

THAILAND – CIGARETTES (PHILIPPINES)¹

(DS371)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Philippines	CVA Arts. 1, 16, GATT Arts. III:2, III:4 and X	Establishment of Panel	17 November 2008
			Circulation of Panel Report	15 November 2010
Respondent	Thailand		Circulation of AB Report	17 June 2011
			Adoption	15 July 2011

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Thailand's customs and tax measures.
- **Product at issue:** Cigarettes imported from the Philippines.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **CVA Art. 1.1 and 1.2(a) (valuation in a related-party transaction):** In determining the acceptability of the transaction value declared by the importer in a related-party transaction, customs authorities must (i) examine the circumstances of the sale in the light of the information provided by the importer or otherwise; (ii) communicate to the importer the grounds for preliminarily considering that the relationship influenced the price; and (iii) give the importer a reasonable opportunity to respond so that the importer can submit further information. The Panel found that Thai Customs acted inconsistently with Arts. 1.1 and 1.2(a) in rejecting the transaction value of the imported cigarettes because it failed to properly examine the circumstances of the transaction between the importer and the seller.
- **CVA Art. 16 (customs' explanation of valuation decision):** Under Art. 16, when requested, the customs authority must provide a written explanation that is sufficient to make clear and give details of how the customs value of the importer's goods was determined. The Panel concluded that the basis for rejecting the transaction value as provided in Thai Customs' letter to the importer (i.e. "it cannot be proven whether the relationship has an influence on the determination of customs values or not") was inadequate to explain the reason for rejecting the transaction value within the meaning of Art. 16.
- **GATT Art. III:2 (national treatment – taxes and charges):** Thailand's measure subjected resellers of imported cigarettes to VAT when they do not satisfy conditions for obtaining input tax credits necessary to achieve zero VAT liability; resellers of like domestic cigarettes are never subject to VAT liability by reason of a complete exemption from VAT. The fact that resellers of imported cigarettes may take action to achieve zero VAT liability under Thailand's measure does not preclude a finding of inconsistency. The Appellate Body upheld the Panel's finding that Thailand acted inconsistently with Art. III:2, first sentence.
- **GATT Art. III:4 (national treatment – domestic laws and regulations):** The analysis must be grounded in close scrutiny of the "fundamental thrust and effect of the measure itself". Such examination normally requires an identification of the implications of the measure for the conditions of competition between imported and like domestic products in the marketplace; this may be discerned from the design, structure, and expected operation of the measure and need not be based on empirical evidence as to the actual effects. When imported and like domestic products are subject to a single regulatory regime with the only difference being that imported products must comply with additional requirements, this would provide a significant indication that imported products are treated less favourably. The Appellate Body upheld the Panel's finding that Thailand treats imported cigarettes less favourably than like domestic cigarettes by imposing additional administrative requirements only on resellers of imported cigarettes.
- **GATT Art. X:3(b) (trade regulations – prompt review of administrative action on customs matters (guarantee decisions):** "Prompt review and correction" under Art. X:3(b) requires review and correction performed in a quick and effective manner and without delay. The nature of the specific administrative action at issue also informs the meaning of "prompt". For review of a customs guarantee to be timely and effective, it must be possible to challenge the guarantee during the time it serves as a security. Thai law delays review of guarantee decisions because they can only be challenged once a notice of assessment of final duty liability is issued. The Appellate Body found that this system does not ensure prompt review of administrative action and upheld the Panel's finding that Thailand acted inconsistently with Art. X:3(b).

¹ Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines

² Other issues addressed: CVA Arts 7.1, 7.3, 10, 16; GATT Arts X:1, X:3(a), XX(d); DSU Art. 11; standard of review; late submission of evidence; terms of reference; recommendations on completed acts.

THAILAND – CIGARETTES (PHILIPPINES) (ARTICLE 21.5 – PHILIPPINES)¹ (DS371)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Philippines	CVA Arts. 1, 2, 3, 5, 10, 11, 16	Establishment of Panel	21 July 2016
			Circulation of Panel Report	12 November 2018
Respondent	Thailand	GATT Arts. III:4, X:1, X:3(a)	Notification of appeal	9 January 2019

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- **Measure at issue:** Three sets of measures, including: (i) a Board of Appeals (BoA) ruling issued in 2012, regarding the customs valuation of 210 shipments of cigarettes imported in 2002–2003, rejecting the importer’s declared transaction values and determined a higher revised customs value for these entries; (ii) a set of criminal charges filed in 2016 accusing the importer of under-declaring the customs values for 272 entries of cigarettes imported between 2003–2006; and (iii) the administration of the value-added tax (VAT) regime for cigarettes.
- **Product at issue:** Cigarettes imported from the Philippines and/or Indonesia

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **CVA Art. 1.1 and 1.2(a) (valuation in a related-party transaction):** The BoA ruling and the Charges violated Arts. 1.1 and 1.2(a) of the CVA by rejecting the importer’s declared transaction values without a valid basis.
- **CVA Art. 5 (valuation based on deductive method):** The BoA ruling violated Arts. 5.1(a)(i), (ii) and (iv) of the CVA by failing to deduct appropriate amounts in respect of P&GE, transport costs and provincial taxes payable.
- **CVA Art. 11 (sufficient reasons):** The BoA violated Art. 11.3 of the CVA by failing to provide sufficient reasons for its decision in the Ruling.
- **CVA Art. 16 (customs’ explanation of valuation decision):** The BoA acted inconsistently with Art. 16 of the CVA by failing to provide a timely explanation of how the customs value was determined, following the importer’s request for an explanation.
- **CVA Art. 2 and 3 (valuation based on identical or similar goods):** The Charges violated Art. 2.1(a), or in the alternative, Art. 3.1 of the CVA, because they improperly treated the purchase prices of a duty-free operator as transaction values for identical or similar goods.
- **CVA Art. 10 (confidentiality):** The Philippines did not demonstrate that Thai officials were responsible for disclosing the importers prices to the media.
- **GATT Art. XX (general exceptions):** The general exceptions in Art. XX of the GATT 1994 are not applicable to the obligations in the CVA.

¹ *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*. Panel report subject to pending appeal.

² Other issues addressed: Scope of Art. 21.5 proceedings; lawyer-client privilege; ripeness of dispute; applicability of CVA to criminal charges; claims under GATT Art. III:4, X:1, and X:3(a).

THAILAND – CIGARETTES (PHILIPPINES) (ARTICLE 21.5 – PHILIPPINES II)¹ (DS371)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Philippines</i>	CVA Arts. 1, 6, 7	Establishment of Panel	<i>27 March 2018</i>
			Circulation of Panel Report	<i>12 July 2019</i>
Respondent	<i>Thailand</i>		Notification of appeal	<i>9 September 2019</i>

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- **Measure at issue:** Two sets of measures, including: (i) a set of criminal charges filed in 2017 accusing the importer of under-declaring the customs values for 780 entries of cigarettes between 2002-2003; and (ii) 1,052 revised Notices of Assessment that the importer received in November 2017 from Thailand's Customs Department, rejecting PMTL's declared transaction values, and determining revised customs values, for 1,052 entries of cigarettes imported over the period 2001-2003.
- **Product at issue:** Cigarettes imported from Indonesia

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **CVA Art. 1.1 and 1.2(a) (valuation in a related-party transaction):** The Charges violated Art. 1.1 and/or the substantive obligation in Art. 1.2(a), second sentence, of the CVA by rejecting the importer's declared transaction values without conducting a proper examination of the circumstances surrounding the sale, and/or a proper determination of the price actually paid or payable.
- **CVA Art. 6 and 7 (valuation based on computed value / reasonable means):** The Charges violated Art. 6.1 and/or Art. 7.1 of the CVA by improperly relied on pricing and cost information reported by the manufacturer in certain tax forms to determine the revised customs value of the imported goods.
- **CVA Arts. 2-7 (sequential use of valuation methods):** The Public Prosecutor violated the obligation to sequentially apply the customs valuation methods in Arts. 2 through 7 of the CVA when it determined the revised customs values of the imported goods.
- **GATT Art. XX (general exceptions):** The general exceptions in Art. XX of the GATT 1994 are not applicable to the obligations in the CVA.

¹ *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines.* Panel report subject to pending appeal.

² Other issues addressed: third-party access to confidential Final Report; party request for information pursuant to Art. 13 of the DSU; terms of reference / respondent's objection to new claims; allegation of illegal acts; Philippines' standing to challenge measures affecting imported cigarettes from Indonesia; termination/withdrawal of challenged measures.