PHL-85.

<sup>1579</sup> Exhibit PHL-1.

<sup>1580</sup> Exhibit PHL-86.

<sup>1581</sup> Philippines' second written submission, paras. 42-48.

<sup>1582</sup> Thailand's response to Panel question No. 145 citing Exhibit THA-88.

<sup>1583</sup> Exhibit PHL-20, Section 112*octuordecies*.

proceedings. In addition, Thailand states that the question of what is "reasonable" administration of the law in a particular case necessarily depends on the circumstances of the case.

- (b) Whether the BoA's review of customs valuation determinations constitutes "administration" within the meaning of Article X:3(a)

7.932 As the Panel noted in paragraph 7.869 above, "administration" in Article X:3(a) covers both the manner in which the legal instruments of the kind falling under Article X:1 are *applied* or *implemented* in particular cases as well as a legal instrument that regulates such application or implementation.

7.933 The Philippines' claim concerns delays caused in the BoA's review of certain customs valuation decisions for PM Thailand's cigarettes. As noted above, appeals made against customs valuation decisions are first lodged with and examined by the BoA, which is an administrative review body within the Ministry of Finance.<sup>1584</sup> Under the Thai law, the decisions of the BoA can then be appealed at the judicial level. We consider that the review of customs valuation decisions at the BoA level is an act of "putting into practical effect, or applying" the relevant Thai customs laws and thus falls within the meaning of the term "administer" in Article X:3(a). Moreover, the parties do not dispute that the appeals process of customs valuation decisions constitutes "administration" of the customs laws.

7.934 Therefore, we will proceed to examine whether the precise aspect of the Thai government's administration at issue here, namely the *delays* in the BoA process of reviewing certain customs valuation decisions at issue, resulted in an *unreasonable* administration of the Thai customs law.

- (c) Whether Thailand administered its customs laws in an "unreasonable" manner through delays caused in the BoA's review process

- (i) *Main arguments of the parties*

7.935 The **Philippines** claims that Thailand violates Article X:3(a) by unreasonably administering its customs laws applicable to imports of foreign cigarettes by delaying the processing of [[xx.xxx.xx]] custom valuation appeals before the BoA for a period of six to seven years. Those delays constitute a pattern of unreasonable administration under Article X:3(a)<sup>1585</sup> because they are "not appropriate or suitable to the circumstances"<sup>1586</sup> and leave importers without a timely remedy against decisions by Customs authorities.<sup>1587</sup>

7.936 The Philippines considers that a finding of unreasonableness under Article X:3(a) requires that the totality of the circumstances be examined.<sup>1588</sup> Yet, the duration of an administrative proceeding alone may be unreasonable administration, absent adequate countervailing explanations for the delays observed.<sup>1589</sup> In this regard, the Philippines first describes the pattern of delays

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<sup>1584</sup> As we address below in the context of our examination of the Philippines' claim under Article X:3(b), we find that the BoA is not independent of the agency entrusted with administrative enforcement, namely the Ministry of Finance, within the meaning of Article X:3(b).

<sup>1585</sup> Philippines' second written submission, para. 560.

<sup>1586</sup> Philippines' first written submission, para. 95, referring to the Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385.

<sup>1587</sup> Philippines first written submission, paras. 95-96.

<sup>1588</sup> Philippines' second written submission, para. 545; Philippines' response to Panel question No. 80. "In this case, the factors to be considered are: (1) the duration of the proceedings so far; (2) the nature of the appeals; (3) the BoA's treatment of similar appeals; (3) the nature and intensity of the efforts undertaken by the BoA to resolve appeals; and (5) any explanation given by Thailand for the duration of the proceedings".

<sup>1589</sup> Philippines' response to Panel question No. 80.

concerning [[xx.xxx.xx]] claims, and then explains that it is exclusively due to misadministration by the BoA.

7.937 The Philippines recalls that [[xx.xxx.xx]] claims were originally brought regarding the custom valuation determinations of cigarettes which entered Thailand between 2000 and 2002. Of the appeals, [[xx.xxx.xx]] related to the entries of *Marlboro* cigarettes in 2002. Those [[xx.xxx.xx]] appeals were still undetermined at the time of the filing of the Philippines' second written submission in this proceeding.

7.938 The Philippines submits a statistical table to describe how the [[xx.xxx.xx]] claims were processed by the BoA: the processing of the [[xx.xxx.xx]] claims at issue is unduly prolonged (the earliest and the most recent of these [[xx.xxx.xx]] appeals have been pending for almost 7.5 and 6.5 years respectively); and the processing is extremely long compared to the average time taken for similar claims (as of the day of filing, the appeals examination of the cases at issue had already taken 4.55 years more than the average time necessary to resolve similar appeals).<sup>1590</sup>

7.939 The Philippines relies on the Panel's statement in *Colombia – Ports of Entry* that Colombia's post-importation review of customs values "appears quite lengthy, taking two years or more for an importer to obtain a refund".<sup>1591</sup> The Philippines underlines that, on average, Thailand's review of custom valuation decisions has taken three times longer than the period discussed in that case.<sup>1592</sup> The Philippines concludes that this delay constitutes unreasonable administration within the meaning of Article X:3(a).

7.940 Moreover, the Philippines states that no countervailing explanation justifies the BoA's delays in processing the [[xx.xxx.xx]] appeals at issue. First, the Philippines contests that the [[xx.xxx.xx]] appeals presented particular difficulty compared to other cases. Through the [[xx.xxx.xx]] resolved appeals, the BoA has consistently decided to apply the *same company wide* P&GE ratio<sup>1593</sup> to *all* cigarettes (either *L&M* or *Marlboro*) imported by PM Thailand and cleared on the Thai market during the 2000-2003 period.<sup>1594</sup> The [[xx.xxx.xx]] entries at issue also concerned PM Thailand cigarettes (*Marlboro*) entering and being cleared on the Thai market between 2002 and 2003. Hence no additional determination should have been necessary to assess the applicable P&GE.<sup>1595</sup> The same P&GE that applied to *all* other PM Thailand cigarettes for products entering and being cleared at the same dates should have been applied without further deliberation.<sup>1596</sup>

7.941 Second, the Philippines disagrees that PM Thailand contributed to undue delays in processing the [[xx.xxx.xx]] claims at issue. In particular, PM Thailand's 2005 request for a different adjusted P&GE ratio cannot justify the extraordinary delays observed.<sup>1597</sup> The Philippines recalls that it submitted this alternative ratio in response to the intent indicated by the BoA<sup>1598</sup> not to apply the

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<sup>1590</sup> Philippines' comments on Thailand's response to Panel questions Nos. 143-144.

<sup>1591</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.128.

<sup>1592</sup> Philippines' response to Panel question No. 80.

<sup>1593</sup> Philippines' comments on Thailand's response to Panel questions Nos. 143-144. P&GE stands for "profit and general expenses", which equals the gross margin.

<sup>1594</sup> Exhibit PHL-273a, BoA Ruling 4, June 19, 2006. See also the Philippines' response to Panel questions Nos. 143-144. This even included 6 entries cleared on the same day as two of the entries concerned by the [[xx.xxx.xx]] outstanding appeals.

<sup>1595</sup> Philippines' response to Panel question No. 143.

<sup>1596</sup> Philippines' comments on Thailand's response to Panel questions Nos. 143-144.

<sup>1597</sup> Exhibit PHL-154. By a letter dated 15 December 2005, PM Thailand requested that a ratio different from the company wide ratio be applied to entries having occurred between January 2002 and December 2002.

<sup>1598</sup> Philippines' second oral statement, para. 145, referring to a meeting held between BoA and PM Thailand on 28 September, 2005 where BoA allegedly stated its intent not to apply the company wide adjusted ratio of [[xx.xxx.xx]] per cent to the [[xx.xxx.xx]] claims at issue.

adjusted company-wide P&GE ratio to 2002 *Marlboro* entries<sup>1599</sup>, [[xx.xxx.xx]<sup>1600</sup>]]. While the BoA could reasonably require additional information, the BoA proved dilatory in the extreme as shown by the submitted chronology table.<sup>1601</sup>

7.942 Third, the Philippines disputes that a modification in PM Thailand's net overall financial performance in the year 2002 can explain additional delays in the BoA's determination of the [[xx.xxx.xx]] claims at issue. Thailand fails to explain how PM Thailand's financial performance may influence the BoA decisions and trigger delays. Additionally, if any measure of financial performance should be used for the purpose of customs valuation, the BoA should have focussed on PM Thailand's gross margin (which deducts expenses) as provided in Article 5.1(a) of the Customs Valuation Agreement. PM Thailand's gross margin remained positive between 2000 and 2002: the BoA was therefore not facing any new situation compared to already decided appeals. Finally, even assuming PM Thailand's overall financial performance to be relevant, the BoA should have acted more rapidly and diligently throughout the six years since the PM Thailand's 2002 financial record was published.<sup>1602</sup>

7.943 Last, the Philippines also contests that PM Thailand's 2007 request that [[xx.xxx.xx]] appeals be treated expeditiously<sup>1603</sup> warranted that those appeals be prioritized over the [[xx.xxx.xx]] appeals at issue, thereby triggering additional delays.<sup>1604</sup>

7.944 The Philippines fails to understand Thailand's argument that such a long review process was in PM Thailand's financial interest. The Philippines insists that, even if this was accurate, it would by no means exempt Thailand from its obligations under Article X:3(a).<sup>1605</sup> The Philippines concludes that no countervailing explanation was convincingly substantiated by Thailand. Thus, the extremely long time taken by the BoA to process the appeals of the [[xx.xxx.xx]] customs valuation claims at issue constitutes unreasonable administration of the relevant customs laws.

7.945 **Thailand** submits that it administers its customs laws in compliance with the requirements of Article X:3(a). It first points out that the Philippines' claim covers only 23 per cent of all PM Thailand's appeals reviewed since 2000<sup>1606</sup> while 77 per cent of the reviews were conducted in a timely manner.<sup>1607</sup> This provides for a reasonable timeline for appeals review. Thailand also alleges that an examination of the totality of the circumstances surrounding the appeals at issue does not warrant the conclusion that they were unreasonably administered within the meaning of Article X:3(a).<sup>1608</sup>

7.946 First, Thailand submits that PM Thailand hindered the review proceedings<sup>1609</sup> by requiring the BoA to apply a new P&GE calculation method<sup>1610</sup> to the [[xx.xxx.xx]] claims at issue. Thailand

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<sup>1599</sup> Philippines' second oral statement, paras. 145-149.

<sup>1600</sup> [[xx.xxx.xx]].

<sup>1601</sup> Philippines' response to Panel questions Nos. 143-144. Table submitted in the Philippines' second written submission, para. 579. *See also*, Philippines' comments on Thailand's response to Panel questions Nos. 143-144, explaining that PM Thailand's frequent requests for information through the period were not timely answered by BoA.

<sup>1602</sup> Philippines' response to Panel questions Nos. 143-144.

<sup>1603</sup> Exhibit THA-58, asking for expeditious treatment of [[xx.xxx.xx]] entries filed in 2006-7.

<sup>1604</sup> Philippines' comments on Thailand's response to Panel question No. 145.

<sup>1605</sup> Philippines' comments on Thailand's response to Panel questions Nos. 143-144.

<sup>1606</sup> Thailand's response to Panel question No. 82, citing EC Third Party Written Submission, para. 61.

<sup>1607</sup> Exhibit THA-97 The average time necessary to complete the [[xx.xxx.xx]] reviews was 2 years, 6 months, 28 days.

<sup>1608</sup> Thailand's response to Panel question No. 80, citing EC third party submission, para. 62.

<sup>1609</sup> Thailand's response to Panel question No. 80; Thailand's second written submission, para. 211.

<sup>1610</sup> Exhibit PHL-154.

declares that calculating the new ratio proved a difficult task since the data submitted by PM Thailand differed substantially from the information provided in the context of other similar appeals. Hence, Thailand disputes that the BoA has been inactive in reviewing the [[xx.xxx.xx]] appeals at issue.<sup>1611</sup> Moreover, Thailand fails to understand the Philippines' argument that an adjusted company-wide ratio should have been applied to the entries at issue. PM Thailand had indeed requested that a *distinct* ratio be applied.<sup>1612</sup> Thus, it was reasonable for the BoA: (i) not to apply the [[xx.xxx.xx]] per cent company wide ratio, and (ii) to use the time necessary to conduct an adequate review of PM Thailand's successive propositions for alternative ratios.<sup>1613</sup>

7.947 In addition, Thailand underlines that examining the new ratio propositions required that difficult calculation issues be resolved. In particular, PM Thailand's financial statements regarding the critical period evolved to a profit (rather than a loss) situation. This meant that Thailand had to adjust its custom valuation calculation method, which proved very time consuming.

7.948 Third, Thailand argues that it was in PM Thailand's best financial interest that a different ratio be calculated and applied. In support of its position, Thailand emphasizes that PM Thailand was then able to submit [[xx.xxx.xx]] per cent, a higher P&GE ratio than [[xx.xxx.xx]] per cent, which would consequently lower the final customs value.<sup>1614</sup>

7.949 Finally, the BoA could not follow its usual timeline because PM Thailand asked it to prioritize [[xx.xxx.xx]] other claims over the [[xx.xxx.xx]] claims at issue. Both informal conversations<sup>1615</sup> and PM Thailand's letter of June 2007 show that, by requiring that [[xx.xxx.xx]] other cases be treated expeditiously, PM Thailand understood that other claims would be temporarily set aside.<sup>1616</sup>

(ii) *Analysis by the Panel*

7.950 In this section, we will examine whether the alleged delays in the BoA process of reviewing the [[xx.xxx.xx]] appeals against the customs valuation determinations for PM Thailand's cigarettes resulted in an *unreasonable* administration of the Thai customs laws under Article X:3(a).

7.951 We recall our consideration above of the reasonableness requirement in Article X:3(a). The term "reasonable" is defined as "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".<sup>1617</sup> We have also found guidance in WTO jurisprudence that the requirement of reasonableness should be examined based on the features of the administrative act at issue in the light of its objective, cause or the rationale behind it.<sup>1618</sup>

7.952 Before we commence our analysis, we summarize the sequence of events relevant to the concerned appeals before the BoA as below.

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<sup>1611</sup> Thailand's response to Panel question No. 82, giving a chronology of events.

<sup>1612</sup> Thailand's comments on the Philippines' response to Panel questions (second meeting), para. 107, referring to the Philippines' responses to Panel question No. 143.

<sup>1613</sup> Exhibit PHL-154 and THA-86. Two alternative P&GE ratios were proposed by the Philippines respectively on 15 December, 2005 ([[xx.xxx.xx]] per cent instead of the company wide [[xx.xxx.xx]] per cent ratio and [[xx.xxx.xx]] per cent on 12 March 2007).

<sup>1614</sup> Thailand's response to Panel question No. 143.

<sup>1615</sup> Exhibit THA-58.

<sup>1616</sup> Thailand's response to Panel question No. 82.

<sup>1617</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385, referring to the *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. II, p. 2482 (2002).

<sup>1618</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.86; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227 (emphasis added).

**Table 1. Facts under Article X:3(a) claim Delay in BoA appeals**

Dates and time gaps	PM Thailand's actions	BoA acts
<p><b>March 2002 (1<sup>st</sup> appeal)<sup>1619</sup> to March 2003 (last appeal)<sup>1620</sup></b> 2 years from 1<sup>st</sup> appeal</p> <p><b>17 March 2004</b> 1 month</p>	<p>[[xx.xxx.xx]] appeals filed related to entries of <i>Marlboro</i></p>	<p>BoA requests supplementary evidence to calculate the deductive value under the 2002-2003 appeals</p>
<p><b>21 April 2004</b> 1.5 months</p> <p><b>4 June 2004</b> 1.3 years</p> <p><b>28 September 2005</b> 2.5 months</p> <p><b>15 December 2005</b> 0.9 years</p> <p><b>10 November 2006</b> 4 months</p> <p><b>24 November and 12 December 2006; 12 March 2007</b> 4 months</p> <p><b>19 July, 2007</b> 1 year and 8 months</p>	<p>PM Thailand submits supplementary evidence related to 17 March request<sup>1621</sup></p> <p>PM Thailand provides additional information related to 17 March request (information still incomplete)<sup>1622</sup></p> <p>July 2004: PM Thailand writes a letter requesting [[xx.xxx.xx]] per cent for [[xx.xxx.xx]] claims.<sup>1623</sup></p> <p>Letter to BoA requesting that new ratios be used ([[xx.xxx.xx]] per cent rather than [[xx.xxx.xx]] per cent)<sup>1625</sup></p> <p>3 successive responses to BoA's request for information</p> <p>In March 2007, new P&amp;GE ratio proposed ([[xx.xxx.xx]] per cent)<sup>1627</sup></p> <p>Letter asking for expeditious treatment of [[xx.xxx.xx]] other claims (previous informal talks were held)<sup>1628</sup></p>	<p>July 2005: BoA grants [[xx.xxx.xx]] per cent to 2002 <i>L&amp;M</i> entries<sup>1624</sup> Meeting to discuss P&amp;GE ratio. BoA says it would apply the company-wide ratio non-adjusted ([[xx.xxx.xx]] per cent) to [[xx.xxx.xx]] claims</p> <p>June 2006: BoA grants [[xx.xxx.xx]] per cent for [[xx.xxx.xx]] 2002 <i>Marlboro</i> entries<sup>1626</sup> BoA request for more information</p> <p>Informal talks between November 2006 and March 2007. THA-56, dated 12 December 2006</p>

<sup>1619</sup> Exhibit PHL-22.

<sup>1620</sup> Exhibits PHL-23 and PHL-24.

<sup>1621</sup> Exhibit THA-52.

<sup>1622</sup> Exhibit THA-53.

<sup>1623</sup> Exhibit PHL-197.

<sup>1624</sup> Exhibit PHL-35.

<sup>1625</sup> Exhibit PHL-154.

<sup>1626</sup> Exhibit PHL-36.

<sup>1627</sup> Exhibit THA-86.

<sup>1628</sup> Thailand's response to Panel question No. 82; Exhibit THA-58.

<p>13 March 2009 2 months ↓ May 2009</p>	<p>PM Thailand answer to BoA 13 March request</p>	<p>Meetings related to [[xx.xxx.xx]] other claims on 13 Sept. and 28 Nov. 2007. Subsequent request for information from BoA on 13 March 2009</p>
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7.953 We will first briefly summarize the factual events surrounding the concerned appeals before the BoA. The parties do not dispute that out of the [[xx.xxx.xx]] appeals lodged by PM Thailand between 2000 and 2002, [[xx.xxx.xx]] appeals relating to the entries lodged between 2000 and 2002 have been decided.<sup>1629</sup> This suggests that, on average, it took 2 years and 6 months for the BoA to process these [[xx.xxx.xx]] appeals. The shortest period of time taken was [[xx.xxx.xx]], while the longest was [[xx.xxx.xx]].<sup>1630</sup> On the other hand, however, the remaining [[xx.xxx.xx]] appeals at issue, which all relate to the *Marlboro* shipments that entered in 2002, have now been pending for 7 years on average.<sup>1631</sup>

7.954 Although we do not consider that the obligation for a WTO Member to administer its laws and regulations in a reasonable manner under Article X:3(a) sets a specific time limit for administrative review processes, such as the BoA review in this dispute, a review process taking over 7 years, particularly compared to the average time taken for other similar claims (i.e. 2.5 years), would appear to be, at least in the abstract sense, rather unusual.

7.955 The Philippines argues that the BoA has consistently been dilatory in all its official communications, taking at least a year (11 months in the shortest instance) in each of its initiatives regarding the [[xx.xxx.xx]] claims at issue.<sup>1632</sup> In the aggregate, the total time attributable to the BoA in seeking information, as of the date of the submission, amounts to [[xx.xxx.xx]] from the first appeal, and [[xx.xxx.xx]] from the last appeal.<sup>1633</sup> Thailand does not appear to argue that the [[xx.xxx.xx]] duration taken for the BoA to review the [[xx.xxx.xx]] appeals at issue is *not* lengthy. Nevertheless, Thailand takes the position that the time taken in reviewing these particular decisions is justified in the light of the particular circumstances attributable to these appeals. Specifically, Thailand points to the following: (i) PM Thailand contributed to the delays because it hindered the BoA review of the claims by continuously making requests for the use of new data (i.e. P&GE ratio), which necessitated complicated calculations; (ii) new calculations were in PM Thailand's interest in any event; and (iii) PM Thailand requested the BoA to prioritize other appeals. We will examine each of these elements in turn.

7.956 First, regarding whether PM Thailand's successive requests for new calculations of the P&GE ratio prolonged its examination, the relevant facts concerning the P&GE ratio are as follows: in July 2004, the Philippines requested that a [[xx.xxx.xx]] per cent ratio be applied to the claims at issue.<sup>1634</sup> In July 2005, the BoA applied the [[xx.xxx.xx]] per cent ratio to *L&M* 2002 entries.<sup>1635</sup> On 18 September 2005 the parties held a meeting, the outcome of which was "to add back the over-paid duty paid [for 2002 entries] to the gross profit initially submitted". The new gross margin, as calculated by

<sup>1629</sup> Thailand's second written submission, para. 208.

<sup>1630</sup> Exhibit THA-97.

<sup>1631</sup> Exhibit PHL-23.

<sup>1632</sup> The initiatives include requesting information useful to ratio evaluations and convening meetings with PM representatives. See Table 1 at page 355.

<sup>1633</sup> Philippines' second written submission, para. 581.

<sup>1634</sup> Exhibit PHL-197.

<sup>1635</sup> Exhibit PHL-35 and PHL-251.

PM Thailand, was [[xx.xxx.xx]] per cent.<sup>1636</sup> A year later, the BoA posed questions on the data used to establish the new ratio a year later to PM Thailand. In a letter sent on 12 March 2007, PM Thailand proposed a third adjusted ratio of [[xx.xxx.xx]] per cent.<sup>1637</sup> Since this date, no other communication regarding the appeals at issue has been recorded.

7.957 Thailand's understanding of the situation in this regard is as follows. Although it had chosen to apply a constructed P&GE ratio of [[xx.xxx.xx]] per cent for the 2002 entries in the light of the increase in PM Thailand's profits since 2000, it considered that it was in the importers' interest to have an opportunity to request the BoA to use a higher P&GE ratio to resolve the pending appeals. Therefore, according to Thailand, to evaluate the [[xx.xxx.xx]] per cent P&GE ratio proposed by PM Thailand by a letter of 15 December 2005, the BoA was obliged to obtain substantive information from PM Thailand for this newly proposed P&GE ratio.<sup>1638</sup> This process of obtaining the new information continued until March 2007, when it was interrupted by PM Thailand with a new proposal for an adjusted P&GE ratio of [[xx.xxx.xx]] per cent<sup>1639</sup>, which required examination of new documentation.

7.958 Particularly with respect to the P&GE ratio of [[xx.xxx.xx]] per cent, Thailand argues that PM Thailand's letter of 15 September 2005<sup>1640</sup>, in which this P&GE ratio of [[xx.xxx.xx]] per cent is suggested, was *not* submitted in response to a request from the BoA. Thailand argues that it was this request from PM Thailand that precipitated the additional delay in the appeals of the [[xx.xxx.xx]] entries. As such, the request for the use of this new P&GE ratio necessitated additional time for the BoA review of the customs valuation determinations on the subject entries. This consequently resulted in justifiably longer examination periods than under the usual circumstances.

7.959 The Philippines argues that the new P&GE ratio indicated in PM Thailand's letter of 15 December 2005 was submitted as a result of the meeting with the BoA on 28 September 2005. The Philippines focuses on its allegation that the BoA has been extremely tardy in seeking information from PM Thailand on the P&GE ratio of [[xx.xxx.xx]] per cent submitted by PM Thailand in December 2005 following a request from the BoA at the September 2005 meeting. Then it took the BoA almost a year to request specific information on this new proposal. PM Thailand then provided more information and new calculations resulting in the [[xx.xxx.xx]] per cent ratio.<sup>1641</sup> The Philippines has presented no specific comment in relation to the newly proposed [[xx.xxx.xx]] per cent P&GE ratio.

7.960 The parties' disagreement on the circumstances surrounding PM Thailand's submission of the new P&GE ratio of [[xx.xxx.xx]] per cent on 15 December 2005 is related to the meeting held on 28 September 2005 between the BoA and PM Thailand. The parties do not dispute that the meeting took place and, at the meeting, issues relating to PM Thailand's P&GE ratios were discussed. The parties present different views, however, on the result of the meeting. In essence, the Philippines submits that its understanding of the meeting was that the BoA was questioning whether it would continue to use an adjusted P&GE ratio rather than the actual company-wide P&GE ratio. Such understanding subsequently prompted PM Thailand to object to the use of the non-adjusted P&GE ratio and to request an adjusted company-wide P&GE ratio through its letter of 15 December 2005.

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<sup>1636</sup> Exhibit PHL-154.

<sup>1637</sup> Exhibit THA-86.

<sup>1638</sup> This request was made in a letter dated 10 November 2006 (Exhibit PHL-54) and the replies trickled in from PM Thailand by letters dated 24 November 2006 (Exhibit THA-55), 12 December 2006 (Exhibit THA-56) and 12 March 2007 (Exhibit THA-86).

<sup>1639</sup> Exhibit THA-86.

<sup>1640</sup> Exhibit PHL-154.

<sup>1641</sup> Philippines' second written submission, para. 574.



7.961 We are not presented with specific evidence that would clarify the exact content of the discussion that took place. However, as Thailand argues, PM Thailand's letter of 15 December 2005 does indicate that there was a certain understanding between the BoA and PM Thailand on the need for *adjusting* the P&GE expense for overpaid duties.<sup>1642</sup> In the introductory paragraph of the concerned letter, PM Thailand states:

"With reference to the meeting on 28<sup>th</sup> September 2005 between Philip Morris (Thailand) Co., Ltd. ("the company") ... in the subject of profit & general expense (gross margin) and DDV calculation for *Marlboro* imported in 2002. The meeting conclusion was to add back the over-paid duty (based on the indicative value by officers during import formality) into the company's profit, in order to calculate the GM as it should be.

The company has now completed the GM and DDV calculations as per the above conclusion. Therefore, the company would like to present the supporting reasons and calculation result as follows:"<sup>1643</sup>

7.962 Therefore, as Thailand submits, PM Thailand's letter of 15 December 2005 tends to show that the conclusion of the meeting was not whether the P&GE ratio should be adjusted, but by how much.

7.963 In our view, however, this does not support Thailand's position that PM Thailand contributed to the delays in the BoA review process by proposing a new data on its own initiative. Furthermore, we consider that what is important in this regard is whether the P&GE ratio newly proposed by PM Thailand justifies in any manner the length of delays in the BoA review process of the [[xx.xxx.xx]] entries at issue. Particularly, we note that it was not until approximately *a year* from receipt of the letter from PM Thailand with the newly proposed P&GE ratio on 15 December 2005 that the BoA requested additional information from PM Thailand in this connection.

7.964 Thailand further contends that the delays are explained by the complexities of the new calculations required to adjust the P&GE ratios. Thailand underlines that PM Thailand's overall financial situation had changed, shifting from negative results in the years 2000 and 2001, to a positive result in 2002. Thailand however never sufficiently explained how this new financial situation complicated the necessary calculations such that it took almost a year for the BoA to seek further information from PM Thailand in this regard.

7.965 Thailand further asserts that the delays triggered by the new calculation were in PM Thailand's financial interest. We understand this position to be based on the view that a higher P&GE ratio would have reduced the consequent customs value for the entries at issue. Although that it may actually have been in PM Thailand's interest to conduct new calculations as requested by PM Thailand by using the newly proposed P&GE ratio<sup>1644</sup>; whether a higher P&GE ratio as suggested by PM Thailand resulted in a lower customs value for the entries at issue is irrelevant to the issue of assessing whether the *delays* caused in the review process as a whole can be justified under Article X:3(a). At the core of the reasonableness requirement under Article X:3(a) is the *manner* in which Member governments administer relevant laws and regulations.

7.966 Finally, Thailand argues that aside from the new calculation issues, PM Thailand itself requested that the BoA prioritize other claims over the pending [[xx.xxx.xx]] claims. According to Thailand, in 2007, PM Thailand asked the BoA to complete the [[xx.xxx.xx]] other claims

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<sup>1642</sup> Thailand's comments on the Philippines' responses to Panel questions (second meeting), para. 36.

<sup>1643</sup> Exhibit PHL-154, p. 1.

<sup>1644</sup> Exhibit PHL-154. In this regard, PM proposed a higher ratio than the company wide ratio when it was given the opportunity to bring in more arguments.

expeditiously<sup>1645</sup> which, in its view, in the light of certain oral communications between the BoA and PM Thailand<sup>1646</sup>, amounted to a request that they be *prioritized* over the [[xx.xxx.xx]] appeals at issue.<sup>1647</sup> The Philippines contests that a request for an expeditious treatment of the other [[xx.xxx.xx]] claims amounted to a request prioritizing those claims over the [[xx.xxx.xx]] pending appeals.<sup>1648</sup>

7.967 The text of the letter that Thailand relies on to support its position states in relevant part that "PMTL kindly requests the Customs Appeal sub-committee to *expeditiously* submit PMTL's appeals and challenges against final assessment (Gor.Sor.Gor 171) regarding the other [[xx.xxx.xx]] claims".<sup>1649</sup> (emphasis added) In the letter, PM Thailand also expresses its concerns about increasing "financial and procedural burdens as a result of ... final assessments ... To solve this issue, PMTL kindly request[ed] expeditious treatment of the [[xx.xxx.xx]] other claims". From a plain reading of this letter, we cannot infer a specific request from PM Thailand that the [[xx.xxx.xx]] must be reviewed before the [[xx.xxx.xx]] entries at issue.

7.968 Further, we note Thailand's assertion that the BoA ran into unusual difficulties in handling a high volume of appeals lodged in 2000, which was the first year for Thailand to commence the implementation of the disciplines under the Customs Valuation Agreement.<sup>1650</sup> It argues that under these circumstances, the fact that the BoA had completed by December 2005 77 per cent of the [[xx.xxx.xx]] appeals lodged by PM Thailand in relation to the entries "landed" between 2000 and 2002, demonstrates that the BoA was making reasonable efforts to complete these reviews in a timely manner. However, given that a relatively shorter period of time was taken in completing the other [[xx.xxx.xx]] entries that were lodged around the same time as the [[xx.xxx.xx]] entries at issue and apparently similar to these entries, it is difficult to understand why such an unusually longer period of time was necessary to review the [[xx.xxx.xx]] claims in the absence of a convincing explanation on some unique feature attributable only to these pending entries, which there is not.

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<sup>1645</sup> Exhibit THA-58.

<sup>1646</sup> Exhibit THA-87. Statement from Mrs Santinyaout, who was Director of the Customs standard procedure and valuation directorate from November 2005 to 2007, and deputy secretary to the board of appeals. Mrs Santinyaout declares that "PM Thailand company representatives also came to meet our officials and told them, verbally, that they would prefer Thai Customs to prioritise the appeals of the [[xx.xxx.xx]] entries landed in 2006 and 2007 ahead of the appeals of [[xx.xxx.xx]] entries landed in 2002." The Appellate Body in *US – Continued Zeroing* (para. 331) held that

"Article 11 requires a panel to consider evidence before it in its totality, which includes consideration of submitted evidence in relation to other evidence."

It also considered that "the nature and scope of the evidence that might be reasonably expected by an adjudicator in order to establish a fact or claim in a particular case will depend on a range of factors, including the type of evidence that is made available by a Member's regulating authority" (para. 357).

Here, we are trying to determine what the intent of PM Thailand was when it addressed a letter asking for expeditious treatment of [[xx.xxx.xx]] claims to the BoA. We have to choose between a written piece of evidence addressed by PM Thailand to Thai Customs and the statements of one official contradicting both this letter and the statements made by the Philippines in front of the Panel. In our evaluation of the weight of the respective evidence, we find that the written letter by PM Thailand is more convincing to reveal PM Thailand's intent.

<sup>1647</sup> Thailand's response to Panel question No. 145.

<sup>1648</sup> Exhibit PHL-279. Mr. [[xx.xxx.xx]], country manager for the branch office of PM Thailand since August 2006 states that he "did not instruct any PM employees or representative to make such a [prioritisation] request verbally to Thai customs or the BoA and to, the best of [his] knowledge, no such verbal request was ever made".

<sup>1649</sup> Exhibit THA-58.

<sup>1650</sup> Thailand's second oral statement, para. 89.

7.969 Overall, although we are mindful of certain challenges that the BoA might have had to face under the circumstances, we are not convinced that the particular aspects pertaining to the review of the [[xx.xxx.xx]] entries at issue, taken together, can justify the current delays in the BoA's review of those claims. Particularly, we observe that the claims concerning these [[xx.xxx.xx]] entries at issue have been pending before the BoA for close to seven years. The overall length of the administrative process, combined with less-than-prompt actions (for example requesting information from PM Thailand) taken by the BoA, also tends to show prejudice caused to other Member governments and traders under Article X:3(a). The overall delays shown throughout the course of the review process therefore are "*not* appropriate or proportionate" considered against the nature of the circumstances concerned. We therefore find that the concerned delays in the BoA review process resulted in the administration of the Thai customs law in an *unreasonable* manner and are in violation of Article X:3(a) of the GATT 1994.

## 5. Determination of the excise, health and television taxes

### (a) Introduction

7.970 In Thailand, importers must pay the customs duties and excise, health and television taxes on the imported goods. The excise tax is based on the declared c.i.f. price (declared transaction value), and the health and TV taxes are calculated as a percentage of the absolute amount of excise tax<sup>1651</sup>, as respectively set out in the Tobacco Act<sup>1652</sup>, the Health Promotion foundation Act<sup>1653</sup>, and the Television and Public Broadcasting Act.<sup>1654</sup>

7.971 In situations where Thai Customs questions the acceptability of the importer's declared c.i.f. price, it can examine the declared c.i.f. price before determining the final customs value through the issuance of the final Notice of Assessment. During the examination process, the importer is given a right to withdraw the goods against payment of a guarantee. This guarantee amounts to the difference between the declared c.i.f. price and the sum of an elevated c.i.f. price (provisionally fixed by the customs authorities) plus the excise, health, television taxes calculated based on this elevated c.i.f. price. When the Notice of Assessment is published, the importer may either accept its content or challenge it to the BoA. The importer then can appeal the BoA's determination to the Thai Tax Court.

7.972 When the final determination of the c.i.f. price is lower than the provisional guarantee value imposed by the Thai authorities, the importer is entitled to a refund corresponding to the discrepancy. In this regard, the parties initially disagreed on whether the importer may also obtain a refund for the additional excise, health and television taxes paid. Later in the proceedings, however, the Philippines appear to agree at least that a refund mechanism does exist.

### (b) Main arguments of the parties

7.973 The **Philippines** argues that the imposition of the excise, health and television taxes on the basis of a guarantee value constitutes a non-uniform, unreasonable and partial administration under Article X:3(a) for the following reasons: (i) two different tax bases (declared c.i.f. price or guarantee value) are applied to the same goods; (ii) the tax base is not grounded in Thai law; (iii) an incorrect customs value is only used for imported cigarettes; and (iv) no automatic refund of the overpaid amounts is available when the final customs value determined by Thai administrative or judicial

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<sup>1651</sup> Philippines' first written submission, paras. 617, 629 and 631.

<sup>1652</sup> Exhibit PHL-119.

<sup>1653</sup> Exhibit PHL-121.

<sup>1654</sup> Exhibit PHL-122.

courts is lower than the guarantee value.<sup>1655</sup> The Philippines submits that using a guarantee value that is higher than the declared transaction value as the base for the determination of excise tax, has a significant financial impact because the effective tax rate of the excise tax is 400 per cent although the normal excise tax rate is currently 80 per cent.<sup>1656</sup> Moreover, because the health and television taxes are calculated as percentages of the excise tax, which is based on a guarantee value when the declared transaction value is not accepted, the Philippines asserts that an excessive amount of health and television taxes is also collected if the final assessed customs value is lower than the guarantee value.<sup>1657</sup>

7.974 The Philippines' claims are based on the premise that no automatic refund mechanism is available to importers for the excess payment of excise, health and television taxes. The Philippines points out that this can be contrasted to the existence of a process allowing a refund of the difference between the customs duties paid on the incorrectly assessed customs value, and the customs duties due on the correct customs value.<sup>1658</sup> In this connection, the Philippines initially argued that no refund mechanism existed.<sup>1659</sup> Later in the proceeding, it elaborates on its argument and submits that for Thailand's administration of the excise, health and television taxes to be reasonable, an *automatic* refund system must be available to the importer.<sup>1660</sup> While acknowledging Thailand's evidence showing that other companies had received a refund, the Philippines argues that the refunds were available only when there was a BoA decision that reduced the assessed customs value.<sup>1661</sup> The Philippines also argues that PM Thailand could not recover additional excise duty paid in relation to transactions between 2000 and 2003.<sup>1662</sup>

7.975 According to the Philippines, *non-uniform administration* arises because the taxes are administered using two different tax bases with respect to the same goods, *Marlboro* and *L&M* cigarettes, that have been imported under the same circumstances. Sometimes the excise tax is administered by using the *correct* duty-paid c.i.f. price, and sometimes the excise tax is administered by referring to an amount based on an *incorrect* customs valuation by Thai Customs.<sup>1663</sup> The Philippines refers to *EC – Selected Customs Matters* in stating that the administration of the tax is not

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<sup>1655</sup> Philippines' first written submission, paras. 654-684; second written submission, para. 532; second oral statement para. 135. If the BoA reverses Thai Customs' initial assessment of the customs valuations for the [[xx.xxx.xx]] entries at issue and reinstates the declared transaction values, the excess excise taxes collected on these entries using an incorrect assessed customs value as the tax base would amount to THB [[xx.xxx.xx]] (USD [[xx.xxx.xx]]) (Philippines' first written submission, para. 625). In 2007, the total amount of guarantees collected in relation with the excise, health and television taxes was USD [[xx.xxx.xx]].

<sup>1656</sup> Philippines' first written submission, paras. 617-622 and footnote 470.

<sup>1657</sup> Philippines' first written submission, paras. 629-623. The Philippines explains that the television tax has been imposed since 1 January 2008. The percentages of the excise tax for the health and television taxes are respectively 2 per cent and 1.5 per cent of the excise tax amount.

<sup>1658</sup> Philippines' response to Panel question No. 86, citing to Customs Notification No. 97/2542, issued under the Customs Act (Exhibit PHL-20 and PHL-184).

<sup>1659</sup> Philippines' first written submission, para. 623; first oral statement, para. 271; response to Panel question 86; second written submission, paras. 271-272. *See also* Exhibit PHL-182, expert opinion of Mr. Piphob Veraphong; and Exhibit PHL-183, expert opinion of Mr. Prasit Aekaputra, both explaining that Clause 7(3) of the Ministry of Finance Rule regarding the Deduction of Revenue Expenditure and the Refund of Revenue ("the Rule"), taken pursuant to section 4 of the Treasury Act, did not provide for a refund mechanism for the additional excise duty paid. Likewise, section 14 of the Health Promotion Act and section 15 of the Thai Public Broadcasting Act both make the repayment of the Health and Television tax contingent on the repayment of the excise tax. In its second written submission, para. 539, the Philippines notes that those provisions are in stark contrast with other Thai law provisions providing for express right to refunds.

<sup>1660</sup> Philippines' second oral statement, para. 135.

<sup>1661</sup> Philippines' comments on Thailand's response to Philippines' question No. 3 (second meeting).

<sup>1662</sup> Philippines' first written submission, para. 624.

<sup>1663</sup> Philippines' first written submission, paras. 663-667; first oral statement, para. 265; second written submission, para. 532.

of "unchanging form, character, or kind", and does not conform to "one standard, rule or pattern".<sup>1664</sup> In addition, the Philippines points at several occurrences in the past in which Thailand administered the excise tax (and therefore the health and television tax) on the basis of incorrect valuations. In some of these cases the BoA found that Thai Customs had taxed imports in excess of the correct value, but the Philippines had already paid excise tax on the basis of an incorrect valuation decision and did not receive a refund of the additional tax paid.<sup>1665</sup>

7.976 The Philippines also submits that *unreasonable administration* arises because Thailand collects taxes using a tax base that has no foundation in Thai law or in fact. According to the Philippines, Thai law does not authorize the excise tax to be levied on any basis other than the correctly assessed customs value plus customs duties. Thailand's decision to disregard the tax basis prescribed in a tax law is not "reasonable", "appropriate", or "rational administration".<sup>1666</sup> The Philippines cites to *Dominican Republic – Import and Sale of Cigarettes* to support its conclusion.<sup>1667</sup>

7.977 The Philippines further claims that Thailand's administration of the excise tax with respect to imported cigarettes is *partial* because it lacks even-handedness, and is prejudicial as compared with its administration of the tax in connection with domestic cigarettes.<sup>1668</sup> This partial administration arises because while the tax base for imported cigarettes is the c.i.f. price, which may be revised as part of the customs process; the tax base for domestic cigarettes is always the ex factory price, and therefore taxes on imported and domestic cigarettes are not revised in a similar fashion.<sup>1669</sup>

7.978 **Thailand** takes the position that all claims by the Philippines under Article X:3(a) regarding the administration of the Thai VAT system are outside the Panel's terms of reference.<sup>1670</sup> However, if the Panel decides that the claims are within its terms of reference, Thailand contests the Philippines' claim on factual and legal grounds.

7.979 Regarding the Philippines' allegation that no refund mechanism for excise, health and television taxes exists, Thailand argues that refund mechanisms are available to importers and that PM Thailand appears to have never requested refunds.<sup>1671</sup> Thailand submits evidence of correspondences confirming that three other importers obtained refunds between 2006 and 2008.<sup>1672</sup> Thailand disagrees with the Philippines' reading of the expert opinions of Mr. Veraphong and Mr. Aekaputra. Instead of disputing that a refund mechanism existed, they underlined that the relevant Acts did not include specific provisions as to "how to make a refund application".<sup>1673</sup> More generally, and in relation to the Philippines' argument that refunds are not automatic, Thailand considers that there is nothing irrational or inappropriate in Members administering their laws through the conferral

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<sup>1664</sup> Philippines' first written submission, para. 665, referring to Panel Report, *EC – Selected Customs Matter*, paras. 7.123-7.124.

<sup>1665</sup> Philippines' first written submission, para. 667.

<sup>1666</sup> Philippines' first written submission, para. 677.

<sup>1667</sup> Philippines' first written submission, paras. 672-679; first oral statement, para. 266; second written submission, para. 532.

<sup>1668</sup> Philippines' first written submission, para. 681.

<sup>1669</sup> Philippines' first written submission, paras. 680-683; first oral statement, para. 267; second written submission, para. 532.

<sup>1670</sup> Thailand's first written submission, paras. 305-307 and footnote 339; second written submission, paras. 241 and 309-314. See section VII.B.1 for the discussion on Thailand's claims on the terms of reference for this Panel.

<sup>1671</sup> Thailand's first written submission, para. 331; first oral statement, para. 21; second written submission, para. 262; response to Philippines' question No. 3 (second meeting).

<sup>1672</sup> Thailand's response to Philippines' question No. 3 (second meeting); Exhibit THA-99.

<sup>1673</sup> Thailand's comment on the Philippines' responses to Panel questions, para. 131; Exhibit PHL-183, paras. 6.2 and 6.3.

of discretion on administrative agencies.<sup>1674</sup> Thailand moreover states that it is inevitable in any jurisdiction that customs value will be revised upwards or downwards after importation and that Article X:3(a) should not be read as prohibiting such revisions.<sup>1675</sup> When the assessed customs value is revised downwards, importers have the "option" to request refunds of any excess payments.<sup>1676</sup>

7.980 In response to its alleged unreasonable, non-uniform and partial administration of excise, health and television taxes, Thailand contends that the use of different data sources to calculate the c.i.f. price component of MRSPs does not amount to non-uniform administration because the difference can be explained by differences in the circumstances of the case.<sup>1677</sup> Second, Thailand puts forward that the use of guarantee values in September 2006 was reasonable given the legitimate doubts expressed by Thai Customs regarding the reliability of PM Thailand's declared values.<sup>1678</sup> Third, Thailand's use of estimates to calculate the c.i.f. price for imported cigarettes does not indicate partiality, because the Philippines has not established that Thai Excise would not use estimates to calculate the domestic ex factory price if there were doubts about the reliability of the figures put forward by TTM.<sup>1679</sup>

7.981 Finally, Thailand states that the Philippines claimed in its first written submission that Thailand used an "unlawful" tax base to calculate the excise, health and television taxes; but it did not claim that Thailand's laws and regulations relating to these taxes were inconsistent with Article X:3(a) because importers cannot claim refunds. Thailand therefore holds that the Panel need not and should not address the issues of whether refunds can be granted under Thai law and whether Article X:3(a) requires WTO Members to confer rights to refunds of overpaid indirect taxes.<sup>1680</sup>

(c) Analysis by the Panel

7.982 We concluded in Section VII.B.1(b) that the Philippines' claim under Article X:3(a) of the GATT 1994 with respect to Thailand's administration of the excise, television and health taxes fell within our terms of reference. Therefore, we will proceed to examine the Philippines' claim.<sup>1681</sup>

7.983 In Section VII.H.2 above, we explained that the obligations under Article X:3(a) apply to the *administration* of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but *not* such laws and regulations *themselves*.<sup>1682</sup> The Appellate Body clarified that to the extent such laws and regulations are discriminatory, they can be examined for their consistency with

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<sup>1674</sup> Thailand's second written submission, para. 246.

<sup>1675</sup> Thailand's first written submission, para. 330; second written submission, para. 261.

<sup>1676</sup> Thailand's first written submission, para. 331.

<sup>1677</sup> Thailand's second written submission, para. 250, referring to the Appellate Body report on *EC – Selected Customs Matters*, para. 261.

<sup>1678</sup> Thailand's second written submission, para. 250.

<sup>1679</sup> Thailand's second written submission, para. 250. The Panel notes that Thailand uses the same arguments to explain the consistency of its MRSP methodology under Article X:3(a).

<sup>1680</sup> Thailand's second written submission, para. 262, referring to the Philippines' first written submission, paras. 672-678.

<sup>1681</sup> The Thai laws and regulations at issue, as set out in the Philippines' request for establishment of a Panel, are: the Tobacco Act B.E. 2509 (1966), sections 5, 5*ter*, and 5*quinqies*; Notices of Director-General for Excise, setting out the ex factory prices; the Health Promotion and Foundation Act, B.E. 2544 (2001); and the Thai Public Broadcasting Service Act 2551 (2008).

<sup>1682</sup> Appellate Body Reports on *EC – Bananas III*, para. 200; *EC – Poultry*, para. 115. The Panel in *Argentina – Hides and Leather* also stated that "Article X:3(a) refers specifically to the *method of application* of measures identified in Article X:1" (emphasis added) (Panel Report, *Argentina – Hides and Leather*, para. 11.73). The Panel in the same dispute further elaborated that "the relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994" (para. 11.70; also referred to in the Panel Report, *US – Byrd Amendment*, para. 7.143).

the relevant provisions of the GATT 1994.<sup>1683</sup> The relevant question for determining the proper scope of Article X:3(a) is therefore "whether the substance of such a measure [or act] is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".<sup>1684</sup> We further recall that the term "administer" means "putting into practical effect", or "applying", a legal instrument of the kind described in Article X:1.

7.984 In respect to the Thai excise, health and television taxes, the Philippines claims that the determination of these taxes on the basis of a guarantee value, instead of a declared transaction value, leads to a non-uniform, unreasonable and partial administration within the meaning of Article X:3(a). Further, the Philippines argues that the lack of an automatic refund mechanism of the excess tax paid (in the form of a guarantee) also leads to an unreasonable administration of the Thai excise, health and television tax laws and regulations.

7.985 According to the Philippines, its claim regarding the use of the guarantee value as a tax base for the excise, health and television taxes is concerned with the "very practice" of using different starting points for the MRSP calculation (i.e. declared value or guarantee value). The Philippines submits that this practice is not in compliance with Thai law, as Thai law, the Thai Tobacco Act, allegedly provides that the sole excise tax base for imported cigarettes is the duty-paid c.i.f. price.<sup>1685</sup> Hence, in our understanding, the Philippines is arguing that Thailand administers certain provisions of the Thai Tobacco Act in a non-uniform, unreasonable and partial manner way under Article X:3(a).

7.986 In the provisions of the Thai Tobacco Act, however, we do not see the requirement that the *sole* excise tax base for imported cigarettes is the duty-paid c.i.f. price. Specifically, Article 5 *ter* 2 provides, in relevant part, that the c.i.f. price is indeed the basis for the excise tax. Point (B) in the same provision provide however that in cases of re-assessment of the price (of tobacco) by Thai Customs under the customs law, the re-assessed prices will be used as a base for the c.i.f. price.<sup>1686</sup> Our reading of this provision indicates that this part of Article 5 *ter* 2 implies that in case of a re-assessment of the price of the goods (tobacco, cigarettes), Thai Customs will determine a new c.i.f. price, which will then form the basis of the excise tax, which in its part forms the basis for the health and television taxes. Based on the plain text of the provision, therefore, we consider that a guarantee value set as a c.i.f. price pending the final determination of the customs value could also fall within the type of re-assessed price envisaged under the provision.<sup>1687</sup> In any event, our consideration of the Philippines' arguments leads to the conclusion that such arguments pertain to the *content* of certain provisions of the Thai Tobacco Act, which are substantive in nature rather than administrative within the meaning of Article X:3(a).

7.987 The Philippines' claim regarding the absence of an automatic refund mechanism in situations where the final customs value is later determined to be lower than the guarantee value initially imposed on imported cigarettes is based on two premises: (i) if there is no automatic refund mechanism, importers end up bearing the additional administrative burden of claiming the refund; or, (ii) if they do not claim the refund (for whatever reason), importers end up bearing the additional cost of the additional taxes paid on the difference between the final customs value and the guarantee value in the absence of an automatic refund mechanism. In our view, however, the object of this claim, namely the absence of an automatic refund mechanism, is not *administrative in nature*. Instead, it

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<sup>1683</sup> Appellate Body Report, *EC – Bananas III*, para. 200.

<sup>1684</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.70 (emphasis added).

<sup>1685</sup> Philippines' first written submission, para. 617-622, referring to section 5 *ter* (2) of the Thai Tobacco Act (Exhibit PHL-119).

<sup>1686</sup> Exhibit PHL-119.

<sup>1687</sup> section 112 of the Thai Customs Act authorizes Thai Customs to request a guarantee for imported goods that are under examination by Thai Customs (Exhibit PHL-20). The Panel notes, that such a provision is explicitly allowed by Article 13 of the Customs Valuation Agreement.

involves substantive issues relating to certain Thai laws and regulations that should be properly dealt with under other provisions of the WTO-covered agreements.

7.988 We therefore conclude that the alleged administration of the Thai Excise, Health and Television taxes, namely the use of the guarantee value as the tax base and the absence of an automatic refund mechanism, concern the substantive aspects of such laws and regulations rather than the manner in which they are put into practical effect. Accordingly, we find that the Philippines' claim under Article X:3(a) in respect of the administration of Thai Excise, Health and Television taxes was improperly brought under Article X:3(a). We need not therefore proceed to examine the consistency of the concerned act with the requirements to administer in a "reasonable, impartial and uniform" manner.

I. ARTICLE X:3(B) OF THE GATT 1994

1. Appeals against custom valuation determinations

(a) Introduction

7.989 The Philippines claims that Thailand violates Article X:3(b) by failing to maintain tribunals or procedures for the prompt review of appeals against customs valuation decisions. The Philippines' claim is based on the position that delays in the BoA's review of certain customs valuation determinations demonstrate that Thailand failed to ensure that procedures for the "prompt" review of administrative actions relating to customs matters are maintained. Thailand focuses on the argument that as the BoA is not an independent tribunal within the meaning of Article X:3(b), the relevant procedural aspects of the BoA are not subject to the disciplines under Article X:3(b).

7.990 Article X:3(b) of the GATT 1994 provides:

"Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures must be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practise of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers."

7.991 To establish a violation of Article X:3(b), a complaining party must therefore show that the responding party has not maintained or instituted independent tribunals or procedures for the purpose of the prompt review and correction of the administrative action relating to customs matters.

7.992 The parties do not dispute that customs valuation determinations fall within the scope of the "administrative action relating to customs matters" under Article X:3(b). The parties' arguments are focused on the following two issues: first, whether the BoA is an independent tribunal within the meaning of Article X:3(b); and, second, if not, whether the time taken for the BoA review process, a process prerequisite to having access to review by an independent tribunal (the Tax Court), particularly the delays caused in the [[xx.xxx.xx]] appeals at issue in this dispute, should still be taken into account in examining the requirements under Article X:3(b).

7.993 Based on the parties' arguments, we note, however, that it is not clear whether Article X:3(b) encompasses not only an obligation for a Member to maintain or institute a *system* for the prompt review and correction of administrative actions relating to customs matters, but also an obligation for relevant tribunals to *in fact* provide for a *prompt* review in specific instances. As the parties'



arguments raise a question touching on the nature of the obligations imposed by Article X:3(b), we will first address the nature of obligations under Article X:3(b).

(b) Nature of the obligations under Article X:3(b)

7.994 Article X:3(b) requires that the WTO Members *maintain* or *institute* independent tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to customs matters. The term "maintain" can be defined as "3. *verb trans.* cause to continue (a state of affairs, a condition, an activity, etc.); keep vigorous, effective, or unimpaired; guard from loss or deterioration".<sup>1688</sup> Based on the ordinary meaning of the term "maintain", therefore, we understand that Article X:3(b) mandates WTO Members to continue with and keep effective independent tribunals and procedures, if they are already in place in their domestic system, for the stated purposes.

7.995 The term "institute" in turn can be defined as "*verb trans.* 2. set up, establish, found; bring into use or practice. Article X:3(b), therefore, requires those Members that did not have independent review tribunals or procedures in place at the time of the entry into force of the GATT 1994, to set up such review mechanisms for the prompt review of administrative actions relating to customs matters as soon as practicable.

7.996 The text of Article X:3(b), particularly the phrase "shall maintain, or institute as soon as practicable, ... tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction ...", raises the question of whether the scope of Article X:3(b) can be understood to include a Member's claim that an actual review conducted by an independent tribunal or in a specific instance is not prompt. In particular, the phrase "*for the purpose* of the prompt review" suggests that the obligations envisaged under Article X:3(b) are of normative nature, namely the obligation to maintain or institute a system designed for the purpose of the prompt review of administrative actions. The text of Article X:3(b), considered in the light of the ordinary meaning of the terms "maintain" and "institute", therefore suggests that Article X:3(b) mandates Members to keep, or create if not already in place, in their domestic system the existing independent tribunals or procedures designed for the purpose of the prompt review of administrative actions.

7.997 As such, it is our view that a claim on whether a tribunal maintained by a Member pursuant to Article X:3(b) does *in fact* promptly review an administrative action is a matter falling more properly within the scope of Article X:3(a). As addressed above, Article X:3(a) requires that Members *administer* the legal instruments of the kind in Article X:1 in a uniform, impartial and reasonable manner. We also clarified that the term "administer" under Article X:3(a) covers the application or implementation of the relevant legal instruments, including judicial decisions. This understanding, in our view, ensures that the distinctive disciplines embodied in Article X:3(a) and X:3(b) are not blurred. We further consider that showing specific instances where prompt review was not provided could nonetheless help to prove a violation of Article X:3(b) to the extent that the non-promptness in the review process concerned can be linked to a systemic flaw in the tribunal or procedure maintained by a Member.

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<sup>1688</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 1647 (2002). The Philippines submits that the term "maintain" means "practice habitually" (Oxford English Dictionary online, Exhibit PHL-209), which consequently entails a dynamic obligation not only to write the relevant procedures and tribunals into law, but also to make sure that those laws are adequately applied (Philippines' second written submission, para. 559). We note however that this particular meaning of the term "maintain" is preceded by an indication that that particular meaning is obsolete. We also observe that the meaning relied on by the Philippines is absent in other authoritative dictionaries. For instance the Black's Law Dictionary defines "maintain" as "1. to continue (something). 2. to continue in possession of (property, etc)" *Black's Law Dictionary*, 7<sup>th</sup> ed., B.A. Garner (ed.) (West Group, 1999), p. 965.

(c) Whether the BoA is an independent tribunal within the meaning of Article X:3(b)

(i) *Main arguments of the parties*

7.998 The **Philippines** argues that the BoA is independent from the customs administration.<sup>1689</sup> The Philippines submits that the BoA has been established as a separate entity under Thai law as specific provisions of the Customs Act govern its composition and operations.<sup>1690</sup> While recognizing that the BoA is composed of agents also acting as customs officials, the Philippines nonetheless considers that independence for the purpose of Article X:3(b) must be assessed in terms of a tribunal's role and composition, in the light of *all* relevant factors.<sup>1691</sup> Specifically, the Philippines refers to the following factors to support its position: (i) detailed rules under Thai law on the constitution of the BoA, including the terms of its members; (ii) the grounds for their removal; (iii) the number of members required at formal meetings; and (iv) the designation of a specially assigned secretariat.<sup>1692</sup>

7.999 The Philippines also points out that Thailand has admitted that just because an official held a dual function did not *per se* prevent independent behaviour by that official.<sup>1693</sup> Similarly, the fact that customs agents involved in the customs value determination also seat as BoA officers does not suffice, in the Philippines' view, to deny the BoA's independence. The Philippines argues that Thailand did not provide any other argument to show that the BoA is a dependent authority. Thus, the Philippines considers that the BoA is the first independent authority to review appeals against customs decisions taken by the Customs administration.

7.1000 **Thailand** argues that the BoA is *not* an independent authority within the meaning of Article X:3(b). Thailand refers to the Panel's statement in *EC – Selected Customs Matters* that "independent" in the context of Article X:3(b) means "free of control or influence from the administrative agencies whose decisions are the subject of review, [so as to act] with freedom in institutional and practical terms from interference by the agencies whose decisions are being reviewed".<sup>1694</sup> Thailand also uses Article X:3(c) as context for Article X:3(b) to assert that the tribunals or procedures under Article X:3(b) must be "*fully and formally independent*".<sup>1695</sup> Thailand argues that the BoA is *not* "fully or formally" independent from Thai Customs, in either "institutional [or] practical terms".<sup>1696</sup> Thailand observes that the BoA is composed almost entirely of Customs agents.<sup>1697</sup> It is therefore not independent from the agency "entrusted with administrative enforcement" within the meaning of Article X:3(b). Thailand considers, as the Panel in *EC – Selected Customs Matters* found, that a "review [by such a dependent entity] would not qualify under Article X:3(b)". Thailand cites this Panel:

"The Panel understands that, in some WTO Members, administrative action relating to customs matters may be reviewed by the same administrative authority that

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<sup>1689</sup> Philippines' first oral statement, para. 23.

<sup>1690</sup> Philippines' first oral statement, para. 23; second written submission, para. 550, referring to sections 112*sexies* to section 112*undecies* of the Customs Act (Exhibit PHL-20).

<sup>1691</sup> Philippines' first oral statement, para. 23; response to Panel question No. 146.

<sup>1692</sup> Philippines' first oral statement, para. 23, referring to section 112*septies* to section 112*decies* of the Customs Act (Exhibit PHL-20).

<sup>1693</sup> Philippines' second written submission, paras. 551-552. The Philippines refers to Thailand's argument that dual function TTM directors could exercise both their functions independently.

<sup>1694</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.520.

<sup>1695</sup> Thailand's second oral statement, para. 93 (emphasis added). Thailand explains that Article X:3(c) provides a limited exception to the obligation to maintain independent tribunals, referring to procedures that are not "fully or formally independent of the agencies entrusted with administrative enforcement".

<sup>1696</sup> Thailand's second oral statement, para. 95; footnote 123, referring to the Panel Report, *EC – Selected Customs Matters*, para. 7.520.

<sup>1697</sup> Thailand's first written submission, para. 289.

originally took the action. For example, two of the third parties to this dispute – namely, Japan and Chinese Taipei – indicated that administrative action may first be reviewed by the same administrative authority that took the action originally ... *Such review would not qualify under Article X:3(b) of the GATT 1994 because, in such cases, the reviewing body is not independent of the administrative authority whose decision is the subject of review*".<sup>1698</sup> (emphasis added)

7.1001 Thailand argues that the BoA falls under the description above and, as a result, does not conduct an independent review of appeals against customs value determinations. As a consequence, the BoA delays cannot be assessed in the context of Article X:3(b).

(ii) *Analysis by the Panel*

7.1002 The parties disagree on whether the BoA is an independent tribunal within the meaning of Article X:3(b). We first recall the Panel's statement in *EC – Selected Customs Matters* that "independent" in the context of Article X:3(b) means "free of control or influence from the administrative agencies whose decisions are the subject of review, [so as to act] with freedom in institutional and practical terms from interference by the agencies whose decisions are being reviewed".<sup>1699</sup>

7.1003 The legal authority for the BoA is set forth in Section 112 of the Thai Customs Act. Section 112<sup>sexies</sup> provides that the importer or the exporter shall have the right to appeal against the duty assessment of the competent officer to the BoA. The BoA, headed by DG Customs as chairman, comprises a representative from the Ministry of Finance, a representative from the Office of Juridical Council, and five to seven members appointed by DG Customs. It is also provided that the BoA shall appoint a civil servant attached to the Customs Department as secretary and as assistance secretary, and that the secretary shall be a committee member as well.<sup>1700</sup> DG Customs, as chairman of the BoA, may vote and exercise the deciding vote in case of a tie in a given appeal.<sup>1701</sup>

7.1004 The BoA is therefore at least partly staffed with agents from the Customs Department with the possibility that some of those agents might be involved in deciding customs determinations that are subject to the BoA's review. This means that most of the agents in charge of reviewing customs decisions are those involved in taking the very customs decisions that are the subject of review by the BoA. The specific aspects of the BoA as described above therefore show a close link between customs officials making decisions on customs matters and the BoA – the entity reviewing such decisions. As recalled above, for tribunals or procedures to be independent of the agencies entrusted with administrative enforcement, they should be "free of control or influence from the administrative agencies whose decisions are the subject of review". The characteristics of the BoA, in particular, its composition, in our view are insufficient for it to be considered free of control or influence from the Thai Customs Department – the Thai agency entrusted with customs determinations – within the meaning of Article X:3(b).

7.1005 In this relation, as the Panel in *EC – Selected Customs Matters* noted, some Members require an initial appeal of an administrative action relating to customs matters to be made to an authority within the agency entrusted with enforcement prior to an independent body and/or a judicial

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<sup>1698</sup> Philippines' first written submission, para. 288, citing Panel Report, *EC – Selected Customs Matters*, footnote 894.

<sup>1699</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.520.

<sup>1700</sup> section 112<sup>septies</sup> of the Customs Act (Exhibit PHL-20).

<sup>1701</sup> section 112<sup>decies</sup> of the Customs Act (Exhibit PHL-20).

authority.<sup>1702</sup> In the context of the Philippines' claim under Article X:3(b) here, our analysis is confined to the question of whether the BoA is independent within the meaning of Article X:3(b). This question therefore does not relate to the issue of whether a non-independent authority within the agency entrusted with enforcement can provide for an objective review within the meaning of Article X:3(b). We note Thailand's argument that under the above standard, the BoA is *not* an independent tribunal, but rather constitutes an administrative tribunal for the purpose of the initial review of the administrative action, as envisaged by the Panel in *EC – Selected Customs Matters*.<sup>1703</sup>

7.1006 For the foregoing reasons, we conclude that the BoA cannot be considered as a tribunal independent of the agencies entrusted with administrative enforcement within the meaning of Article X:3(b).

(d) Whether an independent tribunal or procedure maintained by Thailand within the meaning of Article X:3(b) provides for the *prompt* review of customs value determinations

(i) *Main arguments of the parties*

7.1007 The **Philippines** submits that, even if the BoA is not considered an independent entity, the Thai procedures for the review of customs decisions are still not "prompt" under Article X:3(b).<sup>1704</sup> The Philippines argues that Article X:3(b) requires the Panel to evaluate how much time is necessary after the administrative decision subject to appeal is taken for an appeal against this decision to be heard by an *independent* authority.<sup>1705</sup> Should interposing administrative steps be necessary to have the decision reviewed by an independent authority, then the duration of those interposing steps would have to be taken into account.<sup>1706</sup> Under Thai law, the Tax Court can only exercise jurisdiction after any applicable appeal procedures have been exhausted.<sup>1707</sup> As Section 112*sexies* of the Customs Act provides for such an appeal of assessments of customs value to the BoA, the BoA review of the appeals is a necessary interposing step between the administrative decision and the first review by an independent tribunal, the Tax Court. The Philippines argues that as a consequence, the delays triggered by the BoA review must be fully taken into account when examining whether Thailand maintains a prompt review mechanism for customs decisions within the meaning of Article X:3(b).<sup>1708</sup>

7.1008 The Philippines argues that the BoA has been reviewing [[xx.xxx.xx]] appeals against customs value decisions on PM Thailand cigarettes for more than seven years.<sup>1709</sup> The Philippines underlines that in *Colombia – Ports of Entry*, the Panel held that a two-year review process involved

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<sup>1702</sup> In fact, Article 11.2 of the Customs Valuation Agreement provides that an initial right of appeal without penalty may be to an authority within the customs administration or to an independent body although the legislation of each Member must provide for the right of appeal without penalty to a judicial authority. The panel in *EC – Selected Customs Matters* noted in this regard as follows:

"The Panel understands that, in some WTO Members, administrative action relating to customs matters may be reviewed by the same administrative authority that originally took the action. ... Such review would not qualify under Article X:3(b) of the GATT 1994 because, in such case, the reviewing body is not independent of the administrative authority whose decision is the subject of review." (footnote 894)

<sup>1703</sup> Thailand's second written submission, para. 224, referring to Panel Report, *EC – Selected Customs Matters*, para. 7.520.

<sup>1704</sup> Philippines' response to Panel question No. 84.

<sup>1705</sup> Philippines' comments on Thailand's response to Panel question Nos. 149 and 169.

<sup>1706</sup> Philippines' response to Panel question No. 149.

<sup>1707</sup> Philippines' response to Panel question No. 149; Exhibit PHL-281.

<sup>1708</sup> Philippines' comments on Thailand's response to Panel question Nos. 149 and 169.

<sup>1709</sup> Philippines' second oral statement, para. 141.

"a lengthy delay".<sup>1710</sup> In this regard, a 7-year delay is not prompt within the meaning of Article X:3(b) since it is neither "ready, quick ,... performed without delay, [or] immediate".<sup>1711</sup>

7.1009 **Thailand** submits that to the extent that the first independent court within the meaning of Article X:3(b) is the Tax Court<sup>1712</sup>, the interposing administrative steps between the initial administrative decision (here the customs value decision) and the first review by an independent court (here the tax court) may *not* be taken into account towards fulfilling the requirements under Article X:3(b). This is because non-independent interposing steps qualify as administration of the customs laws, and are therefore governed by Article X:3(a). Article X:3(b) on the other hand applies only to independent review procedures.<sup>1713</sup> The only delays which can be assessed under Article X:3(b) are therefore those which separate the last non-independent administrative decision (here the BoA order) from the first independent review procedure (here the Tax Court decision).

(ii) *Analysis by the Panel*

7.1010 We concluded in the previous section that the BoA is not an *independent* tribunal within the meaning of Article X:3(b). The parties agree that if the BoA is not found to be an independent tribunal, it is the Thai Tax Court that is the first independent authority to review customs decisions under the Thai system.<sup>1714</sup> In this section, we will examine whether the Thai Tax Court, as an independent tribunal or procedure within the meaning of Article X:3(b), provides for the *prompt* review of customs value determinations consistently with the obligations under Article X:3(b).

7.1011 The term "prompt" can be defined as "*adjective*. 2 Of action, speech, etc.: ready, quick; done, performed, etc., without delay".<sup>1715</sup> Article X:3(b) requires that Members maintain or institute independent tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to customs matters. We understand that Article X:3(b) purports to ensure that Members maintain a review system that can provide for the *prompt* redress of adverse impacts caused by administrative actions on traders. Therefore, the review of administrative actions relating to customs matters by an independent tribunal or process must be considered in the light of a given review system in its entirety from the moment when the process required to reach such a tribunal or procedure commences until the review by the independent tribunal or process is completed. This means that any interposing administrative steps between the initial administrative decision and the first review by an independent tribunal must also be taken into account in assessing the fulfilment of the promptness requirement under Article X:3(b). As such, a violation of Article X:3(b) will be found if the process that a Member maintains for review of administrative actions relating to customs matters, when viewed in its entirety, presents a flaw that systemically prevents such actions from being reviewed by an independent tribunal without delay. In this regard, as noted in paragraph 7.1014 below, by stating that we need to consider a Member's review system in its entirety, including any interposing administrative steps, we do *not* mean that the existence of interposing steps prior to an independent review in itself constitutes a systemic flaw that prevents the concerned Member from maintaining procedures for the *prompt* review of administrative actions under Article X:3(b). Bearing this in mind, we will review the review system maintained by Thailand for the purpose of Article X:3(b).

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<sup>1710</sup> Philippines' first oral statement, para. 26, referring to Panel Report, *Colombia – Ports of Entry*, para. 7.128.

<sup>1711</sup> Philippines' second written submission, para. 553, referring to *Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2<sup>nd</sup> ed.).

<sup>1712</sup> Thailand's response to Panel question No. 148.

<sup>1713</sup> Thailand's response to Panel question Nos. 84 and 149.

<sup>1714</sup> The parties' responses to Panel question No. 148.

<sup>1715</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. II, p. 2366 (2002).

7.1012 Under Thai law, specifically according to Section 7(1) and Section 8 of the Act of the Tax Court, the Tax Court can review an appeal against an administrative decision only once any applicable internal appeal procedures have been exhausted.<sup>1716</sup> Concerning customs valuation decisions, Section 112<sup>sexies</sup> of the Customs Act provides for the right of appeal against customs officials' decisions to the BoA. This means that the Tax Court cannot review an appeal against customs decisions unless an importer first brought the customs decision to the BoA.

7.1013 The Philippines argues that as importers are unable to seek review by the Tax Court until they have exhausted the review process at the BoA, which the Philippines alleges is unjustifiably slow, Thailand fails to maintain procedures for prompt review and correction of action by Thai Customs.<sup>1717</sup> Thailand submits that because Article X:3(b) applies only to independent review, interposing steps prior to independent review cannot be taken into account in determining whether a WTO Member complies with its obligation under Article X:3(b) to maintain independent tribunals or procedures for prompt review and correction of administrative action relating to customs matters.<sup>1718</sup> In Thailand's view, interposing steps leading to independent review are subject to the disciplines of Article X:3(a).

7.1014 As noted above in paragraph 7.1005, Members may have a system under which an initial appeal of an administrative action must be made to an authority within the agency entrusted with enforcement prior to an independent body. We do not therefore consider that the existence of interposing steps prior to an independent review in itself is a systemic flaw that prevents Thailand from maintaining procedures for the *prompt* review of administrative actions under Article X:3(b).

7.1015 However, under the factual circumstances of the current dispute, the delays caused in the BoA appeal process concerning the [[xx.xxx.xx]] claims brought by PM Thailand clearly illustrate that the interposing process leading to the review by the Thai Tax Court has the systemic capacity to impede a *prompt* review by an independent tribunal of administrative actions. As we found above, whether the review process maintained by a Member under Article X:3(b) is *prompt* or not requires the scrutiny of the entirety of the review process from the moment an administrative action is taken until the review by an independent tribunal is completed. We do not consider the review system maintained by Thailand, when considered in its entirety in the light of the factual circumstances as presented to us, to be prompt within the meaning of Article X:3(b). In our view, the excessive delays that have been caused in the [[xx.xxx.xx]] appeals before the BoA (the prerequisite step necessary to even reach the Thai Tax Court) are so significant in terms of their duration and frequency that these specific instances can be considered as an indication of the capacity for delays in the system. Therefore, we conclude that Thailand failed to maintain an independent tribunal for the prompt review of customs value determinations inconsistently with Article X:3(b).

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<sup>1716</sup> Exhibit PHL-281; Philippines' response to Panel question No. 149.  
section 7(1) of the Act of the Tax Court provides:

"The tax courts have jurisdiction over the following civil matters: (1) Cases in respect of appeals against any decision of the competent official or the committee relating to any taxation law; ..."

section 8 of the Act of the Tax Court then provides:

"In the case specified in section 7(1), where taxation law provided that an objection or appeal against a competent official or committee shall be initially proceeded under the prescribed rules, methods and period, the case may be submitted to the tax court unless such proceeding has been performed and that objection or appeal has already decides."

<sup>1717</sup> Philippines' first oral statement, para. 28; response to Panel question No. 149.

<sup>1718</sup> Thailand's response to Panel question No. 149.

## 2. Appeals against the guarantee decisions

### (a) Introduction

7.1016 The Philippines claims that Thailand violates Article X:3(b) of the GATT 1994 by failing to maintain or institute tribunals or procedures for the purpose of the prompt review of *guarantees* imposed by Thai Customs on imported cigarettes.<sup>1719</sup> Thailand argues that a decision to impose a guarantee does not constitute an "administrative action relating to customs matters" within the meaning of Article X:3(b) and, even if they fall within the scope of Article X:3(b), Thailand is complying with the obligations under Article X:3(b) because a prompt appeal against guarantees is available before the Thai Tax Court.

7.1017 Section 112 of the Thai Customs Act authorizes customs officials to proceed to further examination when they have doubts as to the amount of duty applicable to one specific good.<sup>1720</sup> In those cases, the customs officers may release the goods pending determination provided that the importer pays "the amount of the duty declared in the entry by the importer or the exporter [and], as the case may be, ... an additional sum of money covering the maximum duty payable on the goods".<sup>1721</sup> In situations where an importer is required to provide a guarantee, internal taxes such as VAT, excise, health and television taxes will also be calculated on the basis of such a guarantee.<sup>1722</sup>

7.1018 As explained in the previous section, in order to establish a violation of Article X:3(b) a complainant must show that the respondent member has not maintained or instituted tribunals or procedures, independent from the agency entrusted with administrative enforcement of customs matters, for the purpose of the prompt review and correction of such administrative actions. In the present dispute, the parties' arguments concerning the Philippines' claim with respect to the imposition of a guarantee raises the following two issues: first, whether the imposition of a guarantee falls within the scope of "administrative action relating to customs matters" under Article X:3(b); second, if so, whether Thailand maintains or instituted tribunals or procedures for prompt review and correction of the amount of a guarantee imposed by Thai Customs. We will address these two issues in turn.

### (b) Whether the imposition of a guarantee falls within the scope of "administrative action relating to customs matters" under Article X:3(b)

#### (i) *Main arguments of the parties*

7.1019 The **Philippines** argues that the imposition of a guarantee is, in itself, an "administrative action" within the meaning of Article X:3(b), and that Thailand admits this.<sup>1723</sup> The Philippines

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<sup>1719</sup> Philippines' first written submission, para. 101.

<sup>1720</sup> Exhibit PHL-20.

<sup>1721</sup> Exhibit PHL-20.

<sup>1722</sup> Philippines' first written submission, para. 102; Thailand's first written submission, paras. 39-43. The excise, health and television taxes are set out in the Tobacco Act (Exhibit PHL-119), the Health Promotion Foundation Act (Exhibits PHL-121 and THA-33) and the Television and Public Broadcasting Act (Exhibit PHL-122). section 5<sup>ter</sup> of the Tobacco Act provides that "in the case of cut tobacco or tobacco imported into the Kingdom, c.i.f. prices of the cut tobacco or tobacco plus duties on imports, differential duty in accordance with the law governing investment promotion and other taxes and fees to be specified by royal decree, excluding value added tax specified in Chapter 4, Title 2 of the Revenue Code." section 11 of the Health Promotion Act states that the Health tax shall be 2% of the Excise Tax. section 12 of the Thai Broadcasting Act establishes the TV tax at 1.5% of the Excise Tax.

<sup>1723</sup> Philippines' comments on Thailand's response to Panel question No. 167, referring to Thailand's first written submission, para. 296, stating that "Article 42 of Thailand's Act on Establishment of Administrative Court and Administrative Court Procedures, BE 2542 (1999) provides a right to challenge all Thai government administrative actions, that fall under Article 9, including orders requiring guarantees." Article 9 states in

considers that guarantee decisions are distinct prejudicial acts, not merely intermediary steps towards final customs determinations. In this regard, the Philippines relies on the Panel's statement in *Colombia – Ports of Entry* that "payment of [customs duties]' and 'guarantee' are two different legal concepts that may not be equated lightly. This is true irrespective of the form that the guarantee may take".<sup>1724</sup>

7.1020 The Philippines considers that a guarantee order constitutes a complete and final act having adverse effects on traders, and that it is not merely an intermediary step towards the final customs determination.<sup>1725</sup> The Philippines emphasizes that guarantee decisions entail *immediate and independent* financial consequences.<sup>1726</sup> The Philippines underlines that the amount of guarantees required by Thai Customs for the import of cigarettes is substantial and often excessive compared to the value of the imported goods. Hence, the effective excise tax rate is 400 per cent, which means that for every baht of uplifted guarantee value, the importer must post a 4-baht guarantee.<sup>1727</sup> In this manner, the guarantee amount initially required from PM Thailand was estimated at US\$[[xx.xxx.xx]] million in 2006. Therefore, guarantee decisions potentially bear two prejudicial consequences: (i) they immobilize capital or cash which could have otherwise been productively employed<sup>1728</sup>; or (ii) in the most severe cases, they dissuade importations altogether, as in August 2006 when PM Thailand refused to clear goods until guarantees were revised downwards.<sup>1729</sup> This shows that guarantee decisions themselves impose a burden on the importer, which is independent from the final customs determination. They therefore constitute final administrative actions within the meaning of Article X:3(b), which commends that a separate appeal against them be available to the importer.<sup>1730</sup>

7.1021 Moreover, in any event, in the Philippines' view, the scope of Article X:3(b) is not restricted to final administrative acts. Rather, it covers all administrative action related to customs matters, which "on its face, could capture any type of administrative action" not just final action.<sup>1731</sup>

7.1022 **Thailand** submits that administrative decisions to require a guarantee do not constitute an "administrative action" within the meaning of Article X:3(b) because those decisions are only administrative steps of a *provisional* nature towards the final determination of customs value.<sup>1732</sup> According to Thailand, Article X:3(b) requires only *final* determinations to be subjected to appeal.

7.1023 Thailand argues that Article 11.1 of the Customs Valuation Agreement, which serves as *lex specialis* to Article X:3(b) concerning customs matters, makes it clear that Members must provide

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relevant part: [The] administrative court has competence to try and adjudicate or give orders over the following matters: ... (2) the case involving a dispute in relation to an administrative agency or official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay; (3) the case involving a wrongful act or other liabilities of an administrative agency or State official arising from the exercise of power under the law or from a law, administrative order or other orders, or from the neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay. Exhibit THA-34.

<sup>1724</sup> Philippines' second written submission, para. 293, referring to the Panel Report, *Colombia – Ports of Entry*, para. 7.88.

<sup>1725</sup> Philippines' combined response to Panel question Nos. 87 and 89. The Philippines also uses the language "final manifestation of the application of a law to a particular case" as the Panel states in *EC – Selected Customs Matters*, para. 7.105.

<sup>1726</sup> Philippines' combined responses to Panel question Nos. 87 and 89.

<sup>1727</sup> Philippines' first written submission, para. 104.

<sup>1728</sup> Philippines' first written submission, para. 103.

<sup>1729</sup> Philippines' combined responses to Panel question Nos. 87 and 89.

<sup>1730</sup> Philippines response to Panel question Nos. 87 and 89, referring to the Panel Report, *EC – Selected Customs Matters*, para. 7.536.

<sup>1731</sup> Philippines' response to Panel question Nos. 87 and 89.

<sup>1732</sup> Thailand's first written submission, para. 298; response to Panel question No. 89; second written submission, para. 239.



appeal procedures against final customs determinations only. Article 11.1 does not require that an appeal be available against intermediary decisions taken in the process of determining the final customs value.<sup>1733</sup> Article 11.1 therefore implicitly restricts the scope of Article X:3(b). By the same token, Thailand notes that Article 13 of the Anti-Dumping Agreement, which applies Article X:3(b) in the anti-dumping context, establishes that prompt appeal shall be available against *final* duty determinations only.<sup>1734</sup> *A contrario*, Article 13 of Customs Valuation Agreement, which specifically deals with guarantees in the customs context, does not mention a right to appeal.<sup>1735</sup> Finally, Thailand refers to the Appellate Body's finding in *US – Shrimp (Thailand)/US – Customs Directive* that "generally speaking a security is accessory or ancillary to the principal obligation that it guarantees [and is] intrinsically linked to that obligation".<sup>1736</sup> Given their provisional and ancillary nature, the decisions to impose guarantees on imports of cigarettes do not constitute "administrative action" under Article X:3(b), and there is no obligation to provide for their prompt review.

7.1024 The **Philippines** contends that Article 11.1 of the Customs Valuation Agreement cannot serve as *lex specialis* to Article X:3(b) of the GATT 1994 as both provisions can be applied together in a harmonious manner. There is no conflict between the right to appeal a determination of customs value under Article 11.1 of the Customs Valuation Agreement and the right to a prompt review of administrative actions relating to customs matters under Article X:3(b) of the GATT 1994 and therefore Members must provide both rights.<sup>1737</sup> Further, the Philippines considers that Thailand's reference to Article 13 of the Anti-Dumping Agreement is not convincing as this Article expressly restricts its scope to *final* determinations, while Article X:3(b) adopts the wider notion of "administrative action relating to customs matters".

(ii) *Analysis by the Panel*

7.1025 The Philippines' claim under Article X:3(b) with respect to the alleged absence of a right to appeal against the amount of a guarantee in Thailand, presents us with the initial question of whether the guarantee decisions fall within the scope of an "administrative action relating to customs matters" under Article X:3(b). We will begin our analysis by examining the term "administrative action relating to customs matters".

7.1026 The word "action" can be defined as "the process or condition of acting or doing ... a thing done, a deed, an act".<sup>1738</sup> The ordinary meaning of the term "action" indicates that its scope includes not only an act or thing done, but also the process or condition of acting or doing. The term "administrative" means "pertaining to the management of affairs; executive".<sup>1739</sup> We also noted earlier in the context of Article X:3(a) that the term "administer" in Article X:3(a) means "putting into practical effect", or "applying", a legal instrument.<sup>1740</sup> The scope of the term "administrative action" therefore appears to cover a broad range of acts as well as the process of applying legal instruments.

7.1027 Taken together with the subsequent term in Article X:3(b) "customs matters", "administrative action relating to customs matters" would mean an act or the process of applying legal instruments pertaining to customs matters. Although the Customs Valuation Agreement does not define the term "customs matters", the Black's Law Dictionary defines "customs" as "duties imposed on imports or

<sup>1733</sup> Thailand's first written submission, para. 299.

<sup>1734</sup> Thailand's response to Panel question No. 89.

<sup>1735</sup> Thailand's first written submission, para. 299.

<sup>1736</sup> Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond*, para. 231.

<sup>1737</sup> Philippines' second written submission, paras. 305-309.

<sup>1738</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 22 (2002).

<sup>1739</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 28 (2002).

<sup>1740</sup> See para. 7.870.

exports. The agency or procedure for collecting such duties".<sup>1741</sup> The Revised Kyoto Convention on the simplification and harmonisation of customs procedures defines "customs matters" as all actions by customs authorities "relating to the importation, exportation, movement or storage of goods".<sup>1742</sup> Furthermore, Article X:1 of the GATT 1994, while not directly mentioning customs matters, sets out various trade regulations that may fall under the scope of Article X, for example, by referring to the classification or the *valuation* of goods for customs purpose as well as rates of duty.

7.1028 We also recall that, in the context of an Article XX of the GATT 1994 analysis, the Appellate Body clarified the term "related to" as meaning that a rational relationship must exist between the measure and the objective pursued. In *US – Shrimp*, the Appellate Body stated that a measure was related to the conservation of natural resources when it "was not disproportionately wide in its scope and reach in relation to [its] policy objective. The means and end relationship [between the measure and the objective was] observably a close and real one".<sup>1743</sup> This suggests that all administrative actions that have a rational relationship to customs matters can be considered as "administrative actions relating to customs matters".

7.1029 The above considerations as a whole suggest that "administrative action relating to customs matters" in Article X:3(b) of the GATT 1994 includes a wide range of acts applying legal instruments having a rational relationship with customs matters, which clearly includes *valuation* of goods being imported.

7.1030 We further note that the underlying objective of Article X:3(b) is the preservation of due process rights for affected parties.<sup>1744</sup> The panel in *EC – Selected Customs Matters* stated:

"[A] due process theme underlies Article X of the GATT 1994. In the Panel's view, this theme suggests that an aim of the review provided for under Article X:3(b) of the GATT 1994 is to ensure that a trader who has been *adversely affected* by a decision of an administrative agency has the ability to have that *adverse* decision reviewed."<sup>1745</sup>

7.1031 The Appellate Body in the same dispute also stated:

"We believe this due process objective is not undermined even if first instance review decisions do not govern the practice of all the agencies entrusted with customs enforcement throughout the territory of a WTO Member, so long as there is a possibility of an independent review and correction of the administrative action of every agency."<sup>1746</sup>

7.1032 These findings by the Panel and the Appellate Body in *EC – Selected Customs Matters* help to support the view that the object and purpose of Article X:3(b) is broad and covers a wide range of actions by domestic administrative agencies concerning customs matters.

7.1033 In this regard, we note the parties' disagreement on whether the scope of "administrative action" under Article X:3(b) includes only *final* administrative actions, as opposed to intermediary

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<sup>1741</sup> *Black's Law Dictionary*, 7<sup>th</sup> ed., B.A. Garner (ed.) (West Group, 1999), p. 390.

<sup>1742</sup> Kyoto Convention on the Simplification and Harmonisation of Customs Procedures, Chapters 2 and 10 of the General Annex.

<sup>1743</sup> Panel Report, *US – Shrimp*, para. 141.

<sup>1744</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.536.

<sup>1745</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.536. See also Appellate Body Report, *US – Shrimp*, para.183: "It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations".

<sup>1746</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 302.

steps leading to a final administrative action. The broad scope of the term "administrative action" under Article X:3(b) as discussed above, however, does not appear to confine "administrative action" to *final* administrative actions. Taking into account in particular, the due process principle as underlined by the Panel in *EC – Selected Customs Matters*, we are of the view that if a certain administrative action can cause a direct and immediate impact on an individual trader, the trader should be able to have the concerned action reviewed and, as necessary, corrected by an independent body as envisaged under Article X:3(b). If only *final* administrative actions were to fall within the scope of "administrative action" under Article X:3(b), as advocated by Thailand, Article X:3(b) would not be able to fully serve its intended purpose of providing a mechanism through which traders can seek review and, if necessary, appropriate correction of administrative actions that are not necessarily final, but nonetheless have immediate adverse impact on traders.

7.1034 Further, the absence of the word "final" preceding "administrative action" in Article X:3(b) would also tend to manifest the drafters' intention to have the obligations under Article X:3(b) applied to a broad range of "administrative action pertaining to customs matters" and that this administrative action is not necessarily confined to final administrative actions. For example, Article 13 of the Customs Valuation Agreement states, "if, in the course of determining the customs value of imported goods, it becomes necessary to delay the *final* determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if where so required the importer provides sufficient guarantee". This shows that when the drafters intended to distinguish final actions or determinations from provisional actions or determinations, they did specifically add the term "final".

7.1035 At the same time, however, we can think of a situation where the provisional characteristic of an administrative action or determination would render such an action or determination to fall outside the scope of Article X:3(b). For example, this would be the case if subjecting the concerned action or determination to an independent review would result in unduly interfering with a domestic agency's decision-making process mainly due to the provisional nature of the action. In this connection, therefore, we must underscore that our mandate for the purpose of resolving this particular dispute is not to define the precise types of the measures falling under Article X:3(b).<sup>1747</sup> It is sufficient for us to clarify that the term "administrative action relating to customs matters" in Article X:3(b) is not necessarily limited to *final* administrative determinations where the so-called intermediary actions taken prior to final determinations result in an immediate adverse affect on traders.<sup>1748</sup>

7.1036 Certain third parties appear to share the same view. For example, the European Union considers that an appeal should be provided against all acts by the customs administration which have a direct and material effect on the importer such as, for instance, the actual collection of a guarantee.<sup>1749</sup> The United States considers that as Article X:3(b) requires Members to provide for review only of, first, "administrative action" and, second, "relating to customs matters", the extent to

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<sup>1747</sup> We agree with the United States' view in this relation that the Panel need not identify each intermediate step in the customs valuation process as to which an independent right to appeal should exist. (United States' response to Panel question No. 16).

<sup>1748</sup> We recall the Appellate Body's consideration in *US – Shrimp (Thailand)/US – Customs Bond Directive* that under certain circumstances a security taken for guaranteeing the payment of a lawfully established duty may constitute "specific action against dumping". In relevant part, the Appellate Body states:

"We do not, however, consider that a security taken for guaranteeing the payment of a lawfully established duty liability would necessarily constitute a specific action against dumping"; rather, whether a particular security constitutes a "specific action against dumping" should be evaluated in the light of the nature and characteristics of the security and the particular circumstances in which it is applied. We wish to emphasize that, in any event, an impermissible specific action against dumping cannot be taken in the guise of a security." (Appellate Body Report, *US – Shrimp (Thailand)/ US – Customs Bond Directive*, para. 230).

<sup>1749</sup> European Union's response to Panel question No. 16.

which an intermediate step in the valuation process gives rise to the right to appeal depends on whether it is such an action.<sup>1750</sup> The United States also points out that the meaning of "administrative action relating to customs matters" should not be equated with "a determination of customs value" in Article 11 of the Customs Valuation Agreement that sets out an obligation to provide for an appeal of the determination of customs value.<sup>1751</sup>

7.1037 We will now turn to the question of whether the imposition of a guarantee is an "administrative action relating to customs matters" under Article X:3(b). The concept of "guarantee" in relation to customs valuation is referred to in Article 13 of the Customs Valuation Agreement:

"If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient *guarantee* in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances."<sup>1752</sup> (*italics added*)

7.1038 The Philippines submits that the imposition of a guarantee is, in itself, an "administrative action" within the meaning of Article X:3(b). The Philippines considers that the imposition of a guarantee is a distinct prejudicial act, not merely an intermediary step towards the final customs determination as it is the culmination of an administrative process, the final manifestation of the application of a law in a particular case. The Philippines is of the view that although a guarantee order is not the final determination of a customs value, it is the final determination of a guarantee. Thailand takes the position that the decision to impose a guarantee on imported cigarettes does not constitute an "administrative action" within the meaning of Article X:3(b) because that decision is only administrative step of a *provisional* nature towards the final determination of a customs value.

7.1039 We will first examine the nature of a guarantee imposed in the context of customs valuation. The determination to impose a guarantee under Article 13 of the Customs Valuation Agreement is not a mandatory procedural step that needs to be taken to arrive at a final customs value. Rather, as the text of Article 13 stipulates, a guarantee is a tool in the form of a surety or a deposit that enables importers to withdraw their goods from customs when it becomes necessary for a customs office to delay the final determination of the customs value of the imported goods. A guarantee should also be sufficient to cover the ultimate customs duties for which the goods may be liable. In this context, we consider that the imposition of a guarantee is a distinct decision purported to play a specific role, namely to secure the payment of final customs duty. We find helpful the Appellate Body's statement in *US – Customs Bond Directive/US – Shrimp (Thailand)* in understanding the specific purpose of a guarantee:

"As in many other cases in customs administration, a Member may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization." In this connection, the Appellate Body explains the nature of security as follows: "[t]he *Ad Note* also suggests that the reasonable security envisaged by it fulfils the same function as the securities taken 'in many other cases in customs administration'. ...in most other cases *in customs administration, security is required*

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<sup>1750</sup> United States' response to Panel question No. 16.

<sup>1751</sup> United States' third party oral statement, para. 20.

<sup>1752</sup> The Black's Law Dictionary defines "guarantee" as "something given or existing as security, such as to fulfil a future engagement or a condition subsequent." *Black's Law Dictionary*, 7<sup>th</sup> ed., B.A. Garner (ed.) (West Group, 1999), p. 711.

*upon entry of merchandise when there is some uncertainty about the actual amount of liability that may be lawfully owed by the importer. Such a security is intended to provide a protection against the non-payment risk that might arise from the difference between the amount collected at the time of importation and the liability that may be finally determined.*"<sup>1753</sup> (emphasis added)

7.1040 Overall, we consider that the imposition of a guarantee in the context of the customs valuation process is a decision that is intended to serve the distinct purpose of *securing* the payment of the ultimate actual amount of customs duty pending final determination by customs.

7.1041 We recall our clarification above that the term "administrative action pertaining to customs matters" in Article X:3(b) includes a wide range of administrative actions having a rational relationship with customs matters, including the *valuation* of goods being imported. In our view, therefore, a customs administration's guarantee decision under the circumstances as stipulated in Article 13 of the Customs Valuation Agreement falls within the scope of "administrative action pertaining to customs matters" as a guarantee indeed has a rational relationship with the valuation of imported goods.<sup>1754</sup> The fact that the imposition of a guarantee is not the *final* determination of a customs value of a good does not affect this understanding because, as explained above, a guarantee is a distinct decision by customs that is intended to secure the payment of a final customs duty for which an importer will ultimately be liable.

7.1042 Furthermore, we observed above that the purpose and objective of Article X:3(b) highlights the view that "administrative actions" under Article X:3(b) should cover the acts by domestic agencies, which have an immediate adverse impact on importers and exporters. To establish the direct adverse effect resulting from the imposition of an excessive guarantee value, the Philippines presents situations where the amount of a guarantee imposed an immediate financial burden on the importer because posting guarantees entailed bank fees and collateral instruments. Cash guarantees represent capital that the importer could have used otherwise. For the years 2006, 2007 and 2008, for example, PM Thailand posted US\$[[xx.xxx.xx]] million, US\$[[xx.xxx.xx]] million and US\$[[xx.xxx.xx]] million respectively as guarantees.<sup>1755</sup> The Philippines also refers to the instance in 2006 where PM Thailand had been unable to comply with Thai Customs' decision to impose a US\$[[xx.xxx.xx]] million as a guarantee.<sup>1756</sup> PM Thailand had to wait until those guarantees were revised downwards to clear its goods.<sup>1757</sup>

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<sup>1753</sup> Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 221.

<sup>1754</sup> Regarding the relationship between the determination of a final customs value and the determination of a guarantee, we note the Appellate Body's following statement in *US – Customs Bond Directive/US – Shrimp (Thailand)*:

"Generally speaking, a security is accessory or ancillary to the principal obligation that it guarantees. A security that is taken to guarantee the obligation to pay anti-dumping or countervailing duties is intrinsically linked to that obligation. Thus, taking security for the full and final payment of duties should be viewed as a component of the imposition and collection of anti-dumping or countervailing duties. Therefore, a reasonable security taken in accordance with the *Ad Note* for potential additional anti-dumping duty liability does not necessarily, in and of itself, constitutes a fourth autonomous category of response to dumping."

(Appellate Body Report, *US – Customs Bond Directive/US – Shrimp (Thailand)*, para. 231).

<sup>1755</sup> Philippines first written submission, paras. 103-104.

<sup>1756</sup> Philippines' combined response to Panel question Nos. 87 and 89; second written submission, para. 295. This corresponds to guarantees placed at a level which was, respectively, 344 and 265 per cent higher than the declared transaction value for *Marlboro* and *L&M*.

<sup>1757</sup> Philippines' combined response to Panel question Nos. 87 and 89.

7.1043 According to the Philippines, therefore, under the most extreme situation, the imposition of an excessive guarantee may dissuade the importer from importing altogether, which would constitute a considerable commercial loss.<sup>1758</sup> The Philippines argues that in the absence of an appeal against guarantee decisions, this loss cannot be compensated. We also understand that there is no refund mechanism for VAT if it is calculated based on a guarantee that is subsequently determined to be higher than the final customs duty. The evidence before us as a whole therefore shows that a guarantee can cause an immediate commercially adverse impact on importers by imposing on importers a burdensome financial obligation if the level of a guarantee is excessive compared to the value of the imported good concerned.

7.1044 Thailand however takes the position that there are very strong policy reasons why appeals should not be provided against intermediate determinations such as guarantee decisions. In Thailand's view, this would annul the importer's right to withdraw his goods pending the determination of the final customs value and would modify the Thai system of administration by giving the prerogative to determine this customs value to the courts rather than to the customs administration. The Philippines argues that the policy reasons put forward by Thailand are insufficient because providing a right of appeal against guarantee decisions would only ensure that the rights of the importer are protected through the customs procedures.<sup>1759</sup>

7.1045 In our view, providing importers with a right of appeal against guarantee decisions would not infringe upon their right to withdraw the goods pending final determination of customs values. As pointed out by the Philippines above, on the contrary, the right of appeal provided under Article X:3(b) will ensure that in a situation where an importer cannot withdraw the goods due to an excessive amount of a guarantee imposed, the importer can have the guarantee at issue reviewed and, if necessary, revised downwards so as to be able to withdraw the goods by providing the required guarantee. In any event, we do not see how a right of appeal against guarantee decisions would "annul" the importers' right to withdraw the goods unless it somehow deprives the importer of the discretion either to choose to pay the guarantee and withdraw the goods or to appeal against the guarantee even if that would mean a delay in the withdrawal of the goods pending the appeal process.

7.1046 Thailand further submits that, even if guarantee decisions constitute an administrative action pertaining to customs matters under Article X:3(b), there is no obligation to provide a possibility of appeal to the importer because Article 11.1 of the Customs Valuation Agreement, which lays down an obligation to provide for a right to appeal against "a determination of customs value", should be read as *lex specialis* to Article X:3(b) in customs value matters. Accordingly, Article 11.1 specifies the requirements in Article X:3(b) such that only *final* determinations of customs value, not intermediate steps towards those decisions, would be subject to appeal. Likewise, Article X:3(b) should be interpreted in the light of Article 13 of the Anti-Dumping Agreement which restricts the obligation to provide prompt review against administrative action to *final* duty determinations.

7.1047 The *lex specialis* principle has been defined by the International Law Commission ("ILC") as "a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific".<sup>1760</sup> It is our understanding that Thailand's *lex specialis* argument

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<sup>1758</sup> Philippines' second written submission, paras. 294-295.

<sup>1759</sup> Philippines' second written submission, paras. 294-295.

<sup>1760</sup> Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006) General Assembly Official Records Sixty-first session Supplement No. 10 (A/61/10), p 408. (Italics added) As an illustration, the ILC refers to two decisions. It first referred to the in *Bankovic v. Belgium and others* by the European Court of Human Rights, which held that "the Convention [here the specific law] should be interpreted as far as possible in harmony with other principles of international law [here the general law] of which it forms part" (ECHR, *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57). It also cited to the Panel statement in *Korea – Measures*

with respect to the relationship between Article X:3(b) and Article 11.1 is therefore made on the premise that the obligations under these two provisions concern the same subject matter. Although both provisions address an obligation to provide for the right of appeal concerning customs issues, namely "administrative action relating to customs matters" under Article X:3(b) and "a determination of customs value" under Article 11.1, we do not consider that these two matters can necessarily be considered as the *same* subject matter such that they would trigger the application of the *lex specialis* principle. For one, as the parties seem to agree, the scope of the subject matter under Article X:3(b) ("administrative action relating to *customs matters*") is broader than that under Article 11.1 ("a determination of customs value"). We recall our understanding above in this regard that the imposition of a guarantee is an administrative action that is distinct from the final determination of a customs value and considered as falling under the scope of "administrative action relating to customs matters".

7.1048 Furthermore, Article 11.2 provides that "an initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority". The obligation under Article 11.1 to provide for the right of appeal against a determination of customs value, read in the light of Article 11.2 as context, thus focuses on the right to appeal to a *judicial* authority. This should be contrasted to Article X:3(b) that sets forth the obligation to maintain or institute tribunals or procedures *independent* of the agencies entrusted with administrative enforcement, whether judicial, arbitral or administrative, for the prompt review and correction of administrative action relating to customs matters. Therefore, insofar as a determination of customs value is concerned, Members are obliged under Article 11 of the Customs Valuation Agreement to provide for the right of appeal to a judicial authority although an initial right of appeal may be to an authority within the customs administration or to an independent body. We note that to the extent "a determination of customs value" can also fall within the scope of "administrative action relating to customs matters", Members must maintain or institute independent tribunals or procedures for the prompt review and correction of the concerned determination, which could simultaneously be satisfied if the right to appeal to a judicial authority is already provided under Article 11.1. This, however, does not affect the Members' obligation under Article X:3(b) with respect to "administrative action relating to customs matters".

7.1049 As discussed above, Article X:3(b) provides importers with the right to have a wide range of administrative actions relating to customs matters that immediately cause an adverse impact on

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*Affecting Government Procurement* that "to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement [here the specific law] that applies differently, we are of the view that the customary rules of international law [here the general law] apply to the WTO treaties and to the process of treaty formation under the WTO." (Panel Report, *Korea – Measures Affecting Government Procurement*, para. 7.96).

We note that the Appellate Body has extensively relied on general principles of international law to interpret member's obligations. See for instance, Appellate Body Report, *US – Cotton Yarn*, para. 120, applying the general principle of proportionality as found in Article 51 of the International Law Commission Draft Articles on State's Responsibility;

In *EC – Hormones*, the Appellate Body referred to "the interpretative principle of *in dubio mitius*" as a supplementary means of interpretation "widely recognized in international law" (Appellate Body Report, *EC – Hormones*, footnote 154); in *US – Shrimp*, the Appellate Body held that

"The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'" (Appellate Body Report, *US – Shrimp*, para. 158).

importers, reviewed and corrected. In this light, the right to appeal a determination of a customs value to a judicial authority provided under Article 11.1 would not address the obligations envisaged under Article X:3(b), namely to maintain an independent tribunal or procedure for the prompt review and correction of administrative actions that adversely affect importers concerning customs matters. Considered together, if Thailand's position were to be accepted, the rights and obligation of the WTO Members under Article X:3(b) of the GATT 1994 would lose their *raison d'être*.<sup>1761</sup>

7.1050 We also find support for our view in the discussions on a similar matter in previous disputes. In *Canada – Periodicals*, for example, regarding the respondents' argument that since a set of rules on services exists in the GATS, the provisions of Article III:4 of the GATT 1994 on distribution and transportation are obsolete, the Appellate Body found that the scope of Article III:4 was not diminished by the entry into force of the GATS.<sup>1762</sup> Similarly, in *Indonesia – Autos*, as regards the argument that a subsidy could not be found inconsistent with the obligations under Article III of the GATT 1994 as the SCM Agreement acted as *lex specialis* to Article III of the GATT 1994 and therefore became the exclusive norm applicable to subsidies before WTO panels, the Panel considered that Article III of the GATT 1994 and the SCM Agreement had different coverage and did not impose the same type of obligations. The panel considered that the existence of the SCM Agreement, did not mean that Article III would never be applicable to subsidies.<sup>1763</sup> Accordingly, the Panel found that a subsidy could alternatively fall under Article III of the GATT 1994 or the SCM Agreement within its coverage.<sup>1764</sup>

7.1051 Finally, we recall that the general interpretative note to Annex 1A of the WTO Agreement provides that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in [the WTO Agreement], the provision of the other agreement shall prevail to the extent of the conflict". In our understanding, however, Thailand is *not* arguing that there is a conflict between Article X:3(b) of the GATT 1994 and Article 11.1 of the Customs Valuation Agreement. In any event, our reading above of both provisions in their specific context does not indicate a conflict between these two provisions either. Accordingly, we do not consider the principles under the general interpretative note to Annex 1A as applicable to the relationship between Article X:3(b) of the GATT 1994 and Article 11.1 of the Customs Valuation Agreement.

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<sup>1761</sup> The Appellate Body in *US – Gasoline* states, "One of the corollaries of the general rule of interpretation in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing clauses or paragraphs of a treaty to redundancy or inutility" (Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3 at 21. The Appellate Body referred to the *effet utile* doctrine of interpretation in previous disputes such as *Japan – Alcoholic Beverages II*, p. 12, DSR 1996-I, 97, at 110; *US – Underwear*, p. 16, DSR 1997:I, 11, at 24; *EC – Asbestos*, para. 115. The Panel in *Turkey – Textiles* also stated: "Finally we would also like to recall the principle of effective interpretation whereby all provisions of a treaty must be, to the extent possible, given their full meaning so that parties to such a treaty can enforce their rights and obligations effectively. ... We understand that this principle of interpretation prevents us from reaching a conclusion on the claims of India or the defence of Turkey, or on the related provisions invoked by the parties, that would lead to a denial of either party's rights or obligations" (Panel Report, *Turkey – Textiles*, para. 9.96).

<sup>1762</sup> Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, at 464. The ILC also underlined that "the scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply" (Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006) General Assembly Official Records Sixty-first session Supplement No. 10 (A/61/10), p 412).

<sup>1763</sup> Panel Report, *Indonesia – Autos*, para. 14.29-14.36.

<sup>1764</sup> Panel Report, *Indonesia – Autos*, paras. 14.35-14.36.



7.1052 Therefore, we are not, persuaded by Thailand's argument that as Article 11.1 of the Customs Valuation Agreement, as *lex specialis* to Article X:3(b), specifies the requirements in Article X:3(b), no obligation under Article X:3(b) exists for Members to provide a possibility of appeal to the importer for guarantee decisions.<sup>1765</sup>

7.1053 For the foregoing reasons, we conclude that the imposition of a guarantee is an "administrative action relating to customs matters" within the meaning of Article X:3(b) of the GATT 1994.

(c) Whether Thailand maintains tribunals or procedures for prompt review and correction of guarantee decisions

(i) *Main arguments of the parties*

7.1054 The **Philippines** claims that Thailand does not maintain independent tribunals or procedures for the prompt review of guarantee decisions.<sup>1766</sup> In support of its claim, the Philippines relies on the decisions of the Thai Administrative Court and the Thai Supreme Administrative Court, and the Thai Supreme Court that allegedly show the lack of the right for importers to appeal guarantee decisions directly to the Thai Court.<sup>1767</sup>

7.1055 Specifically, the Philippines refers to the Supreme Administrative Court decision in 2007 in which upheld the decision of the Administrative Court of First Instance that it did not have jurisdiction to rule on PM Thailand's appeal against guarantee decisions. The Philippines further submits that no right of appeal against guarantee decisions exists independently from the notice of assessment. The Philippines refers to various Thai court decisions that allegedly ruled to this effect, namely the 1989 and 1991 decisions by the Thai Supreme Court and the 2007 decision by the Thai Supreme Administrative Court.

7.1056 In 1989, the Thai Supreme Court held:

"[I]n the case of the requirement of the guarantee by the competent official according to Section 112, if the Court allows the Plaintiff to file the lawsuit [against the guarantee] such as in this case, ... before the Defendant's competent officer assessed the duty and notified the Plaintiff, it would curtail the power of the competent official to assess the duty pursuant to Section 112bis, paragraph one and would completely curtail the right of the Plaintiff to appeal against such assessment. .... [I]n this case, because the Defendant's competent official had not yet assessed the duty and notified the Plaintiff to pay the duty pursuant to Section 112bis, paragraph one, the Defendant has not according to Section 55 of the Civil Procedure Code infringed upon the right

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<sup>1765</sup> We note that this conclusion is in line with relevant international instruments. For instance, standard 10.2 of the Kyoto convention on the harmonization and simplification of customs procedures provides that "any person who is directly affected by a decision or omission of the Customs shall have a right of appeal." Similarly, Council Regulation (EEC), No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended provides that goods may be released when the customs debt is secured (Article 74). The act by which a security is imposed qualifies as a decision by customs authorities under Article 4(5). A possibility of Appeal is therefore provided against this decision under Article 243. Appeal may be first to a customs authority. Appeal to an independent judicial authority must be provided (Article 243.2).

<sup>1766</sup> Philippines' first written submission, para. 101.

<sup>1767</sup> Exhibit PHL-132. (Central Administrative Court order No.1740/2549 of 19 October 2006), confirmed by Exhibit PHL-133 (Supreme Administrative Court order No 417/2550 of 27 June 2007). Both are in line with Supreme Court decisions No. 509/2532 (1989) *S.K.W steels v. Customs* (Exhibit PHL-136) and *Saereewattana Industry v. Customs* (Exhibit PHL-288).

or duty of the Plaintiff and, therefore, the Plaintiff has no power to file such lawsuit in this case."<sup>1768</sup>

7.1057 In 1991, the Supreme Court confirmed that:

"[I]n order to wait for the results of the criminal case to be finalised, the Defendant has not issued the notice of assessment to notify the plaintiff. As such, the plaintiff did not have the right to request the defendant to return the cash guarantees or bank guarantees to the plaintiff."<sup>1769</sup>

7.1058 In the 2007, the Supreme Administration Court also considered that:

"Although the Plaintiff views that the determination of such [guarantee] prices caused damage to the Plaintiff and the Plaintiff had no opportunity to provide an explanation, it is the process or procedure for assessment of the prices of products for collection of duty and excise tax. Upon payment of import duty as assessed by the 1<sup>st</sup> Defendant, if the Plaintiff thinks that such assessment was not accurate, the Plaintiff shall then be entitled to appeal to the BOA according to Section 112 (f) of the Customs Act."<sup>1770</sup>

7.1059 The Philippines also refers to Professor Asawaroj's commentary on the Supreme Court decision No. 509/2532 (1989) *S.K.W steels v. Customs* in which he emphasizes that at the time of writing (2006), "a lawsuit could not be brought unless the importer or the exporter has first appealed the assessment of the competent official to the Board of Appeal pursuant to Section 112*sexies*".<sup>1771</sup> The Philippines asserts that these court decisions recognize that there is no right of direct appeal against guarantee decisions as only notices of assessment, which are distinct acts, may be challenged.<sup>1772</sup>

7.1060 The Philippines further points out that under Thai law, an administrative act must specify the nature of any right to appeal against the act.<sup>1773</sup> Therefore, if Thai Customs believed that there was a right to appeal against the guarantees, for instance to the Tax Court, the Thai Customs letter of 11 August 2006 imposing the guarantee order should have informed PM Thailand of that right. The Philippines explains that the letter in fact informs PM Thailand that, "once the Customs Department has issued the assessment letter, the Company can appeal against such assessment in accordance with

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<sup>1768</sup> Exhibit PHL-136.

<sup>1769</sup> Exhibit PHL-288.

<sup>1770</sup> Exhibit PHL-133, p. 6.

section 112 (f) of the Customs act states: "the importer or the exporter shall have the right to appeal against the *duty assessment* of the competent officer" (italics added) (Exhibit PHL-20).

<sup>1771</sup> Exhibit PHL-135.

<sup>1772</sup> Philippines' first written submission, para. 101.

<sup>1773</sup> Philippines' response to Panel question No. 168, referring to section 40 of the Administrative Procedure Act (Exhibit PHL-130). section 40 provides:

"[t]he administrative order against which appeal or an objection may further be filed, the circumstances in which the appeal or objection may be filed, the filing of the appeal or objection and period of time for the filing of said appeal or objection must be specified.

In the event of violation of the provisions under para. 1, the period of time required for filing appeal or objection shall re-commence on the date of receipt of the notification of the criteria pursuant to para. 1. But if no new notification is given and such period of time is shorter than one year, such period of time is to be extended to one year of date of receipt of the administrative order."

the law".<sup>1774</sup> PM Thailand was not informed of any right to appeal the guarantee itself without awaiting final assessment.<sup>1775</sup>

7.1061 **Thailand** argues that it does not violate Article X:3(b) because guarantee decisions can be appealed to the Tax Court independently of the notice of assessment.<sup>1776</sup> In support of its position, Thailand cites to a letter from its Attorney General stating that *direct* appeals to the Tax Court against guarantee decisions are also available as "it is considered to be a dispute case in respect to rights or duties under an obligation made for tax collection's purposes under Section 7(4) of the Establishment of Tax Court and Tax Court procedure Act B.E.2528 [hereinafter "Tax Court Act"]".<sup>1777</sup> Thailand in addition references a Thai Supreme Court decision in which the Court decided that the Thai administration could bring a court case against a company which had unduly obtained a corporate tax refund in front of the Tax Court. The Supreme Court then held that such claim concerned a "case in respect to rights and duties incurred under an obligation made for tax collection purposes" and therefore fell within the Tax Court's competence by virtue of Section 7(4) of the Tax Court Act. Thailand cites to the court's statement that "a refund of taxation before an audit is not an absolute refund but a *conditional* refund ... [T]he plaintiff has the right to sue for tax".<sup>1778</sup>

7.1062 Regarding the right of appeal against guarantee decisions before the Thai Administrative Court, Thailand initially argued that the Thai Administrative Courts are competent to hear appeals against guarantees. However, it agreed at a later stage of the proceedings, specifically after the reference by the Philippines to the Supreme Administrative Court's decision, that its opinion had not been endorsed by the courts.<sup>1779</sup>

7.1063 The **Philippines** argues that the evidence put forward by Thailand allegedly showing that the Tax Court does have jurisdiction to review guarantee decisions independently of final customs value decisions, is irrelevant. The letter from the Attorney General explaining that Section 7(4) of the Tax Court Act provides an appeal against guarantee decisions contradicts the decisions of the Thai Supreme Administrative Court and the Thai Supreme Court.<sup>1780</sup> Similarly, the decision of the Thai Supreme Court produced by Thailand to this effect has no link to guarantees in the customs context, and rather deals with refunds of company taxes.<sup>1781</sup>

7.1064 **Thailand** submits that even if there was no direct appeal to the Thai Tax Court, importers have, at a minimum, the right to challenge the imposition of guarantees to the Thai Tax Court upon the exhaustion of alternative remedies. Thailand points out that even the Philippines' own experts

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<sup>1774</sup> Philippines' response to Panel question No. 168.

<sup>1775</sup> Philippines' response to Panel question No. 168. Professor C. Asawaroj, Collection of Customs and Law relating to Customs Tariff (Duentula Publishing House, Bangkok, 2006). Exhibit PHL-135, stating that an administrative act must specify the nature of any right to appeal under Thai law.

<sup>1776</sup> Thailand's response to Panel question No. 167.

<sup>1777</sup> Exhibit PHL-281, section 7 of the Act for Establishment and Procedures for Tax Court B.E. (2528) provides:

The tax courts have jurisdiction over the following civil matters:

- (1) Cases in respect of appeals against any decision of the competent official or the committee relating to any taxation law;
- (2) Cases in respect of disputes over right of claim on tax debts;
- (3) Cases in respect of taxes refund;
- (4) Cases in respect of debts incurred in connection with [an] obligation made for collecting taxes;
- (5) Cases that are prescribed to be under the jurisdiction of the tax courts.

<sup>1778</sup> Exhibit THA-101 (italics added).

<sup>1779</sup> Thailand's second written submission, para. 231, footnote 206.

<sup>1780</sup> Philippines' comments on Thailand's response to Panel question No. 167.

<sup>1781</sup> Philippines' comments on Thailand's response to Panel question No. 167; Exhibit THA-101.

accept that importers have rights to appeal decisions imposing guarantees to the Thai Tax Court once the notice of assessment is issued. Specifically, Thailand refers to the statement by Mr Veraphong that "the importer cannot appeal against a guarantee directly, but must wait until a notice of assessment is issued under Section 112*bis* of the Customs Act and the Board of Appeal renders its decision under Section 112*octodecim*".<sup>1782</sup> Further, Thailand also makes a reference to the statement by Mr Aekaputra that "the Customs Act does not directly provide a process to challenge guarantees but it states that, pursuant to Section 112*sexies*, appeals against a final notice of assessment shall be made within 30 days of receipt of the notice".<sup>1783</sup> In Thailand's view, therefore, appeals against guarantee decisions are available before the Thai Tax Court as the issuance of the notice of assessment is only a *procedural* pre-requisite to bring such appeals to the Tax Court. As such, unless the obligation under Article X:3(b) to maintain independent tribunals for the purpose of prompt review requires WTO Members to provide importers with "independent and immediate" rights to appeal, the Philippines' claim must fail.<sup>1784</sup>

7.1065 Thailand argues that Article X:3(b) does *not* require that WTO Members provide "immediate and independent" rights of appeal to affected importers.<sup>1785</sup> Rather, the WTO Members are permitted to impose requirements to await the completion of internal proceedings and the exhaustion of alternative remedies before rights of appeal can be exercised. Thailand counters that an appeal under Article X:3(b) needs not be "immediate" as the Philippines argues, but only "prompt".<sup>1786</sup> WTO Members often require the exhaustion of internal administrative procedures before an appeal can be lodged against administrative decisions. In this regard, Thailand can lawfully require that a notice of assessment be issued and appealed before guarantee decisions are reviewed by the Tax Court.<sup>1787</sup>

7.1066 Furthermore, Thailand submits that there are very strong policy reasons why Article X:3(b) should not be considered as requiring Members to provide an immediate right of appeal against the imposition of guarantees. Thailand draws on the current dispute to underline two elements in this regard: first, the right of the importer to withdraw the goods pending customs value determinations would be impaired, which would be contrary to Article 13 of the Customs Valuation Agreement; and, second, the judicial authorities would, in effect, pre-empt the authority of the customs administration in the area of customs valuation as the judicial authorities would be required to consider the appropriate customs value of the goods at the same time or even before the customs administration had addressed or resolved the issue.<sup>1788</sup>

7.1067 The **Philippines** argues that in many cases, a guarantee will be revoked when goods are finally assessed, and domestic courts may not wish to rule upon such a measure at that stage of the process.<sup>1789</sup> The Philippines argues that, in any event, Thailand does not provide for prompt appeals of guarantee decisions as there is no timeframe governing the issuance of notices of assessment, which recently took up to 10 months.<sup>1790</sup> Because, as described by Thailand, the issuance of a notice

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<sup>1782</sup> Exhibit PHL-182, para. 10.3; Exhibit PHL-20, Customs Act section 112*octuordecies* states "the Appellant has the right to appeal [in front of the tax court] a decision of the Appeals Committee, [i.e. the BoA]".

<sup>1783</sup> Exhibit PHL-183, Philippines' response to Panel question No. 4.1.

<sup>1784</sup> Thailand's second oral statement, para. 100.

<sup>1785</sup> Thailand's second written submission, paras. 233-236; second oral statement, para. 101.

<sup>1786</sup> Thailand's second written submission, para. 233.

<sup>1787</sup> Thailand's second written submission, para. 234.

<sup>1788</sup> Thailand's response to Panel question No. 89.

<sup>1789</sup> Philippines' second written submission, para. 304.

<sup>1790</sup> Philippines' first written submission, para. 107; Exhibit PHL-27, rows 128-132, for shipments entered on 3, 10 and 17 September 2007.

of assessment is a procedural pre-requisite to the examination of guarantee decisions by the Tax Court, no prompt appeal right is provided to the importer.<sup>1791</sup>

7.1068 Moreover, according to the Philippines, the policy reasons put forward by Thailand are unconvincing: neither the right of the Thai administration to impose guarantees under Article 13 of the Customs Valuation Agreement nor the Thai Customs' responsibility in determining customs values would be defeated. Subjecting the guarantees to review would only ensure that those prerogatives and rights are carried out in accordance with WTO law.<sup>1792</sup>

(ii) *Analysis by the Panel*

7.1069 The Philippines claims that Thailand fails to maintain tribunals or procedures for prompt review of guarantee decisions inconsistently with Article X:3(b) of the GATT 1994. Thailand argues that the Philippines' claim must fail as under the Thai System, guarantee decisions are challengeable before the Thai Tax Court.

7.1070 At the outset, we note that the parties do not dispute that the Thai Administrative Court does not have jurisdiction over Thai Customs' guarantee decisions. Though Thailand initially argued that an appeal can be brought before the Administrative Court regarding guarantee decisions. It, however, acknowledged later in the proceeding after the Philippines' reference to the Thai Supreme Administrative Court's ruling to this effect that its initial view is *not* endorsed by the Thai Administrative Court. The ruling provides, in relevant part:

"Once the Plaintiff considered the Notification or order unlawful, it shall be deemed to be an appeal against the decision of the official under the law relating to taxation, *which is under the jurisdiction of the Tax Court pursuant to Section 7 (1) of the Tax Court Act and not within the jurisdiction of the Administrative Court* pursuant to third paragraph of Section 9 (3) of the Admin Court Act."<sup>1793</sup>

7.1071 As such, the question of whether independent tribunals or procedures are available in Thailand for the prompt review and correction of guarantee decisions is linked to two questions: first, whether Thailand *maintains* an independent tribunal or procedure for the prompt review of guarantee decisions. The main contention between the parties with respect to this question is whether importers can appeal guarantee decisions either directly or indirectly to the Thai Tax Court; and, second, if so, whether the existing right of appeal against guarantee decisions provides for a *prompt* review and correction of guarantee decisions.

7.1072 In examining the first question, we understand the Philippines' claim to be that no right of appeal against a guarantee decision exists independently from a notice of assessment. In other words, the Philippines is not arguing that guarantee decisions can never be challenged before an independent tribunal. Particularly, in the light of the Philippines' statements in the course of the proceeding<sup>1794</sup>,

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<sup>1791</sup> Philippines' second written submission, para. 304; combined responses to Panel questions Nos. 87 and 89.

<sup>1792</sup> Philippines' second written submission, paras. 313-314.

<sup>1793</sup> Exhibit PHL-133. Supreme Administrative Court Case No 417/2550 (2007), *PM Thailand Ltd-Customs and Excise Departments*.

<sup>1794</sup> Philippines' second written submission, paras. 302-303. The Philippines considers that providing an appeal against a guarantee decision together with the final customs determination is insufficient because: (i) if the guarantee is fixed at a sufficiently high level, there may never be an assessed customs value because goods may not be cleared. In this situation, no remedy would be available against guarantees entirely foreclosing market access; (ii) even when some imports occur, a guarantee may undermine competitive opportunities, as [t]he delay before an assessed customs value is issued can run to many months – as this dispute shows – with

considered in conjunction with the relevant court decisions and expert opinions, the Philippines does not appear to be contesting that pursuant to Section 112 of the Customs Act, guarantee decisions can be appealed to the Tax Court once a notice of assessment on a final customs value is issued.<sup>1795</sup> Thailand, however, submits that aside from this appeal under Section 112 of the Customs Act, a direct appeal to the Thai Tax Court is also available to the importers against guarantee decisions by virtue of Section 7(4) of the Tax Court Act.<sup>1796</sup>

7.1073 Based on the evidence before us, we find that guarantee decisions can be appealed to the Thai Tax Court once the importer has been provided with a notice of assessment regarding a final customs value of the good concerned. In respect of appeals against notices of assessment, however, we recall that under Thai law, an importer must lodge its complaint against a notice of assessment first to the BoA for it to be able to bring its appeal to the Tax Court. Therefore, to the extent that an appeal of a guarantee decision is also conditioned upon the issuance of a notice of assessment, the same process is equally applicable to the appeal process for a guarantee decision.<sup>1797</sup>

7.1074 Thailand, however, takes the position that direct appeals against guarantee decisions independently of final customs value decisions are also available before the Tax Court by virtue of Section 7(4) of the Tax Court Act.<sup>1798</sup> In this connection, Thailand relies on two pieces of evidence to demonstrate that guarantee decisions can be appealed to the Tax Court independently of a notice of assessment. First, Thailand submitted a letter from the Attorney General dated August 2009 stating that guarantee decisions can directly be appealed to the Tax Court as they fall within the scope of Article 7(4) of the Tax Court Act.<sup>1799</sup> Thailand also relies on the Supreme Court decision No 819/2540, which also refers to Section 7(4) of the Tax Court Act<sup>1800</sup>, to support its position that guarantee decisions can be appealed to the Tax Court independently of final customs value determinations.

7.1075 The Philippines argues that the evidence put forward by Thailand does not show that the Tax Court has jurisdiction to review guarantee decisions independently of final customs value decisions. The Philippines submits that the letter from the Attorney General explaining that Section 7(4) of the Tax Court Act provides for a direct appeal against guarantee decisions before the Tax Court contradicts the decisions of the Thai Supreme Administrative Court and the Thai Supreme Court.<sup>1801</sup>

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market access impaired throughout that time [and] (iii), in many cases, the guarantee will be revoked when goods are finally assessed, and domestic courts may not wish to rule upon such a measure.

<sup>1795</sup> Thailand's second written submission, para. 231. Based on the experts' opinions submitted by the Philippines, Thailand also notes that "it appears not to be in dispute that importers *may* challenge guarantees *after* notices of assessment are issued" (Thailand's response to Panel question No. 88) The affidavit by Mr. P. Veraphong also clarifies this point : "In other words, the importer subject to a guarantee value must (1) wait for a definitive assessment notice and (2) obtain a ruling from the Board of Appeals, *before he can submit an appeal to the Tax Court.*" (Exhibit PHL-150, para. 10.3, emphasis added).

<sup>1796</sup> Thailand's response to question No. 167.

<sup>1797</sup> Thailand's second written submission, para. 231, referring to Aekaputra Affidavit, Response to Panel question 4.1, Exhibit PHL-183 and Veraphong Affidavit, Response to Question 10, paragraph 10.3, Exhibit PHL-182.

<sup>1798</sup> Thailand's response to Panel question No. 167.

<sup>1799</sup> section 7 of the Tax Court Act provides in relevant part:

"section 7. The tax courts have jurisdiction over the following civil matters:

(1) Cases in respect of appeals against any decision of the competent official or the committee relating to any taxation law;

...

(4) Cases in respect of debts incurred in connection with obligation made for collecting taxes..."

<sup>1800</sup> Exhibit PHL-281. section 7(4) of the Tax Court Act states that tax courts have jurisdiction over cases in respect of debts incurred in connection with obligation[s] made for collecting taxes.

<sup>1801</sup> Philippines' comments on Thailand's response to Panel question No. 167.

Similarly, in the Philippines' view, the Thai Supreme Court decision produced by Thailand to this effect has no link to guarantees in the customs context, and rather deals with refunds of company taxes.<sup>1802</sup>

7.1076 We will examine the evidence provided by Thailand in turn to determine whether direct appeals against guarantee decisions independently of final customs value decisions are also available before the Tax Court by virtue of Section 7(4) of the Tax Court Act. First, Thailand refers to a letter from the Attorney General dated August 2009. The letter shows that the Attorney General Office's opinion was provided upon request from the Customs Department regarding the importers' right of appeal against a guarantee decision. In relevant part, the letter states:

"Office of the Attorney General is of the opinion that an importer has two options to appeal regarding a guarantee placement order made by the Customs official under the law. First option, appeal such order to the Customs officials, as the appeal to an administrative order under Article 44 of the Administrative Procedure Act B.E. 2539, if not satisfied, an importer is entitled to bring the case to the Tax Court, since such claim is considered to be a case in respect to appeal against any decision of any competent officials relating to taxation that is under Article 7(1) of the Establishment of Tax Court and Tax Court Procedure Act B.E. 2528. Second option, an importer may bring the case to the Tax Court directly, since this matter is considered to be a dispute case in respect to rights or duties under an obligation made for tax collection's purpose under Section 7(4) of the Establishment of Tax Court and Tax Court Procedure Act B.E. 2528. Therefore, it can be concluded that Thai law has already provided fair channels for an importer to appeal regarding guarantee placement order."<sup>1803</sup>

7.1077 Therefore, according to the letter, the Office of the Attorney General is of the opinion that guarantee decisions *can* be directly appealed to the Tax Court as those decisions fall within the scope of Article 7(4) of the Tax Court Act.

7.1078 The Philippines, however, points to the decision of the Thai Supreme Court, which, in its view, contradicts the Attorney General's opinion as provided in the letter.<sup>1804</sup> In 1989, the Thai Supreme Court held:

"In the case of the requirement of the guarantee by the competent official according to Section 112, if the Court allows the Plaintiff to file the lawsuit [against the guarantee] such as in this case, ... before the Defendant's competent officer assessed the duty and notified the Plaintiff, it would curtail the power of the competent official to assess the duty pursuant to Section 112 bis, paragraph one and would completely curtail the right of the Plaintiff to appeal against such assessment. ... [I]n this case, because the Defendant's competent official had not yet assessed the duty and notified the Plaintiff to pay the duty pursuant to Section 112 bis, paragraph one, the Defendant has not according to Section 55 of the Civil Procedure Code infringed upon the right

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<sup>1802</sup> Philippines' comments on Thailand's response to Panel question No. 167; Exhibit THA-101.

<sup>1803</sup> Exhibit THA-91.

<sup>1804</sup> The Philippines' comments on Thailand's response to Panel question No. 167. As described in paras. 7.1054-7.1060, the Philippines also referred to the decisions of the Thai Administrative Court and the Thai Supreme Administrative Court in which it was clarified that the Thai Administrative Court did not have jurisdiction over guarantee decisions. We note, however, that the Thai Supreme Administrative Court was of the view that guarantee decisions were a subject matter that falls within the scope of jurisdiction of the Thai Tax Court.

or duty of the Plaintiff and, therefore, the Plaintiff has no power to file such lawsuit in this case."<sup>1805</sup>

7.1079 In this connection, we also note expert opinions submitted by the Philippines. In his commentary to this Thai Supreme Court decision, Professor Asawaroj underlines that at the time of writing (2006), "a lawsuit could not be brought unless the importer or the exporter has first appealed the assessment of the competent official to the Board of Appeal pursuant to Section 112 sexies".<sup>1806</sup> Further, Mr Piphob Veraphong provides the view that the Customs Act does not directly provide a process for challenging the guarantees.<sup>1807</sup>

7.1080 Moreover, the Philippines refers to the 1991 Thai Supreme Court decision in which the Court addressed a criminal case involving false customs value declaration under the Customs Act. The company concerned initially brought the case before the Tax Court to recover the guarantee pending the finalisation of the criminal prosecution.<sup>1808</sup> In relevant part of the decision, the Supreme Court states:

"[I]n order to wait for the results of the criminal case to be finalised, the Defendant [DG Customs] has not issued the notice of assessment to notify the plaintiff. As such, the plaintiff did not have the right to request the defendant to return the cash guarantees or bank guarantees to the plaintiff."<sup>1809</sup>

7.1081 We consider that the Thai Supreme Court decisions cited above clarify the Court's view that importers do not have the right to appeal guarantee decisions to the Thai Tax Court independently of the issuance of a notice of assessment. Both Supreme Court decisions indicate that the issuance of a notice of assessment is a prerequisite for acquiring the right to appeal an administration's decision. Although Thailand put forward the opinion of the Office of the Attorney General in this regard, which differs from the rulings in the Supreme Court's decisions, we are not in a position to blindly accept such an opinion in the absence of a specific and convincing explanation by Thailand on how such an opinion should supersede or can be reconciled with the Supreme Court decisions.

7.1082 Thailand also refers to the Thai Supreme Court decision in which the Court rules that Thai Customs *could* bring a case against a company before the Tax Court for the purpose of obtaining a corporate tax refund. According to Thailand, because both the customs guarantee and the refund of company taxes are "conditional" obligations<sup>1810</sup>, the Supreme Court's ruling on the competence of the Tax Court to hear a tax refund case is equally applicable to appeals against guarantee decisions. The Supreme Court's ruling as relied upon by Thailand, however, does not appear to present the set of circumstances that would prove that the ruling is equally applicable to Thai Customs' guarantee decisions. As the Philippines points out, we do not see how the Thai Supreme Court decision on a tax refund dispute as cited by Thailand can effectively be linked to the importers' right to appeal guarantees in the customs context despite the Supreme Court's previous ruling to the contrary on the latter question.

7.1083 Therefore, we are not presented with sufficient evidence to conclude that a guarantee decision can be appealed to the Thai Tax Court independently of the notice of assessment. This raises the

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<sup>1805</sup> Philippines' first oral statement, para. 152, referring to the Supreme Court Case No. 509/2532 (1989), *S.K.W. Steels Product Co., Ltd., - Customs Department*, p. 2 (Exhibit PHL-136).

<sup>1806</sup> Professor Chuchart Asawaroj, *Collection of Customs Law and Law relating to Customs Tariff*, p. 4 (Duentula Publishing House, Bangkok, 2006) (Exhibit PHL-135).

<sup>1807</sup> Exhibit PHL-182, para. 10.3.

<sup>1808</sup> Philippines' comments on Thailand's response to Panel question No. 167.

<sup>1809</sup> Supreme Court Decision 119/2534, (1991) *Saereewattana Industry Co., Ltd v. Customs Department*, (Exhibit PHL-288).

<sup>1810</sup> Thailand's response to Panel question No. 167.



question of whether the availability of appeals against a guarantee before the Thai Tax Court after an initial review by the BoA upon the issuance of the notice of assessment satisfies the requirement to provide for the *prompt* review by an independent body within the meaning of Article X:3(b).

7.1084 The Philippines claims that Thailand does not provide for prompt appeals of guarantee decisions as there is no time-frame governing the issuance of Notices of Assessment, which recently took up to 10 months. Thailand argues that Article X:3(b) does not require that WTO Members provide "immediate and independent" rights of appeal to affected importers.

7.1085 We noted above that the term "prompt" was defined as "*adjective*. 2 Of action, speech, etc.: ready, quick; done, performed, etc., without delay".<sup>1811</sup> In the context of Article X:3(b), Members are required to maintain the internal review system "for the prompt *review* and *correction* of administrative action relating to customs matters". Considered in its context, therefore, the word "prompt" concerns the *review* as well as the *correction* of administrative actions.

7.1086 We have found that a guarantee could, depending on the situation, bring about a heavy financial burden on importers. This was shown in the situation where PM Thailand, for example, was not able to post guarantee amounts necessary to withdraw the imported cigarettes pending final determination of a customs value due to an unusually high level of guarantee amount set by Thai Customs.<sup>1812</sup> Given the possibility that a guarantee immediately and adversely may affect the importers' ability to withdraw imported goods, the obligation imposed on Members under Article X:3(b) must be interpreted such that an appeal mechanism maintained by a Member enables the concerned administrative action to be *promptly* reviewed and corrected. Whether a Member's appeal system maintained pursuant to Article X:3(b) provides for the prompt review and correction of an administrative action as required under Article X:3(b), in our view, therefore would have to be considered, *inter alia*, in the light of the nature of the specific administrative action concerned.<sup>1813</sup>

7.1087 In challenging a guarantee decision, an importer seeks to have the amount of a guarantee reviewed and, if warranted by the circumstances, revised downwards, for example, to the level in line with the value of the imports and similar import, so as to enable it withdraw the goods from customs. Considered in the light of this, if a system does not make available the review of a guarantee decision until the final determination has made in respect of a customs value, an importer can face a situation where it will not be able to withdraw imported goods due to a guarantee value set at an excessively high level. In our view, this is not compatible with the obligation under Article X:3(b) to maintain independent tribunals for the *prompt* review of the concerned administrative action.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 We first summarize our conclusions on the parties' claims on the scope of our terms of reference in this dispute. For the reasons set forth in Section VII.B.1, we conclude that:

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<sup>1811</sup> *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. I, p. 2366 (2002).

<sup>1812</sup> Philippines' combined response to Panel question Nos. 87 and 89.

<sup>1813</sup> In this regard, we note the statement by the Appellate Body that the word "immediately" in Article 12.1 of the Agreement on Safeguards must be given meaning on a case by case basis. (Appellate Body Report, *US – Wheat Gluten*, para. 105, "As regards the meaning of the word "immediately" in the chapeau to Article 12.1, we agree with the Panel that the ordinary meaning of the word "implies a certain urgency". The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages. Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify "immediately".)

- (a) the Philippines' claim under Article X:3(a) with respect to the Thai VAT system is outside the Panel's terms of reference because the Philippines failed to plainly connect the challenged measure with Article X:3(a) in its panel request;
- (b) the Philippines' claim under Article X:3(a) with respect to the excise, health and television taxes are within the Panel's terms of reference;
- (c) Thai Customs' valuation determinations for the imported cigarettes at issue that were cleared between 11 August 2006 and 13 September 2007 are within the Panel's terms of reference and appropriately presented for the Panel's examination; and
- (d) the December 2005 MRSP Notice, the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice are within the Panel's terms of reference.

8.2 With respect to the Philippines' claims under the Customs Valuation Agreement, we conclude that:

- (a) Thailand does not maintain or apply a general rule requiring the rejection of the transaction value and the use of the deductive valuation method;
- (b) Thailand's rejection of PM Thailand's declared transaction values for the [[xx.xxx.xx]] entries at issue is inconsistent with Articles 1.1 and 1.2;
- (c) Thailand acted inconsistently with Article 1.2(a) by failing to communicate within the meaning of Article 1.2(a) the Thai Customs "grounds" for considering that the relationship between PM Thailand and PM Philippines influenced the price;
- (d) Thailand acted inconsistently with Article 16 by failing to provide an adequate explanation on how Thai Customs determined the customs values for imported cigarettes;
- (e) Thailand acted inconsistently with Article 7.1 by improperly assessing the deductive value of the imported cigarettes concerned;
- (f) Thailand acted inconsistently with Article 7.3 by failing to properly inform PM Thailand in writing of the customs value determined under Article 7 and the method used to determine such value; and
- (g) Thailand acted inconsistently with Article 10 by disclosing confidential customs valuation information provided by PM Thailand to Thai Customs in the Thai media.

8.3 With respect to the Philippines' claims under the GATT 1994, we conclude that:

- (a) regarding the determination of the MRSPs for VAT on imported cigarettes, Thailand acted inconsistently with Article III:2, first sentence by subjecting imported cigarettes to a VAT liability in excess of that applied to like domestic cigarettes with respect to the MRSPs for the December 2005 MRSP Notice, the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice;
- (b) regarding the VAT exemption for domestic cigarette resellers, Thailand acted inconsistently with Article III:2, first sentence by subjecting imported cigarettes to a

VAT liability in excess of that applied to like domestic cigarettes by granting the exemption from the VAT liability only to domestic cigarettes resellers; and

- (c) regarding the VAT exemption for domestic cigarette resellers, Thailand acted inconsistently with Article III:4 by subjecting imported cigarettes to less favourable treatment compared to like domestic cigarettes by imposing additional administrative requirements, connected to VAT liabilities, on imported cigarette resellers.

8.4 With respect to the Philippines' claims under Article X of the GATT 1994, we conclude that:

- (a) Thailand acted inconsistently with Article X:1 of the GATT 1994 for failing to publish the methodology used to determine the tax base for VAT;
- (b) Thailand did not act inconsistently with Article X:1 by failing to publish the methodology and data necessary to determine ex factory prices for domestic cigarettes;
- (c) Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to properly publish the general rule pertaining to the release of guarantees;
- (d) Thailand did not act inconsistently with Article X:3(a) by appointing certain government officials to the Board of Directors for TTM;
- (e) Thailand acted inconsistently with Article X:3(a) because of the delays caused in the BoA decision-making process;
- (f) Thailand acted inconsistently with Article X:3(b) by failing to maintain or institute independent review tribunals or processes for the prompt review of customs valuation determinations; and
- (g) Thailand acted inconsistently with Article X:3(b) by failing to maintain or institute independent review tribunals or process for the prompt review of guarantee decisions.

8.5 Regarding the Philippines' claim under Article 4 of the Customs Valuation Agreement, we conclude that the Philippines' claim cannot form part of the Philippines' request for findings and recommendations because the Philippines' request was not made in a timely manner.

8.6 We conclude that the Philippines' sequencing claim under Article 7.1 of the Customs Valuation Agreement cannot form part of the Philippines' request for findings and recommendations because it was not presented in a timely manner. We also consider that Article 7.1 of the Customs Valuation Agreement does not constitute the basis for an independent sequencing claim under the Customs Valuation Agreement.

8.7 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures listed above are inconsistent with the Customs Valuation Agreement and the GATT 1994, they have nullified or impaired benefits accruing to the Philippines under those Agreements.

8.8 Accordingly, the Panel recommends that the Dispute Settlement Body request Thailand to bring these inconsistent measures as listed above into conformity with its obligations under the GATT 1994 and the WTO Agreement. Regarding our findings in paragraphs 7.509-7.566 above in

respect of the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice, as explained in paragraph 6.24 of the Interim Review section, it is not entirely clear to us whether and, if so, to what extent, these MRSP Notices will have effects on the subsequent MRSP Notices. Our recommendations with respect to these MRSP Notices, therefore, apply only to the extent they continue to have effects. We do not make a recommendation for the December 2005 MRSP Notice as it is not disputed that it has expired and does *not* continue to exist for purpose of Article 19.1 of the DSU.

## ANNEX A-1

### WORKING PROCEDURES FOR THE PANEL

1. The Panel will provide the parties to the dispute (hereinafter "parties") and third parties (hereinafter "third parties") with a timetable for panel proceedings and shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.
2. The Panel shall meet in closed session. The parties, and the third parties, shall be present at the meetings only when invited by the Panel to appear before it.
3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in these procedures shall preclude parties or third parties from disclosing statements of their own positions to the public, provided that such party or third party does not thereby disclose any confidential information from the other party or third parties. Parties shall treat as confidential information submitted by the other party or third party to the Panel where such information has been so designated. As provided in Article 18.2 of the DSU, where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall normally be submitted no later than one (1) week after the written request is presented to the Panel, unless a different deadline is granted by the Panel where good cause is shown.
4. The Panel has adopted additional procedures for the protection of certain BCI as an annex to these working procedures, taking into account the procedures proposed by the parties and their comments on each other's proposals.
5. Before the first substantive meeting of the Panel with the parties and third parties, the parties shall transmit to the Panel written submissions in which they present the facts of the case and their arguments. The third parties may transmit to the Panel written submissions, but only after the first written submissions of the parties have been submitted.
6. At its first substantive meeting with the parties, the Panel shall ask the Philippines and then Thailand to present their cases.
7. All third parties shall be invited to present their views during a session of the first substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of this session. Each party and third party shall serve its written submissions made in advance of the first substantive meeting of the Panel on the other party and third parties.
8. Formal rebuttals shall be made at the second substantive meeting of the Panel. Thailand shall have the right to take the floor first to be followed by the Philippines. The parties shall submit, prior to that meeting, written rebuttals to the Panel.
9. The Panel may at any time put questions to the parties and third parties and ask them for explanations either during the course of a meeting with the parties and third parties or in writing. Written replies to questions shall be submitted in accordance with the timetable established by the Panel. Third parties shall not be permitted to ask questions to the parties or to the other third parties.

10. The parties and any third party invited to present orally their views to the Panel shall make available to the Panel and to the other party, and where appropriate to the third parties, a written version of their oral statements by 5:30 pm of the first working day following the last day of the substantive meetings in which the statement was made. The parties and third parties are encouraged to provide a provisional written version of their oral statements at the time the oral statement is presented.

11. The parties and third parties shall make all submissions in an official WTO language. Where the original language of exhibits or of text quoted in the submissions or responses to questions is not an official WTO language, the party or third party shall submit the original language version of that at the same time. In the case of exhibits, parties may submit them in the original language provided that a translated version in an official WTO language is submitted at the same time. The Panel may grant extensions of time for the translation of such exhibits into an official WTO language where good cause is shown.

12. Any objection as to the accuracy of a translation should be raised in writing and at the earliest possible moment, preferably no later than the next regular filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

13. The presentations, rebuttals and statements referred to in paragraphs 5, 6, 7 and 8 shall be made in the presence of the parties. Moreover, each party's written submissions, written answers to questions and comments thereon, comments on the descriptive part of the report, and written request for review of precise aspects of the Interim Panel Report and comments on the other party's request shall be made available to the other party and, where appropriate, to the third parties.

14. Any request for a preliminary ruling (including rulings on jurisdictional issues) by the Panel shall be submitted at the earliest possible moment, and in any event no later than in a party's first written submission. If a party requests such a preliminary ruling, the other party shall submit its response to such request within a time limit specified by the Panel. Exceptions to this procedure will be granted where good cause is shown.

15. The parties shall submit all factual evidence to the Panel no later than the first substantive meeting, except with respect to factual evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by each other. Exceptions to this procedure will be granted where good cause is shown. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

16. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, the parties are requested to number their exhibits sequentially throughout the stages of the dispute. For example, exhibits submitted by the Philippines could be numbered PHI-1, PHI-2, etc, and exhibits submitted by Thailand could be numbered THA-1, THA-2, etc. If, for example, the last exhibit in connection with the first submission was numbered PHI-5, the first exhibit of its next submission thus would be numbered PHI-6.

17. The parties and third parties shall submit executive summaries of their written submissions (excluding any separate requests for a preliminary ruling and responses thereto) and oral statements within twenty days of the original submission or statement concerned. Each executive summary of the written submissions to be provided by each party shall not exceed 10 pages in length and each executive summary of the oral statements shall not exceed 5 pages in length. The summary to be provided by each third party shall not exceed 5 pages. The Panel may revise these page limits upon request of a party. Paragraph 22 shall apply to the service of executive summaries.

18. The executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. However, the Panel intends to use them solely for the purpose of preparing the descriptive part of its report, subject to any modifications deemed appropriate by the Panel. The replies of the parties and third parties to questions and the parties' comments on each other's replies to questions will not be attached to the Panel report as annexes. They will be reflected in the findings section of the Panel report where relevant. The parties may, however, make a request in their comments on the descriptive part of the report for the inclusion in that part of their replies to questions and/or their comments on each other's replies to questions. In making such request(s), the parties shall specify the precise parts of their replies and/or comments on each other's replies that they wish to have included in the specific sections of the descriptive part.

19. The parties and third parties to these proceedings have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel. The parties and the third parties shall provide a list of the participants of their delegation at least one day before each meeting, to the Secretary of the Panel, Mrs. Tessa Bridgman (e-mail: [tessa.bridgman@wto.org](mailto:tessa.bridgman@wto.org)).

20. Following issuance of the Interim Panel Report, the parties shall have three weeks to submit written requests to review precise aspects of the Interim Panel Report and to request a further meeting with the Panel. The right to request such a meeting must be exercised no later than at the time the written request for review is submitted. Following receipt of any written requests for review, in cases where no further meeting with the Panel is requested, the parties shall have the opportunity within one-and-a-half weeks to submit written comments on the other party's written request for review. Such comments shall be strictly limited to responding to the other party's written request for review. The parties are also reminded that the Interim Panel Report shall be kept strictly confidential and shall not be disclosed.

21. The Panel will do its utmost to provide the parties with electronic versions of the descriptive part of its report, its Interim Panel Report and its final report. Hard copies will be provided to the parties in any event. In case of inconsistency between the electronic and hard copy version of these documents, the hard copy version shall prevail.

22. The following procedures regarding service of documents apply:

- (a) Each party and third party shall serve its written submissions (including any separate requests for preliminary ruling and responses thereto), executive summaries and written versions of oral statements, directly on the other party, including, where appropriate, the third parties, and confirm it has done so at the time it provides its submissions to the Panel.
- (b) The parties and third parties should provide the Panel and the other party with their submissions, written answers to questions and comments invited by the Panel by 5:30 p.m. of the date referred to in the deadlines established by the Panel, unless a different time is set by the Panel.
- (c) The parties and third parties shall provide the Panel with 10 hard copies of all their submissions. All these copies shall be filed with the Dispute Settlement Registrar, \*\*\*\*\* (office 2052).
- (d) At the time they provide a hard copy of their submissions, the parties and third parties shall also provide the Panel with electronic copies of all their submissions on a

diskette or as an e-mail attachment in a format compatible with the Secretariat's software. E-mail attachments shall be sent to the Dispute Settlement Registry (DSRegistry@wto.org) with a copy to \*\*\*\*\* (e-mail: \*\*\*\*\*@wto.org) and \*\*\*\*\* (e-mail: \*\*\*\*\*@wto.org). If the electronic version is provided by diskette or CD, four copies should be delivered to \*\*\*\*\* (office 2052).

23. The Panel reserves the right to modify these procedures at any time following consultations with the parties.

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**Annex**

**ADDITIONAL PANEL WORKING PROCEDURES  
CONCERNING BUSINESS CONFIDENTIAL INFORMATION**

The following procedures apply to all business confidential information (BCI) submitted in the course of the Panel process. These procedures are intended to supplement but not replace the provisions of Article 18.2 of the DSU.

1. BCI is defined as financially or commercially sensitive information submitted to the Panel in the course of these proceedings that is (i) not otherwise available in the public domain, and (ii) clearly designated as BCI by the Philippines or Thailand in their submissions to the Panel.
2. Access to BCI shall be restricted to Approved Persons. No later than Monday, 16 March 2009 (close of business, Geneva time), each Party shall submit to the other Party, and to the Panel a list of Approved Persons including the job title of the listed persons. This list shall also include any outside legal advisers in the delegations of the parties as well as clerical or support staff who need access to BCI submitted by the other Party and/or Third Parties. In no circumstances shall persons that serve, on a permanent, part-time or occasional basis, as an employee, officer or agent of an enterprise, including a State-owned enterprise, engaged in the production, distribution, export, import or sale of the products concerned in this dispute be included among the Approved Persons. Each Party shall keep the number of Approved Persons as limited as possible.
3. Unless a Party objects to the designation of an individual as an Approved Person by Wednesday, 18 March 2009 (close of business, Geneva time), the Panel shall designate these individuals as Approved Persons. Where a Party objects, the Panel shall decide on the objection promptly.
4. An objection may only be based either on the failure to exclude from the list of Approved Persons an employee, officer or agent of an enterprise, including a State-owned enterprise, engaged in the production, distribution, export, import or sale of the products concerned in this dispute or on a conflict of interest.
5. The Parties may submit amendments to their lists at any time.
6. Nothing in these procedures shall be construed as limiting the right of government officials of either party to have access to information submitted to a government prior to the establishment of the Panel and reviewed by those officials in the normal course of their duties.
7. Nothing in these procedures shall be construed as limiting the access of Panel members or employees of the Secretariat to BCI submitted during these proceedings.
8. Only designated representatives of Third Parties may have access to BCI. Such access shall be restricted to Parties' submissions for the first meeting of the Panel, and shall be used solely for the purpose of preparing third party submissions and oral statements in the dispute. The Third Parties will provide the name(s) and title(s) of the designated representative(s) to the Parties and the Panel no later than Monday, 16 March 2009 (close of business, Geneva time). The procedures of paragraphs 2, 3, 4 above shall apply mutatis mutandis with respect to third parties.

9. A Party or Third Party submitting BCI in any written submission (including in any exhibits) shall mark the cover and/or first page of the document containing any such information with the words "Contains Business Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]] and the notation "Contains Business Confidential Information" shall be marked at the top of each page containing the BCI. A non-confidential version, clearly marked as such, of any written submission (including any exhibits) containing BCI, shall be submitted to the Panel within three working days after the submission of the confidential version containing the BCI. In the case of an oral statement containing BCI, the Party or Third Party making such a statement shall inform the Panel before commencing that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. A written non-confidential version of an oral statement containing BCI shall be submitted within two working days after the statement has been made. Non-confidential versions of both oral and written statements, including exhibits, shall be redacted in such a manner as to convey a reasonable understanding of the substance of the BCI deleted therefrom.

10. Any BCI information that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

11. As required by Article 18.2 of the DSU, a Party or Third Party having access to BCI submitted in this Panel process shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each Party and Third Party is responsible for ensuring that its employees and/or outside advisers comply with these procedures to protect BCI.

12. The Panel agrees not to disclose in its Report any information designated as BCI under these procedures. The Panel may, however, make statements of conclusion based on such information.

13. After the conclusion of the Panel process, and within a period fixed by the Panel, each Party shall return all documents in its possession submitted as BCI in the Panel process to the Party that originally submitted the BCI. Alternatively, a Party may certify in writing to the other Party that all such documents have been destroyed. The Secretariat may retain one copy of the documents containing the BCI for the archives of the WTO.

14. Submissions containing information designated as BCI under these procedures will be included in the record forwarded to the Appellate Body in the event of any appeal of the Panel's Report.

15. At the request of a Party, the Panel may apply these procedures or an amended form of these procedures, to protect information that does not fall within the scope of the information set out in paragraph 1. The Panel may, with the consent of the parties, waive any part of these procedures.

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