

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

Notification of an Appeal by Thailand
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 22 February 2011, from the Delegation of Thailand, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Thailand hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (WT/DS371/R), which was circulated on 15 November 2010 (the "Panel Report"). Pursuant to Rules 20(1) and 21(1) of the *Working Procedures for Appellate Review*, Thailand is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

As described below, Thailand appeals certain of the Panel's findings on measures related to Thailand's Value Added Tax ("VAT") regime for cigarettes, as well as Thailand's regime for the acceptance of guarantees to secure the importer's ultimate liability for customs duties pending final determination of the customs value of imported goods.

Thailand seeks review by the Appellate Body of the following errors of law and legal interpretation by the Panel in the Panel Report:

I. The Panel's finding under Article III:2 of the GATT 1994

1. The Panel erred in law in finding a violation of Article III:2, first sentence, of the GATT 1994, not on the basis of the fiscal burdens imposed on imported and domestic products under Thai VAT law, but solely on the basis of the administrative requirements of Thailand's VAT system and the consequences of non-compliance with those requirements.¹ The administrative requirements of Thailand's VAT system and the consequences of non-compliance are measures that fall within the scope of Article III:4, not Article III:2, first sentence, of the GATT 1994.

¹ See Panel Report, paras. 6.98-6.120, paras. 7.568-7.644, and para. 8.3(b). This appeal does not include the Panel's separate finding under Article III:2, first sentence, in paragraphs 7.567 and 8.3(a) of the Panel Report.

2. Even if the Panel were correct to address the administrative requirements of Thai VAT law under Article III:2, first sentence, of the GATT 1994, the Panel erred in law in finding a violation of Article III:2 solely on the basis of administrative requirements whereby resellers must file a VAT form declaring and offsetting their VAT credits and liabilities on re-sales of imported cigarettes for each month and whereby VAT credits are granted only with respect to actual, documented purchases of goods such as imported cigarettes.² These requirements cannot, as a matter of law, lead to taxation of imported products in excess of that imposed on domestic products within the meaning of Article III:2, first sentence.

II. The Panel's finding under Articles III:4 and XX(d) of the GATT 1994

3. The Panel erred in law in finding that certain additional administrative requirements for re-sales of imported cigarettes amounted to less favourable treatment of imported products within the meaning of Article III:4 of the GATT 1994 on the basis of a finding solely that these administrative requirements could potentially affect the competitive position of imported cigarettes that is not supported by its factual analysis and findings.³

4. The Panel erred in law in rejecting Thailand's defence under Article XX(d) of the GATT 1994 to the Philippines' claim under Article III:4 on the ground that it had already found the measures with respect to which Thailand asserted the defence (the additional administrative requirements for re-sales of imported cigarettes) to be inconsistent with Article III:4 of the GATT 1994.⁴ Instead, the Panel should have looked first at whether the laws with respect to which Thailand sought to achieve compliance were otherwise consistent with the GATT 1994.⁵

5. The Panel erred in law by accepting and relying on evidence that was submitted at the last opportunity for the parties to submit their views to the Panel and that was the only evidence to support one aspect of the Panel's finding under Article III:4 and upon which Thailand had no opportunity to comment.⁶ The Panel acted inconsistently with Article 11 of the DSU and paragraph 15 of its Working Procedures and also failed to protect Thailand's due process rights by accepting and relying on this evidence.⁷

III. The Panel's finding under Article X:3(b) of the GATT 1994

6. The Panel erred in law in finding that the provisional step of accepting a guarantee in the circumstances provided for in Article 13 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("CVA") constitutes an "administrative action relating to customs matters" within the meaning of and subject to a right of review under Article X:3(b) of the GATT 1994.⁸

² See Panel Report, paras. 6.98-6.120; paras. 7.613-7.637; and 8.3(b).

³ See Panel Report, paras. 7.724-7.738 and para. 8.3(c).

⁴ See Panel Report, paras. 7.749-7.758.

⁵ See Panel Report, paras. 7.738 and para. 8.3(c).

⁶ See Panel Report, paras. 6.122-6.128, paras. 7.684-7.704, and para. 8.3(c).

⁷ See Panel Report, paras. 6.122-6.128, paras. 7.684-7.704, and para. 8.3(c).

⁸ See Panel Report, paras. 7.1016-7.1053 and para. 8.4(g).

7. Even if the Panel were correct that the acceptance of a guarantee under Article 13 of the CVA constitutes an "administrative action relating to customs matters" within the meaning of Article X:3(b), the Panel erred in law in finding that providing a right of review of the taking of a guarantee at the time of the final determination of duty liability cannot satisfy the obligation in Article X:3(b).⁹

Thailand respectfully requests the Appellate Body to reverse the findings of the Panel identified in this Notice of Appeal.

⁹ See Panel Report, paras. 7.1054-7.1087, and para. 8.4(g).