

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

AB-2011-1

Report of the Appellate Body

I.	Introduction.....	1
II.	Arguments of the Participants and the Third Participants	5
A.	<i>Claims of Error by Thailand – Appellant</i>	5
1.	Article III:2 of the GATT 1994	5
2.	Article III:4 of the GATT 1994	8
(a)	Article III:4: "treatment no less favourable"	8
(b)	Article 11 of the DSU: the Panel's Treatment of Exhibit PHL-289	10
(c)	Thailand's Defence Under Article XX(d) of the GATT 1994	12
3.	Article X:3(b) of the GATT 1994.....	13
B.	<i>Arguments of the Philippines – Appellee</i>	16
1.	Article III:2 of the GATT 1994	16
2.	Article III:4 of the GATT 1994	18
(a)	Article III:4: "treatment no less favourable"	19
(b)	Article 11 of the DSU: the Panel's Treatment of Exhibit PHL-289	20
(c)	Thailand's Defence Under Article XX(d) of the GATT 1994	22
3.	Article X:3(b) of the GATT 1994.....	23
C.	<i>Arguments of the Third Participants</i>	26
1.	Australia.....	26
2.	European Union	28
3.	United States	32
III.	Issues Raised in This Appeal	33
IV.	Article III of the GATT 1994.....	34
A.	<i>Introduction</i>	34
B.	<i>Overview of the Measures at Issue</i>	34
1.	The Measure Challenged Under Article III:2 of the GATT 1994	34
2.	The Measure Challenged Under Article III:4 of the GATT 1994	38
C.	<i>Article III:2 of the GATT 1994</i>	41
D.	<i>Article III:4 of the GATT 1994</i>	46
1.	Article III:4: "treatment no less favourable"	47
2.	Article 11 of the DSU: the Panel's Treatment of Exhibit PHL-289.....	55
3.	Thailand's Defence Under Article XX(d) of the GATT 1994	64
4.	Conclusion	70
V.	Article X:3(b) of the GATT 1994.....	70
A.	<i>Introduction</i>	70
B.	<i>Article X:3(b) of the GATT 1994</i>	71
1.	The Meaning of "administrative action relating to customs matters" and "prompt review and correction" in Article X:3(b)	73
2.	Application of Article X:3(b) to the Facts of the Dispute.....	78
(a)	Administrative Action Relating to Customs Matters.....	78
(b)	Prompt Review and Correction.....	81
VI.	Findings and Conclusions	84
ANNEX I	Notification of an Appeal by Thailand.....	87

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008
<i>Canada – Patent Term</i>	Appellate Body Report, <i>Canada – Term of Patent Protection</i> , WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, as upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, as upheld (WT/DS339/R) and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
<i>China – Intellectual Property Rights</i>	Panel Report, <i>China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights</i> , WT/DS362/R, adopted 20 March 2009
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009

Short Title	Full Case Title and Citation
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
<i>EC – Selected Customs Matters</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX-X, 3915
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Alcoholic Beverages</i>	Panel Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, circulated to WTO Members 15 November 2010
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701

Short Title	Full Case Title and Citation
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, 3507
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – FSC</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 – FSC</i> (Article 21.5 – EC)	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S/206
<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 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<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 (Thailand) /</i> <i>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, DSR 2008:VII, 2385 / DSR 2008:VIII, 2773
<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

LIST OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1995 DG Revenue ruling	Ruling by the Director-General of the Thai Revenue Department, Gor.Kor. 0802/Por.22836, dated 10 October 1995 (Panel Exhibit THA-96)
2000 DG Revenue ruling	Ruling by the Director-General of the Thai Revenue Department, Gor.Kor. 0811/Por.633, dated 27 January 2000 (Panel Exhibit PHL-253).
2006 textbook	Excerpt of page 4-266 of <i>Textbook on the Revenue Code</i> by Professor Paichit Rojanavanich, Chumporn Sensai, and Saroch Thongpracum, B.E. 2549 (2006) (Panel Exhibit THA-95)
<i>Agreement on Customs Valuation</i>	<i>Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994</i>
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
BCI	business confidential information
BoA	Board of Appeals
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
MRSP	maximum retail selling price, a reference price fixed by the Thai Government for each brand of cigarettes
Order No. Por. 85/2542	Government of the Kingdom of Thailand, Order of Revenue Department No. Por. 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 (Panel Exhibit PHL-95)
Panel Report	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, 15 November 2010
<i>Revised Kyoto Convention</i>	<i>International Convention on the Simplification and Harmonization of Customs Procedures</i> , done at Kyoto, 18 May 1973, 950 UNTS 269, as amended by the <i>Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures</i> , done at Brussels, 26 June 1999, 2370 UNTS 27
Royal Decree No. 239	Government of the Kingdom of Thailand, Royal Decree Issued Under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (Panel Exhibit PHL-217)
Thai Customs	Thai Customs Department
Thai Customs Act	Government of the Kingdom of Thailand, The Customs Act, B.E. 2469 (Panel Exhibit PHL-20).

Abbreviation	Description
Thai Revenue Code	Government of the Kingdom of Thailand, The Council of Regency, The Act Promulgating the Revenue Code, B.E. 2481 (Panel Exhibit PHL-94).
<i>TRIPS Agreement</i>	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
TTM	Thailand Tobacco Monopoly
VAT	value added tax
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Thailand, *Appellant*
Philippines, *Appellee*

Australia, *Third Participant*
China, *Third Participant*
European Union¹, *Third Participant*
India, *Third Participant*
Separate Customs Territory of Taiwan, Penghu,
Kinmen and Matsu, *Third Participant*
United States, *Third Participant*

AB-2011-1

Present:

Van den Bossche, Presiding Member
Ramírez-Hernández, Member
Zhang, Member

I. Introduction

1. Thailand appeals certain issues of law and legal interpretations developed in the Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (the "Panel Report").² The Panel was established on 17 November 2008 to consider a complaint by the Philippines with respect to certain customs and fiscal measures imposed by Thailand on cigarettes imported from the Philippines.³

¹This dispute began before the entry into force of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) on 1 December 2009. On 29 November 2009, the World Trade Organization 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". On 13 July 2010, the World Trade Organization received a second Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party. We understand the reference in the Verbal Notes to the "European Community" to be a reference to the "European Communities". In the proceedings before the Panel, the third party submission dated 18 May 2009 and the 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 the Panel to refer to "European Union" and "EU", rather than "European Communities" and "EC", in the Panel Report. (Panel Report, footnote 3 to para. 1.6) We refer to the European Union in this Report.

²WT/DS371/R, 15 November 2010.

³Panel Report, para. 1.3.

2. Before the Panel, the Philippines made a number of claims in respect of several Thai customs and fiscal measures affecting cigarettes imported from the Philippines.⁴ The Philippines raised three sets of claims: (i) with respect to measures pertaining to customs valuation, under Articles 1, 4, 5, 7, 10, and 16 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the "*Agreement on Customs Valuation*")⁵; (ii) with respect to measures forming part of Thailand's value added tax ("VAT") regime under Article III:2 and Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")⁶; and (iii) with respect to Thailand's administration of certain customs and fiscal measures, including with respect to guarantees, under Article X of the GATT 1994.⁷

3. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 15 November 2010.

⁴Panel Report, para. 7.1.

⁵With respect to Thai Customs' valuation of cigarettes imported from the Philippines and cleared between 11 August 2006 and 13 September 2007, the Philippines claimed that: (i) Thailand acted inconsistently with Article 1.1 and Article 1.2(a) of the *Agreement on Customs Valuation* because Thai Customs improperly rejected the transaction values of those entries; (ii) Thai Customs applied the deductive valuation method inconsistently with Thailand's obligations under Articles 5 and 7 in determining the customs value of those cigarette entries; (iii) Thailand acted inconsistently with its obligation under Article 10 not to disclose confidential information; and (iv) Thailand acted inconsistently with its obligation under Article 16 to provide an explanation for the determination of the final customs value. The Philippines also claimed that Thailand acted inconsistently with Article 1.1 and Article 1.2(a) of the *Agreement on Customs Valuation* by maintaining an unpublished general rule requiring the rejection of transaction value and the use of the deductive valuation method. (Panel Report, paras. 7.2 and 7.79-7.81)

⁶The Philippines claimed that Thailand acted inconsistently with Article III:2, first sentence, of the GATT 1994 by subjecting imported cigarettes to tax in excess of that applied to like domestic cigarettes through: (i) a discriminatory tax base for VAT imposed on imported cigarettes; and (ii) the exemption of domestic cigarettes from VAT obligations. The Philippines also claimed that Thailand acted inconsistently with Article III:4 of the GATT 1994 by imposing more onerous administrative requirements on resellers of imported cigarettes than on resellers of domestic cigarettes. (Panel Report, paras. 7.412, 7.568, and 7.645)

⁷The Philippines claimed that Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to publish: (i) the methodology for determining the maximum retail selling price ("MRSP"), a reference price fixed by the Thai Government for each brand of cigarettes; (ii) the methodology for determining ex factory prices for Thailand Tobacco Monopoly ("TTM") cigarettes; and (iii) laws and regulations governing the release of guarantees for potential liability arising from health, excise, and television taxes. The Philippines also raised the following claims under Article X:3(a) of the GATT 1994: (i) Thailand did not administer its customs and internal tax rules in a "reasonable" and "impartial" manner by appointing certain senior Thai Government officials to serve on the Board of Directors of TTM; (ii) undue delays in the decision-making process of the Board of Appeals (the "BoA") constitute an "unreasonable" administration of customs laws; (iii) the determination of the tax base for VAT for imported cigarettes is administered in a "non-uniform", "unreasonable", and "partial" manner; and (iv) the establishment of the health, excise, and television taxes in relation to imported cigarettes is administered in a "non-uniform", "unreasonable", and "partial" manner. The Philippines further claimed that Thailand acted inconsistently with Article X:3(b) of the GATT 1994: by (i) failing to maintain tribunals or procedures for the prompt review of appeals against certain customs valuation decisions; and (ii) failing to maintain or institute tribunals or procedures for the purpose of prompt review of guarantees imposed by Thai Customs on imported cigarettes. (Panel Report, paras. 7.759, 7.862, 7.989, and 7.1016)

4. In its Report, the Panel made a number of findings with respect to the scope of the matters before it⁸, and a number of findings that Thailand had acted inconsistently with its obligations under the *Agreement on Customs Valuation*.⁹ None of these findings is at issue in this appeal.

5. The Panel further made several findings that Thailand had acted inconsistently with its obligations under Article III of the GATT 1994, including that:

(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.¹⁰

⁸With respect to the *claims* advanced by the Philippines, the Panel found that: (i) the Philippines' claim under Article X:3(a) of the GATT 1994 with respect to the Thai VAT system was outside its terms of reference because the Philippines failed to plainly connect the challenged measure with Article X:3(a) in its panel request; and (ii) the Philippines' claim under Article X:3(a) with respect to the health, excise, and television taxes was within the Panel's terms of reference. (Panel Report, para. 8.1(a) and (b); see also paras. 7.26 and 7.31) The Panel also found that, although the two provisions were listed in the panel request, the Philippines' claims under Article 4 and Article 7.1 of the *Agreement on Customs Valuation* were not supported by specific arguments and evidence presented in a timely manner, and further that Article 7.1 of the *Agreement on Customs Valuation* does not constitute a basis for an independent sequencing claim under that Agreement. (*Ibid.*, paras. 8.5 and 8.6; see also para. 7.280) With respect to the *measures* at issue, the Panel found the following to be within its terms of reference: (i) Thai Customs' valuation determinations for the imported cigarettes at issue that were cleared between 11 August 2006 and 13 September 2007; and (ii) the December 2005 MRSP Notice, the September 2006 MRSP Notice, the March 2007 MRSP Notice, and the August 2007 MRSP Notice. (*Ibid.*, para. 8.1(c) and (d); see also paras. 7.51 and 7.67)

⁹Panel Report, para. 8.2; see also paras. 7.195, 7.223, 7.266, 7.332, 7.398, and 7.411. With respect to the Philippines' claims under the *Agreement on Customs Valuation*, the Panel found that the rejection by Thai Customs of the declared transaction values for certain cigarette entries in 2006 and 2007 was inconsistent with Article 1.1 and Article 1.2, and that Thailand acted inconsistently with Article 1.2(a) by failing to communicate Thai Customs' grounds for such rejection. The Panel also found that the application by Thai Customs of its valuation methodology was inconsistent with Thailand's obligations under Article 7.1 and Article 7.3, and that Thailand acted inconsistently with Article 10 and Article 16, respectively, by disclosing confidential information, and by failing to provide an adequate explanation as to how Thai Customs determined customs values for imported cigarettes. The Panel found, however, that Thailand does not, as the Philippines claimed, maintain or apply a general rule requiring the rejection of the transaction value and the use of the deductive valuation method.

¹⁰Panel Report, para. 8.3(b) and (c); see also paras. 7.644 and 7.738. The Panel also found that Thailand acted inconsistently with Article III:2, first sentence, by subjecting imported cigarettes to 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. (*Ibid.*, para. 8.3(a); see also para. 7.567) This finding has not been appealed.

6. The Panel also made certain findings that Thailand had acted inconsistently with its obligations under Article X of the GATT 1994, including that:

- (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.¹¹

7. The Panel recommended that the Dispute Settlement Body (the "DSB") request Thailand to bring those measures found to be inconsistent into conformity with its obligations under the GATT 1994 and the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). The Panel made no recommendation with respect to one measure that had expired. With respect to certain other measures found to be inconsistent with Thailand's obligations under the *Agreement on Customs Valuation*, the Panel indicated that it was "not entirely clear ... whether and, if so, to what extent"¹² those measures have effects on subsequent measures. Accordingly, for those measures, the Panel stated that its recommendations "apply only to the extent [that those measures] continue to have effects".¹³

8. On 22 February 2011, Thailand notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal¹⁴ and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the *Working Procedures for Appellate Review* (the "*Working Procedures*").¹⁵ On 14 March 2011, the Philippines filed an appellee's submission.¹⁶ On 15 March 2011, Australia, the European Union, and the United States each filed a third participant's submission¹⁷, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu notified its

¹¹Panel Report, para. 8.4(g); see also para. 7.1087. The Panel also found that: (i) Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to publish the methodology used to determine the MRSP (the tax base for VAT); (ii) 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; (iii) 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; (iv) Thailand did not act inconsistently with Article X:3(a) by appointing certain government officials to the Board of Directors for TTM; (v) Thailand acted inconsistently with Article X:3(a) because of the delays caused in the BoA decision-making process; (vi) the Philippines' claim relating to the administration of Thai health, excise, and television taxes was improperly brought under Article X:3(a); and (vii) 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. (*Ibid.*, para. 8.4(a)-(f); see also paras. 7.791, 7.829, 7.861, 7.929, 7.969, 7.988, and 7.1015) With the exception of the Panel's finding in paragraph 8.4(g)—reproduced above—none of these findings are at issue in this appeal.

¹²Panel Report, para. 8.8.

¹³Panel Report, para. 8.8.

¹⁴WT/DS371/8 (attached as Annex I to this Report).

¹⁵WT/AB/WP/6, 16 August 2010.

¹⁶Pursuant to Rule 22 of the *Working Procedures*.

¹⁷Pursuant to Rule 24(1) of the *Working Procedures*.

intention to appear at the oral hearing as a third participant.¹⁸ On 16 March 2011, China and India each notified its intention to appear at the oral hearing and requested to make an oral statement at the hearing. In accordance with Rule 24(4) of the *Working Procedures*, the Division authorized China, India, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, each to make an oral statement at the hearing.

9. By letter dated 15 March 2011, the Philippines requested, pursuant to Rule 18(5) of the *Working Procedures*, authorization from the Appellate Body Division hearing this appeal to correct a clerical error in its appellee's submission. On 16 March 2011, the Division invited Thailand and the third participants to comment on this request. No comments were received. On 18 March 2011, the Division authorized the Philippines to correct the clerical error in its appellee's submission.

10. The Panel adopted additional working procedures for the protection of business confidential information ("BCI")¹⁹, but we have not done so in this appeal. Neither participant requested that we adopt additional procedures for the protection of BCI in these appellate proceedings, although the Philippines made a conditional request that we consult the participants in the event that we considered it necessary to refer to information that was considered to be BCI in the proceedings before the Panel. We have not found it necessary to refer to any such information in this Report.

11. The oral hearing in this appeal was held on 18 and 19 April 2011. The participants and three of the third participants (Australia, the European Union, and the United States) made oral statements. The participants and third participants responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. Claims of Error by Thailand – Appellant

1. Article III:2 of the GATT 1994

12. Thailand requests the Appellate Body to reverse the Panel's finding that Thailand acted inconsistently with Article III:2, first sentence, of the GATT 1994. Thailand contends that the measures at issue consist of administrative requirements that are not subject to the scope of Article III:2, and that, even if these administrative requirements could be examined under

¹⁸Although the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu indicated that its notification was made pursuant to Rule 24(2) of the *Working Procedures*, the notification was not received before the 17:00 deadline specified in Rule 18(1) of the *Working Procedures*. Accordingly, the Division treated it as a notification and request to make an oral statement at the hearing made pursuant to Rule 24(4) of the *Working Procedures*.

¹⁹See Panel Report, paras. 2.3 and 2.4, and Annex A-1 at pp. 399 and 400.

Article III:2, the Panel erred in finding an inconsistency arising in situations where resellers of imported cigarettes do not satisfy those requirements.

13. Thailand argues that the Panel improperly found a violation of Article III:2 because the Panel's analysis was not based on any difference in the tax burdens imposed on imported and domestic cigarettes, but rather on the regulatory requirements affecting the resale of imported cigarettes and the consequences of non-compliance with those requirements. In Thailand's view, such a difference in regulatory requirements cannot give rise to a violation of Article III:2 and should therefore have been addressed solely under Article III:4.

14. According to Thailand, Article III:2 "imposes a strict standard"²⁰ that internal taxes or internal charges on imported products may not be in excess of those applied to like domestic products. Thus, Article III:2 concerns the actual tax burden, and is essentially a mathematical exercise in which the tax burden on imported and domestic products under the measure at issue is first identified and then compared. In contrast, Article III:4 addresses the non-charge elements of internal legislation, which, in this dispute, consist of administrative requirements.

15. Thailand submits that the difference in how measures are analyzed under Article III:2 and under Article III:4 explains why it is important to maintain the distinction between their scopes. Article III:2 is intended to discipline the tax burdens imposed on imported and domestic products by Members, not how Members regulate their internal markets. Subjecting administrative requirements, or the financial consequences of failing to comply with those requirements, to the scope of Article III:2 will deprive Members of their right under Article III:4 to regulate sales of imported and domestic products differently, so long as the differences do not amount to less favourable treatment of imported products. Thailand further argues that it is well established that a measure that consists of administrative requirements should be analyzed under Article III:4, even if the failure to comply with those administrative requirements may have financial consequences for an imported product. Accordingly, the financial consequences of non-compliance with the administrative requirements of Thailand's VAT regime cannot be treated as separate measures to be analyzed under Article III:2 independently of those administrative requirements.

16. Thailand contends that, in the circumstances of this case, there is "no question of any difference between the actual tax burden"²¹ on imported cigarettes and that on domestic cigarettes. The Panel found that Thailand's VAT rate is seven per cent for both imported and domestic cigarettes, and that the full amount of VAT is collected from both the domestic producer and the importer at the

²⁰Thailand's appellant's submission, para. 55.

²¹Thailand's appellant's submission, para. 73.

time of the initial sale by the domestic producer or importer to the wholesaler. Thus, the Panel's finding was not based on the tax burden under Thai VAT law, but instead solely on the difference in the regulatory requirements for resales of imported and domestic cigarettes and the consequences of failure to comply with those requirements. Such requirements, Thailand contends, "are fundamentally administrative rather than fiscal in nature".²²

17. Thailand objects to the Panel's reliance on the GATT panel report in *US – Tobacco* and to its application of the proposition that a challenged measure is inconsistent with Article III:2 where it carries with it "*the risk of discriminatory treatment of imports* in respect of internal taxes".²³ Thailand states that it does not disagree that a risk of excess taxation may give rise to a violation of Article III:2, and that a measure that contains an inherent risk of applying a higher tax rate for imported products will be inconsistent with Article III:2. Such risk, however, must relate to the calculation of the tax burden imposed under the measures at issue. The scope of Article III:2 cannot be expanded to include consequences arising out of non-compliance with administrative requirements. In this dispute, the measures at issue do not prescribe a mandatory formula that "mathematically, invariably leads to a specific result concerning the tax rate".²⁴ Moreover, any risk associated with a failure to comply with reporting requirements cannot be equated with an inherent risk of being subject to higher taxation. Thailand maintains that the measures in this dispute *a priori* provide for equal taxation for imported and domestic products.

18. Even if the Panel were correct in examining the consequences of failure to comply with administrative requirements under Article III:2, first sentence, Thailand argues that the Panel's finding of inconsistency was incorrect for two reasons. First, a system of offsetting tax paid against tax collected cannot be said to be inconsistent with Article III:2 simply because private parties are required to comply with certain administrative requirements in order to obtain offsetting credits. Entitlement to a right is not any less "automatic" where parties do not avail themselves of that right. Moreover, the Panel improperly relied on the Appellate Body report in *Korea – Various Measures on Beef* in concluding that "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".²⁵ In Thailand's view, the Appellate Body did not, in that dispute, suggest that WTO law does not permit Members to require private parties to comply with administrative procedures in order to protect their rights and fulfil their obligations under domestic law.

²²Thailand's appellant's submission, para. 78.

²³Thailand's appellant's submission, para. 80 (quoting Panel Report, para. 7.625, in turn quoting GATT Panel Report, *US – Tobacco*, para. 97 (emphasis added by the Panel)).

²⁴Thailand's appellant's submission, para. 83.

²⁵Thailand's appellant's submission, para. 93 (quoting Panel Report, para. 7.637, in turn quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 146).

19. Second, Thailand considers that the situations in which a tax credit may be denied involve either instances in which resellers cannot establish that the claimed credit relates to an actual and legitimate purchase of cigarettes, or where the rules do not relate to the purchase and resale of imported products. It cannot be inconsistent with WTO law not to give tax credits on purchases that may not have taken place, to require proof of purchase in order to obtain an input tax credit, or to deny claims based on inaccurate invoices. An analysis of excess taxation for purposes of Article III:2 must involve a comparison of the taxes applied on actual, legitimate, documented sales of imported and domestic products, and WTO Members must be entitled to establish reporting and record-keeping requirements to satisfy themselves that taxes are imposed and collected only with respect to legitimate sales. Yet, Thailand claims, the Panel's finding under Article III:2 implies that it would be required under WTO law to grant input tax credits claimed by resellers even if the resellers cannot prove that the purchases for which the credit was claimed actually took place.

2. Article III:4 of the GATT 1994

20. Thailand requests the Appellate Body to reverse the Panel's finding that Thailand acted inconsistently with Article III:4 of the GATT 1994 by subjecting imported cigarettes to less favourable treatment than that accorded to like domestic cigarettes, through the imposition of additional VAT-related administrative requirements only on resellers of imported cigarettes. Thailand advances three independent grounds for reversal of this finding: (i) that the Panel erred in its application of Article III:4 to the facts of this dispute and in finding that the Thai measures at issue accord less favourable treatment to imported cigarettes; (ii) that the Panel violated Thailand's due process rights, and acted inconsistently with Article 11 of the DSU and paragraph 15 of its Working Procedures, in accepting and relying upon a piece of evidence submitted late in the proceedings by the Philippines; and (iii) that the Panel erred in rejecting Thailand's defence under Article XX(d) of the GATT 1994.

(a) Article III:4: "treatment no less favourable"

21. Thailand submits that the Panel's analysis and findings do not support a finding of less favourable treatment under Article III:4. Under Article III:4, the fact that different regulatory regimes apply to imported and to like domestic products is not determinative of whether imported products are treated less favourably. Members have the right to treat imported products differently and, therefore, to impose additional or more complicated requirements so long as they do not amount to less favourable treatment. The Panel reached its finding without making any factual findings other than to establish the existence of the different requirements themselves. According to Thailand, in this case the Panel simply referred to price elasticity and switching patterns as an indication that the additional

administrative requirements can potentially have a negative impact, and asserted that "an additional administrative burden *can* be linked to the operating costs of [] businesses", which "*could* in turn result in modifying the competitive conditions".²⁶ The Panel's finding was thus based entirely on the theoretical possibility that the differences "*could potentially affect* the competitive position of imported cigarettes in a negative manner".²⁷ Thailand argues that the Panel, therefore, simply identified differences in the regulatory treatment of resales of imported cigarettes and assumed that those differences had the potential to affect negatively the competitive position of such imported products.

22. Thailand points out that the Appellate Body has found that a measure that accords imported products treatment different from that accorded to domestic products "is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is 'no less favourable'".²⁸ The Panel's reliance on a "could potentially affect" standard appears to be founded on the Appellate Body's statement in *US – FSC (Article 21.5 – EC)* that an examination of less favourable treatment "need not be based on the *actual effects* of the contested measure in the marketplace".²⁹ The Appellate Body also stated in that case, however, that a determination of less favourable treatment "*cannot rest on simple assertion*, but must be found on a careful analysis of the contested measure and of its implications in the marketplace".³⁰ The Panel appears to have considered it sufficient to identify any conceivable potential negative effect on the competitive position of imports and to find a violation of Article III:4 on that basis. As a result, the Panel made no attempt to identify how or to what extent the minor differences in treatment might in practice increase costs, or how any increase in costs would affect negatively the competitive position of imported cigarettes. Moreover, the Panel failed to account for the gains that resellers of imported cigarettes obtain by virtue of the administrative requirements, such as the possibility to claim additional input tax credits from VAT paid on utilities, administrative expenses, and other services. Thus, in Thailand's view, the Panel "failed to conduct *any* meaningful analysis of how these differences affect the competitive position of imports".³¹

23. Thailand also rejects the Panel's reliance on several other WTO cases. For instance, Thailand does not understand the Appellate Body to have suggested, in *US – Section 211 Appropriations Act*,

²⁶Thailand's appellant's submission, para. 119 (quoting Panel Report, para. 7.736). (emphasis added by Thailand)

²⁷Thailand's appellant's submission, para. 120. (original emphasis)

²⁸Thailand's appellant's submission, para. 122 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 135; and referring to Appellate Body Report, *EC – Asbestos*, para. 100, and Appellate Body Report, *US – Section 211 Appropriations Act*, para. 261).

²⁹Thailand's appellant's submission, para. 124 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (original emphasis)).

³⁰Thailand's appellant's submission, para. 125 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215). (emphasis added by Thailand)

³¹Thailand's appellant's submission, para. 135. (original emphasis)

that all "additional" requirements are "inherently" less favourable. To the contrary, the Appellate Body emphasized that it is permissible to subject imported products to different legal provisions.³² Moreover, the differential treatment in that case involved two entirely separate administrative proceedings, a comparison qualitatively different from the "benign"³³ or "very minor"³⁴ differences in reporting requirements under Thailand's VAT regime. In addition, although the panel in *Canada – Wheat Exports and Grain Imports* stated that practices not very onerous in commercial terms may still be banned when they are likely to put imported products at a competitive disadvantage, Thailand argues that the Panel in this dispute never examined whether such a likelihood in fact exists for imported cigarettes.

(b) Article 11 of the DSU: the Panel's Treatment of Exhibit PHL-289

24. Thailand also contends that the Panel violated Thailand's due process rights and acted inconsistently with Article 11 of the DSU and paragraph 15 of its Working Procedures by accepting and relying on Exhibit PHL-289, which was submitted by the Philippines at the last stage of the proceedings, without affording Thailand the right to comment on such evidence. Because the Panel relied on Exhibit PHL-289 in reaching its findings under Article III:4, Thailand also requests the Appellate Body to reverse the Panel's finding that Thailand acted inconsistently with that provision.

25. Thailand submits that Article 11 of the DSU requires panels to protect the due process rights of each party to a dispute, including the provision of an adequate opportunity to respond to evidence adduced by the other party. However, Thailand was not afforded the opportunity to comment on Exhibit PHL-289, which was submitted by the Philippines in its comments on Thailand's responses to the Panel's questions after the second substantive meeting. The Panel's due process violation is particularly serious because the Panel stated in its Interim Report that it was basing its finding that sales of domestic cigarettes need not be reported in form Por.Por.30 solely on the expert opinion contained in Exhibit PHL-289. Although the Panel deleted this reference from its Report, "Exhibit PHL-289 was still the only evidence referred to in the final report".³⁵ As the panel found in *Korea – Alcoholic Beverages*, the rights of the parties under the DSU may be affected by the importance of the evidence at issue.³⁶ Therefore, since Exhibit PHL-289 was the only evidence upon which the Philippines based its *prima facie* case, Thailand considers that its due process rights with respect to

³²Thailand's appellant's submission, paras. 122 and 137 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 261).

³³Thailand's appellant's submission, para. 135.

³⁴Thailand's appellant's submission, para. 137.

³⁵Thailand's appellant's submission, para. 169.

³⁶Thailand's appellant's submission, para. 170 (quoting Panel Report, *Korea – Alcoholic Beverages*, para. 10.25).

Exhibit PHL-289 should have been "accorded the highest importance"³⁷, and that Thailand could not have been required to request special leave to respond to Exhibit PHL-289 in order to have its due process rights respected.

26. Thailand also alleges that the Panel's due process violation was "exacerbated"³⁸ by the fact that the Panel did not accord considerable deference to Thailand's interpretation of its own law. This is because, in Thailand's view, where the only evidence suggesting that sales of domestic cigarettes need not be reported in form Por.Por.30 was expert testimony, and Thailand had informed the Panel that these sales had to be reported in that form, the Panel "could have and should have"³⁹ given deference to Thailand's interpretation of its own law.

27. Thailand contends that the Panel's reliance on the Appellate Body's statement in *Argentina – Textiles and Apparel*, that working procedures do not constrain panels with "hard and fast rules on deadlines for submitting evidence", is misplaced for three reasons.⁴⁰ First, a panel's working procedures cannot supersede a panel's due process obligations. Second, the Appellate Body made this finding in respect of the working procedures of the panel in that dispute, which contained deadlines for submitting evidence that were less detailed and clear than those specified in the Working Procedures adopted by the Panel in this dispute. Third, the Panel failed to take into account the Appellate Body's observation that *prima facie* evidence must be submitted during the first procedural stage of the panel proceedings.

28. Thailand also argues that the Panel failed to comply with paragraph 15 of its Working Procedures by accepting and relying upon Exhibit PHL-289. According to Thailand, under Article 12.1 of the DSU, panels are required to comply with working procedures that are adopted in agreement with the parties. Paragraph 15 of the Panel's Working Procedures establishes, as a general rule, that evidence cannot be submitted after the first substantive meeting, and that evidence may be submitted after this deadline only in exceptional circumstances, provided that good cause is shown and the other party is afforded an opportunity to comment.⁴¹ However, the Panel neither rejected

³⁷Thailand's appellant's submission, para. 171.

³⁸Thailand's appellant's submission, para. 173 (referring to Panel Report, *US – Section 301 Trade Act*, para. 7.19).

³⁹Thailand's appellant's submission, para. 173.

⁴⁰Thailand's appellant's submission, para. 176 (quoting Panel Report, para. 6.125, in turn quoting Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 79 and 80).

⁴¹Paragraph 15 of the Panel's Working Procedures provides:

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.

Exhibit PHL-289 as untimely, nor accepted it subject to a showing of good cause and the provision to Thailand of an opportunity to comment. Moreover, Exhibit PHL-289 cannot be classified as rebuttal evidence because it was crucial to the Philippines' *prima facie* case, and a piece of evidence cannot be rebuttal evidence and *prima facie* evidence at the same time. Nor could Exhibit PHL-289 be deemed to have been necessary for the Philippines' comments on Thailand's responses to the Panel's questions, since the opportunity to comment on answers provided by the other party is not intended to provide a fresh opportunity to rectify or expand *prima facie* evidence. Thailand adds that there is no reason why the Philippines could not have submitted the expert testimony contained in Exhibit PHL-289 earlier in the proceedings so as to permit Thailand to respond to it.

(c) Thailand's Defence Under Article XX(d) of the GATT 1994

29. Thailand requests the Appellate Body to reverse the Panel's finding that Thailand did not discharge its burden of establishing its defence under Article XX(d) of the GATT 1994 on the grounds that the Panel committed legal error in so finding. Furthermore, because the Panel's failure to conduct the correct legal analysis "effectively deprived Thailand of its right to assert its Article XX(d) defence"⁴², Thailand requests the Appellate Body to reverse the Panel's finding of inconsistency under Article III:4 on the grounds that it is also legally flawed.

30. Thailand contends that the Panel's reasoning in respect of Thailand's defence under Article XX(d) was circular. Before the Panel, Thailand had argued that, even if the additional administrative requirements were found to be inconsistent with Article III:4, those requirements are justified under Article XX(d) because they are necessary to secure compliance with "the obligation to pay VAT" and to "combat smuggling, including tax avoidance by contraband and counterfeit cigarettes".⁴³ Although an essential step in the analysis of an Article XX(d) defence is to identify the laws or regulations with which the measure at issue is asserted to secure compliance, the Panel in this case failed to identify the Thai laws or regulations with which the additional administrative requirements secure compliance. Instead, in paragraph 7.758, the Panel simply referred back to Section VII.F.6(b)(ii) of its Report, where it had found the additional administrative requirements to be inconsistent with Article III:4. Therefore, the Panel erroneously concluded that the additional administrative requirements cannot be justified under Article XX(d) because the same additional administrative requirements had been found to be inconsistent with Article III:4 of the GATT 1994. This circular reasoning led the Panel to commit a fundamental error of legal analysis in its rejection of Thailand's defence under Article XX(d). Thailand adds that, even if the Panel's cross-reference could be rewritten as having intended to be a reference to the Panel's finding under Article III:2, the Panel's

⁴²Thailand's appellant's submission, para. 156.

⁴³Thailand's appellant's submission, para. 151.

analysis under Article XX(d) would remain circular, because that finding was based on the same additional administrative requirements with respect to which Thailand asserted its Article XX(d) defence.

3. Article X:3(b) of the GATT 1994

31. Thailand requests the Appellate Body to reverse the Panel's finding that Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent review tribunals or procedures for the prompt review of guarantee decisions. Thailand contends that the Panel erred in concluding that requiring a guarantee in order to obtain the release of goods pending a final determination of customs value is "administrative action relating to customs matters" within the meaning of Article X:3(b). In the event that the Appellate Body rejects this allegation of error, Thailand asserts that providing for a right of appeal of guarantee decisions upon the final assessment of customs duties satisfies Thailand's obligations under Article X:3(b).

32. With respect to the allegation that the Panel erred in finding that guarantee decisions are covered by Article X:3(b), Thailand argues that: (i) the ordinary meaning of the phrase "administrative action relating to customs matters" in Article X:3(b) does not include provisional measures such as customs guarantees; (ii) the context of Article X:3(b) supports the conclusion that the acceptance of guarantees in the sense of Article 13 of the *Agreement on Customs Valuation* does not fall within the scope of "administrative action relating to customs matters"; and (iii) the "object and purpose of the treaty" supports the conclusion that the acceptance of guarantees is not within the scope of Article X:3(b).

33. Thailand submits that the ordinary meaning of the phrase "administrative action relating to customs matters" in Article X:3(b) does not include provisional measures such as customs guarantees for three reasons. First, dictionary definitions of the words making up the phrase "administrative action relating to customs matters" are not dispositive in this case. Because it is inconceivable that all government acts relating to customs matters fall within the scope of Article X:3(b), Thailand maintains that it is necessary to assess the "surrounding circumstances"⁴⁴ in order properly to assess the common intention of the parties.

34. Second, referring to the Panel's statement that "the provisional characteristic of an administrative action or determination [may] render such an action or determination to fall outside the

⁴⁴Thailand's appellant's submission, para. 238 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 175).

scope of Article X:3(b)"⁴⁵, Thailand alleges that the Panel failed properly to analyze whether requiring a guarantee was of such a provisional character. Thailand also refers to the Appellate Body report in *US – Shrimp (Thailand) / US – Customs Bond Directive* in support of the proposition that a security required under the *Ad Note* to paragraphs 2 and 3 of Article VI of the GATT 1994 is an accessory or ancillary obligation. Because the guarantees in the present case are also "provisional" and "accessory or ancillary" to the final duty liability⁴⁶, Thailand submits that they should be regarded as a component of the final determination of customs duties, rather than as distinct decisions.

35. Third, Thailand argues that acceptance of the Panel's view that guarantees fall within the ambit of Article X:3(b) would "result in unduly interfering with"⁴⁷ the customs administration's decision-making process. Because a guarantee is intrinsically linked to the determination of the final customs value, decisions relating to a guarantee are within both the technical expertise and prerogative of the customs administration. Therefore, contends Thailand, allowing a guarantee decision to be challenged before the final duty assessment would curtail the power of the competent official to assess such duty.

36. Thailand further submits that the context of Article X:3(b) supports the conclusion that guarantee decisions do not fall within the scope of Article X:3(b). Specifically, Thailand refers to Article X:1 and Article X:3(a) of the GATT 1994, Articles 11, 12, and 13 of the *Agreement on Customs Valuation*, as well as to Articles 7, 13, and 9.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and Articles 2(j) and 3(h) of the *Agreement on Rules of Origin*. For Thailand, these provisions support the conclusion that the guarantee decisions at issue do not fall within the scope of the phrase "administrative action relating to customs matters" in Article X:3(b) of the GATT 1994.

37. With respect to Article X:1 of the GATT 1994, Thailand argues that, while this provision lists several different types of measures, namely, "[l]aws, regulations, judicial decisions and administrative rulings of general application", it contains no reference to guarantees or other securities. This suggests that the drafters did not intend Article X:3(b) to apply to provisional steps such as guarantee decisions. Thailand also refers to Article 13 of the *Agreement on Customs Valuation*, which relates to the possibility for customs to release goods in exchange for a guarantee. Because Article 13 itself does not contain a reference to a right of appeal against the imposition of a guarantee, there is no such right. If the drafters had intended to provide for a right to appeal, "they could and would have said

⁴⁵Thailand's appellant's submission, para. 239 (quoting Panel Report, para. 7.1035).

⁴⁶Thailand's appellant's submission, para. 242.

⁴⁷Thailand's appellant's submission, paras. 245 and 248 (quoting Panel Report, para. 7.1035).

so".⁴⁸ Thailand also refers to Article 11 of the *Agreement on Customs Valuation*, arguing that this Article provides for a right to appeal only with respect to a determination of customs value and that the lack of express provision for an appeal against the taking of a guarantee indicates that the negotiators did not intend to provide for the possibility of such appeal.

38. Thailand also refers to Articles 7, 9.5, and 13 of the *Anti-Dumping Agreement*. For Thailand, the absence of a right to appeal against either provisional measures or "new shipper" guarantees under the *Anti-Dumping Agreement* suggests that guarantees taken to secure payment of customs duties do not fall within the scope of "administrative action relating to customs matters" in Article X:3(b) of the GATT 1994. Thailand also refers to Articles 2(j) and 3(h) of the *Agreement on Rules of Origin*. These provisions stipulate that WTO Members must ensure that "any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral, or administrative tribunals or procedures".⁴⁹ Thailand argues that, because the word "any" is used in these provisions of the *Agreement on Rules of Origin* but not in Article X:3(b) of the GATT 1994, certain "administrative action[s]", such as the taking of a guarantee, are not within the scope of Article X:3(b).

39. In addition, Thailand argues that considerations of object and purpose also support the conclusion that the acceptance of guarantees is not within the scope of Article X:3(b). For Thailand, the principle of due process, which the Panel considered to be expressed in Article X:3, does not compel the conclusion that there must be a right of appeal against provisional steps. Procedural due process is not a technical concept with fixed content unrelated to time, place, and circumstance, but must be defined in the light of the particular circumstances of the case.⁵⁰ The doctrine of "ripeness" and deference to the expertise of an administrative agency must also be taken into account.⁵¹ Thailand argues that "it does not make practical sense to require courts to intervene in a decision-making process within the technical expertise of an administrative agency before that agency has had an opportunity to consider the issue fully and issue a final decision."⁵²

40. In the event that the Appellate Body upholds the Panel's finding that requiring a guarantee in order to obtain the release of goods pending a final determination of customs value constitutes "administrative action relating to customs matters", Thailand argues that providing for a right of appeal upon final assessment of duties nonetheless satisfies Thailand's obligations under

⁴⁸Thailand's appellant's submission, para. 256.

⁴⁹Thailand's appellant's submission, para. 272. (emphasis added by Thailand)

⁵⁰Thailand's appellant's submission, para. 277 (quoting United States Supreme Court, *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

⁵¹Thailand's appellant's submission, para. 278 (referring to United States Supreme Court, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)).

⁵²Thailand's appellant's submission, para. 278.

Article X:3(b). Allowing the challenge of a guarantee before the issuance of the final notice of customs value would unduly interfere with the customs administration's decision-making process in an area within its technical expertise. Thailand submits that this concern can be reconciled with the right of appeal under Article X:3(b) if it were considered to be consistent with that provision to require importers to await the final determination of customs value before exercising their right of appeal in respect of the guarantee. Thailand asserts that this point was acknowledged by the Panel when it stated that it does "not ... consider that the existence of interposing steps prior to an independent review in itself constitutes a systemic flaw that prevents Thailand from maintaining procedures for prompt review of administrative actions under Article X:3(b)".⁵³ Thailand however alleges that the Panel did not explain "why *other* interposing steps might not result in a violation of Article X:3(b) but an interposing step in the form of a requirement to await the final assessment before appealing a guarantee would *always* do so".⁵⁴

B. *Arguments of the Philippines – Appellee*

1. Article III:2 of the GATT 1994

41. The Philippines requests the Appellate Body to uphold the Panel's finding that Thailand acted inconsistently with Article III:2, first sentence, of the GATT 1994. The Philippines contends that the Panel properly based its finding on differences in the levels of taxation that apply to resales of domestic and imported cigarettes resulting from Thailand's *de jure* exemption from VAT liability for resellers of domestic cigarettes. The Philippines also maintains that discriminatory taxation cannot be cured by a right to claim an offsetting tax credit, and that, even if it could, the Panel properly found that resellers of imported cigarettes may be denied a tax credit in defined circumstances under Thai law.

42. The Philippines argues that *de jure* discriminatory taxation between imported and domestic cigarettes constitutes a sufficient basis for a finding of inconsistency under Article III:2. Article III:2 requires that goods shall not be subject to internal taxes in excess of those applied to domestic goods and, as Thailand acknowledges, the first sentence of Article III:2 is violated if imported goods are subject to "even the slightest difference"⁵⁵ in taxation. Moreover, the Philippines argues, *de jure* discrimination arises if it can be demonstrated on the basis of the words of the relevant legislation, regulation, or other legal instrument constituting the measure.

⁵³Thailand's appellant's submission, para. 297 (quoting Panel Report, para. 7.1014).

⁵⁴Thailand's appellant's submission, para. 297. (original emphasis)

⁵⁵Philippines' appellee's submission, para. 58 (referring to Thailand's appellant's submission, footnote 30 to para. 62).

43. The Philippines considers that the Panel correctly found that resales of imported cigarettes are subject to internal taxes in excess of those applicable to resales of domestic cigarettes. Resellers of imported cigarettes are obliged to account fully to Thai fiscal authorities for the VAT liability on taxable resales. The process of securing a tax credit does not mean that resales of imported cigarettes are not subject to tax, but is rather a mechanism for accounting for that tax liability. The Panel also correctly found that, in contrast, resellers of domestic cigarettes are exempt from VAT on resales of cigarettes, and therefore are not subject to any VAT liability. Because resales of imported cigarettes are subject to a tax rate of seven per cent, whereas resales of domestic cigarettes are subject to zero tax, a comparison of the relative tax burdens shows excess taxation based on the origin of the cigarettes. For these reasons, the Philippines maintains that Thailand errs in arguing that the Panel's finding under Article III:2 was based on different administrative requirements, and not on different tax burdens.

44. With respect to Thailand's argument that VAT liability is offset by an input tax credit, the Philippines maintains that, having established that imported cigarettes are subject to VAT in excess of that applicable to like domestic cigarettes, the Panel was not required to examine the legal conditions under which Thailand grants offsetting tax credits. In *Canada – Patent Term*, the Appellate Body rejected the argument that Canada had met its obligation to provide patent protection for 20 years, under Article 33 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "TRIPS Agreement"). In that case, Canada granted a 17-year patent term, which patent holders could extend to 20 years by taking specific procedural action.⁵⁶ Similarly, Article III:2 of the GATT 1994 prevents a Member from making its compliance with the national treatment obligations depend on private party action. *De jure* discrimination cannot be cured by the fact that a private party may take action in an attempt to counteract that discrimination. In the Philippines' view, if a private party fails to take all possible action available to it under a Member's law, the adverse consequences of the private party's lack of action are the responsibility of the Member.

45. The Philippines further submits that the Panel correctly found that resellers of imported cigarettes are not automatically entitled to a tax credit to offset the discriminatory obligation to pay VAT. Thailand admitted before the Panel, and accepts on appeal, that a tax credit is available only if a reseller of imported cigarettes complies with the relevant administrative requirements. In particular, Thailand accepts that a tax credit is not granted if the reseller of imported cigarettes: (i) fails to file form Por.Por.30; (ii) fails to claim a tax credit in form Por.Por.30; (iii) fails to produce an invoice as proof of purchase; and (iv) fails to produce a complete and accurate invoice. Section 82/5 of the Thai

⁵⁶Philippines' appellee's submission, para. 73 (referring to Appellate Body Report, *Canada – Patent Term*, paras. 91 and 92).

Revenue Code⁵⁷ sets forth other circumstances in which a reseller of imported cigarettes can be denied an input tax credit. Accordingly, the Philippines considers that the Panel properly rejected Thailand's argument that a reseller of imported cigarettes can never incur a net liability on the resale of cigarettes, and correctly found that there are circumstances, defined under Thai law, in which a reseller of imported cigarettes would not receive a tax credit.

46. The Philippines also maintains that the Panel properly dismissed Thailand's argument that an inconsistency does not arise under Article III:2 if a reseller of imported cigarettes does not obtain a tax credit due to the reseller's own failure to exercise its right to claim a tax credit. It is the Thai Government, and not a private reseller, that establishes the legal conditions that determine whether a reseller of imported cigarettes is entitled to offset the discriminatory obligation to pay VAT. In contrast, resellers of domestic cigarettes are never required to comply with the tax credit requirements in connection with resales of domestic cigarettes, because they are automatically exempt from VAT on these sales. The Philippines argues that, under Article III of the GATT 1994, it is Thailand, and not a private reseller, that is obliged to ensure that imported cigarettes benefit, in all circumstances, from equality of competitive conditions.

47. The Philippines takes note of Thailand's argument that it should not be obliged to grant a tax credit to resellers of imported cigarettes if they cannot demonstrate that the claimed credit results from actual and legitimate purchases of cigarettes. This, the Philippines asserts, "is the same argument in another guise".⁵⁸ It is Thailand, and not a private reseller, that is responsible under Article III:2 for establishing a regulatory framework in which imported goods are not subject to taxation in excess of that applied to like domestic cigarettes. This does not imply that Members cannot, as a general matter, insist that taxpayers comply with legal conditions to obtain a tax credit. The reason Thailand's VAT system discriminates, the Philippines submits, is because resales of domestic cigarettes are *de jure* exempt from VAT liability, and are therefore exempt from all requirements relating to tax credits.

2. Article III:4 of the GATT 1994

48. The Philippines requests the Appellate Body to uphold the Panel's finding that Thailand acted inconsistently with Article III:4 of the GATT 1994. The Philippines further requests the Appellate Body to reject Thailand's arguments that the Panel acted inconsistently with Article 11 of the DSU and paragraph 15 of its Working Procedures in accepting the expert opinion contained in Exhibit

⁵⁷Government of the Kingdom of Thailand, The Council of Regency, The Act Promulgating the Revenue Code, B.E. 2481 (Panel Exhibit PHL-94).

⁵⁸Philippines' appellee's submission, para. 86.

PHL-289, as well as Thailand's appeal of the Panel's finding on Thailand's defence under Article XX(d) of the GATT 1994.

(a) Article III:4: "treatment no less favourable"

49. The Philippines contends that the Panel correctly found that Thailand subjects imported cigarettes to less favourable treatment than domestic cigarettes by imposing additional VAT-related administrative requirements only on resellers of imported cigarettes. "Less favourable treatment" within the meaning of Article III:4 is accorded where treatment does not ensure effective equality of opportunities, and does not protect expectations on the competitive relationship between imported and domestic products. Article III:4 requires that government regulation on imported and like domestic products be "perfectly neutral".⁵⁹ The Philippines adds that, when government regulation subjects imported goods to administrative burdens that are not imposed on like domestic goods, this is not neutral, and upsets the equality of competitive conditions.

50. The Philippines considers that the Panel correctly relied on WTO jurisprudence in support of its finding. For instance, the Appellate Body stated in *US – Section 211 Appropriations Act* that "even the *possibility* that [foreign nationals] face two hurdles is *inherently less favourable* than the undisputed fact that United States [nationals] face only one".⁶⁰ Moreover, the panel in *Canada – Wheat Exports and Grain Imports* found that "less favourable treatment in this case results from the imposition of *an additional requirement on imported grain that does not apply to domestic grain*".⁶¹ Accordingly, to the extent that a Member subjects imported products to administrative requirements to which domestic products are not subject, this gives rise to unequal treatment, which is inherently less favourable for imported products. This is because the additional requirements prevent traders from making a "free choice between like domestic and imported [products] on the basis of purely commercial considerations".⁶² This situation is to be distinguished from one in which different sets of requirements are imposed on imported and domestic products. In such circumstances, the Philippines maintains, a panel may be required to conduct a closer examination of the measures to determine whether the different administrative requirements disturb the effective equality of competitive conditions to the detriment of imported goods and thus constitute less favourable treatment.

⁵⁹Philippines' appellee's submission, para. 123.

⁶⁰Philippines' appellee's submission, para. 125 (quoting Appellate Body Report, *US – Section 211 Appropriations Act*, para. 265 (original emphasis)).

⁶¹Philippines' appellee's submission, para. 126 (quoting Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.190). (emphasis added by the Philippines)

⁶²Philippines' appellee's submission, para. 130 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 219).

51. The Philippines recalls that the Panel found that Thailand subjects resales of imported cigarettes to a number of VAT administrative requirements and that such requirements do not apply in connection with resales of domestic cigarettes. It follows from this alone that the treatment accorded to imported cigarettes is less favourable, and there is no need to inquire into the "impact of the discriminatory treatment" or the "trade effects" of such treatment.⁶³ Thus, Thailand's appeal, which focuses on, and finds fault with, the Panel's assessment of "the degree of likelihood that any differences in treatment will have any negative impact on the competitive position of imports"⁶⁴, is misplaced. In addition, although it was not required to do so, the Panel sought further confirmation for its finding by examining the ways in which Thailand's discriminatory administrative requirements upset the equality of competitive conditions in the Thai market. The Panel correctly concluded, on the basis of evidence of price elasticity and switching patterns, that the close competitive relationship between imported and domestic cigarettes means that any unequal fiscal treatment is sufficient to disturb the equality of competitive conditions. Moreover, the Panel correctly linked the effects of the additional administrative requirements with the operating costs of businesses, and stated that the costs of compliance with such administrative requirements could affect business decisions and limit opportunities for imported cigarettes. The Philippines considers it noteworthy that more than 20 per cent of cigarette retailers have opted not to sell imported cigarettes. Although there is no evidence as to why they do not resell imported cigarettes, these retailers avoid the administrative requirements by reselling only domestic cigarettes. Regarding Thailand's assertion that, by complying with the additional requirements, resellers of imported cigarettes may obtain certain gains in the form of additional tax credits, the Philippines argues that the fact that the obligation to pay VAT may be offset in some instances "does not cure the *de jure* discrimination".⁶⁵ The Philippines emphasizes that WTO jurisprudence clearly establishes that more favourable treatment of imported products in some instances does not justify less favourable treatment in other instances.

(b) Article 11 of the DSU: the Panel's Treatment of Exhibit PHL-289

52. With respect to the Panel's acceptance of and reliance on Exhibit PHL-289, the Philippines argues that Thailand's due process rights were properly respected by the Panel because Thailand had opportunities to comment on Exhibit PHL-289 and took advantage of one of them. The exercise of due process rights involves responsibilities for the party invoking such rights, and parties should bring

⁶³Philippines' appellee's submission, para. 138.

⁶⁴Philippines' appellee's submission, para. 136 (quoting Thailand's appellant's submission, footnote 115 to para. 124).

⁶⁵Philippines's appellee's submission, para. 150.

alleged procedural deficiencies to a panel's attention at the "earliest possible opportunity".⁶⁶ Although the Philippines submitted the 2000 DG Revenue ruling⁶⁷ at the second substantive meeting, Thailand chose to submit the 1995 DG Revenue ruling⁶⁸ only in its responses to Panel questions after the second substantive meeting. Conversely, the Philippines submitted Exhibit PHL-289 in its comments on those responses, which was the first opportunity after Thailand filed the 1995 DG Revenue ruling. In any event, the Philippines maintains, Thailand was responsible for seeking an opportunity to comment on Exhibit PHL-289, but instead opted to object to this evidence only in its comments on the Panel's Interim Report, where Thailand made largely the same arguments it now raises on appeal.

53. The Philippines also contends that Exhibit PHL-289 was properly submitted before the Panel, in accordance with paragraph 15 of its Working Procedures, because it is rebuttal evidence provided in comments on Thailand's answers to Panel questions. The Philippines asserts that Exhibit PHL-289 was submitted to support the Philippines' comments on the 1995 DG Revenue ruling that had been attached to Thailand's responses to Panel questions. The first sentence of paragraph 15 of the Panel's Working Procedures expressly allows the submission of evidence with comments on the other party's responses to questions. The expert testimony submitted in Exhibit PHL-289 stated that its purpose was to "provide an opinion on [the 1995 DG Revenue ruling]".⁶⁹ Had Thailand not submitted the 1995 DG Revenue ruling, the Philippines would have had no cause to submit this expert testimony. Thus, Exhibit PHL-289 falls within the category of evidence set out in the first sentence of paragraph 15 of the Panel's Working Procedures, as opposed to that set out in the second sentence, for which a showing of good cause and an opportunity to respond is required. At any rate, the Philippines asserts, if Thailand considered that the evidence was not submitted consistently with paragraph 15, the proper course of action for Thailand would have been to object immediately to Exhibit PHL-289, rather than to wait until its comments on the Interim Report.

54. The Philippines argues that the Panel did not give decisive weight to Exhibit PHL-289 and did not act inconsistently with Article 11 of the DSU. Rather, the Panel reached its finding that sales of domestic cigarettes need not be reported in form Por.Por.30 based on the totality of the evidence. Article 11 of the DSU affords panels a "certain margin of discretion" in assessing the credibility and

⁶⁶Philippines' appellee's submission, para. 186 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 205, in turn quoting Appellate Body Report, *US – Carbon Steel*, para. 123).

⁶⁷Ruling by the Director-General of the Thai Revenue Department, Gor.Kor. 0811/Por.633, 27 January 2000 (Panel Exhibit PHL-253).

⁶⁸Ruling by the Director-General of the Thai Revenue Department, Gor.Kor. 0802/Por.22836, 10 October 1995 (Panel Exhibit THA-96).

⁶⁹Philippines' appellee's submission, para. 200 (quoting Panel Report, para. 6.127).

weight to be ascribed to a given piece of evidence.⁷⁰ Even in its Interim Report, the Panel did not give decisive weight to Exhibit PHL-289, but simply explained that the expert testimony in Exhibit PHL-289 confirmed the change in the requirement to report sales of domestic cigarettes in form Por.Por.30. The Panel's use of the word "only" to describe the evidence relating to the change in reporting practice was incorrect, and, following a suggestion by the Philippines, the Panel corrected this mistake in the Panel Report. In any case, the Philippines considers that, under Article 17 of the DSU, the Interim Report is not subject to appellate review, and that it is improper for Thailand to base its appeal on the Panel's findings in the Interim Report.

(c) Thailand's Defence Under Article XX(d) of the GATT 1994

55. The Philippines requests the Appellate Body to reject Thailand's appeal of the Panel's finding on Thailand's defence under Article XX(d) of the GATT 1994. The Panel properly concluded that Article XX(d) does not justify one WTO-inconsistent measure (discriminatory administrative requirements on imported cigarettes) on the grounds that it secures compliance with another WTO-inconsistent measure (discriminatory taxation on imported cigarettes). The Philippines also points out that Thailand's arguments with respect to its Article XX(d) defence were not well developed, consisting of a total of six paragraphs in all of its submissions to the Panel.

56. In the view of the Philippines, the cross-reference made by the Panel, in paragraph 7.758 of its Report, is a clerical error rather than, as Thailand claims, a "fundamental"⁷¹ error. There is no basis in the Panel's reasoning to suggest that its substantive examination of Thailand's defence consisted of a circular analysis of whether the administrative requirements are necessary to secure compliance with those same administrative requirements. To the contrary, the Panel properly articulated the legal standard under Article XX(d) as involving two different measures, one to be justified and the other that must be WTO-consistent. The Panel also identified Thailand's argument as being that the "administrative requirements" are necessary to secure compliance "with the Thai VAT laws". The Panel therefore correctly assessed whether the inconsistent measures were necessary to secure compliance with different measures. Thus, the Philippines believes that the Panel's reasoning reveals that the cross-reference in paragraph 7.758 was simply a mistake: the Panel referred to Section VII.F.6(b)(ii) of its Report, which deals with discriminatory administrative requirements, instead of to Section VII.E.5(b)(ii), which deals with discriminatory taxation. Accordingly, the Philippines requests the Appellate Body to modify this clerical error, replacing the reference to

⁷⁰Philippines' appellee's submission, para. 212 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 331, in turn referring to Appellate Body Report, *EC – Hormones*, para. 132, and Appellate Body Report, *EC – Sardines*, para. 299).

⁷¹Philippines' appellee's submission, para. 238 (referring to Thailand's appellant's submission, para. 153).

"Section VII.F.6(b)(ii)" with a reference to "Section VII.E.5(b)(ii)". The Philippines further rejects Thailand's contention that the Panel's analysis under Article XX(d) would remain circular even if the cross-reference were rewritten in this way, because the Panel's finding under Article III:2 of the GATT 1994 was based on the discriminatory obligation to pay VAT, rather than, as Thailand asserts, on the discriminatory administrative requirements with respect to which Thailand advanced its Article XX(d) defence.

57. The Philippines also disagrees with Thailand's contention that, should the Appellate Body reverse the Panel's finding under Article XX(d), it should also reverse the Panel's finding under Article III:4. The interpretation and/or application of a substantive obligation is distinct from an analysis of an exception set out in a separate legal provision, and reversal of a finding under the latter does not entail reversal of a finding under the former. The Philippines also observes that Thailand has not requested the Appellate Body to complete the analysis of its Article XX(d) defence.

3. Article X:3(b) of the GATT 1994

58. The Philippines requests the Appellate Body to uphold the Panel's finding that Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent review tribunals or procedures for the prompt review of guarantee decisions. The Philippines argues that the Panel correctly found that requiring a guarantee in order to obtain the release of goods pending a final determination of customs value is "administrative action relating to customs matters" within the meaning of Article X:3(b). The Philippines further submits that the Panel correctly found that providing for independent review of guarantees only following the final determination of customs value does not satisfy Article X:3(b) of the GATT 1994.

59. The Philippines contends that the legal character and purpose of a customs guarantee, the context of Article X:3(b), as well as the object and purpose of Article X:3(b), confirm that guarantee decisions constitute "administrative action relating to customs matters" within the meaning of Article X:3(b). Guarantees involve a process that is related to, but separate from, the customs valuation process. A guarantee decision establishes the legal conditions under which an importer may withdraw its goods from customs, pending the final assessment of the customs value. Thus, the Panel correctly found that a guarantee 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".⁷² For the Philippines, a guarantee is not an integral part of the determination of customs value and does not, as Thailand asserts, constitute a provisional decision regarding customs value. Instead, it is a

⁷²Philippines' appellee's submission, para. 287 (quoting Panel Report, para. 7.1040 (original italics; underlining added by the Philippines)).

final administrative action establishing the definite legal conditions under which the importer may withdraw its goods from customs, and has immediate consequences for importers and market access. As the panel in *Colombia – Ports of Entry* recognized, a guarantee is legally distinct from the payment obligation that it secures.⁷³ While acknowledging the Appellate Body's statement in *US – Shrimp (Thailand) / US – Customs Bond Directive* that a guarantee obligation is "ancillary" and "intrinsically linked to" the obligation it secures⁷⁴, the Philippines argues that this does not mean that the two obligations become an "indistinguishable whole".⁷⁵

60. With respect to the context of Article X:3(b), the Philippines notes that Article 11 of the *Agreement on Customs Valuation* limits independent review to final "determination[s] of customs value", and that Article 13 of the *Anti-Dumping Agreement* limits independent review to "final" anti-dumping determinations. The Panel was correct to conclude that the absence of the word "final" in Article X:3(b) suggests that independent review under Article X:3(b) "is not necessarily confined to final administrative actions".⁷⁶ The Philippines also endorses the Panel's reasoning that the use of the term "customs matters" in Article X:3(b), as opposed to "customs value" in Article 11.1 of the *Agreement on Customs Valuation*, suggests that the scope of Article X:3(b) is broader than that of Article 11.1.

61. The Philippines characterizes as misplaced Thailand's contextual arguments based on Article X:1 of the GATT 1994 and Article 12 of the *Agreement on Customs Valuation*. In response to Thailand's contention that the absence of a reference to guarantee decisions in Article X:1 suggests that Article X:3(b) of the GATT 1994 does not apply to guarantee decisions, the Philippines notes that Thailand has not appealed the Panel's finding that rules relating to guarantees are covered by Article X:1 as rules pertaining to customs valuation. Moreover, the Philippines argues that the absence of a reference to Article X of the GATT 1994 in Article 12 of the *Agreement on Customs Valuation* cannot be read to restrict the obligation to provide for independent review pursuant to Article X:3(b).

62. The Philippines also disagrees with Thailand's contextual arguments based on Article 7.2 and Article 9.5 of the *Anti-Dumping Agreement*. For the Philippines, there is a significant difference between provisional anti-dumping measures and guarantees provided pending completion of "new

⁷³Philippines' appellee's submission, para. 290 (quoting Panel Report, *Colombia – Ports of Entry*, para. 7.88).

⁷⁴Philippines' appellee's submission, para. 294 (referring to Thailand's appellant's submission, paras. 240-243, in turn quoting Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 231).

⁷⁵Philippines' appellee's submission, para. 295.

⁷⁶Philippines' appellee's submission, para. 301 (quoting Panel Report, para. 7.1034). (emphasis added by the Philippines)

shipper" reviews under the *Anti-Dumping Agreement*, on the one hand, and a customs guarantee, on the other hand. Both a provisional anti-dumping measure and a "new shipper" guarantee can be imposed for only a short period. Once the authority completes the relevant proceeding, the provisional measure or security is automatically removed and replaced by a definitive anti-dumping measure. In contrast, the Philippines maintains, a customs guarantee may be imposed for an indefinite period of time, and thus has the potential of imposing long-term costs on the importer.

63. The Philippines submits that the object and purpose of Article X:3(b) confirms the Panel's conclusion that a customs guarantee is administrative action relating to customs matters falling within the scope of Article X:3(b). The Panel was correct in stating that the underlying objective of Article X:3(b) is the preservation of due process rights for affected parties, and in finding that a guarantee decision can cause an immediate commercially adverse impact on importers if the level of a guarantee is excessive. The Philippines disagrees with Thailand that, because customs guarantee decisions are only provisional measures, they are not "ripe" for independent review, and that courts should therefore not intervene in a decision-making process that falls within the technical expertise of an administrative agency. Thailand itself has illustrated, in another dispute, the importance of permitting a challenge to a guarantee decision for due process reasons, when it successfully challenged in WTO dispute settlement a guarantee imposed by the United States to cover potential liability for definitive anti-dumping duties.⁷⁷ There was no suggestion in that case that such review prejudiced or unduly interfered with the ability of the United States Department of Commerce to assess final anti-dumping duties. The Philippines adds that, irrespective of the level of a guarantee or the basis for its determination, customs authorities are required to determine the customs value consistently with the relevant provisions of the *Agreement on Customs Valuation*, and that customs law is not so complex and difficult that governmental actions must be immune from scrutiny by independent tribunals. By interpreting Article X:3(b) to encompass customs guarantees, the Panel ensured that importers are entitled to seek independent review to contest the amount of a guarantee, thereby preserving the competitive opportunities that Article X of the GATT 1994 protects.

64. Finally, the Philippines takes issue with Thailand's conditional appeal requesting that, if a guarantee decision is considered to be an "administrative action relating to customs matters", the Appellate Body find that the provision of a right of appeal upon final assessment of customs duties nonetheless satisfies Thailand's obligations under Article X:3(b). Under Thai law, no independent tribunal enjoys jurisdiction to hear a challenge to a guarantee decision separately from the appeal of a final assessment of customs value. The Panel was correct to find that permitting review of guarantee

⁷⁷Philippines' appellee's submission, para. 319 (referring to Appellate Body Report, *US – Shrimp (Thailand)* / *US – Customs Bond Directive*, paras. 258-260).

decisions only after the final determination of customs value has been issued does not comply with Article X:3(b). Such a system is not a system for the prompt review and correction of guarantee decisions, but only a system of review of customs valuation determinations. If an importer decides not to import goods because a guarantee imposes too great a financial burden, there would never be a final determination of customs value, and it would thus be impossible for an importer to obtain independent review of a guarantee decision. Even in situations in which importation occurs and a final customs valuation determination is made, the requirement to await that determination before pursuing independent review of a guarantee results in unnecessary delays.

65. The Philippines disagrees with Thailand's argument that, since the Panel found that it is, in principle, acceptable under Article X:3(b) to require that importers pursue internal review before seeking independent review of a customs valuation determination, it must also be permissible to compel importers to await a final customs value determination before seeking independent review of a guarantee decision. A requirement first to seek internal review of a customs valuation determination does not create a lacuna in the review system, thereby making independent review of a final determination impossible in certain situations. In contrast, requiring importers to await a final customs value determination before seeking independent review of a guarantee decision does give rise to such a lacuna. In addition, the Philippines contends that, while internal review of a customs valuation determination may contribute to the resolution of the valuation issue, waiting for the issuance of the final customs value determination does not contribute to the prompt review and correction of a guarantee decision.

C. *Arguments of the Third Participants*

1. Australia

66. Australia submits that, in examining Thailand's appeal under Article III:2 of the GATT 1994, the Appellate Body must first examine the threshold issue of whether the Panel correctly identified the measure at issue. Australia considers that the Panel was unclear as to whether this was the VAT scheme *per se*, or whether the measure comprises the mechanisms used to collect the VAT. Australia considers it difficult to separate each component of Thailand's VAT regime, and observes that whether a sale of a product is exempt from VAT, or whether a reseller may apply for input tax credits to relieve itself of the tax burden, is relevant and indistinguishable from the tax regime itself.

67. Referring to the reasoning of the panel in *Argentina – Hides and Leather*, and the GATT panel in *US – Malt Beverages*, Australia submits that the administrative nature of Thailand's tax collection mechanism does not mean *a priori* that it falls outside the scope of the first sentence of

Article III:2 of the GATT 1994. In the circumstances of this case, the administrative requirements are a collection mechanism that affects the calculation of the cumulative VAT burden. The non-fulfilment of the administrative requirements for resellers of imported cigarettes directly results in a higher tax burden, whereas resellers of domestic cigarettes are fully exempt from paying VAT. Accordingly, the collection mechanism itself constitutes a "tax" for the purposes of Article III:2 as it potentially results in a higher cumulative tax burden on the reseller of imported cigarettes. As for whether the tax burden on imported cigarettes is "in excess" of that on domestic cigarettes, Australia submits that the additional administrative requirements applicable to resellers of imported cigarettes, and the inherent risk of a higher tax burden if these requirements are not met, should be taken into account. Noting Thailand's acknowledgment that "a risk of excess taxation may give rise to a violation of Article III:2"⁷⁸, Australia points out that, when a claim for input tax credit by a reseller is rejected, the actual tax burden is higher, whereas this risk is not faced by resellers of domestic cigarettes, which are automatically exempt from VAT.

68. With respect to Thailand's arguments that the Panel erred in finding that the additional administrative requirements accord "less favourable treatment" within the meaning of Article III:4 of the GATT 1994, Australia disagrees with Thailand's contention that "the right to treat imported products differently may include the right to impose additional or more complicated requirements so long as they do not amount to 'less favourable' treatment".⁷⁹ Rather, panels and the Appellate Body have found merely that different treatment is not sufficient for a finding of inconsistency with Article III:4. While emphasizing that any determination of less favourable treatment must be made on a case-by-case basis, Australia requests the Appellate Body to take account of the broader systemic implications of the threshold for a finding of inconsistency under Article III:4. For Australia, the Panel's finding of less favourable treatment based on its view that the measures "could potentially affect", or "may potentially modify", the conditions of competition seems to imply a lower threshold than that used by the panels in *China – Publications and Audiovisual Products* ("may reasonably be expected")⁸⁰ and *India – Autos* ("is more than likely").⁸¹

69. Regarding Thailand's appeal under Article XX(d) of the GATT 1994, Australia expresses concern that the Panel failed to identify clearly both the GATT-inconsistent measure and the "laws or regulations" with which the GATT-inconsistent measure secures compliance. This apparent failure

⁷⁸Australia's third participant's submission, para. 19 (quoting Thailand's appellant's submission, para. 81).

⁷⁹Australia's third participant's submission, para. 24 (quoting Thailand's appellant's submission, para. 129). (underlining added by Australia)

⁸⁰Australia's third participant's submission, para. 26 (quoting Panel Report, *China – Publications and Audiovisual Products*, para. 7.1471).

⁸¹Australia's third participant's submission, para. 27 (quoting Panel Report, *India – Autos*, para. 7.201).

"compromised [the Panel's] ability to consider the [Article] XX(d) defence".⁸² The Panel should have considered whether the administrative mechanism for the implementation of VAT was designed to secure compliance with Thailand's VAT regime. In Australia's view, the design of that measure appears, at least in part, to secure such compliance. Moreover, in determining whether the measure is "necessary", consideration should have been given to the range of possible alternative measures that could secure compliance with Thailand's VAT regime. Australia notes, in this regard, the Philippines' argument before the Panel that Article XX(d) cannot justify "both the VAT-related administrative requirements imposed on resellers of imported cigarettes and the exemption accorded to resellers of domestic cigarettes".⁸³

70. Australia supports Thailand's view that the acceptance of a guarantee is a provisional decision that does not fall within the scope of Article X:3(b) of the GATT 1994. Guarantees are interlocutory decisions made pending a final customs valuation determination, and are difficult to distinguish from that final determination. In the absence of an express reference to a right to appeal at an interlocutory stage, no such right should be read into Article X:3(b). Noting the Panel's statement that it could "think of a situation where the provisional characteristics of an administrative action or determination would render such an action or determination to fall outside the scope of Article X:3(b)", Australia argues that the Panel then failed to consider whether the acceptance of guarantees for the payment of customs duties may be such a situation.⁸⁴ Requiring external review of a provisional decision to accept a guarantee could effectively pre-empt and interfere with the final customs valuation determination to be taken by the relevant domestic agency. Australia submits that, so long as the right to appeal the final determination is capable of overturning any stage of the process, then there should be no right of appeal of individual, interlocutory stages in that process unless such a right is expressly provided for, which is not the case under Article X:3(b).

2. European Union

71. With respect to Thailand's appeal under Article III:2 of the GATT 1994, the European Union understands the measure at issue to consist of the VAT exemption on the resale of domestic cigarettes, as compared to the additional administrative requirements that are imposed on imported cigarettes in order to obtain the same level of tax burden. The European Union considers that there is a *de jure* violation of Article III:2 of the GATT 1994 when, for domestic products only, an automatic exemption from VAT is embedded in the design and structure of the measure, but the same automatic result is not granted with respect to imported products. The European Union disagrees with Thailand

⁸²Australia's third participant's submission, para. 32.

⁸³Australia's third participant's submission, para. 35. (original underlining)

⁸⁴Australia's third participant's submission, para. 39 (quoting Panel Report, para. 7.1035).

that, in order to be found inconsistent with Article III:2, first sentence, a measure needs to lead to a higher tax *rate* for imported products. Rather, as the panel stated in *Argentina – Hides and Leather*, the "tax burden" need not be the tax itself, but can also be derived from "aspects of broader tax systems" that are covered by the disciplines of Article III:2.⁸⁵ The European Union adds that the use of the term "indirectly" in Article III:2 supports the view that the scope of this provision includes situations, like the present case, where the measure at issue contains elements that adversely affect only imported products, by increasing their overall tax burden, as compared to domestic products.

72. The European Union also disagrees with Thailand's contention that the analysis of a measure under the first sentence of Article III:2 must consist of a mathematical exercise. Such a narrow interpretation would give WTO Members the possibility to circumvent the norm of Article III:2. Moreover, it is not appropriate to draw a distinction between "substantive" tax measures, such as the tax rate, and "measures of tax administration", such as the measures at issue in the present case. The European Union insists that a tax burden can also be of a non-mathematical nature.

73. The European Union observes that Thailand's appeal under Article III:4 of the GATT 1994 appears to raise the issue of whether, in an analysis under that provision, panels must engage in a detailed analysis in order to establish that the measure at issue *will* affect the competitive position of imported cigarettes in a negative manner, or whether an analysis based on the possibility that the measure at issue *could* affect the competitive position of imported cigarettes can suffice to find an inconsistency. The Appellate Body has stated that, in establishing inconsistency with Article III:4, the actual effects of a measure in the marketplace need not be shown. Instead, it is sufficient to show that "such a measure is likely to lead to that result".⁸⁶ Previous measures have also been found to be inconsistent with Article III:4 when they create a mere "incentive"⁸⁷ to favour domestic products, or "may be reasonably expected"⁸⁸ to modify the conditions of competition. Accordingly, it seems to be sufficient for a panel to determine on the basis of the available elements of fact that the measure will *probably* negatively affect the conditions of competition. Without expressing a view on the Panel's finding under Article III:4, the European Union encourages the Appellate Body to review that finding in accordance with this case law, and to consider the extent to which the facts before the Panel (that is, the accumulation of all the requirements imposed on the resellers of imported cigarettes) allow a

⁸⁵European Union's third participant's submission, para. 18 (quoting Panel Report, *Argentina – Hides and Leather*, footnote 449 to para. 11.152).

⁸⁶European Union's third participant's submission, para. 27 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215).

⁸⁷European Union's third participant's submission, para. 28 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 212; and Panel Report, *India – Autos*, paras. 7.195-7.198 and 7.201).

⁸⁸European Union's third participant's submission, para. 29 (referring to Panel Report, *China – Publications and Audiovisual Products*, para. 7.1471).

reasonable expectation, or, in other words, lend credence to the conclusion, that the imported products will be treated less favourably.

74. Concerning Thailand's appeal in respect of the Panel's acceptance of Exhibit PHL-289, the European Union submits that the first issue that the Appellate Body needs to resolve is whether Exhibit PHL-289 is rebuttal evidence or not. If it is not, then the Panel infringed its Working Procedures by admitting this item of untimely evidence without requiring good cause and without affording Thailand the right to comment thereon. Article 11 of the DSU requires panels actively to respect parties' due process rights. Thus, if the Panel accepted and relied upon Exhibit PHL-289 contrary to its Working Procedures, it should, at a minimum, have afforded Thailand an opportunity to comment. If the Panel failed to do so, then this defect cannot be cured by arguing that such an opportunity was provided during interim review. The Appellate Body need not address the content of the Interim Report since the issue on appeal is whether the Panel's finding in its Report that VAT registrants need not report resales of domestic cigarettes in form Por.Por.30 was based exclusively on Exhibit PHL-289. Finally, the European Union observes that, even if the Appellate Body agrees with Thailand regarding the Panel's treatment of Exhibit PHL-289, Thailand bears the burden of explaining why and how the ultimate finding made by the Panel under Article III:4 was fully dependent on the Panel's factual finding regarding the reporting of resales of domestic cigarettes in form Por.Por.30.

75. Regarding Thailand's appeal under Article XX(d) of the GATT 1994, the European Union considers the relevant question to be whether the measure at issue secures compliance with other laws or regulations which are not WTO-inconsistent. The measure at issue in this dispute is the different treatment applied to imported cigarettes versus domestic cigarettes, that is, the additional administrative requirements imposed on imported cigarettes. The laws or regulations with which the measure at issue aims to secure compliance are Thailand's VAT laws. Since the GATT-inconsistent measure at issue is part of the VAT regime, the European Union considers that the Panel properly concluded that the laws or regulations with which the measure at issue secures compliance, namely, the laws comprising the Thai VAT regime, are also WTO-inconsistent.

76. The European Union submits that the Panel correctly found that decisions on the imposition of guarantees pursuant to Article 13 of the *Agreement on Customs Valuation* fall within the scope of "administrative action relating to customs matters" in Article X:3(b) of the GATT 1994. The characterization of an action as "provisional" or "final" is not crucial to bring that action within the scope of Article X:3(b). Rather, the key issue is whether the administrative action at issue has a direct and individual material effect on the importer. The European Union contends that neither the text of Article X:3(b), nor that of the other paragraphs of Article X, make a distinction between "provisional"

and "final" administrative actions. This contrasts with other provisions in the GATT 1994, such as Article XV:2, which explicitly refer to "final" measures. The European Union also agrees with the Panel's reasoning that the due process objective underlying Article X:3(b) supports an interpretation of the term "administrative action" that is not limited to final administrative determinations.

77. Furthermore, the European Union views the imposition of a guarantee as being separate and distinct from a customs value determination. Like a determination of the value of imported goods, the imposition of a guarantee is one component of the imposition and collection of customs duties. However, imposing a guarantee is not a component of determining the customs value. Instead, it is a separate and distinct action, constituting "administrative action" in the sense of Article X:3(b). The European Union also disputes Thailand's assertion that the imposition of a guarantee cannot be reviewed effectively without knowing the final duty liability, as well as Thailand's reliance upon the Appellate Body report in *US – Shrimp (Thailand) / US – Customs Bond Directive*. The Appellate Body did not, in that dispute, rule out that, under certain circumstances, a guarantee could constitute "specific action against dumping" pursuant to Article 17.4 of the *Anti-Dumping Agreement*.⁸⁹ In the view of the European Union, the same reasoning supports the view that a guarantee pursuant to Article 13 of the *Agreement on Customs Valuation* may constitute "administrative action relating to customs matters" within the meaning of Article X:3(b) of the GATT 1994.

78. Finally, in the event that the Appellate Body upholds the Panel's finding that the acceptance of a guarantee under Article 13 of the *Agreement on Customs Valuation* constitutes an "administrative action relating to customs matters" within the meaning of Article X:3(b) of the GATT 1994, the European Union considers that a system which requires a final customs value determination in order to appeal the imposition of a guarantee is contrary to Article X:3(b). Thailand's concerns about an appeal of a guarantee interfering with the customs administration's decision-making process are unfounded. Courts are in a position fully to review customs authorities' decisions. Furthermore, courts may not need to review the final customs value determination, but could limit their analysis to reviewing the basis for establishing the amount of the guarantee, thus not interfering with the customs administration's decision-making process. The European Union adds that, once the final customs value is established, an appeal against the imposition of a guarantee becomes irrelevant because the guarantee effectively ceases to exist.

⁸⁹European Union's third participant's submission, para. 64 (referring to Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 230 and 231).

3. United States

79. With respect to Thailand's appeal of the Panel's finding of less favourable treatment under Article III:4 of the GATT 1994, the United States argues that, while a complainant need not demonstrate the actual trade impact of a measure, it must establish that the measure modifies the conditions of competition for imported products. The United States questions whether mere risk that a change to the conditions of competition might occur would fulfil that requirement, given that a finding of less favourable treatment cannot be based on mere assertion or speculation.⁹⁰

80. As regards Thailand's appeal concerning the Panel's treatment of Exhibit PHL-289, the United States observes that the Panel's Working Procedures expressly allowed for the submission of factual evidence, even after the first substantive meeting, for the purposes of rebuttals, answers to questions, or comments on answers to questions. The United States takes no view on whether the evidence at issue can properly be considered to have been submitted for these purposes. In any event, while it could have done so, the Panel was not required as a matter of due process to offer Thailand an opportunity to comment on Exhibit PHL-289. Furthermore, Thailand did in fact respond to the evidence as part of the interim review, and the Panel took Thailand's response into account in its evaluation of the evidence. Accordingly, it is not clear to the United States what due process right of Thailand was not respected. The United States also recalls that Article 11 of the DSU affords panels a degree of discretion regarding the treatment of evidence, and that working procedures "do not constrain panels with hard and fast rules on deadlines for submitting evidence".⁹¹

81. The United States takes no position on whether Thailand has acted inconsistently with the obligations of Article X:3(b) of the GATT 1994. The United States observes, however, that the Panel did not accept Thailand's categorization of "provisional" versus "non-provisional" customs measures, and thus did not make a broad finding about such classes of measures, nor seek to define the precise types of measures falling within the scope of Article X:3(b). Instead, the United States maintains, the Panel properly examined whether the guarantees at issue constitute "administrative action relating to customs matters", and, if so, whether Thailand failed to provide for the prompt review and correction of such action. This is the same question that is presented on appeal. The United States further considers that, contrary to Thailand's arguments on appeal, neither the Appellate Body report in *US – Shrimp (Thailand) / US – Customs Bond Directive*, nor the provisions of the *Agreement on Customs Valuation* or the *Anti-Dumping Agreement*, are relevant in answering this question. With respect to the issue of whether a measure satisfies the obligation to provide for "prompt review and

⁹⁰United States' closing statement at the oral hearing.

⁹¹United States' opening statement at the oral hearing (quoting Appellate Body Report, *Argentina – Textiles and Apparel*, para. 80).

correction", the United States agrees with both Thailand and the Panel that such an evaluation requires a case-by-case analysis, and with the Panel that what it means for action to be taken "promptly" will depend on the factual context of the specific measure at issue in a dispute.

III. Issues Raised in This Appeal

82. The following issues are raised in this appeal:

- (a) With respect to the Panel's findings under Article III of the GATT 1994 concerning Thailand's treatment of resellers of imported cigarettes, as compared to its treatment of resellers of like domestic cigarettes:
 - (i) whether the Panel erred in finding that Thailand acts inconsistently with Article III:2, first sentence, of the GATT 1994 by subjecting imported cigarettes to value added tax ("VAT") liability in excess of that applied to like domestic cigarettes;
 - (ii) whether the Panel erred in finding that Thailand acts inconsistently with Article III:4 of the GATT 1994, and, in particular:
 - whether the Panel erred in finding that Thailand accords less favourable treatment to imported cigarettes than to like domestic cigarettes;
 - whether the Panel failed to ensure due process and, thus, to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter, by accepting and relying on Exhibit PHL-289 without affording Thailand an opportunity to comment on that evidence; and
 - whether the Panel erred in rejecting Thailand's defence under Article XX(d) of the GATT 1994 to the Panel's finding of inconsistency under Article III:4; and
- (b) Whether the Panel erred in its interpretation and application of Article X:3(b) of the GATT 1994 in finding that Thailand acts inconsistently with its obligation, under that provision, to maintain or institute independent tribunals or procedures for the prompt review of guarantee decisions.

IV. Article III of the GATT 1994

A. *Introduction*

83. The Philippines alleged before the Panel that Thai law discriminates between resellers of imported cigarettes and resellers of domestic cigarettes in a manner inconsistent with Article III:2 and Article III:4 of the GATT 1994. According to the Philippines, Thailand acts inconsistently with Article III:2, first sentence, because Thailand imposes VAT liability on imported cigarettes in excess of that applied to like domestic cigarettes through an exemption from VAT for resales of domestic cigarettes.⁹² The Philippines also claimed that Thailand acts inconsistently with Article III:4 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 like domestic cigarettes.

84. In respect of both claims, the Panel found in favour of the Philippines⁹³, and Thailand appeals those findings. Before examining Thailand's appeal, we describe relevant aspects of Thailand's VAT regime, and identify the measures that the Panel found to be inconsistent with Article III:2 and Article III:4, respectively, of the GATT 1994.

B. *Overview of the Measures at Issue*

1. The Measure Challenged Under Article III:2 of the GATT 1994

85. For purposes of the Philippines' claim under Article III:2 of the GATT 1994, the Panel considered various provisions of Thailand's VAT regime.⁹⁴

86. Thailand administers VAT pursuant to Chapter IV of the Act Promulgating the Revenue Code⁹⁵ (the "Thai Revenue Code").⁹⁶ The Thai Revenue Code provides that, as a general rule, every

⁹²The Philippines also claimed that, in the determination of the tax base for imported cigarettes, Thailand acts inconsistently with Article III:2, first sentence, of the GATT 1994 by subjecting imported cigarettes to VAT liability in excess of that applied to like domestic cigarettes. The Panel found in favour of the Philippines in respect of this claim, and Thailand has not appealed this finding. (Panel Report, para. 8.3(a))

⁹³Panel Report, para. 8.3(b) and (c).

⁹⁴The Panel stated that 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". The Panel explained that in the course of the dispute the parties also referred to other provisions pertaining to the imposition of, and exemption from, VAT liability. (Panel Report, para. 7.572)

⁹⁵Government of the Kingdom of Thailand, The Council of Regency, The Act Promulgating the Revenue Code, B.E. 2481 (Panel Exhibit PHL-94).

⁹⁶Panel Report, para. 7.573 (referring to Chapter IV, "Value Added Tax", consisting of Sections 77-90 of the Thai Revenue Code).

VAT registrant⁹⁷ in the distribution chain for a product incurs liability in respect of VAT.⁹⁸ The VAT rate generally applicable to sales of products in Thailand is seven per cent *ad valorem*.⁹⁹ For most products, VAT is determined by applying this rate to the actual selling price of the product at each stage of the supply chain.¹⁰⁰ VAT must be reported on a monthly basis in tax form Por.Por.30.¹⁰¹ Pursuant to Section 82/3 of the Thai Revenue Code, in each tax month sellers are entitled to deduct the "input tax", paid upon purchase of the goods from the previous seller, from the "output tax" collected from the next purchaser of the goods.¹⁰² VAT liability under Thai law in respect of a sales transaction thus consists of the amount to be paid after subtracting input tax from output tax.¹⁰³ When output tax exceeds input tax, the tax payable is equal to the difference between the two. When input tax exceeds output tax, the difference is treated as a tax credit, and the seller is entitled to receive a tax refund or to apply that credit in future VAT assessments.¹⁰⁴

87. With respect to sales of cigarettes, however, Thailand's VAT system operates differently in two main respects. First, instead of applying the tax rate against the actual sales price, VAT is determined for each stage of the supply chain for cigarettes, starting with the first sale of cigarettes in Thailand by Thailand Tobacco Monopoly ("TTM") or an importer, by applying the seven per cent rate to the maximum retail selling price ("MRSP"), a reference price fixed by the Thai Government for each brand of cigarettes.¹⁰⁵ This means that, because VAT is based on the same fixed price at each stage of the supply chain, the amount of VAT assessed is the same for each sales transaction along that chain. Moreover, because the VAT paid by a reseller of cigarettes to a prior seller in the form of input tax is the same as the amount that the reseller collects from a subsequent purchaser in the form of output tax, these amounts will, subject to compliance with certain administrative requirements, be offset, resulting in a VAT liability of zero.

88. Second, Thai law provides for an exemption from VAT for all sales of domestic cigarettes by resellers in the distribution chain for domestic cigarettes. Thus, resellers of domestic cigarettes incur

⁹⁷VAT obligations under the Thai Revenue Code apply to VAT registrants. Section 85 of the Thai Revenue Code requires that all sellers file an application for VAT registration before commencing a business of selling goods or providing services. Section 81 of the Thai Revenue Code exempts from VAT registration businesses engaged in sales only of VAT-exempt goods, and businesses with annual sales of less than 1.8 million baht. (Panel Report, paras. 7.687-7.689 and footnote 1243 thereto)

⁹⁸Panel Report, paras. 7.574 and 7.580 (referring to, *inter alia*, Thai Revenue Code, Section 82 and Section 82/3).

⁹⁹Panel Report, para. 7.457.

¹⁰⁰Panel Report, footnote 947 to para. 7.460.

¹⁰¹Panel Report, paras. 7.634 and 7.652.

¹⁰²Panel Report, para. 7.579.

¹⁰³Panel Report, paras. 7.580 and 7.628.

¹⁰⁴Panel Report, para. 7.581.

¹⁰⁵Panel Report, para. 7.460 and footnote 947 thereto, and paras. 7.577 and 7.578 (referring to Thai Revenue Code, Section 79/5 and Section 82/7). Although cigarettes cannot be sold at prices exceeding the MRSP, they may be sold at prices below the MRSP. (*Ibid.*, para. 7.463)

no VAT liability because of an exemption provided pursuant to Section 81(1)(v) of the Thai Revenue Code, Section 3(1) of Thailand's Royal Decree issued under the Thai Revenue Code¹⁰⁶ ("Royal Decree No. 239"), and Thailand's Order of Revenue Department No. Por. 85/2542¹⁰⁷ ("Order No. Por. 85/2542").¹⁰⁸

89. Section 81(1)(v) of the Thai Revenue Code provides:

Section 81. There shall be exempt from value added tax the following transactions:

(1) Sale of goods not for export or provision of services as follows:

...

(v) Sale of goods or provision of services designated by a Royal Decree.¹⁰⁹ (footnote omitted)

90. Section 3(1) of Royal Decree No. 239 provides:

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 ...¹¹⁰

91. As the Panel explained, because TTM is the only manufacturer of cigarettes in Thailand, and an organization of the Thai Government, these provisions exempt resellers of TTM brand cigarettes from VAT.¹¹¹ The Panel thus concluded that, in respect of sales of domestic cigarettes, TTM is subject to VAT, whereas resellers of domestic cigarettes are not.¹¹²

¹⁰⁶Government of the Kingdom of Thailand, Royal Decree Issued Under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (Panel Exhibit PHL-217).

¹⁰⁷Government of the Kingdom of Thailand, Order of Revenue Department No. Por. 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 (Panel Exhibit PHL-95).

¹⁰⁸Panel Report, para. 7.591.

¹⁰⁹See Panel Report, para. 7.584.

¹¹⁰Panel Report, para. 7.585.

¹¹¹Panel Report, para. 7.585. Order No. Por. 85/2542 also confirms that, with respect to the first purchaser of cigarettes from TTM, there is an exemption from VAT in accordance with Section 81(1)(v) of the Thai Revenue Code. (*Ibid.*, para. 7.586)

¹¹²Panel Report, paras. 7.590 and 7.591.

92. In respect of imported cigarettes, the Panel stated:

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.¹¹³ (footnote omitted)

93. Finally, the Panel referred to certain "[o]ther relevant provisions" that it examined, including Section 82/5 of the Thai Revenue Code, which sets out instances in which VAT registrants are not allowed to deduct input tax in computing tax liability under Section 82/3.¹¹⁴ Section 82/5 provides for the denial of a tax credit in the following six instances:

(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.¹¹⁵

94. In sum, in evaluating the Philippines' Article III:2 claim in respect of resellers of cigarettes, the Panel considered several provisions under Thai law collectively. The Panel first identified that resellers of imported cigarettes are liable for VAT under Section 82/7 of the Thai Revenue Code, and that resellers of domestic cigarettes are exempt from VAT liability pursuant to Section 81(1)(v) of the

¹¹³Panel Report, para. 7.591.

¹¹⁴Panel Report, subheading VII.E.3(d) and para. 7.593.

¹¹⁵Panel Report, para. 7.593.

Thai Revenue Code, Section 3(1) of Royal Decree No. 239, and Order No. Por. 85/2542.¹¹⁶ Recognizing that VAT liability consists of output tax minus input tax¹¹⁷, the Panel then proceeded to evaluate whether an input tax credit is "automatically" available to resellers of imported cigarettes.¹¹⁸ The Panel found that such resellers would not obtain an input tax credit if they fail to satisfy certain conditions, namely: (i) to complete and file form Por.Por.30; (ii) to produce a complete and accurate tax invoice in respect of a transaction (or to satisfy other conditions under Section 82/5 of the Thai Revenue Code); or (iii) to meet other record-keeping requirements.¹¹⁹ On this basis, the Panel concluded that "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 [resellers] of imported cigarettes in every case."¹²⁰

95. Accordingly, the measure that the Panel analyzed under Article III:2 of the GATT 1994 consists of an exemption from VAT liability for resellers of domestic cigarettes, together with the imposition of VAT on resellers of imported cigarettes when they do not satisfy prescribed conditions for obtaining input tax credits necessary to achieve zero VAT liability.

2. The Measure Challenged Under Article III:4 of the GATT 1994

96. For purposes of the Philippines' claim under Article III:4 of the GATT 1994, the Panel also considered a series of provisions of Thailand's VAT regime.¹²¹

97. Pursuant to Section 81/2 of the Thai Revenue Code, businesses exempt from VAT are also exempt from compliance with the provisions of Chapter IV of the Thai Revenue Code. Consequently, because resellers of domestic cigarettes are exempt from VAT, they are also relieved of the obligation to comply with VAT-related administrative requirements contained in Chapter IV.¹²² The Panel addressed various requirements that, according to the Philippines, apply only to resellers of imported cigarettes, and not to resellers of domestic cigarettes. The Panel concluded that three sets of

¹¹⁶Panel Report, paras. 7.621 and 7.622.

¹¹⁷Panel Report, para. 7.628.

¹¹⁸Panel Report, para. 7.632.

¹¹⁹Panel Report, para. 7.634.

¹²⁰Panel Report, para. 7.644.

¹²¹The Philippines identified the following relevant provisions in connection with Thailand's VAT-related administrative requirements: Sections 81 and 82/7 of the Thai Revenue Code; Royal Decree No. 239; and Order No. Por. 85/2542. (Panel Report, para. 7.649)

¹²²Panel Report, paras. 7.688-7.690.

VAT-related administrative requirements impose an additional administrative burden only on resellers of imported cigarettes.¹²³

98. First, Section 83/1 of the Thai Revenue Code imposes on every VAT registrant the obligation to file a tax return, namely, form Por.Por.30, on a monthly basis regardless of the type of goods sold and/or services provided.¹²⁴ Resellers of goods subject to VAT, such as imported cigarettes, are therefore required to file form Por.Por.30. Resellers of exclusively VAT-exempt goods, such as domestic cigarettes, are not required to be VAT registrants and are therefore exempt from this requirement.¹²⁵ When a reseller sells both domestic cigarettes and other goods subject to VAT, that reseller is, by virtue of its sales of the latter, under an obligation to file form Por.Por.30. The Panel found, however, that such a reseller is not required to report its sales of VAT-exempt domestic cigarettes in that form.¹²⁶ The Panel therefore 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 because: (i) a reseller of domestic cigarettes who carries exclusively VAT-exempt goods, and therefore is not required to register for VAT, is exempted from the obligation to file form Por.Por.30, whereas the same exemption is not provided to resellers of imported cigarettes; and (ii) a cigarette reseller who is a VAT registrant need not report sales of domestic cigarettes when completing form Por.Por.30.¹²⁷ In this Report, we refer collectively to this first set of requirements as the "requirements relating to form Por.Por.30".

99. Second, Section 87 of the Thai Revenue Code requires resellers of imported cigarettes to prepare and maintain input tax and output tax records, and goods and raw materials records.¹²⁸ Resellers of imported cigarettes are also subject to an obligation to file revenue and expense reports, from which resellers of exclusively domestic cigarettes are exempt.¹²⁹ Thus, the Panel concluded that resellers of imported cigarettes, but not resellers of domestic cigarettes, are subject to an obligation to fill out and file reports.¹³⁰ The Panel further found that Section 87/3 of the Thai Revenue Code

¹²³The Philippines also alleged before the Panel that resellers of imported cigarettes are subject to tax invoice-related requirements and auditing procedures to which resellers of domestic cigarettes are not subject. Regarding the requirement to prepare and keep tax invoices, the Panel found that the Philippines did not respond to Thailand's argument that sales receipts, which both VAT registrants and non-VAT registrants must maintain, may serve as tax invoices, and that the Philippines did not fully explain its argument that the use of the MRSP as the tax base would make the requirement to prepare a tax invoice more burdensome for resellers of imported cigarettes. (Panel Report, paras. 7.706 and 7.707) With respect to the auditing procedures, the Panel found that resellers of both imported and domestic cigarettes are subject to similar procedures. (*Ibid.*, para. 7.718)

¹²⁴Panel Report, para. 7.686.

¹²⁵Panel Report, para. 7.694.

¹²⁶Panel Report, para. 7.703.

¹²⁷Panel Report, para. 7.704.

¹²⁸Panel Report, para. 7.654.

¹²⁹Panel Report, para. 7.710.

¹³⁰Panel Report, para. 7.715.

requires resellers of imported cigarettes to maintain more information for accounting and auditing purposes than that required of resellers of domestic cigarettes.¹³¹ In this Report, we refer collectively to this second set of requirements as the "reporting and record-keeping requirements".

100. Third, Sections 89 and 90 of the Thai Revenue Code subject VAT registrants to various penalties and other sanctions associated with the failure to comply with VAT-related administrative requirements set out in Chapter IV of the Thai Revenue Code.¹³² Resellers of goods that are subject to VAT, such as imported cigarettes, are therefore subject to these penalties and other sanctions, whereas resellers of exclusively domestic cigarettes are not. In this Report, we refer collectively to this third set of requirements as the "penalties and other sanctions".

101. In sum, the Panel found that Thailand imposes these three sets of requirements only on resellers of imported cigarettes.¹³³ With the exception of the issue of whether sales of domestic cigarettes must be reported in form Por.Por.30, discussed below in section IV.D.2 of our Report, the participants do not contest on appeal the Panel's findings that the requirements relating to form Por.Por.30, the reporting and record-keeping requirements, and the penalties and other sanctions are imposed only on resellers of imported cigarettes, and not on resellers of domestic cigarettes.¹³⁴

102. Accordingly, the measure that the Panel analyzed under Article III:4 of the GATT 1994 consists of an exemption from three sets of VAT-related administrative requirements for resellers of domestic cigarettes, together with the imposition of these administrative requirements on resellers of imported cigarettes.

103. Based on the foregoing, we now turn to assess Thailand's claims of error on appeal under Article III:2 and Article III:4 of the GATT 1994.

¹³¹Panel Report, para. 7.717.

¹³²Panel Report, paras. 7.719, 7.720, and 7.722. The Panel analyzed these penalties and other sanctions as part of the additional administrative requirements at issue, and neither participant has challenged this approach. We observe that they are not administrative requirements as such, but rather the consequence of failing to comply with VAT-related administrative requirements. Nonetheless, like the Panel, we address the penalties and other sanctions as among the relevant additional administrative requirements for purposes of our Report.

¹³³Panel Report, para. 7.722.

¹³⁴The Panel did not make any finding regarding the extent to which cigarette resellers sell exclusively domestic, exclusively imported, or both domestic and imported cigarettes, nor regarding the extent to which the distribution channels for domestic and imported cigarettes in Thailand overlap. Although the Panel acknowledged evidence adduced by the Philippines that more than 20 per cent of cigarette resellers in Thailand do not sell imported cigarettes, the Panel considered that the Philippines had not demonstrated why the 68,000 businesses concerned decided not to sell imported cigarettes, and also took note of Thailand's argument that many of those businesses are exempt from VAT liability by virtue of their low annual turnover. (Panel Report, paras. 7.725 and 7.727, and footnote 1300 to para. 7.736) Pursuant to Section 81/1 and Section 81/2 of the Thai Revenue Code, small businesses (that is, businesses with annual sales of less than 1.8 million baht) are exempt from all obligations under Chapter IV of the Thai Revenue Code. (*Ibid.*, para. 7.689 and footnote 1243 thereto)

C. *Article III:2 of the GATT 1994*

104. Thailand appeals the Panel's finding that:

... 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 cigarette[] resellers.¹³⁵

105. Thailand raises two principal issues on appeal. First, Thailand claims that the Panel erred because the measures that it found to be inconsistent with Article III:2, first sentence, of the GATT 1994 are not fiscal measures subject to the scope of that provision. Rather, according to Thailand, the measures entail only administrative requirements that fall within the scope of Article III:4, rather than Article III:2. Second, Thailand claims that, even if the measures fall within the scope of Article III:2, they do not subject imported cigarettes to taxes in excess of those applied to domestic cigarettes. In Thailand's view, inconsistency with Article III:2 cannot arise due to an obligation to comply with the administrative formality of filing a tax form, or a limitation on the availability of tax credits only for transactions that are documented and legitimate.

106. The Philippines argues that the Panel correctly established under Article III:2 that imported cigarettes are subject to taxation in excess of that applied to like domestic cigarettes. The Philippines considers that the Panel could have limited its analysis and simply found that resellers of imported cigarettes are subject to VAT liability, whereas resellers of domestic cigarettes, through a complete exemption from VAT, are not. The Philippines adds that, although the Panel did not need to do so, the Panel undertook further analysis and correctly found the existence of a discriminatory tax because resellers of imported cigarettes, in defined circumstances under Thai law, may not satisfy the conditions necessary to offset VAT liability. The Philippines rejects Thailand's argument that the administrative formalities associated with VAT liability cannot give rise to excess taxation under Article III:2.

107. Before we turn to evaluate the substance of Thailand's claim of error on appeal, we consider it necessary to recall the measure that the Panel found to be inconsistent with Article III:2, first sentence, of the GATT 1994. Thailand asserts that it is beyond dispute that Thailand's VAT rate is seven per cent for both imported and domestic cigarettes, and that the Panel found that the full amount

¹³⁵Panel Report, para. 8.3(b); see also para. 7.644. In assessing the Philippines' claim under Article III:2, the Panel undertook a two-step analysis to determine: (i) whether the imported and domestic products at issue are "like"; and (ii) whether the challenged measure subjects the imported products to an internal tax or charge in excess of that applied to like domestic products. (*Ibid.*, para. 7.569) In respect of likeness, the Panel found that the imported cigarettes at issue are "like" domestic cigarettes within the same price segments. (*Ibid.*, paras. 7.451 and 7.597) Thailand has not appealed this finding.

of VAT is collected from both the domestic producer and importers at the time of the first sale.¹³⁶ Thus, Thailand argues, the Panel's finding was not based on the tax burden under Thai VAT law, but instead was based solely on the difference in the "administrative requirements" for resales of imported and domestic cigarettes, and the consequences of failure to comply with those requirements.¹³⁷

108. We consider that Thailand's description of the measure analyzed by the Panel under Article III:2 as "administrative requirements" in respect of VAT is both under-inclusive and over-inclusive. The description is under-inclusive because it does not account for the complete exemption from VAT for resales of domestic cigarettes, and therefore disregards that VAT liability will, when certain conditions prescribed under Thai law are not met, be incurred by resellers of imported cigarettes, but never by resellers of domestic cigarettes. For this reason, Thailand's observation that the domestic producer and importer pay the same VAT amount is incomplete because it disregards that, under Thai law, subsequent resellers of imported cigarettes, but not subsequent resellers of domestic cigarettes, may also incur VAT liability. At the same time, Thailand's description is over-inclusive because the relevant measure for purposes of the Panel's consideration of the Philippines' Article III:2 claim does not include all of the administrative requirements evaluated by the Panel in respect of the Philippines' Article III:4 claim.¹³⁸ As we have explained, the relevant measure analyzed by the Panel under Article III:2 consists of an exemption from VAT liability for resellers of domestic cigarettes, together with the imposition of VAT on resellers of imported cigarettes when they do not satisfy prescribed conditions for obtaining input tax credits necessary to achieve zero VAT liability.¹³⁹

109. On the basis of this understanding of Thailand's measure, we now turn to Thailand's appeal of the Panel's finding under Article III:2, first sentence, of the GATT 1994.

110. Article III of the GATT 1994, entitled "National Treatment on Internal Taxation and Regulation", sets out obligations that prohibit the application by Members of internal tax and regulatory measures in a manner affording protection to domestic production. The various provisions

¹³⁶Thailand's appellant's submission, para. 73 (referring to Panel Report, para. 7.590).

¹³⁷Thailand's appellant's submission, paras. 74 and 75.

¹³⁸In its Article III:2 analysis, the Panel identified provisions under Thai law that specify conditions for obtaining an input tax credit. The Panel considered that a reseller of imported cigarettes would be subject to VAT if it did not properly fill out and file form Por.Por.30, or did not, as specified in Section 82/5(1) and (2) of the Thai Revenue Code, produce a complete and accurate tax invoice in respect of a transaction. The Panel also stated that an input tax credit would not be available if certain reporting and record-keeping requirements were not satisfied, or if the conditions specified in Section 82/5 of the Thai Revenue Code were not met. (Panel Report, para. 7.634) In contrast, we note that, in its consideration of the Philippines' claim under Article III:4, the Panel evaluated various administrative requirements in addition to the requirements relating to form Por.Por.30, but did not examine the conditions specified in Section 82/5 of the Thai Revenue Code.

¹³⁹See *supra*, para. 95.

of Article III thus operate to ensure that Members provide equality of competitive conditions for imported products in relation to domestic products in their internal markets.¹⁴⁰

111. The first sentence of Article III:2 provides:

The products of the territory of any Member imported into the territory of any other Member 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.

112. Article III:2, first sentence, thus serves to prohibit the imposition of discriminatory internal taxes or other internal charges on imported versus like domestic products. Thailand's appeal calls for us to address two issues: whether Thailand's measure falls within the scope of the first sentence of Article III:2; and, if so, whether the taxes or charges applied to imported products pursuant to Thailand's measure are "in excess of" those applied to like domestic products. Article III:2, first sentence, concerns circumstances where imported and like domestic products are subject "directly or indirectly" to internal taxes or other internal charges "of any kind". This language suggests that the provision applies to a broad range of measures.¹⁴¹ Regarding the requirement of "not ... in excess of", the Appellate Body has clarified that a finding of inconsistency under Article III:2, first sentence, is not conditional on a "trade effects test", and that even the smallest amount of "excess" is too much.¹⁴² For purposes of our consideration of Thailand's appeal, a measure that subjects products to internal taxes or other internal charges may be examined under Article III:2, first sentence, of the GATT 1994. When such a measure subjects imported products to taxes or charges in excess of those applied to like domestic products, it will be inconsistent with the first sentence of Article III:2.

113. Thailand argues that, because the relevant measure relates only to administrative requirements, and the financial consequences of non-compliance with those requirements, it should have been evaluated by the Panel under Article III:4, not Article III:2, of the GATT 1994. According to Thailand, administrative requirements related to the collection of taxes, or consequences arising out of failure to comply with those requirements, are not subject to the disciplines of Article III:2, "even if the failure to comply with those administrative requirements may have financial consequences for an

¹⁴⁰Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 16-18, DSR 1996:I, 97, at 109-111. See also Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 119 and 127; and Appellate Body Reports, *China – Auto Parts*, para. 161.

¹⁴¹Appellate Body Report, *Canada – Periodicals*, p. 19, DSR 1997:I, 449, at 464-465.

¹⁴²Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23, DSR 1996:I, 97, at 115.

imported product".¹⁴³ The Philippines argues that the Panel properly found that Thailand's measure falls within the scope of Article III:2.

114. We have already explained that we do not accept Thailand's characterization of the measure that was challenged by the Philippines, and found by the Panel to be inconsistent with Article III:2, as administrative requirements. For the reasons set out above, we also do not accept Thailand's position that the measure at issue does not relate to the respective tax burdens imposed on imported and domestic cigarettes. Thailand's measure subjects resellers of imported cigarettes to VAT when they do not satisfy prescribed conditions for obtaining input tax credits necessary to achieve zero VAT liability. Whether such conditions are satisfied thus has a direct consequence for the amount of tax liability imposed on imported cigarettes. Conversely, a complete exemption from VAT ensures that there can never be any VAT liability for resellers in respect of their sales of domestic cigarettes. We therefore agree with the Panel that Thailand's measure affects the respective tax liability imposed on imported and like domestic cigarettes, and accordingly reject Thailand's claim that the measure consists solely of administrative requirements that are not subject to the disciplines of Article III:2, first sentence, of the GATT 1994.¹⁴⁴

115. Thailand also argues that, even if the Panel were correct to examine Thailand's measure under Article III:2, the Panel erred in finding that Thailand acted inconsistently with that provision. Thailand contends that it cannot be WTO-inconsistent to require resellers to complete "administrative formalities"¹⁴⁵ in order to obtain input tax credits necessary to achieve zero VAT liability. Thailand adds that none of the six situations set out in Section 82/5 of the Thai Revenue Code¹⁴⁶ involves a situation in which a reseller could be denied an input tax credit on the basis of an actual, legitimate purchase of cigarettes for resale. In contrast, the Philippines argues that, if resellers of imported cigarettes cannot obtain an input tax credit, this is the legal consequence of the regulatory framework established by Thailand. The Philippines maintains that resellers of domestic cigarettes are never subject to that consequence because they are automatically exempt from VAT liability on such sales.

¹⁴³Thailand's appellant's submission, para. 71.

¹⁴⁴We note that even if a measure at issue consisted solely of administrative requirements, we do not exclude the possibility that such requirements may have a bearing on the respective tax burdens on imported and like domestic products, and may therefore be subject to Article III:2. Although Thailand may be correct in stating that prior WTO reports have examined measures consisting of "administrative requirements relating to the sale of imported products" under Article III:4 (Thailand's appellant's submission, para. 69), this does not in our view demonstrate that, if such requirements subject imported and like domestic products to internal taxes or other internal charges, the same measures, or certain aspects of the same measures, could not also be scrutinized under Article III:2. (See Panel Report, *Argentina – Hides and Leather*, para. 11.143 (finding that administrative measures concerning the pre-payment of tax "qualify as tax measures [that] fall to be assessed under Article III:2"))

¹⁴⁵Thailand's appellant's submission, para. 91.

¹⁴⁶See *supra*, para. 93.

116. Thailand does not dispute that resellers of imported cigarettes incur VAT liability when they do not satisfy conditions to obtain an input tax credit¹⁴⁷, or that a measure that creates a risk of excess taxation may give rise to a violation of Article III:2, first sentence.¹⁴⁸ Rather, Thailand argues that requiring resellers to satisfy administrative requirements in respect of VAT does not present a risk related to the calculation of the tax burden, and therefore cannot give rise to a violation under Article III:2. We consider, however, that a proper conception of Thailand's measure clarifies that it is not the mere imposition of administrative requirements that creates a differential tax burden, but rather that only resellers of imported cigarettes will incur VAT liability as a consequence of failing to offset output tax. Resellers of imported cigarettes are subject to VAT liability in defined circumstances under Thai law, whereas resellers of domestic cigarettes, due to a complete exemption from VAT, are not. Based on this understanding of the measure, we therefore agree with the Panel that Thailand subjects imported cigarettes to internal taxes in excess of those applied to like domestic cigarettes, within the meaning of Article III:2, first sentence, of the GATT 1994.

117. Thailand also argues that the conduct of private parties in relation to the challenged measure cannot form the basis for establishing a violation of Article III:2. As Thailand puts it, a system of offsetting input tax against output tax cannot be said to be WTO-inconsistent "simply because private parties are required to comply with certain administrative requirements", or because it compels resellers "to limit claims for input tax credits to actual, legitimate purchases" of cigarettes.¹⁴⁹ Thailand argued at the oral hearing that resellers of imported cigarettes will owe VAT only when they have not legitimately purchased cigarettes, or when they make mistakes in their filing for VAT.¹⁵⁰ It is not clear to us, based on the Panel's findings regarding the operation of Thailand's measure, that the situations in which resellers of imported cigarettes will incur VAT liability are limited to those identified by Thailand. In any event, we do not consider that Thailand's measure precludes a finding of inconsistency with Article III:2 due to the fact that resellers of imported cigarettes may take action to avoid the imposition of VAT liability. In our view, the availability of such a course of action does not alter the legal assessment of whether, under Thai law, imported cigarettes are subject to internal taxes or other internal charges in excess of those applied to domestic cigarettes. As we have explained, Thailand's measure provides for circumstances in which resellers of imported cigarettes will be subject to VAT liability, to which resellers of domestic cigarettes will never be subject. In this respect, we agree with the Panel's reliance on *Korea – Various Measures on Beef*, where the Appellate

¹⁴⁷Thailand's appellant's submission, para. 97. See also Thailand's responses to Panel Questions 137 and 138.

¹⁴⁸Thailand's appellant's submission, paras. 80-82 (referring to GATT Panel Report, *US – Tobacco*, para. 97).

¹⁴⁹Thailand's appellant's submission, para. 90.

¹⁵⁰Thailand's responses to questioning at the oral hearing.

Body stated, in the context of its Article III:4 analysis, that "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".¹⁵¹

118. We also disagree with Thailand's suggestion that the Panel's finding would limit the ability of WTO Members to ensure the proper administration of their tax regimes.¹⁵² Again, the Panel considered that Thailand's measure was inconsistent with Article III:2, first sentence, not because it prescribed conditions for obtaining tax credits, but rather because those conditions applied only in respect of resellers of imported cigarettes, and did not "automatically and irrevocably offset tax liabilities incurred by [those resellers] in every case".¹⁵³ WTO Members remain free "to administer and collect internal taxes as they see fit", so long as they do so "in conformity with Article III:2".¹⁵⁴ Imposing legal requirements that result in tax liability on imported products when resellers do not satisfy prescribed conditions necessary to avoid that liability, but which never result in tax liability on like domestic products, is inconsistent with the requirements of Article III:2, first sentence.

119. For the foregoing reasons, we *uphold* the Panel's finding, in paragraph 8.3(b) of the Panel Report, that Thailand acts inconsistently with Article III:2, first sentence, of the GATT 1994 by subjecting imported cigarettes to VAT liability in excess of that applied to like domestic cigarettes.¹⁵⁵

D. *Article III:4 of the GATT 1994*

120. Thailand appeals the Panel's finding that:

... 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.¹⁵⁶

121. The Panel's finding under Article III:4 of the GATT 1994 concerned an exemption from three sets of VAT-related administrative requirements for resellers of domestic cigarettes, together with the

¹⁵¹Panel Report, para. 7.637 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 146).

¹⁵²Thailand's appellant's submission, paras. 96, 97, and 104.

¹⁵³Panel Report, para. 7.644.

¹⁵⁴Panel Report, *Argentina – Hides and Leather*, para. 11.144. The Panel stated that Thailand did not assert a defence under Article XX to the alleged violation of Article III:2 of the GATT 1994. (Panel Report, para. 7.642)

¹⁵⁵See also Panel Report, para. 7.644.

¹⁵⁶Panel Report, para. 8.3(c); see also para. 7.738.

imposition of these administrative requirements on resellers of imported cigarettes. These three sets of administrative requirements consist of: (i) requirements relating to form Por.Por.30; (ii) reporting and record-keeping requirements; and (iii) penalties and other sanctions.¹⁵⁷ We refer to these requirements collectively as the "additional administrative requirements".

122. Thailand advances three independent grounds for reversal of the Panel's finding under Article III:4. First, Thailand argues that the Panel's analysis of "treatment no less favourable" was insufficient as a matter of law to support a finding that Thailand acted inconsistently with Article III:4. Second, Thailand claims that the Panel erred in accepting and relying upon an exhibit submitted late in the proceedings by the Philippines—Exhibit PHL-289—and thus violated Article 11 of the DSU, Thailand's due process rights, and paragraph 15 of the Panel's Working Procedures. Third, Thailand alleges that, because the Panel failed to conduct a correct legal analysis in respect of Thailand's defence under Article XX(d) of the GATT 1994, the Panel "effectively deprived" Thailand of the opportunity to justify the additional administrative requirements as necessary to secure compliance with the Thai VAT laws. We address these issues in turn.

1. Article III:4: "treatment no less favourable"

123. In its appeal of the Panel's finding that imported cigarettes are treated less favourably than like domestic cigarettes, Thailand argues that differences in treatment are "not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is 'no less favourable'"¹⁵⁸, and that a determination of less favourable treatment "*cannot rest on simple assertion*, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace".¹⁵⁹ According to Thailand, however, the Panel based its finding on a "mere assertion"¹⁶⁰ or a "theoretical possibility"¹⁶¹ that the differences in treatment found by the Panel "*could* affect costs and *could potentially affect* the competitive position" of imported cigarettes.¹⁶² Thailand adds that the Panel failed to conduct "*any* meaningful analysis"¹⁶³ of how the differences in treatment might, in practice, increase costs, or how the measures at issue "constrained" or "restricted" the choices available to traders in such a manner as to affect the competitive conditions for imported cigarette resellers.¹⁶⁴

¹⁵⁷See *supra*, Section IV.B.2.

¹⁵⁸Thailand's appellant's submission, para. 122 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 135).

¹⁵⁹Thailand's appellant's submission, para. 125 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215). (emphasis added by Thailand)

¹⁶⁰Thailand's appellant's submission, para. 142.

¹⁶¹Thailand's appellant's submission, para. 120.

¹⁶²Thailand's appellant's submission, para. 120. (original emphasis)

¹⁶³Thailand's appellant's submission, para. 135. (original emphasis)

¹⁶⁴Thailand's appellant's submission, para. 140.

124. In response, the Philippines submits that treatment is less favourable if it does not "ensure effective equality of opportunities"¹⁶⁵ between imported products and domestic products, and that this equality of opportunities is upset when government regulation is not "perfectly neutral".¹⁶⁶ The Philippines contends that, when government regulation subjects imported products to burdens that are not imposed on like domestic products, the treatment of imported and like domestic products is unequal and, accordingly, "'inherently less favorable' for imported goods".¹⁶⁷ On this basis, the Panel correctly found that, because resellers of imported cigarettes must comply with three additional administrative requirements that are not imposed on resellers of domestic cigarettes, the treatment accorded to imported cigarettes was "inherently less favourable".¹⁶⁸ The Philippines adds that, even though it was not necessary for it to do so, the Panel sought further confirmation for its finding of less favourable treatment by examining the ways in which Thailand's additional administrative requirements upset the equality of competitive conditions in the Thai market. The Panel considered evidence of price elasticity and switching patterns and found that domestic and imported cigarettes operate in a close competitive relationship in the Thai market, such that the additional administrative requirements can potentially have a negative impact on the competitive position of imported cigarettes. The Philippines points out that the additional administrative requirements can be linked to the operating costs of businesses, thereby disturbing the equality of competitive conditions.

125. We begin our analysis with the text of Article III:4 of the GATT 1994, which provides in relevant part:

The products of the territory of any Member imported into the territory of any other Member 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.

126. Article III:4 forms part of the broader framework set out in Article III, which ensures that Members provide equality of competitive conditions for imported products in relation to domestic products.¹⁶⁹ Like the other paragraphs of Article III, the obligation prescribed under Article III:4 is informed by the general principle set out in Article III:1 that internal measures should not be applied

¹⁶⁵Philippines' appellee's submission, para. 121 (quoting, *inter alia*, Panel Report, *Canada – Autos*, paras. 10.78 and 10.84).

¹⁶⁶Philippines' appellee's submission, para. 123.

¹⁶⁷Philippines' appellee's submission, para. 129 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 265).

¹⁶⁸Philippines' appellee's submission, para. 137 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 265).

¹⁶⁹See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109.

so as to afford protection to domestic production.¹⁷⁰ In the context of Article III:4, this means that, where there is less favourable treatment of imported products, there is protection to domestic production.¹⁷¹

127. Article III:4 consists of three elements that must be demonstrated in order to establish inconsistency with this provision, namely: (i) that the imported and domestic products are "like products"; (ii) that the measure at issue constitutes a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue; and (iii) that the treatment accorded to imported products is less favourable than that accorded to like domestic products.¹⁷² Thailand's appeal concerns only the Panel's finding in respect of the third element, namely, the no less favourable treatment standard in Article III:4.¹⁷³

128. The phrase "treatment no less favourable" in Article III:4 has been interpreted by the Appellate Body in prior disputes. In *Korea – Various Measures on Beef*, the Appellate Body explained that the analysis of whether imported products are treated less favourably must ascertain whether the measure at issue "modifies the *conditions of competition* in the relevant market to the detriment of imported products".¹⁷⁴ The Appellate Body also stated that "[a] formal difference in treatment between imported and like domestic products is ... neither necessary, nor sufficient, to show a violation of Article III:4".¹⁷⁵ Accordingly, the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4.¹⁷⁶ Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, then the differential treatment will amount to treatment that is "less favourable" within the meaning of Article III:4.

129. The analysis of whether imported products are accorded less favourable treatment requires a careful examination "grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'"¹⁷⁷, including of the implications of the measure for the conditions of competition between

¹⁷⁰See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18, DSR 1996:I, 97, at 111.

¹⁷¹See Appellate Body Report, *EC – Asbestos*, para. 100.

¹⁷²Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

¹⁷³The Panel found that the imported cigarette brands Marlboro and L&M are "like" Thai domestic cigarettes within the meaning of Article III:4 of the GATT 1994. (Panel Report, para. 7.662) Likewise, the Panel found that the Thai regulations at issue, containing the additional administrative requirements, can be considered as affecting the internal sale of imported cigarettes within the meaning of Article III:4 of the GATT 1994. (*Ibid.*, para. 7.665) Neither of these findings is appealed.

¹⁷⁴Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (original emphasis)

¹⁷⁵Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

¹⁷⁶Appellate Body Report, *EC – Asbestos*, para. 100.

¹⁷⁷Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, footnote 44 to para. 142).

imported and like domestic products. This analysis need not be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned. Of course, nothing precludes a panel from taking such evidence of actual effects into account.

130. The implications of the contested measure for the equality of competitive conditions are, first and foremost, those that are discernible from the design, structure, and expected operation of the measure. For instance, where a Member's legal system applies a single regulatory regime to both imported and like domestic products, with the sole difference being that an additional requirement is imposed only on imported products, the existence of this additional requirement may provide a significant indication that imported products are treated less favourably. Because, however, the examination of whether imported products are treated less favourably "cannot rest on simple assertion"¹⁷⁸, close scrutiny of the measure at issue will normally require further identification or elaboration of its implications for the conditions of competition in order properly to support a finding of less favourable treatment under Article III:4 of the GATT 1994.

131. The Panel found that the additional administrative requirements imposed only on resellers of imported cigarettes "could potentially affect" the conditions of competition for imported cigarettes in a negative manner.¹⁷⁹ In its analysis, the Panel began by observing that, in previous disputes, a simple administrative authorization scheme¹⁸⁰, a differentiated distribution scheme¹⁸¹, or the mere possibility that non-nationals have to defend their patent claims in two jurisdictions rather than only one¹⁸², were all situations found to constitute "additional administrative burdens" that accord less favourable treatment.¹⁸³ The Panel then observed that the relative market shares held by imported and domestic cigarettes in the Thai market and an econometric study submitted by the Philippines show a certain degree of price elasticity and switching patterns. The Panel considered that this would also indicate that the additional administrative requirements "can potentially have" a negative impact on the competitive position of imported cigarettes in the Thai market.¹⁸⁴ Furthermore, the Panel reasoned that, because the burden associated with the additional administrative requirements can be linked to the operating costs of suppliers of imported cigarettes, this could limit business opportunities for

¹⁷⁸Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

¹⁷⁹Panel Report, para. 7.734.

¹⁸⁰Panel Report, para. 7.732 (referring to Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 6.184 and 6.213).

¹⁸¹Panel Report, para. 7.732 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paras. 143-151; and GATT Panel Report, *US – Malt Beverages*, paras. 5.32 and 5.35).

¹⁸²Panel Report, paras. 7.730 and 7.732 (referring to Appellate Body Report, *US – Section 211 Appropriations Act*, para. 265).

¹⁸³Panel Report, para. 7.732.

¹⁸⁴Panel Report, para. 7.735.

imported cigarettes to the extent that cigarette suppliers seek to reduce costs by avoiding resales of imported cigarettes.¹⁸⁵

132. On appeal, Thailand contends that the Panel erred and applied an incorrect standard of less favourable treatment because its finding was based on the "theoretical possibility" that the "differences *could* affect costs and *could potentially affect* the competitive position of imported cigarettes in a negative manner"¹⁸⁶, and that the Panel failed to engage in any meaningful analysis as to the implications of the measure in the marketplace, or how the differences affect the competitive position of imported cigarettes. Although Thailand does not contest the Panel's finding that the additional administrative requirements are imposed only on resellers of imported cigarettes¹⁸⁷, Thailand characterizes these requirements as "benign"¹⁸⁸ or "very minor"¹⁸⁹ differences in treatment, and argues that "the right to treat imported products differently may include the right to impose additional or more complicated requirements so long as they do not amount to 'less favourable' treatment".¹⁹⁰

133. We observe that the regulatory "differences" at issue stem from the fact that resellers of imported cigarettes must comply with the additional administrative requirements, whereas resellers of domestic cigarettes are exempt from such requirements. Thus, in this dispute, the sole difference in regulatory treatment consists of requirements applied *only* to imported cigarettes. The uncontested fact that resellers of imported cigarettes are subject to certain administrative requirements, whereas resellers of like domestic cigarettes are not, itself provides a significant indication that imported cigarettes are accorded less favourable treatment.

134. With respect to the standard of less favourable treatment under Article III:4, we observe that, in its third participant's submission, Australia expresses concern with the Panel's apparent use of a test of whether the measure at issue "may potentially modify" the conditions of competition to the detriment of imported products. Australia argues that previous panels have used a more rigorous legal standard of less favourable treatment, namely, whether a measure "may reasonably be expected"¹⁹¹ or "is more than likely"¹⁹² to modify adversely the conditions of competition. In our view, however, an

¹⁸⁵Panel Report, para. 7.736.

¹⁸⁶Thailand's appellant's submission, para. 120. (original emphasis)

¹⁸⁷Thailand confirmed at the oral hearing that, on appeal, it contests only the evidentiary basis for the Panel's finding that resellers of imported cigarettes are not required to report resales of domestic cigarettes in form Por.Por.30. That issue is addressed below in the context of Thailand's claim under Article 11 of the DSU.

¹⁸⁸Thailand's appellant's submission, para. 135.

¹⁸⁹Thailand's appellant's submission, para. 137.

¹⁹⁰Thailand's appellant's submission, para. 129.

¹⁹¹Australia's third participant's submission, para. 26 (quoting Panel Report, *China – Publications and Audiovisual Products*, para. 7.1471).

¹⁹²Australia's third participant's submission, para. 27 (quoting Panel Report, *India – Autos*, para. 7.201).

analysis of less favourable treatment should not be anchored in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialize. Rather, an analysis under Article III:4 must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue. Such scrutiny may well involve—but does not require—an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market. In any event, there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably.

135. Furthermore, we do not agree with Thailand that the Panel's use of the word "potentially" reveals that the Panel found less favourable treatment based only on a remote, unsubstantiated, or "theoretical possibility" that differences in regulatory treatment could affect the conditions of competition for imported cigarettes. The Panel referred to the Appellate Body Report in *US – FSC (Article 21.5 – EC)* to note that an examination of whether a measure involves less favourable treatment "need not be based on the *actual effects* of the contested measure in the marketplace".¹⁹³ The Panel understood this statement to mean that "the contested measure in the marketplace can be assessed on its *potential* effects on the competitive conditions of the imported product concerned".¹⁹⁴ We consider that, when read in the context of this reasoning, it is clear that the terms "potentially" and "potential effects" were intended to reflect the Panel's recognition that it was not required to inquire into the "actual effects" of the additional administrative requirements.

136. In addition, we observe that the Panel *did* identify further implications of the additional administrative requirements in the Thai market affecting the competitive position of imported and domestic cigarettes. In particular, the Panel observed that an econometric study submitted by the Philippines suggested a "certain degree of price elasticity and switching patterns" between imported and domestic cigarettes, and that this was an indication that the additional administrative requirements "can potentially have a negative impact on the competitive position of [imported] cigarettes in the market".¹⁹⁵ On appeal, Thailand alleges that the Panel itself acknowledged that this evidence was

¹⁹³Panel Report, para. 7.730 (quoting Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (original emphasis)).

¹⁹⁴Panel Report, para. 7.730. (original emphasis)

¹⁹⁵Panel Report, para. 7.735. This evidence was provided by the Philippines, and consists of a study conducted by an economics professor regarding cross-price elasticity between imported and domestic cigarettes in Thailand between 2007 and 2009. In particular, this study noted that "the estimated increase of market share of domestic cigarettes pursuant to an increase in the relative [retail selling price] of imported cigarettes strongly suggests that the two products are close substitutes in the eyes of Thai consumers". (*Ibid.*, para. 7.446 (quoting Panel Exhibit PHL-149, p. 9))

"uneven".¹⁹⁶ Furthermore, adds Thailand, the no less favourable treatment analysis under Article III:4 presupposes that imported and domestic products have been considered "like", and that, consequently, imported and domestic products subject to an Article III:4 analysis will always have "'some' degree of competitive relationship with each other".¹⁹⁷

137. As we see it, the Panel did not acknowledge that the econometric evidence before it was "uneven". Instead, the Panel merely took note of Thailand's contention that "switching patterns are uneven across various pairs of domestic and foreign brands".¹⁹⁸ Furthermore, the Panel did not err in relying upon this econometric evidence for its finding of less favourable treatment under Article III:4. The Panel used this evidence merely to *confirm* that the additional administrative requirements may have a negative impact on imported cigarettes relative to domestic cigarettes, as these products are in close competition with each other in the Thai market.¹⁹⁹ Taking a specific example, the Panel considered that the additional administrative requirements imposed only on resellers of imported cigarettes may affect business decisions of cigarette suppliers because "an additional administrative burden can be linked to the operating costs of their businesses", which would, in turn, modify the conditions of competition to the detriment of imported cigarettes.²⁰⁰ Although Thailand criticizes the Panel for this "cursory" statement²⁰¹, we consider that the Panel sought merely to identify that the "potential operating costs associated with the additional administrative requirements" may influence business decisions in a market where products compete closely with each other.²⁰² In our view, it was reasonable for the Panel to conclude that compliance with the additional administrative requirements will involve some costs that resellers of imported cigarettes, and not resellers of like domestic cigarettes, must bear, taking account of, *inter alia*, economic evidence relating to the market.

138. Accordingly, we are not persuaded by Thailand's arguments that the Panel made its finding "without making any factual findings other than to establish the existence of the different requirements themselves".²⁰³ The Panel assessed certain implications of these measures in the Thai market by referring to econometric evidence indicating a close competitive relationship, and also by

¹⁹⁶Thailand's appellant's submission, para. 114 (quoting Panel Report, footnote 1299 to para. 7.735).

¹⁹⁷Thailand's appellant's submission, para. 132.

¹⁹⁸Panel Report, footnote 1299 to para. 7.735.

¹⁹⁹At paragraph 7.735 of its Report, the Panel stated: (i) that TTM holds a 78 per cent market share, whereas imported cigarettes account for the remaining 22 per cent; (ii) that the econometric evidence adduced by the Philippines suggests a certain degree of elasticity and switching patterns between imported and domestic cigarettes; and (iii) that, "[i]n 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".

²⁰⁰Panel Report, para. 7.736.

²⁰¹Thailand's appellant's submission, para. 134.

²⁰²Panel Report, para. 7.736.

²⁰³Thailand's appellant's submission, para. 119.

noting that the additional administrative requirements carry certain operating costs.²⁰⁴ We note that, although the Panel could have inquired further into the implications of Thailand's measure for the conditions of competition, the mere fact that the additional administrative requirements are imposed on imported cigarettes, and not on like domestic cigarettes, provides, in itself, a significant indication that the conditions of competition are adversely modified to the detriment of imported cigarettes. We therefore consider that the Panel's analysis was sufficient to support its finding that the additional administrative requirements modify the conditions of competition to the detriment of imported cigarettes.

139. Finally, Thailand claims that the Panel failed to address Thailand's argument that resellers of imported cigarettes gain certain "financial advantages" by virtue of the additional administrative requirements.²⁰⁵ In particular, Thailand argues that resellers of imported cigarettes may claim "additional input tax credits for VAT paid on utilities, administrative expenses and other services consumed on the basis of the ratio of their VAT sales to their VAT-exempt sales".²⁰⁶ However, we observe that Thailand submitted this argument only in response to Panel questions following the first substantive meeting, and in a few other instances thereafter, and that Thailand produced no evidence to substantiate its assertion. Therefore, we do not see any basis for Thailand's contention on appeal that the Panel should have given greater consideration to this argument in conducting its substantive analysis.²⁰⁷

140. Accordingly, we reject Thailand's contention on appeal that the Panel's findings and "analysis of less favourable treatment are not sufficient as a matter of law to support a finding of a violation of

²⁰⁴In addition, we note that other Panel findings shed further light on the implications of the additional administrative requirements in the Thai market. The Panel found that failure to comply with the requirements relating to form Por.Por.30 and the reporting and record-keeping requirements may lead to denial of tax credits. (Panel Report, para. 7.634) Moreover, the Panel found that resellers of imported cigarettes may be subject to certain penalties and other sanctions if they fail to comply with the VAT-related administrative requirements. (*Ibid.*, paras. 7.719 and 7.722) By contrast, these economic risks are not borne by resellers of domestic cigarettes.

²⁰⁵Thailand's appellant's submission, para. 136.

²⁰⁶Thailand's appellant's submission, para. 136.

²⁰⁷We also note that the GATT Panel in *US – Section 337 Tariff Act* held that:

[T]he "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.

(GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.14)

Article III:4".²⁰⁸ We therefore *find* that the Panel did not err in concluding, in paragraph 7.738 of the Panel Report, that Thailand accords less favourable treatment to imported cigarettes than to like domestic cigarettes.

2. Article 11 of the DSU: the Panel's Treatment of Exhibit PHL-289

141. We now turn to Thailand's request to reverse the Panel's finding of inconsistency with Article III:4 of the GATT 1994 on the grounds that the Panel failed to comply with Article 11 of the DSU. According to Thailand, the Panel failed to ensure due process and to make an objective assessment of the matter by accepting and relying on Exhibit PHL-289 without affording Thailand any opportunity to respond to that evidence.

142. Before considering the merits of Thailand's claim of error, we consider it useful to set out the circumstances that have given rise to this issue on appeal. Exhibit PHL-289 was submitted by the Philippines at the last stage of the proceedings before the Panel and consists of an expert opinion from a Thai tax lawyer. The opinion concerns the issue of whether, as a matter of Thai law, VAT registrants reselling domestic cigarettes are required to report their sales of domestic cigarettes in form Por.Por.30. This issue was contested throughout the Panel proceedings, with the Philippines arguing that VAT registrants are obliged to report only resales of imported, not domestic, cigarettes, and Thailand arguing that resales of both imported and domestic cigarettes must be reported. As explained above²⁰⁹, the Panel ultimately agreed with the Philippines.²¹⁰ The requirement to report resales of imported cigarettes, but not resales of like domestic cigarettes, in form Por.Por.30 was thus one of the additional administrative requirements examined by the Panel in its Article III:4 analysis.²¹¹

143. Prior to the submission of Exhibit PHL-289, each party had adduced several exhibits in support of its position on whether or not resales of domestic cigarettes must be reported in form Por.Por.30. Thailand submitted form Por.Por.30, along with the instructions provided to taxpayers on how to complete that form²¹², as well as certain examples of form Por.Por.30 actually filed by VAT

²⁰⁸Thailand's appellant's submission, para. 117.

²⁰⁹*Supra*, para. 98.

²¹⁰Panel Report, para. 7.703.

²¹¹Thailand's Article 11 claim with respect to Exhibit PHL-289 relates only to the Panel's finding in paragraph 7.704 that VAT registrants need not include information on resales of domestic cigarettes in form Por.Por.30, and does not concern the Panel's finding in the same paragraph, that resellers of exclusively domestic cigarettes are exempt from the requirement to file form Por.Por.30. Nor does Thailand's objection to Exhibit PHL-289 concern the other additional administrative requirements that the Panel found to be imposed only on resellers of imported cigarettes.

²¹²Form Por.Por. 30 (Thai monthly VAT form) (Panel Exhibit THA-42), submitted by Thailand with its answers to the Panel's questions following the first substantive meeting.

registrants.²¹³ With its second written submission, the Philippines submitted an expert opinion²¹⁴ and a ruling by the Director-General of the Thai Revenue Department issued in 2000 (the "2000 DG Revenue ruling").²¹⁵ The Philippines further attached a second expert opinion to its opening statement at the second substantive meeting of the Panel with the parties.²¹⁶ In its questions following the second substantive meeting, the Panel specifically requested Thailand to comment on the 2000 DG Revenue ruling provided by the Philippines.²¹⁷ In responding to that question, Thailand submitted an excerpt from a 2006 textbook on the Thai Revenue Code²¹⁸ (the "2006 textbook"), and a ruling by the Director-General of the Thai Revenue Department issued in 1995 (the "1995 DG Revenue ruling").²¹⁹ On 8 December 2009, each party submitted its comments on the other party's answers to Panel questions following the second substantive meeting. This was the last stage of the proceedings before the Panel. In its comments, the Philippines responded to Thailand's evidence, and in particular to the 1995 DG Revenue ruling, and in doing so submitted a third expert opinion (Exhibit PHL-289), which is the evidence at the centre of this issue on appeal.²²⁰

144. The Panel's Interim Report was issued to the parties on 30 June 2010. In its comments on the Interim Report, Thailand requested the Panel to revise its analysis under Article III:4 of the GATT 1994 and to find that resales of domestic cigarettes *are* required to be reported in form Por.Por.30.²²¹ Among the arguments put forth by Thailand in support of this request was that the Panel should not have relied upon Exhibit PHL-289. Thailand stressed that this exhibit had been provided only "at the last opportunity afforded to the parties to submit their views"²²², and that paragraph 15 of the Panel's Working Procedures required evidence, including Exhibit PHL-289, to be submitted no later than the first substantive meeting of the Panel with the parties.²²³ In dismissing Thailand's request, the Panel observed that nothing in the DSU or its Working Procedures precluded the Panel "from accepting evidence submitted by a party at the latest stage of the proceedings".²²⁴ The Panel also read the first sentence of the opinion in Exhibit PHL-289 as "suggesting that the

²¹³TTM and Re-seller Forms Por.Por.30 (Panel Exhibit THA-89 (BCI)), submitted by Thailand with its opening statement at the second substantive meeting.

²¹⁴Expert statement by Mr. Piphob Veraphong, 17 July 2009 (Panel Exhibit PHL-207).

²¹⁵Revenue Ruling Gor.Kor. 0811/Por.633, 27 January 2000 (Panel Exhibit PHL-253).

²¹⁶Expert Statement by Mr. Piphob Veraphong, 1 September 2009 (Panel Exhibit PHL-254).

²¹⁷In Panel Question 142(2), the Panel requested Thailand to comment on the "DG Excise's ruling, provided by the Philippines at the second substantive meeting (Exhibit PHL-253)".

²¹⁸Excerpt of page 4-266 of *Textbook on the Revenue Code* by Professor Paichit Rojanavanich, Chumporn Sensai, and Saroch Thongpracum, B.E. 2549 (2006) (Panel Exhibit THA-95).

²¹⁹Revenue Department Ruling Gor.Kor. 0802/Por.22836, 10 October 1995 (Panel Exhibit THA-96).

²²⁰Expert Statement by Mr. Piphob Veraphong, 8 December 2009 (Panel Exhibit PHL-289).

²²¹Thailand's comments on the Interim Report, para. 63. Thailand's comments were submitted to the Panel on 14 July 2010.

²²²Panel Report, para. 6.122 (quoting Thailand's comments on the Interim Report, para. 48).

²²³Panel Report, para. 6.122.

²²⁴Panel Report, para. 6.125.

intended purpose of this evidence was to rebut Thailand's arguments in relation to [the 1995 DG Revenue ruling]".²²⁵ Accordingly, since Exhibit PHL-289 was evidence necessary for purposes of rebuttal or comments provided by parties, the Panel concluded that accepting this evidence was in accordance with paragraph 15 of its Working Procedures.

145. On appeal, Thailand argues that the Panel violated Thailand's due process rights and acted inconsistently with Article 11 of the DSU by accepting and relying on Exhibit PHL-289 without affording Thailand the right to comment on that evidence. Thailand points to several considerations as establishing such a violation, which may be grouped into two main lines of argument. First, Thailand emphasizes that due process requires that parties be provided with an adequate opportunity to respond to evidence adduced by the other party. Given the significance of Exhibit PHL-289 to the Panel's finding regarding the requirement to report sales of domestic cigarettes in form Por.Por.30, Thailand considers that its due process rights with respect to that piece of evidence should have been "accorded the highest importance".²²⁶ Thailand adds that the Panel's failure to ensure due process was "exacerbated" by the fact that the Panel did not accord deference to Thailand's interpretation of its own law.²²⁷ Second, Thailand contends that the Panel's acceptance of Exhibit PHL-289 was not consistent with paragraph 15 of its Working Procedures. In Thailand's view, because Exhibit PHL-289 was not rebuttal evidence, it should have been submitted no later than the first substantive meeting, or accepted only after having required the Philippines to show good cause and having afforded Thailand a right of response.

146. The Philippines, for its part, argues that the Panel complied with its duties under Article 11 of the DSU. According to the Philippines, the Panel respected both Thailand's due process rights and paragraph 15 of the Panel's Working Procedures. Thailand did have opportunities to comment on Exhibit PHL-289, and took advantage of one of them during interim review. The Philippines stresses that Thailand did not seek an opportunity to comment on Exhibit PHL-289 at the time that it was submitted, and that Thailand did not submit its own evidence, the 1995 DG Revenue ruling, at the earliest opportunity, but only in its responses to Panel questions after the second substantive meeting. The Philippines further maintains that the Panel did not give decisive weight to Exhibit PHL-289, in either the Interim Report or the Panel Report. For the Philippines, moreover, the expert opinion contained in Exhibit PHL-289 constitutes evidence that is covered by the first, rather than the second, sentence of paragraph 15 of the Panel's Working Procedures. Accordingly, the Panel was not required, pursuant to paragraph 15, to determine that the Philippines had shown good cause for the admission of Exhibit PHL-289, nor to afford Thailand an opportunity to respond to that evidence.

²²⁵Panel Report, para. 6.127.

²²⁶Thailand's appellant's submission, para. 171.

²²⁷Thailand's appellant's submission, para. 173.

147. We note that Thailand couches its claim under Article 11 of the DSU as a "due process claim".²²⁸ Due process is a fundamental principle of WTO dispute settlement.²²⁹ It informs and finds reflection in the provisions of the DSU.²³⁰ In conducting an objective assessment of a matter, a panel is "bound to ensure that due process is respected".²³¹ Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. The protection of due process is thus a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication.

148. Panel working procedures should both embody and reinforce due process. Article 12.1 of the DSU states that panels "shall" follow the working procedures set out in Appendix 3 to the DSU "unless the panel decides otherwise after consulting the parties to the dispute". The working procedures adopted by a panel must conform to the DSU.²³² As the Appellate Body has previously observed, the use by panels of detailed, standardized working procedures promotes fairness and the protection of due process.²³³ The inclusion by a panel in its working procedures of a rule that is inconsistent with due process would be a clear sign that such panel has failed to ensure the protection of due process. At the same time, even when the working procedures are themselves sound, a panel's failure to adhere to those procedures may be pertinent to, albeit not necessarily determinative of, the issue of whether such panel has failed to ensure the protection of due process in a given instance.

149. We also recall that panel proceedings consist of two main stages, the first of which involves each party setting out its "case in chief, including a full presentation of the facts on the basis of submission of supporting evidence", and the second designed to permit the rebuttal by each party of

²²⁸Thailand's response to questioning at the oral hearing.

²²⁹The Appellate Body has held that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU", and that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". (Appellate Body Reports, *Canada – Continued Suspension / US – Continued Suspension*, para. 433; and Appellate Body Report, *Thailand – H-Beams*, para. 88, respectively. See also Appellate Body Report, *Chile – Price Band System*, para. 176)

²³⁰See Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107. See also Appellate Body Report, *India – Patents (US)*, para. 94; and Appellate Body Report, *Chile – Price Band System*, para. 176.

²³¹Appellate Body Report, *Chile – Price Band System*, para. 176.

²³²We observe that, in *India – Patents (US)*, the Appellate Body held that, while "panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU". (Appellate Body Report, *India – Patents (US)*, para. 92. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 241)

²³³See Appellate Body Reports, *Canada – Continued Suspension / US – Continued Suspension*, para. 434; Appellate Body Report, *Argentina – Textiles and Apparel*, footnote 68 to para. 79; Appellate Body Report, *EC – Bananas III*, para. 144; and Appellate Body Report, *India – Patents (US)*, para. 95.

the arguments and evidence submitted by the other parties.²³⁴ Nonetheless, the submission of evidence may not always fall neatly into one or the other of these categories, in particular when panels themselves, in the exercise of their fact finding authority, seek to pursue specific lines of inquiry in their questioning of the parties. In this respect, we wish to reiterate that due process will best be served by working procedures that provide "for appropriate factual discovery at an early stage in panel proceedings"²³⁵, and that "[d]ue process may be of particular concern in cases where a party raises *new facts* at a late stage of the panel proceedings."²³⁶ Furthermore, when the particular circumstances of specific disputes present situations that are not explicitly regulated by their working procedures, panels, in the exercise of their control over the proceedings, and subject to the constraints of due process and the DSU, enjoy a margin of discretion to deal with such situations.²³⁷

150. As a general rule, due process requires that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This was expressly acknowledged by the Appellate Body in *Australia – Salmon* when it stated that "[a] fundamental tenet of due process is that a party be provided with an opportunity to respond to claims made against it".²³⁸ At the same time, due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close. These interests find reflection in the provisions of the DSU, including Article 3.3, which calls for "[t]he prompt settlement" of WTO disputes, as this is "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". Likewise, Article 12.2 of the DSU provides that "[p]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process". Furthermore, "in the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity".²³⁹ Accordingly, ensuring due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations. In our view, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.

²³⁴ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 79. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 240.

²³⁵ Appellate Body Report, *India – Patents (US)*, para. 95.

²³⁶ Appellate Body Report, *US – Gambling*, para. 271. (original emphasis)

²³⁷ Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152.

²³⁸ Appellate Body Report, *Australia – Salmon*, para. 278. See also *ibid.*, para. 272; and Appellate Body Report, *US – Gambling*, para. 270.

²³⁹ Appellate Body Report, *US – Carbon Steel*, para. 123. See also Appellate Body Report, *US – Gambling*, para. 269; Appellate Body Report, *US – FSC*, para. 166; and Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50.

151. We begin our analysis of the Panel's treatment of Exhibit PHL-289 by examining Thailand's arguments concerning paragraph 15 of the Panel's Working Procedures, which provides:

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.²⁴⁰

152. We note at the outset that, although it alleges that the Panel failed to comply with this paragraph, Thailand is not seeking from us an independent finding that the Panel violated paragraph 15 of its Working Procedures. Rather, Thailand invokes this provision to support its contention that the Panel violated Thailand's due process rights and failed to comply with its duties under Article 11 of the DSU.²⁴¹

153. We read paragraph 15 as addressing two categories of evidence. The first encompasses evidence that is submitted no later than the first substantive meeting, as well as evidence that, albeit submitted at a later stage, is necessary for purposes of rebuttal, answers to questions, or comments on answers to questions. The second category of evidence is residual. It comprises evidence that does not fall within the scope of the first sentence. For the second category of evidence, the submitting party must show good cause and the other party must be accorded an opportunity to comment.

154. Thailand contends that Exhibit PHL-289 cannot be characterized as evidence necessary for purposes of rebuttal, or comments on Thailand's answers to Panel questions, because it was evidence adduced in support of the Philippines' *prima facie* case and, in particular, to establish that resales of domestic cigarettes need not be reported in form Por.Por.30. Yet, as explained above, the Philippines had previously submitted the 2000 DG Revenue ruling and two expert opinions in support of this assertion. Then, in response to a specific request by the Panel to comment on the 2000 DG Revenue ruling, Thailand submitted the 1995 DG Revenue ruling to show that resales of domestic cigarettes must be reported in form Por.Por.30. The Philippines, in turn, responded in its comments on Thailand's answers by submitting Exhibit PHL-289 to show that the 2000 DG Revenue ruling reflected the current state of Thai law. As we see it, Exhibit PHL-289 was submitted to explain the discrepancies between the 1995 DG Revenue ruling and the 2000 DG Revenue ruling. As such, this exhibit was "factual evidence necessary for purposes of rebuttals ... or comments on [Thailand's] answers" within the meaning of the first sentence of paragraph 15. Thus, the Panel's acceptance of

²⁴⁰Panel Report, Annex A-1. The Panel, pursuant to Article 12.1 of the DSU, adopted its own Working Procedures following consultation with the parties.

²⁴¹Thailand's response to questioning at the oral hearing.

Exhibit PHL-289 without requiring the Philippines to show good cause or affording Thailand an opportunity to comment thereon was not inconsistent with paragraph 15 of the Panel's Working Procedures.²⁴²

155. However, the fact that the Panel's treatment of Exhibit PHL-289 was not inconsistent with paragraph 15 of its Working Procedures is, in our view, not dispositive of whether Thailand's due process rights were respected and, accordingly, of whether the Panel complied with its duties under Article 11 of the DSU. As set out above, due process generally demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. At the same time, a number of different considerations will need to be factored into a panel's effort to protect due process in a particular dispute, and these may include the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties. In the context of this dispute, there are several considerations that are germane to our assessment of Thailand's claim under Article 11 of the DSU. These include: the conduct of the parties; the legal issue to which the evidence related and the circumstances surrounding the submission of the evidence relating to that issue; and the discretion afforded under the DSU to panels in their handling of the proceedings and appreciation of the evidence.

156. With respect to the conduct of the parties, we observe that Thailand adduced two items of evidence, including the 1995 DG Revenue ruling, in response to a specific question posed by the Panel following the second substantive meeting. Exhibit PHL-289 was then submitted by the Philippines at the earliest subsequent opportunity, that is, in its comments on Thailand's answers to Panel questions.²⁴³ Although this was the last stage in the Panel proceedings, the Philippines would have had no reason to produce the expert testimony contained in Exhibit PHL-289 at an earlier stage, given that this evidence was introduced to rebut the 1995 DG Revenue ruling. Moreover, Thailand did not object to Exhibit PHL-289 when it was submitted, but rather seven months later, in its comments on the Panel's Interim Report. Although we are mindful that the parties' submission of comments on each other's responses to the Panel's questions marked the last step in the Panel proceedings, we do not consider that this precluded Thailand from objecting to Exhibit PHL-289 in a

²⁴²We note that the first sentence of paragraph 15 appears to allow for the submission of factual evidence at the very last stage of the proceedings, that is, in a party's comments on the other party's answers to questions by the Panel following the second substantive meeting. A party's submission of factual evidence so late in the proceedings should be unusual.

²⁴³Philippines' appellee's submission, paras. 189-192.

timely fashion, and requesting that the Panel either reject that evidence or give Thailand an opportunity to respond to that evidence.²⁴⁴

157. Thailand alleges that the due process violation is "more serious" because "Exhibit PHL-289 was the 'only evidence' supporting"²⁴⁵ the Panel's finding that resales of domestic cigarettes need not be reported in form Por.Por.30, and that "the parties' rights under the DSU may be affected by the importance of the evidence at issue".²⁴⁶ In response, the Philippines argues that the Panel did not attach "decisive weight"²⁴⁷ to Exhibit PHL-289, but instead reached its finding based "on several pieces of evidence constituting the totality of the evidence before it".²⁴⁸

158. We recall that the issue of whether a VAT registrant is required to report resales of VAT-exempt goods, such as domestic cigarettes, in form Por.Por.30 was contested between the parties throughout the proceedings, and each adduced several pieces of evidence in support of its position. Thus, at the time that Exhibit PHL-289 was submitted by the Philippines, both Thailand and the Panel would have been aware that it related to a key and highly disputed issue. In determining that resales of domestic cigarettes need not be reported in form Por.Por.30, the Panel explained that this finding was "based on [its] careful examination of all the evidence in its totality".²⁴⁹ In its analysis, the Panel referred to the 2006 textbook, as well as the 1995 DG Revenue ruling, which had been adduced to show that resales of VAT-exempt products must be reported in form Por.Por.30.²⁵⁰ The Panel also observed that the 2000 DG Revenue ruling, together with the second expert opinion submitted by the Philippines, indicated that businesses selling VAT-exempt domestic cigarettes do not have to report those sales in form Por.Por.30.²⁵¹ The Panel further noted that the third expert opinion submitted by the Philippines—Exhibit PHL-289—explained that the differences in the rulings issued in 1995 and 2000 reflect "a change in DG Revenue's approach to the requirements for completing Form Por.Por.30".²⁵²

²⁴⁴ Although the Philippines asserts that Thailand had, and took advantage of, the opportunity to respond to Exhibit PHL-289 in its comments on the Interim Report, we do not consider that this constituted an appropriate opportunity to respond.

²⁴⁵ Thailand's appellant's submission, para. 170.

²⁴⁶ Thailand's appellant's submission, para. 170 (referring to Panel Report, *Korea – Alcoholic Beverages*, para. 10.25).

²⁴⁷ Philippines' appellee's submission, para. 209.

²⁴⁸ Philippines' appellee's submission, para. 221.

²⁴⁹ Panel Report, para. 7.703. Thailand's assertion that Exhibit PHL-289 was the *only* evidence upon which the Panel based its finding that sales of domestic cigarettes need not be reported in form Por.Por.30 is also based on a statement made by the Panel in its Interim Report that was not included in the Panel's final Report. We do not consider that it is appropriate, in these appellate proceedings, for Thailand to rely upon a statement made by the Panel in its Interim Report but which was redacted from the Panel Report.

²⁵⁰ Panel Report, para. 7.698.

²⁵¹ Panel Report, para. 7.699.

²⁵² Panel Report, para. 7.700 and footnote 1253 thereto.

159. The above overview of the evidence considered by the Panel indicates that Exhibit PHL-289 was not the only evidence supporting the Panel's finding that resales of domestic cigarettes need not be reported in form Por.Por.30.²⁵³ If anything, the main support for the Panel's finding seems to have been found in the 2000 DG Revenue ruling, which the Panel apparently found compelling because it confirmed that "income exempted under Section 81 need not be reported in Form Por.Por.30 for the calculation of VAT".²⁵⁴

160. In the light of the above, we do not consider that the Panel's treatment of Exhibit PHL-289 amounted to a violation of due process. Thailand could have requested an opportunity to respond when the Philippines submitted the exhibit in question, but it did not.²⁵⁵ Although Exhibit PHL-289 was submitted very late in the proceedings, this evidence did not raise or relate to a new issue, previously unknown to Thailand or unexplored by the Panel, and it was not the only evidence supporting the Panel's conclusion that resales of domestic cigarettes need not be reported in form Por.Por.30. The Panel could have chosen to refuse to accept Exhibit PHL-289 or to afford Thailand an opportunity to respond to it. It did not do so. However, taking into account all of the circumstances, we consider that the Panel did not fail to protect due process in this case.²⁵⁶

²⁵³We take note of Thailand's additional argument that the Panel's failure to respect Thailand's due process rights was "exacerbated" by the fact that the Panel failed to give "due deference" to Thailand's interpretation of its own law. (Thailand's appellant's submission, para. 173) In our view, the panel in *China – Intellectual Property Rights* correctly recognized that, "objectively, a Member is normally well-placed to explain the meaning of its own law", but that this does not relieve a party of its burden to adduce arguments and evidence necessary to sustain its proposed interpretation. (Panel Report, *China – Intellectual Property Rights*, para. 7.28) Further, a panel's duties under Article 11 of the DSU require it to conduct an objective assessment of all such arguments and evidence. In this dispute, the Panel observed, in the context of its Article III:4 analysis, that "Thailand should normally be in a position to explain the nature" of obligations under Thai law but that, to the extent that the parties disagree on the content of such obligations, the Panel was "required to objectively examine the question at issue based on the text of the concerned provision[s] as well as on the evidence before [the Panel]". (Panel Report, para. 7.684 (footnote omitted)) We see no error in the Panel's approach.

²⁵⁴Panel Report, para. 7.701.

²⁵⁵We are not suggesting that the fact that Thailand did not expressly request an opportunity to respond to Exhibit PHL-289 automatically implies that it cannot succeed in its claim that the Panel failed to ensure due process. At the same time, Thailand's failure to request an opportunity to respond is a consideration relevant to our overall assessment of whether, in the circumstances of this case, the Panel's conduct denied due process to Thailand. We observe, in this regard, that when confronted with an issue similar to the one raised here, the panel in *China – Auto Parts* rejected "China's argument that the Panel should, *sua sponte*, have accorded a period of time for other parties to comment on Exhibit CDA-48", and stated that "it is China, *not the Panel*, that should have initiated an opportunity to submit comments on Exhibit CDA-48." (Panel Reports, *China – Auto Parts*, para. 6.22 (emphasis added)) We disagree with these statements to the extent that they imply that only the conduct of the party receiving evidence submitted by the other party late in the proceedings is relevant in determining whether due process was protected. In our view, both that party and the panel to which the evidence is submitted have a responsibility to consider whether an opportunity to respond to that evidence would be useful or necessary, and to conduct themselves accordingly.

²⁵⁶We wish to emphasize, however, that we do not consider that the mere characterization of evidence as rebuttal evidence means that no due process concerns can arise in situations where a panel does not afford a party an opportunity to respond to such rebuttal evidence.

161. For all of these reasons, we *find* that Thailand has not established that the Panel failed to ensure due process and, thus, to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter by accepting and relying on Exhibit PHL-289 without having afforded Thailand an opportunity to comment on that evidence.

3. Thailand's Defence Under Article XX(d) of the GATT 1994

162. Thailand also appeals the Panel's finding 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 1994.²⁵⁷

163. The Panel made this finding in response to Thailand's efforts to invoke Article XX(d) of the GATT 1994 to defend the additional administrative requirements found to be inconsistent with Article III:4. Article XX(d) enables Members to justify measures found to be inconsistent with the provisions of the GATT 1994 if they can establish that such measures are "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement", and provided that the application of such measures is also consistent with the requirements of the chapeau of Article XX. Thus, in order to make out an Article XX(d) defence, a respondent must, *inter alia*, identify "laws or regulations which are not inconsistent" with the GATT 1994, and establish that the measure found to be GATT-inconsistent is "necessary" to secure compliance with such "laws or regulations".

164. Thailand requests us to reverse the Panel's finding under Article XX(d). Thailand does not challenge the substance of the Panel's reasoning on Thailand's defence, as such. Rather, Thailand contends that a reference contained in the sentence of the Panel Report immediately preceding the Panel's finding reveals that the Panel "committed a fundamental error of legal analysis in its rejection of Thailand's defence under Article XX(d)".²⁵⁸ That sentence reads:

As addressed in Section VII.F.6(b)(ii) above, however, we found that the Thai VAT laws that Thailand purports to secure compliance with through the administrative requirement[s] at issue, were *not* WTO consistent.²⁵⁹ (original italics; underlining added)

²⁵⁷Panel Report, para. 7.758.

²⁵⁸Thailand's appellant's submission, para. 153.

²⁵⁹Panel Report, para. 7.758.

165. Thus, by means of a cross-reference to Section VII.F.6(b)(ii) of its Report, the Panel expressed the view that Thailand had not identified "laws or regulations which are not inconsistent" with the GATT 1994, but only VAT laws that the Panel had already found to be GATT-inconsistent. As Thailand's asserted Article XX(d) defence could not succeed if the laws or regulations with which the measures at issue purportedly secure compliance are themselves GATT-inconsistent, the Panel, in the very next sentence of its Report, reached the finding set out above.

166. Section VII.F.6(b)(ii) of the Panel Report comprises paragraphs 7.729 through 7.738. It contains the Panel's analysis of "[w]hether imported cigarettes are subject to less favourable treatment than domestic cigarettes within the meaning of Article III:4"²⁶⁰, and culminates with the Panel's conclusion 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*."²⁶¹

167. Thailand argues that the Panel's reference to Section VII.F.6(b)(ii) shows that the Panel identified as the "laws or regulations" with which the inconsistent measure purportedly secures compliance the very same measure that the Panel had found to be inconsistent with Article III:4 of the GATT 1994. Thus, the Panel's cross-reference signifies, according to Thailand, that the Panel rejected Thailand's Article XX(d) defence to the violation of Article III:4 on the grounds that it had already found that the additional administrative requirements violate Article III:4. Such circular reasoning constitutes, in Thailand's view, a "fundamental error" by the Panel that "effectively deprived Thailand of its right to assert its Article XX(d) defence" to the finding of inconsistency with Article III:4. For this reason, Thailand submits that the Panel's Article III:4 finding "is also legally flawed"²⁶², and should also be reversed.

168. The Philippines, on the other hand, considers the cross-reference made by the Panel to be a mere clerical error. The Philippines sees no basis in the Panel's reasoning to suggest that its examination of Thailand's defence consisted of a circular analysis of whether the additional administrative requirements are necessary to secure compliance with those same administrative requirements. The Philippines highlights that the Panel properly articulated the legal standard under Article XX(d) and identified Thailand's argument as being that the "administrative requirements" are necessary to secure compliance "with the Thai VAT laws". Thus, the Philippines believes that other elements of the Panel's reasoning disclose that the cross-reference in paragraph 7.758 was simply a mistake, and that the Panel really intended to refer to Section VII.E.5(b)(ii) of its Report, which deals

²⁶⁰Panel Report, heading to Section VII.F.6(b).

²⁶¹Panel Report, para. 7.738. (emphasis added)

²⁶²Thailand's appellant's submission, para. 156.

with discriminatory taxation, rather than to Section VII.F.6(b)(ii) of its Report, which deals with the discriminatory administrative requirements. Accordingly, the Philippines requests the Appellate Body to modify this clerical error, replacing the reference to "Section VII.F.6(b)(ii)" with a reference to "Section VII.E.5(b)(ii)".

169. Like the participants, we, too, consider the Panel's reference to Section VII.F.6(b)(ii) to be erroneous. Read literally, this cross-reference means that the Panel considered that the additional administrative requirements could not be justified as necessary to secure compliance with those same additional administrative requirements because the additional administrative requirements had already been found to be inconsistent with Article III:4. This would be a manifestly incorrect approach to the analysis of Thailand's Article XX(d) defence.

170. The Panel's analysis and disposition of Thailand's defence under Article XX(d) of the GATT 1994 was extremely brief. In just over a page, the Panel set out the text of the provision, identified the order of analysis, the burden of proof, and the requisite elements of an Article XX(d) defence. In a single paragraph, including the cross-reference to Section VII.F.6(b)(ii) quoted above, the Panel applied this analysis to the facts before it. The brevity of this analysis has not itself been challenged on appeal. Yet it does mean that the Panel's reasoning offers few clues as to the details of the analytical steps taken by the Panel. Thus, even accepting the Philippines' assertions that the Panel properly identified the legal standard to be applied under Article XX(d) and the elements of the defence advanced by Thailand, we do not see sufficient reasoning to enable us to conclude with confidence that, although the Panel in fact referred to its finding in Section VII.F.6(b)(ii), it intended to refer to its finding in Section VII.E.5(b)(ii) of its Report, or indeed to any other Section of its Report. The reference to Section VII.F.6(b)(ii) was an obvious error, but it is not clear, on the basis of the Panel Report, what would have been the correct reference.

171. Accordingly, due to the obvious error in the penultimate sentence of paragraph 7.758 of the Panel Report, we are compelled to *reverse* the Panel's finding, in that paragraph, that Thailand did not discharge its burden of demonstrating that the additional administrative requirements are necessary to secure compliance with the Thai VAT laws within the meaning of Article XX(d) of the GATT 1994.

172. Thailand contends that, in the event that we reverse this finding by the Panel, we should also reverse the Panel's finding that the additional administrative requirements are inconsistent with Article III:4 because the Panel "effectively deprived Thailand of its right to assert its Article XX(d)

defence" to that finding.²⁶³ Thailand does not refer to any provision of the DSU or other covered agreement, nor to any jurisprudence, in support of this position.

173. We have difficulties understanding why the Panel's disposition of the Philippines' claim under Article III:4 should depend on the Panel's disposition of Thailand's defence under Article XX(d). It is true that, in examining a specific measure, a panel may be called upon to analyze a substantive obligation and an affirmative defence, and to apply both to that measure. It is also true that such an exercise will require a panel to find and apply a "line of equilibrium"²⁶⁴ between a substantive obligation and an exception. Yet this does not render that panel's analyses of the obligation and the exception a single and integrated one. On the contrary, an analysis of whether a measure infringes an obligation necessarily precedes, and is distinct from, the "further and separate" assessment of whether such measure is otherwise justified.²⁶⁵ Thus, we reject Thailand's request to reverse the Panel's Article III:4 finding on the grounds that the Panel erred in its analysis of Thailand's Article XX(d) defence.

174. In circumstances where it has reversed panel findings and legal interpretations, the Appellate Body has, within the limits of its jurisdiction, consistently sought to "facilitate the prompt settlement of the dispute"²⁶⁶ by completing the legal analysis of relevant issues.²⁶⁷ The same considerations impel us to seek to do the same in this appeal. Accordingly, we consider whether we are able to rule, ourselves, on Thailand's defence under Article XX(d) of the GATT 1994.

175. Article XX(d) of the GATT 1994 provides:

General Exceptions

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 Member of measures:

....

²⁶³Thailand's appellant's submission, para. 156.

²⁶⁴Appellate Body Report, *US – Shrimp*, para. 159.

²⁶⁵In *US – Gasoline*, the Appellate Body cautioned against confusing "the question of whether inconsistency with a substantive rule existed, with the *further and separate question* ... as to whether that inconsistency was nevertheless justified". (Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 1, at 21 (emphasis added). See also GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.9)

²⁶⁶Appellate Body Report, *US – Hot-Rolled Steel*, para. 235.

²⁶⁷To the extent that completion of the legal analysis requires the Appellate Body to rely upon facts, the Appellate Body can complete the analysis only if "factual findings of the panel" and/or "undisputed facts in the panel record" provide a sufficient factual basis to perform the requisite legal analysis. (See Appellate Body Report, *EC – Asbestos*, para. 78)

- (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, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]

176. Article XX(d) is one of the limited and conditional "General Exceptions" that allow Members pursuing certain public policy objectives to derogate from the substantive obligations in the GATT 1994, including the national treatment obligations set out in Article III.²⁶⁸ In order to justify an otherwise GATT-inconsistent measure, a Member invoking Article XX(d) as a defence bears the burden of establishing that the conditions prescribed therein are met.²⁶⁹

177. A Member will successfully discharge that burden and establish its Article XX(d) defence upon demonstration of three key elements, namely: (i) that the measure at issue secures compliance with "laws or regulations" that are themselves consistent with the GATT 1994; (ii) that the measure at issue is "necessary" to secure such compliance; and (iii) that the measure at issue meets the requirements set out in the chapeau of Article XX. Furthermore, when Article XX(d) is invoked to justify an inconsistency with Article III:4, what must be shown to be "necessary" is the treatment giving rise to the finding of less favourable treatment.²⁷⁰ Thus, when less favourable treatment is found based on differences in the regulation of imports and of like domestic products, the analysis of an Article XX(d) defence should focus on whether those regulatory differences are "necessary" to secure compliance with "laws or regulations" that are not GATT-inconsistent.

178. In all of its submissions before the Panel, Thailand devoted just six paragraphs to justifying the additional administrative requirements, and provided little or no elaboration of the necessary elements of its asserted defence under Article XX(d). We see at least four critical flaws in Thailand's presentation of its Article XX(d) defence to the Panel.

179. First, in putting forth its defence, Thailand sought to justify administrative requirements relating to VAT liability generally, rather than to justify the *differential treatment* afforded to imported versus domestic cigarettes under its measure. Second, Thailand failed to identify precisely the "laws or regulations" with which the measure at issue purportedly secures compliance, and engaged in no effort to establish that such laws and regulations are consistent with the GATT 1994.

²⁶⁸See Appellate Body Report, *US – Gasoline*, p. 24, DSR 1996:I, 1, at 22; and Appellate Body Report, *US – Shrimp*, para. 156.

²⁶⁹See Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

²⁷⁰See GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.27.

Even assuming that the vague references made by Thailand in its submissions to the Panel²⁷¹ could be construed as identifying relevant laws or regulations with which the additional administrative requirements seek to ensure compliance, Thailand's arguments with respect to, third, "necessity" and, fourth, the chapeau of Article XX, were patently underdeveloped.²⁷² With respect to the necessity test, Thailand asserted that the "reporting requirements are necessary ... to the enforcement of Thailand's VAT system"²⁷³, and that the additional administrative requirements are necessary "in that it is difficult to see how Thailand could administer its VAT system *without* requiring VAT payers to maintain and submit input and output reports, the VAT Form Por.Por. 30 and the other requirements".²⁷⁴ Thailand provided no further elaboration of these assertions and adduced no evidence in support of them.²⁷⁵ As for the chapeau of Article XX, Thailand referred to it only once. In its entirety, this reference consisted of Thailand's argument that, "[g]iven 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

²⁷¹Thailand made loose references to: "Thailand's VAT law" (Thailand's first written submission to the Panel, para. 260); "Thailand's VAT system, as established under Chapter 4 of Thailand's Revenue Code" (*ibid.*); and the "normal reporting requirements of its VAT and other tax laws" (Thailand's response to Panel Question 139, para. 147). These references encompass a myriad of provisions of Thai law addressing various matters. In one instance, Thailand also argued that the "penalties [] ensure compliance with the normal reporting requirements of its VAT and other tax laws especially where ... those reporting requirements contribute to the fight against smuggling of cigarettes". (Thailand's response to Panel Question 139, para. 147) This argument seems to have been advanced in order to justify the penalties under Article XX(d) in the event that the Panel considered such penalties to constitute "excess tax" under Article III:2 of the GATT 1994. It is unclear to us whether Thailand sought to assert the same defence in the event that, as the Panel ultimately found, the penalties were inconsistent with Article III:4.

²⁷²That the defence by Thailand was largely unelaborated with respect to "necessity" is likely due to the fact that it is difficult to make detailed arguments to demonstrate the "necessity" of a measure under Article XX(d) in the absence of a clear identification of the laws or regulations with which that measure is purportedly necessary to secure compliance.

²⁷³Thailand's second written submission to the Panel, para. 177.

²⁷⁴Thailand's first written submission to the Panel, para. 260. (original emphasis) Thailand added that the additional administrative requirements "are necessary, as that term has been interpreted by the Appellate Body in *Brazil – Retreaded Tyres*" (Thailand's second written submission to the Panel, para. 177), and, in a footnote, quoted a statement by the Appellate Body in that report, that a measure is necessary if it is "apt to make a material contribution to the achievement of its objective" (Thailand's second written submission to the Panel, footnote 139 to para. 177 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 150)).

²⁷⁵We recall that the issue of "whether a measure is 'necessary' should be determined through 'a process of weighing and balancing a series of factors'" (Appellate Body Report, *Korea – Various Measures on Beef*, para. 164) and that "two factors that, in most cases, will be relevant to a panel's determination of the 'necessity' of a measure [are] the contribution of the measure to the realization of the ends pursued by it [and] the restrictive impact of the measure on international commerce" (Appellate Body Report, *US – Gambling*, para. 306). Moreover, a panel's analysis of "necessity" must include consideration of "whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available". (Appellate Body Report, *Korea – Various Measures on Beef*, para. 166) See also Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 142 and 143.

trade".²⁷⁶ This cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX.²⁷⁷

180. In our view, therefore, the arguments and evidence put forward by Thailand fail, on their face, to establish the requisite elements of an Article XX(d) defence. Accordingly, we *find* that Thailand failed to make out a *prima facie* defence and, therefore, failed to establish that the additional administrative requirements are justified under Article XX(d) of the GATT 1994.

4. Conclusion

181. In the light of the above, we *uphold* the Panel's finding, in paragraph 8.3(c) of the Panel Report, that Thailand acts inconsistently with its obligations under Article III:4 of the GATT 1994 by subjecting imported cigarettes to treatment less favourable than that accorded to like domestic cigarettes.²⁷⁸

V. **Article X:3(b) of the GATT 1994**

A. *Introduction*

182. Thailand appeals the Panel's finding that Thailand acts inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent review tribunals or procedures for the prompt review of guarantee decisions.²⁷⁹

183. The Panel considered, first, the meaning of the phrase "administrative action relating to customs matters" in Article X:3(b). The Panel found that the imposition of a guarantee by the Thai Customs Department ("Thai Customs") is "administrative action relating to customs matters" within the meaning of Article X:3(b).²⁸⁰ Second, the Panel considered whether Thailand maintains or instituted tribunals or procedures for the prompt review and correction of guarantee decisions in accordance with Article X:3(b) and found that the Thai system does not comply with that obligation.²⁸¹

²⁷⁶Thailand's first written submission to the Panel, para. 260.

²⁷⁷Furthermore, we are uncertain what Thailand meant to refer to when it stated that "these measures are applied to all products, imported or domestic, subject to VAT", since the measures that had to be justified under Article XX(d) and the chapeau of Article XX were the additional administrative requirements, which are *not* applied to resellers of domestic cigarettes.

²⁷⁸See also Panel Report, para. 7.738.

²⁷⁹Panel Report, paras. 7.1087 and 8.4(g).

²⁸⁰Panel Report, para. 7.1053.

²⁸¹Panel Report, para. 7.1087.

184. On appeal, Thailand requests us to reverse the Panel's finding that Thailand acts inconsistently with Article X:3(b). Thailand contends that the Panel erred in concluding that requiring a guarantee in order to obtain the release of goods pending a final determination of customs value is "administrative action relating to customs matters" within the meaning of Article X:3(b). In the event that we reject this allegation of error and uphold the Panel's finding that requiring a guarantee falls within the scope of Article X:3(b), then Thailand further submits that providing for a right of appeal of a guarantee decision upon final assessment of duties satisfies Thailand's obligations under Article X:3(b).

185. The Philippines contends that the Panel correctly found that the guarantee decisions at issue constitute "administrative action relating to customs matters" within the meaning of Article X:3(b). The Philippines requests us to uphold this finding by the Panel and to reject Thailand's contention that providing for a right of appeal upon final assessment of duties satisfies Thailand's obligations under Article X:3(b).

B. *Article X:3(b) of the GATT 1994*

186. Article X:3(b) stipulates that WTO Members shall maintain judicial, arbitral or administrative tribunals or procedures for the "prompt review and correction of administrative action relating to customs matters." On appeal, Thailand's claims of error relate to the Panel's interpretation and application, in the context of guarantee decisions, of the phrases "administrative action relating to customs matters" and "prompt review" in Article X:3(b).

187. Before turning to our analysis we briefly set out our understanding of the operation of the measure at issue based on the findings of the Panel and on the Panel record. Section 112 of Thailand's Customs Act (the "Thai Customs Act")²⁸² provides that in the event of doubt as to the amount of duty applicable to a specific good, customs officials may undertake a detailed examination. In such circumstances, the goods in question may be released from customs pending the final assessment of duty liability, provided that the importer pays "the amount of the duty declared in the entry by the importer or the exporter" and provided that "an additional sum of money covering the maximum duty payable on the goods" is deposited as a guarantee.²⁸³ If, for example, Thai Customs questions whether the importer's declared price is an appropriate basis for customs valuation, then Thai Customs may examine the matter further. During the examination process, the importer is entitled to withdraw

²⁸²Government of the Kingdom of Thailand, The Customs Act, B.E. 2469 (Panel Exhibit PHL-20).

²⁸³Panel Report, para. 7.1017 (quoting Thai Customs Act, Section 112).

the goods against payment of a guarantee.²⁸⁴ Section 112 further stipulates that the guarantee may be given in the form of a cash deposit or, provided that the Director-General of Thai Customs so approves, it may be given in the form of a "guarantee ... of the Ministry of Finance or a bank".

188. Once final duty liability has been established, Thai Customs issues a notice of assessment. If the final duty liability exceeds the duty paid on the declared value at the time of entry of the goods, and the guarantee has been given in the form of a cash deposit, then the amount by which it exceeds the declared duty shall be paid immediately from the cash deposit.²⁸⁵ In the event that a guarantee from a bank or the Ministry of Finance has been given, the importer or exporter shall pay the amount that exceeds the declared duty within 30 days after the date of receiving the notice of assessment. If the declared duty paid or the cash deposit exceeds the amount specified in the notice of final assessment, the excess amount, together with interest, is to be refunded to the importer.²⁸⁶

189. Both the importer and the exporter have the right to challenge the final duty assessment before a Board of Appeals (the "BoA") within 30 days from the date of the receipt of the notice of assessment, pursuant to Section 112*sexies* of the Thai Customs Act.²⁸⁷

190. The Panel found that guarantee decisions can be appealed to the Thai Tax Court only when: (i) the importer has been provided with a notice of assessment regarding the final customs value of the goods concerned; and (ii) the importer has challenged that notice before the BoA.²⁸⁸ We understand that the Philippines' claim under Article X:3(b) with respect to appeals of guarantee decisions as well as the Panel's finding with respect thereto, focused on the first of these two mandatory steps, that is, on the requirement under Thai law to await the issuance of the notice of assessment before being able

²⁸⁴Panel Report, para. 7.971. The guarantee must be in an amount equal to the difference between the declared c.i.f. price and a (higher) c.i.f. price provisionally fixed by Thai Customs, plus taxes calculated on the basis of the higher, provisional, c.i.f. price.

²⁸⁵Panel Report, para. 7.856 (quoting Thai Customs Act, Section 112*bis*).

²⁸⁶Panel Report, para. 7.857 (quoting Thai Customs Act, Section 112*quater*).

²⁸⁷In findings that are not subject to appeal, the Panel concluded that the BoA cannot be considered to be free of control or influence from Thai Customs, principally because it is staffed, at least partially, with Thai Customs agents, thus creating the possibility that individuals involved in taking customs decisions might also participate in the review of those same decisions. (Panel Report, paras. 7.1003-7.1005) Accordingly, the Panel considered that the BoA cannot be considered to be a tribunal independent of the agencies entrusted with administrative enforcement within the meaning of Article X:3(b). (*Ibid.*, para. 7.1006)

²⁸⁸Although Thailand contended that guarantee decisions could be appealed directly to the Thai Tax Court without a prior appeal to the BoA, the Panel, based on evidence submitted by the Philippines, found otherwise. (Panel Report, paras. 7.1072-7.1083; see also para. 7.91)

to appeal a guarantee decision.²⁸⁹ Furthermore, we understand the Philippines' claim to relate to guarantee decisions regardless of whether security is provided by means of a cash deposit or by means of a guarantee from a bank or the Ministry of Finance. Finally, with respect to the obligation under Article X:3(b), we note that the Philippines' claim and the Panel's findings focused on whether the Thai system ensures "prompt" review rather than on what constitutes "review and correction" of guarantee decisions.

1. The Meaning of "administrative action relating to customs matters" and "prompt review and correction" in Article X:3(b)

191. Article X:3(b) of the GATT 1994 provides as follows:

Each Member 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 shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice 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; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts. (original italics)

192. We begin our analysis of the ordinary meaning of the phrase "administrative action relating to customs matters" by considering dictionary definitions of the individual words making up this phrase. The word "action" is defined, *inter alia*, as "[a] thing done, a deed, an act", and as "an act or decision by an executive or legislative body (as of a government or a political party) or by a supranational agency".²⁹⁰ The word "administrative" is defined as "of or relating to the executive branch of a government" and "of or relating to a government agency".²⁹¹ Thus, "administrative action" refers to acts or decisions of the executive branch of a government, or of a government agency.

²⁸⁹We note the Panel's finding that delays in the BoA appeal proceedings at issue 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". (Panel Report, para. 7.1015 (original emphasis)) Based on evidence of excessive delays in multiple cases, the Panel concluded that there was a "capacity for delays in the system", and therefore concluded that Thailand acts inconsistently with its obligation under Article X:3(b) of the GATT 1994. (*Ibid.*)

²⁹⁰*Webster's Third New International Dictionary of the English Language, Unabridged*, P. Babcock Gove (ed.) (Merriam-Webster Inc., 1976), p. 21.

²⁹¹*Merriam Webster's Dictionary of Law*, L.P. Wood (ed.) (Merriam-Webster Inc., 1996), p. 13.

193. Furthermore, the word "customs" is defined as "duties levied upon imports as a branch of the public revenue; the department of the Civil Service employed in levying these duties".²⁹² We also note that the *International Convention on the Simplification and Harmonization of Customs Procedures*, as amended²⁹³ (the "*Revised Kyoto Convention*") defines the word "customs" in the context of Chapter 2 of the General Annex to that Convention.²⁹⁴ It refers to the government service responsible for the administration of customs law and the collection of duties and taxes and which also has responsibility for the application of other laws and regulations "relating to the importation, exportation, movement or storage of goods".²⁹⁵ Moreover, we observe that the term "matter", when used with a qualification is defined as "[a] thing, affair, subject, etc., of the kind denoted by, or pertaining to the thing denoted by the qualification."²⁹⁶

194. Turning to the term "relating to", we note that "relate to" is defined, *inter alia*, as "[h]ave some connection with, be connected to".²⁹⁷ The Panel also referred to the Appellate Body's interpretation of the term "related to" in the context of Article XX of the GATT 1994, where the Appellate Body found that for a measure to be "related to" a particular objective, there must be a rational relationship between the measure and the objective pursued.²⁹⁸ For such a rational relationship to exist, the measure must not be disproportionately wide in its scope and reach in relation to its objective. Similarly, in the context of Article X:3(b), we consider that measures must have a rational connection with customs matters to fall within the scope of that provision.

195. Next, we consider the phrase "administrative action relating to customs matters" in its context. We note that the second sentence of Article X:3(b) refers to "agencies entrusted with administrative enforcement". This suggests that "administrative action" in the sense of Article X:3(b) is action by agencies that "enforce", that is, "apply" relevant rules. The reference to "appeals to be lodged by importers" suggests that the relevant administrative action is action that affects "importers".

²⁹²*The Oxford English Dictionary*, 2nd edn, J.A. Simpson and E.S.C. Weiner (eds) (Clarendon Press, Oxford, 1989), Vol. IV, p. 167.

²⁹³*International Convention on the Simplification and Harmonization of Customs Procedures*, done at Kyoto, 18 May 1973, 950 UNTS 269, as amended by the *Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures*, done at Brussels, 26 June 1999, 2370 UNTS 27.

²⁹⁴The "General Annex" is the set of provisions applicable to all the customs procedures and practices referred to in the Convention (see Article 1 of the *Revised Kyoto Convention*).

²⁹⁵See also Panel Report, para. 7.1027 (quoting the *Revised Kyoto Convention*, Chapters 2 and 10 of the General Annex).

²⁹⁶*The Oxford English Dictionary*, 2nd edn, J.A. Simpson and E.S.C. Weiner (eds) (Clarendon Press, Oxford, 1989), Vol. IX, p. 481.

²⁹⁷*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2519.

²⁹⁸Panel Report, para. 7.1028 (referring to Appellate Body Report, *US – Shrimp*, para. 141).

196. We also consider relevant the context provided by Article 11.1 of the *Agreement on Customs Valuation*. It stipulates:

The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.

197. This provision imposes an obligation with respect to a specific kind of administrative action, namely, with respect to the determination of customs value. As we see it, the more specific description of one type of administrative action in Article 11.1 of the *Agreement on Customs Valuation*, and the absence of any similar qualification in Article X:3(b) of the GATT 1994, suggest that the obligation contained in Article X:3(b) is not limited to particular types of customs-related "administrative action".

198. We note Thailand's assertion that Articles 7, 9.5, and 13 of the *Anti-Dumping Agreement* "provide[] important context in considering whether the imposition of a guarantee under Article 13 of the [*Agreement on Customs Valuation*] is an 'administrative action relating to customs matters'".²⁹⁹ Thailand argues that the lack of any right to appeal against either provisional anti-dumping measures or "new shipper" guarantees under the *Anti-Dumping Agreement* suggests that guarantees within the meaning of Article 13 of the *Agreement on Customs Valuation* do not fall within the scope of "administrative action relating to customs matters" in Article X:3(b) of the GATT 1994.³⁰⁰

199. Thailand has not explained why these provisions of the *Anti-Dumping Agreement* constitute context relevant to the interpretation of the phrase "administrative action relating to customs matters", and we are not convinced that they do. We see significant conceptual differences between ordinary customs duties and anti-dumping duties. These differences speak against considering the above provisions of the *Anti-Dumping Agreement* as relevant context for the interpretation of Article X:3(b) of the GATT 1994. The *Anti-Dumping Agreement* specifically regulates questions relating to situations of what is widely understood as "unfair trade". These rules authorize a response by importing Members to offset the effects of dumping and re-establish a "level playing field". Article X:3(b), in contrast, is not a specific rule targeting "unfair" trade practices. Rather, it relates to customs matters in general. The conceptual differences between anti-dumping duties and ordinary customs duties are reflected in the different disciplines that apply in respect of the imposition of each type of duty. For example, the imposition of anti-dumping duties requires as a prerequisite, *inter alia*,

²⁹⁹Thailand's appellant's submission, para. 266.

³⁰⁰Thailand's appellant's submission, para. 270.

a determination of injury by the importing Member. In contrast, ordinary customs duties may, within tariff bindings, be applied without any such determination.

200. Even if we were to consider the above provisions of the *Anti-Dumping Agreement* as relevant context for the interpretation of the phrase "administrative action relating to customs matters" in Article X:3(b) of the GATT 1994, we do not see that these provisions support Thailand's position. We do not consider it evident that the customs guarantees at issue should be equated with provisional anti-dumping measures and "new shipper" guarantees provided in the context of an anti-dumping determination. Furthermore, Article 13 of the *Anti-Dumping Agreement* uses language that differs from the language of Article X:3(b) of the GATT 1994, and which makes clear that the review is limited to "final" determinations and determinations of review proceedings under Article 11 of the *Anti-Dumping Agreement*. The absence of any such express limitation in Article X:3(b) suggests, if anything, that the phrase "administrative action related to customs matters" is not limited in the way Thailand contends.

201. Consequently, we consider that these provisions do not shed light on the ordinary meaning of the phrase "administrative action relating to customs matters" in Article X:3(b). Instead, reading the phrase "administrative action relating to customs matters" in the light of Article X:3(b) as a whole and in the context of Article 11.1 of the *Agreement on Customs Valuation* points to a common intention of WTO Members not to limit the obligation contained in Article X:3(b) to particular types of customs-related "administrative action".

202. Finally, we turn to consider the phrase "administrative action relating to customs matters" in the light of the object and purpose of the treaty. A basic object and purpose of the GATT 1994, as reflected in Article X:3(b), is to ensure due process in relation to customs matters. The Appellate Body referred to this due process objective in *EC – Selected Customs Matters*.³⁰¹ In that vein, the panel in *EC – Selected Customs Matters* stated that Article X:3(b) seeks 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."³⁰² In addition, relating more broadly to Article X:3 of the GATT 1994, the Appellate Body has found that this provision establishes certain minimum standards for transparency and procedural fairness in Members' administration of their trade regulations.³⁰³ While recognizing WTO Members' discretion to design and administer their own laws and regulations, Article X:3 also serves to ensure that Members afford the protection of due process to individual traders. As we see it, the obligation under Article X:3(b) to maintain tribunals or procedures for the

³⁰¹ Appellate Body Report, *EC – Selected Customs Matters*, para. 302.

³⁰² Panel Report, *EC – Selected Customs Matters*, para. 7.536.

³⁰³ See Appellate Body Report, *US – Shrimp*, para. 183.

prompt review and correction of administrative action relating to customs matters is an expression of this due process objective of Article X:3. In the light of the above considerations, we see no error in the Panel's intermediate finding that "administrative action relating to customs matters" encompasses "a wide range of acts applying legal instruments that have a rational relationship with customs matters".³⁰⁴

203. Next, we address the meaning of the phrase "prompt review and correction" in Article X:3(b). The word "prompt" is defined as "ready, quick; done, performed, etc., without delay".³⁰⁵ In addition, the due process objective reflected in Article X:3 of the GATT 1994 suggests that "prompt review and correction" is to be understood as review and correction of administrative action that is performed in a quick and effective manner and without delay. What is quick or performed without delay depends on the context and particular circumstances, including the nature of the specific type of action to be reviewed and corrected. Whether a system does or does not ensure prompt review thus cannot be determined in the abstract. We therefore agree with the Panel that the nature of the specific administrative action at issue informs the meaning of the word "prompt" in the particular circumstances of a Member's domestic system.³⁰⁶

204. We further note that Article X:3(b) refers to "review and correction" of administrative action. The word "review" is defined as "[a]n inspection, an examination", or in the legal context as "[c]onsideration of a judgment, sentence, etc., by some higher court or authority".³⁰⁷ The word "correction" is defined as "[t]he action of putting right or indicating errors".³⁰⁸ The reference to "correction" indicates that Article X:3(b) requires more than mere declaratory action or *ex post* review of whether administrative action conforms to domestic law or not. Compliance with the obligation to maintain tribunals or procedures for the "correction" of administrative action relating to customs matters requires that Members ensure that their system of review provides for the relevant administrative action to be set right.

205. Finally, we note that Article X:3(b) does not prescribe one particular type of review or correction of administrative action relating to customs matters. Instead it refers to "judicial, arbitral or

³⁰⁴Panel Report, para. 7.1029.

³⁰⁵*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2367. See also Panel Report, para. 7.1085.

³⁰⁶Panel Report, para. 7.1086. We also note the Panel's statement, elsewhere in its Report, 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." (*Ibid.*, para. 7.997)

³⁰⁷*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2566.

³⁰⁸*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 527.

administrative tribunals or procedures". This suggests that there are a variety of ways in which a Member may comply with the obligation of maintaining tribunals or procedures for prompt review and correction of administrative action relating to customs matters, provided that, *inter alia*, such tribunals and procedures are independent of the agencies entrusted with administrative enforcement as required by the second sentence of Article X:3(b).

2. Application of Article X:3(b) to the Facts of the Dispute

(a) Administrative Action Relating to Customs Matters

206. We now turn to consider whether the Panel correctly found that decisions by Thai Customs on the guarantees required in order to have goods released pending a final duty assessment constitute "administrative action relating to customs matters". The Panel noted the participants' agreement that customs valuation determinations fall within the scope of "administrative action relating to customs matters" in Article X:3(b).³⁰⁹ On appeal, as before the Panel, the participants' disagreement concerns whether the imposition of a guarantee as a security to cover ultimate duty liability in exchange for release of the goods also falls within the scope of Article X:3(b).

207. We recall that, pursuant to Section 112 of the Thai Customs Act, customs officials may, in case of doubt as to the amount of duty applicable to a specific good, undertake a detailed examination. In that event, the goods in question may be released from customs pending the final assessment of duty liability, provided that the importer pays the declared duty and that a cash deposit or guarantee covering the maximum duty payable on the goods is given.³¹⁰

208. We note that the Panel took into account the following definition of "guarantee" from *Black's Law Dictionary*: "[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent."³¹¹ Read in the light of the present case, the "future engagement" is the payment of ultimate customs duties. We further note, as did the Panel, that Article 13 of the *Agreement on Customs Valuation* refers to the concept of "guarantee" in relation to customs valuation. The first sentence of Article 13 refers to different forms in which a guarantee may be provided. The second sentence, while stipulating an obligation for Members to provide for the possibility to obtain the release of goods pending a final determination of customs value, leaves considerable discretion to Members in determining the form of the guarantee to be provided. Thus, we understand that, in customs matters, guarantees include legal instruments of different forms, provided in order to secure

³⁰⁹Panel Report, para. 7.992.

³¹⁰Panel Report, para. 7.1017 (quoting Thai Customs Act, Section 112). See *supra*, paras. 187 and 188.

³¹¹Panel Report, footnote 1752 to para. 7.1037 (quoting *Black's Law Dictionary*, 7th edn, B.A. Garner (ed.) (West Group, 1999), p. 711).

the payment of ultimate customs duties. We also observe that the decisions of customs authorities imposing or accepting guarantees may relate, *inter alia*, to the amount or to the form of the security being provided.

209. The customs guarantee decisions at issue in this dispute are actions taken by Thailand's customs authorities.³¹² As such, they are acts of the executive branch of government and thus constitute administrative action in the sense of Article X:3(b). Furthermore, because they serve to secure the payment of ultimate customs duties, these guarantee decisions are connected to "customs matters" and thus fall within the scope of Article X:3(b).

210. On appeal, Thailand submits that the imposition of a guarantee does not constitute "administrative action" within the meaning of Article X:3(b) because it constitutes only an administrative step of a provisional nature. Thailand asserts that the Appellate Body's statement in *US – Shrimp (Thailand) / US – Customs Bond Directive* that "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" suggests that the Appellate Body characterized a security as a "provisional measure".³¹³ Thailand submits that the Appellate Body's rationale in *US – Shrimp (Thailand) / US – Customs Bond Directive* applies equally to the guarantees at issue in this dispute.

211. We disagree with Thailand. In our view, the Appellate Body's statement in *US – Shrimp (Thailand) / US – Customs Bond Directive*, that securities under the *Ad Note* to paragraphs 2 and 3 of Article VI of the GATT 1994 are accessory to final duty liability, does not stand for the proposition that such securities are "provisional" measures. The fact that two legal instruments, in that case, the security and the imposition of anti-dumping duties, are interlinked, does not, without more, suggest that one of the two instruments is necessarily provisional in nature. There, the Appellate Body explained that the "security [was] intended to provide a protection against the non-payment risk that might arise from the differences between the amount collected at the time of importation and the liability that may be finally determined."³¹⁴ This statement is consistent with the view that a security is a final and not a provisional measure with respect to that intention to avoid the risk of non-payment.

212. The Panel referred to this part of the Appellate Body report in *US – Shrimp (Thailand) / US – Customs Bond Directive*, and concluded that, in the particular circumstances of customs valuation, the imposition of a guarantee is intended to serve the distinct purpose of securing the payment of the

³¹²In the following paragraphs, when referring to the Thai system, and unless otherwise indicated, we use the word "guarantees" to cover both cash deposits and guarantees from a bank or the Ministry of Finance, within the meaning of Section 112 of the Thai Customs Act.

³¹³Thailand's appellant's submission, para. 240 (quoting Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 231).

³¹⁴Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 221.

ultimate amount of customs duty pending a final determination of duty liability by customs.³¹⁵ We agree with that characterization of the guarantee. With respect to the purpose of securing payment of customs duties, the guarantee is the final measure, not merely an intermediate step.

213. Thailand also argues that Article X:1 of the GATT 1994 lists several different types of measures, such as "[l]aws, regulations, judicial decisions and administrative rulings of general application", but contains no reference to guarantees and other securities. For Thailand, this suggests that the drafters did not intend Article X:3(b) to apply to guarantee decisions.³¹⁶ We are not persuaded by this argument. It is built on the premise that Article X:1 and Article X:3(b) relate to the same types of measures. However, this is not necessarily so. Article X:1 and Article X:3(b) of the GATT 1994 stipulate distinct obligations. Both use general, albeit different language. Neither provision uses the word "guarantee". Therefore, we see no basis for an assumption that the obligation of Article X:3(b) extends only to measures falling within the scope of Article X:1 of the GATT 1994.

214. Finally, Thailand argues that the concept of due process does not compel the conclusion that there must be a right of appeal against guarantee decisions. Thailand submits that guarantee decisions are not *final* administrative acts but constitute merely intermediate steps on the way towards a final customs valuation decision and that, as such, they do not constitute "administrative action relating to customs matters" in the sense of Article X:3(b). Thailand refers to the doctrine of "ripeness", reflecting the concept of deference to the expertise of an administrative agency. Thailand argues that it does not make practical sense to require courts to intervene in a decision-making process within the technical expertise of an administrative agency, before that agency has had an opportunity fully to consider the issue and render a final decision.³¹⁷

215. As already noted above, we do not consider that a guarantee is merely an intermediate step within the administrative procedure leading up to the final assessment of customs duty. Rather, a requirement to provide a guarantee in exchange for release of the goods has an administrative content of its own. As the Panel correctly found, the guarantee is a device allowing, on the one hand, the importer to withdraw their goods from customs, and, on the other hand, securing the payment of the ultimate customs duty.³¹⁸ It is a final, and not an intermediate, administrative act with respect to these particular objectives. The fact that a guarantee provides security for a claim stemming from another

³¹⁵Panel Report, para. 7.1039 (referring to Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 221).

³¹⁶Thailand's appellant's submission, para. 253.

³¹⁷Thailand's appellant's submission, para. 278 (referring to United States Supreme Court, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)).

³¹⁸Panel Report, paras. 7.1039 and 7.1040.

administrative action does not change the fact that the imposition of a guarantee is an administrative action in its own right.

216. For these reasons, we agree with the Panel that the "imposition of a guarantee is an 'administrative action relating to customs matters' within the meaning of Article X:3(b)".³¹⁹

(b) Prompt Review and Correction

217. In the event that we uphold the Panel's finding that guarantee decisions fall within the scope of "administrative action relating to customs matters", then Thailand appeals the Panel's finding that Thailand's provision of a right of appeal against guarantee decisions at the time when the notice of final assessment is issued does not satisfy the obligation in Article X:3(b).³²⁰ Because we have agreed with the Panel that guarantee decisions fall within the scope of "administrative action relating to customs matters" within the meaning of Article X:3(b), the condition on which this part of Thailand's appeal is predicated is fulfilled. Consequently, we now turn to consider whether the Panel erred in finding that Thailand's provision of a right of appeal against the imposition of a guarantee only at the time when the notice of final assessment is issued does not satisfy the obligation prescribed in Article X:3(b).

218. In its assessment of whether the availability of an appeal of a guarantee decision to the Thai Tax Court following the issuance of the notice of assessment satisfies Article X:3(b), the Panel considered that the question of whether a Member provides for prompt review and correction of administrative action has to be considered in the light of the nature of the specific administrative action concerned.³²¹ The Panel also took into account that guarantee decisions could, depending on the situation, entail a heavy financial burden on importers. With respect to the present dispute, the Panel observed that there is no time-frame for the issuance of a notice of assessment, and that in some cases this has taken "up to 10 months".³²² The Panel also noted that following the issuance of a final assessment, an importer must first exhaust an appeal to the BoA before it can appeal to the Thai Tax Court.³²³ In the context of the Philippines' claim pursuant to Article X:3(b) relating to guarantee decisions, neither the Philippines nor the Panel addressed the length of time taken for BoA proceedings.³²⁴ The Panel then found that if a system does not make available the review of a

³¹⁹Panel Report, para. 7.1053.

³²⁰Thailand's appellant's submission, para. 294.

³²¹Panel Report, para. 7.1086.

³²²Panel Report, para. 7.1084.

³²³Panel Report, paras. 7.1072-7.1083; see also para. 7.91.

³²⁴Elsewhere in its Report, in the context of a claim by the Philippines under Article X:3(a), the Panel observed that specific appeals of customs valuation decisions lodged by PM Thailand between 2000 and 2002 took, on average, two years and six months for the BoA to complete. (Panel Report, para. 7.953)

guarantee decision until the final assessment has been made in respect of the customs duty, an importer may face a situation where it will not be able to withdraw imported goods due to a guarantee value set at an excessively high level.³²⁵ The Panel concluded that this is not compatible with the obligation under Article X:3(b) to maintain independent tribunals or procedures for the prompt review of the concerned administrative action.³²⁶

219. Above, we have set out the reasons why we agree with the Panel that the nature of the specific administrative action at issue informs the meaning of the word "prompt" in the particular circumstances of any given case. Turning to the situation in this dispute, we consider that the character of a guarantee is relevant in determining what can be regarded as "prompt" with respect to the review of guarantee decisions. As set out above, a "guarantee" is defined as "[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent".³²⁷ This definition clarifies a key element of a guarantee, namely, its relation to a future event. A guarantee is tied to, but distinct from, the fulfilment of an engagement or condition in the future. Accordingly, a guarantee is effective as a security from the time it is given up to the time when the engagement or condition is fulfilled. Once the future condition is fulfilled, the guarantee no longer serves as a security.

220. We also recall our above consideration that the due process objective reflected in Article X:3 of the GATT 1994 suggests that "prompt review and correction" is to be understood as review and correction of administrative action that is performed in a quick and effective manner and without delay. It follows that the mechanism for the review of administrative action relating to customs matters must permit review to be timely and effective. In the particular circumstances of a guarantee, which is effective as a security from the time it is given until the time when the engagement or condition is fulfilled, we consider that, for a review to be considered timely and effective, it must at least be possible to challenge the guarantee during the time it serves as a security. This is so because it is during the period of time that a guarantee is required that importers are most affected by the guarantee decision.

221. In the present case, the Panel understood Thailand's measure to operate in a way that allows a challenge of the guarantee decision only once the notice of assessment is issued and the BoA has reviewed that final assessment. As set out above, Thai law provides that once the ultimate duty has been established, and if the ultimate duty liability exceeds the duty paid on the declared value at the time of entry of the goods, the amount by which it exceeds the declared duty shall be paid

³²⁵Panel Report, para. 7.1087.

³²⁶Panel Report, para. 7.1087.

³²⁷*Black's Law Dictionary*, 7th edn, B.A. Garner (ed.) (West Group, 1999), p. 711.

immediately from the cash deposit if cash was deposited as security.³²⁸ In the event that a guarantee by a bank or the Ministry of Finance has been given, the importer or exporter shall pay the amount that exceeds the declared duty within 30 days after the date of receiving the notice of assessment. If the duty initially paid or the cash deposit exceeds the amount specified in the notice of final assessment, the excess amount, together with interest, is to be refunded to the importer.³²⁹ Thus, with the fulfilment of the condition—in this case payment of the ultimate duty—the security function of the guarantee ceases.³³⁰ In providing that a guarantee can only be challenged once the notice of assessment has been issued, Section 112 of the Thai Customs Act invariably delays review of guarantee decisions and thereby shields guarantee decisions from challenge throughout the period in which they serve as a security and in which traders are most affected by these decisions.³³¹ We recognize that, where security has been given in the form of a guarantee by a bank or the Ministry of Finance, such a guarantee could be challenged within the short time period between the issuance of a notice of assessment and payment of the ultimate duty. Even in such cases, however, the review system maintained by Thailand imposes delays that are essentially coextensive with the lifetime of a guarantee's security function. Thus, this system does not ensure prompt review of the relevant administrative action.

222. For the above reasons, we find no error in the Panel's conclusion that Thailand's system for the review of guarantee decisions is not compatible with the obligation under Article X:3(b) to provide for the prompt review of administrative action relating to customs matters because such review is not available until after the final assessment of customs duty has been made. Consequently, we *uphold* the Panel's finding, in paragraph 8.4(g) of the Panel Report, that Thailand acts inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent review tribunals or procedures for the prompt review of guarantee decisions.³³²

³²⁸Panel Report, para. 7.856 (quoting Thai Customs Act, Section 112*bis*).

³²⁹Panel Report, para. 7.857 (quoting Thai Customs Act, Section 112*quater*).

³³⁰This occurs either immediately upon issuance of the notice of assessment when security has been given in the form of a cash deposit, or upon full payment of the assessed duty within 30 days when security has been given in the form of a guarantee by a bank or the Ministry of Finance.

³³¹We also note that the fact that a guarantee decision cannot be challenged before the issuance of the notice of assessment may in certain cases prevent an importer from obtaining release of goods from customs pending determination of final customs duties or may even lead an importer to cancel a transaction, for instance, where the amount of a guarantee is so high that the importer is unable to provide it. (See Panel Report, para. 7.1086; and Philippines' appellee's submission, para. 312)

³³²See also Panel Report, para. 7.1087.

VI. Findings and Conclusions

223. For the reasons set out in this Report, the Appellate Body:

- (a) with respect to the Panel's findings under Article III of the GATT 1994 concerning Thailand's treatment of resellers of imported cigarettes, as compared to its treatment of resellers of like domestic cigarettes:
 - (i) upholds the Panel's finding, in paragraph 8.3(b) of the Panel Report³³³, that Thailand acts inconsistently with Article III:2, first sentence, of the GATT 1994 by subjecting imported cigarettes to VAT liability in excess of that applied to like domestic cigarettes;
 - (ii) with respect to the Panel's findings under Article III:4 of the GATT 1994:
 - finds that the Panel did not err in concluding, in paragraph 7.738 of the Panel Report, that Thailand accords less favourable treatment to imported cigarettes than to like domestic cigarettes;
 - finds that Thailand has not established that the Panel failed to ensure due process and, thus, to comply with its duty under Article 11 of the DSU to make an objective assessment of the matter, by accepting and relying on Exhibit PHL-289 without affording Thailand an opportunity to comment on that evidence;
 - reverses the Panel's finding, in paragraph 7.758 of the Panel Report, regarding Article XX(d) of the GATT 1994; but finds that Thailand failed to establish that its measure is justified under Article XX(d) of the GATT 1994; and
 - upholds the Panel's finding, in paragraph 8.3(c) of the Panel Report³³⁴, that Thailand acts inconsistently with Article III:4 of the GATT 1994 by subjecting imported cigarettes to less favourable treatment than that accorded to like domestic cigarettes; and

³³³See also Panel Report, para. 7.644.

³³⁴See also Panel Report, para. 7.738.

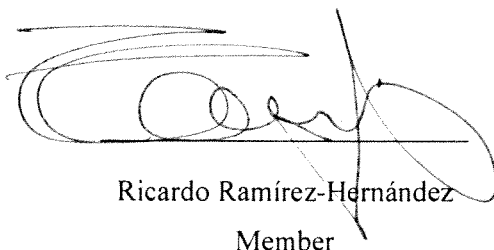
- (b) upholds the Panel's finding, in paragraph 8.4(g) of the Panel Report³³⁵, that Thailand acts inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent tribunals or procedures for the prompt review of guarantee decisions.

224. The Appellate Body recommends that the DSB request Thailand to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Customs Valuation* and the GATT 1994, into conformity with its obligations under those Agreements.

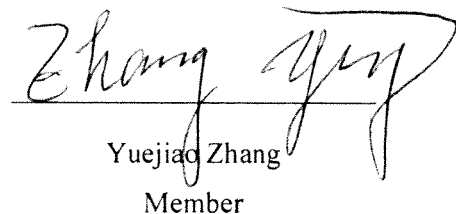
Signed in the original in Geneva this 20th day of May 2011 by:



Peter Van den Bossche
Presiding Member



Ricardo Ramírez-Hernández
Member



Yuejiao Zhang
Member

³³⁵See also Panel Report, para. 7.1087.

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS371/8
23 February 2011

(11-0961)

Original: English

**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.

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

¹See 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.

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

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

⁴See Panel Report, paras. 7.749-7.758.

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

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

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

⁸See 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.

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