

that to date there had been no finding or resolution indicating whether TTM's activities fall within the scope of the exemption in Section 4(2).²⁰⁶¹ Indeed, Thailand states that it is "pure speculation as to whether TTM would be granted, or even claim, an exemption".²⁰⁶²

7.976. We note that TTM's Annual Report for the year 2015 reads in relevant part that "TTM's core functions are to provide the state with remittance in a form of revenues and taxes and to support tobacco farmers in improving the tobacco leaf quality in compliance with Good Agricultural Practices (GAP)".²⁰⁶³ The 2015 Annual Report adds that:

Although TTM has adhered to the policy that does not support people's smoking, there are still consumers' demand and an increasing amount of imported cigarettes. Therefore, TTM, as a state enterprise having a function to redistribute the revenues to the Government, has to protect the nation's interests and develop business operation with more effectiveness.²⁰⁶⁴

In our view, this raises the question of whether TTM's self-description of its functions and objectives suggests that it may indeed satisfy the requirements of Section 4(2).

7.977. We make no finding on whether TTM does or does not fall within the exemption in Section 4(2). Rather, we find that Thailand bears the burden of substantiating its assertion that TTM does not enjoy any exemption from the relevant Thai competition law, and that Thailand has not provided sufficient evidence in the course of this proceeding to discharge its burden.

7.4.5.5 Conclusion

7.978. For the reasons set forth above, the Panel concludes that, in implementing the DSB's recommendations and rulings in the original proceeding, Thailand's VAT notification requirement accords less favourable treatment to imported cigarettes as compared to like domestic cigarettes by exposing cigarette importers to legal risks and additional administrative burdens and costs, which the domestic producer of cigarettes does not have to face. The VAT notification requirement is thus inconsistent with Article III:4 of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. Regarding the BoA Ruling of 16 November 2012, concerning 210 entries of *Marlboro* cigarettes imported into Thailand by PMTL between January 2002 and January 2003, we conclude that:

- a. the BoA acted inconsistently with Articles 1.1 and 1.2(a) of the CVA by rejecting PMTL's declared transaction values without a valid basis, and in particular that:
 - i. the BoA acted inconsistently with Article 1.2(a), second sentence, by failing to properly examine the circumstances surrounding the sale of the cigarettes to PMTL because its examination of the circumstances of sale was not apt to reveal whether the relationship between PMTL and PM Indonesia influenced the price paid by PMTL for the relevant cigarettes; and
 - ii. the BoA acted inconsistently with Article 1.2(a), third sentence, by failing to communicate to PMTL its grounds for considering that the relationship influenced the price and failing to give PMTL an opportunity to respond.
- b. the BoA acted inconsistently with Article 5.1 of the CVA in applying the deductive method to determine an alternative customs value, and in particular that:
 - i. the BoA acted inconsistently with Article 5.1(a)(i) by failing to deduct an appropriate amount in respect of P&GE;

²⁰⁶¹ Thailand's response to Panel question No. 124(b), p. 49.

²⁰⁶² Thailand's request to review the Interim Report, para. 2.61.

²⁰⁶³ TTM, Annual Report, 2015 (English and Thai), (Exhibit PHL-3), p. 5.

²⁰⁶⁴ TTM, Annual Report, 2015 (English and Thai), (Exhibit PHL-3), p. 5.

- ii. the BoA acted inconsistently with Article 5.1(a)(ii) by failing to deduct an appropriate amount in respect of transport costs; and
- iii. the BoA acted inconsistently with Article 5.1(a)(iv) by failing to deduct an appropriate amount in respect of provincial taxes payable.
- c. the BoA acted inconsistently with Article 11.3 of the CVA by failing to provide sufficient reasons for its decision in the BoA Ruling itself; and
- d. the BoA acted inconsistently with Article 16 of the CVA by failing to provide a timely explanation of how the customs value was determined, following PMTL's request for an explanation.

8.2. Regarding the Charges filed by the Public Prosecutor on 18 January 2016 concerning 272 entries of *Marlboro* and *L&M* cigarettes imported by PMTL between July 2003 and June 2006, we find that the Philippines' claims are admissible and fall within the scope of this compliance proceeding²⁰⁶⁵, and we conclude that:

- a. the Charges are inconsistent with Articles 1.1 and 1.2(a) of the CVA because they reject PMTL's declared transaction values without a valid basis, and in particular that the Public Prosecutor acted inconsistently with Article 1.2(a), second sentence, by not engaging in an examination of the circumstances of sale that was apt to reveal whether the relationship between PMTL and PMPMI influenced the price paid by PMTL;
- b. the Charges are inconsistent with Article 2.1(a) and (b), or in the alternative, Article 3.1(a) and (b) of the CVA, because they improperly treat King Power's purchase prices as transaction values for identical or similar goods; and
- c. the Philippines has not demonstrated that Thai officials were responsible for disclosing PMTL's import prices to the media contrary to Thailand's obligation under Article 10 of the CVA.

8.3. Regarding the requirement under Notification 187 and Order Por. 145-2555 to notify the average actual market price of cigarettes on the date of notification for the purpose of determining the VAT base, we conclude that:

- a. Thailand's failure to publish the administrative ruling of general application that cigarette importers can notify RRSPs to the extent they reflect the average actual market prices under Notification 187 and Order Por. 145-2555, is inconsistent with Article X:1 of the GATT 1994;
- b. Thailand has administered its Revenue Code provisions in an unreasonable manner, inconsistently with Article X:3(a) of the GATT 1994, by imposing on cigarette importers the VAT notification requirement with which it is impossible to ensure compliance and which exposes importers to potential consequences of non-compliance; and
- c. Thailand has acted inconsistently with Article III:4 of the GATT 1994 by imposing the VAT notification requirement, which accords less favourable treatment to imported cigarettes than like domestic cigarettes.

8.4. 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. We conclude that, to the extent that the measures at issue are inconsistent with the Customs Valuation Agreement and the GATT 1994, they have nullified or impaired benefits accruing to the Philippines under those agreements.

8.5. We therefore conclude that Thailand has failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the CVA and the GATT

²⁰⁶⁵ See Sections 7.1.3 (The ACWL/Commerce letters and lawyer-client privilege), 7.3.2 (Preclusion), 7.3.3 (Close nexus), 7.3.4 (Ripeness) above.

1994. To the extent that Thailand has failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.
