

***Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines***  
(AB-2011-1/DS371)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES

April 18, 2011

**Introduction**

1. Mr. Chairman and members of the Division, on behalf of the United States, we would like to thank you for the opportunity to present the views of the United States as a third participant in this appeal. In our written submission, the United States set forth its views on certain aspects of the Panel’s report subject to appeal. In today’s statement, the United States will focus on two areas: (1) arguments raised in connection with Thailand’s appeal of the Panel’s findings under Article X:3(b) of the *General Agreement on Tariffs and Trade 1994* and (2) Thailand’s claim that the Panel violated Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

**Scope of Issues Presented Under Article X:3(b)**

2. As explained in our written submission, the United States considers that the proper issue on appeal with respect to the Article X:3(b) claims is whether the guarantees at issue are an “administrative action relating to customs matters.” As the Panel recognized, this inquiry does not require a definition of the universe of measures that fall under Article X:3(b). Nor does it require a delineation of what measures are sufficiently “final,” as opposed to “provisional,” as to

fall within the scope of that Article. The United States respectfully suggests that the Division limit its inquiry to the specific issue on appeal.

3. As a practical matter, Thailand’s arguments as to whether a guarantee is sufficiently “final” so as to give rise to appeal appear to be premised on the concern that a guarantee is a component of the determination of customs value, such that requiring an appeal of a guarantee would unduly interfere with the functions of a customs authority in determining the customs value. However, the United States understands that, although a guarantee might relate to customs value, the subject of an appeal of a guarantee would be the guarantee itself, not the final determination of value.

4. In support of its argument that Article X:3(b) of the GATT 1994 does not apply to the determination of guarantee values, Thailand also cites the lack of any reference to an appeal in Article 13 of the Customs Valuation Agreement, which provides that an importer should be able to withdraw its goods from customs even where the final determination of customs value is delayed if it provides sufficient guarantee. Thailand further cites the lack of any reference to an appeal of a guarantee in Article 11 of the Customs Valuation Agreement, which requires an appeal of the “determination of customs value.” It is true that the only decision as to which the Customs Valuation Agreement explicitly requires Members to provide the right to appeal is the determination of customs value. The language of Article X:3(b) of the GATT 1994, however, is not so limited.

#### **Claims Under Article 11 Regarding the Submission of Evidence**

5. Thailand argues that the Panel acted inconsistently with Article 11 of the DSU by accepting and relying on evidence that the Philippines first submitted in its comments on Thailand's responses to the Panel's second set of questions (i.e. the last submission before the interim report). The fact that the Panel's working procedures (as in many disputes) expressly allowed for the submission of factual evidence, even after the first substantive meeting, for purposes of rebuttals, answers to questions, or comments on answers to questions is not in dispute. The United States takes no view on whether the evidence at issue can properly be considered to have been submitted for these purposes.

6. There is also no dispute that a complaining Member has the burden to establish a prima facie case of a WTO-inconsistency. The burden was not on Thailand to prove that it had not breached Article III:4.

7. Thailand argues that the Panel violated its due process rights by not ensuring that Thailand had an opportunity to comment on evidence submitted by the Philippines in its comments on Thailand's responses to the Panel's second set of questions and then subsequently relying on that evidence. Thailand argues that it was incumbent on the Panel to ensure that its due process rights were protected by providing Thailand with an opportunity to comment, an issue that Thailand apparently raised after seeing the evidence cited in the interim report.

8. The United States understands that the Panel in this dispute did not on its own initiative offer Thailand, prior to the interim report, a separate formal opportunity to comment on the evidence submitted by the Philippines in its comments on Thailand's answers. While the Panel could have offered Thailand the opportunity to comment, or could have posed an additional question regarding the new evidence, the United States does not consider this a requirement on

the Panel. Furthermore, Thailand could have requested an opportunity to comment on this evidence. And according to the Panel report, 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. In these circumstances, it is not clear to the United States what "due process" right of Thailand was not respected – one of the purposes of the review of a panel's interim report is precisely to ensure that a panel has accurately considered all the evidence presented.

9. The United States notes that, as a general matter, a panel has a degree of discretion regarding the treatment of evidence, including whether evidence is relevant and what weight it should be given. As the Appellate Body recognized in *Argentina – Textiles*, "the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence". In that dispute, Argentina claimed that the panel had acted inconsistently with Article 11 by accepting evidence submitted shortly before the second meeting with the panel. The Appellate Body concluded that the panel had not abused its discretion such that it had failed to render an objective assessment of the matter, while acknowledging that the panel could have chosen to exercise its discretion differently.

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### **Conclusion**

10. This concludes our presentation. The United States appreciates this opportunity to express its views. We look forward to any questions the Division may have.