Thailand - Customs and Fiscal Measures Affecting Imports of Cigarettes from the Philippines
(DS371)

Responses of the United States to Questions to the Third Parties
Following the First Substantive Meeting with the Panel

Wednesday, 1 July 2009

General Issues

1. *(All third parties)* What is your view on the position that panels are not allowed to make recommendations pursuant to Article 19.1 of the DSU with respect to expired measures or completed acts?

1. Article 19.1 of the DSU provides: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement" (emphasis added). Consequently, whenever a panel finds that a measure within the panel's terms of reference is inconsistent with the responding Member's WTO obligations, the plain text of the DSU requires the panel to make the recommendation called for in Article 19.1. There are no exceptions provided in the text for "expired measures" or "completed acts."

2. The DSU requires a recommendation even for measures that, according to the responding party, have expired during the course of the panel proceedings.[1] A contrary conclusion would not only be inconsistent with the DSU text, it would also raise considerable difficulty for dispute settlement proceedings: given the rapid pace of panel meetings and short deadlines for the parties' submissions, parties and panels are not in a good position to deal with allegations of changes to a measure during the course of a proceeding. The WTO dispute settlement system is not designed to handle such moving targets.

3. In general, an assertion that a measure expired during the course of the panel proceedings is best addressed during the implementation phase of the dispute – in fact, it may be possible for

[1] The panel in *Indonesia – Autos*, for example, made a recommendation with respect to measures that had been revoked. *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted July 23, 1998, para. 14.9. In arguing that the Panel should refrain from making recommendations with respect to completed acts, Thailand cites the panel report in *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted May 19, 2005, as modified by the Appellate Body Report, WT/DS302/AB/R, and the Appellate Body report in *EC – Selected Customs Matters*, WT/DS315/AB/R, adopted Dec. 11, 2006. However, those reports appear to have failed to follow the DSU mandate. Notably, in the *Dominican Republic – Cigarettes* dispute, the Appellate Body modified the panel report by making a broad recommendation that the Dominican Republic bring its measures into compliance with WTO rules; the Appellate Body's recommendation extended to the Selective Consumption Tax, which had been in existence as of the date of panel establishment but subsequently modified. WT/DS302/AB/R at para. 130.

the parties to reach agreement on that point during implementation, such that no further proceedings are necessary.

4. We note for completeness that measures that have expired and are not in existence at the time of a request for consultations are not within a panel's terms of reference under the DSU. As such measures are outside a panel's terms of reference, a panel may not make recommendations with respect to them.

5. With respect to "completed acts," it is a bit unclear as to what is meant by a "completed act" compared to an "expired measure." An "act" would appear by its nature to be time limited. The argument that a panel is unable to make a recommendation with respect to a "completed act" would therefore raise significant issues. In particular, it is difficult to see how an "act" that is within a panel's terms of reference would not be "completed" prior to the end of the panel proceedings. Accordingly, the argument that a panel is unable to make a recommendation with respect to a "completed act" would appear to mean that no panel could ever make a recommendation with respect to an "act." There is nothing in the DSU or the covered agreements that would support such an approach.

2. ***(All third parties)*** **Thailand is of the view that panels should also exercise its discretion to decline to make findings on expired measures or completed acts as panels have a responsibility to prevent the WTO's dispute settlement procedures from being used to obtain purely declaratory judgments or to address matters that are completely moot by the time the Panel is established. Please comment on this view.**

6. As noted in our response to Question 1, measures that have expired as of the time of a request for consultations are not within a panel's terms of reference under the DSU. The United States agrees that the WTO's dispute settlement procedures should not be used to obtain declaratory judgments or advisory opinions. While a panel may exercise "judicial economy" to decline to make findings on additional *claims* regarding the *same measure*, it may not decline to make any findings whatsoever with regard to a measure that is within its terms of reference.[2]

[2] *See Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted Sept. 27, 2004, para. 133 ("The practice of judicial economy, which was first employed by a number of GATT panels, allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint. At the same time, if a panel fails to make findings on claims where such findings are necessary to resolve the dispute, then this would constitute a false exercise of judicial economy and an error of law.").

Customs Valuation Agreement

3. *(All third parties)* Please explain, based on your own customs authority's practice and your interpretation of the CVA, the procedural steps to be followed in a chronological order within the meaning of Article 1.1 and 1.2(a) of the CVA in assessing the acceptability of a declared transaction value where the buyer and the seller are related.

7. Articles 1.1 and 1.2(a) of the Customs Valuation Agreement establish certain obligations that a Member's customs authority must satisfy in the valuation process.

8. The customs authority has a general obligation to accept the transaction value. Article 1.1 of the CVA provides, "The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation . . ." provided that, among other factors, "the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2." Article 1.2(a) provides that "the fact the buyer and the seller are related . . . shall not in itself be grounds for regarding the transaction value as unacceptable."

9. The process of valuation typically begins when an importer presents a declaration of the value of the imported goods to the customs authority. The customs authority may simply accept the declared value, even where the buyer and the seller are related.[3] In other cases involving transactions between related parties, the customs authority may have doubts about the acceptability of the price. In such cases, the Interpretative Notes explain that the customs authority "should give the importer an opportunity to supply such further detailed information as may be necessary to enable it to examine the circumstances surrounding the sale."[4]

10. A number of exchanges back and forth between the customs authority and the importer could follow the customs authority's indication that it has doubts about the acceptability of the price, depending on the situation. Such an exchange could occur either in an examination of the

[3] As Paragraph 2 of the Note to Article 1 in the Interpretive Notes (Annex I to the Customs Valuation Agreement) makes clear, even where the buyer and the seller are related, "[w]here the customs administration have no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer."

[4] Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 3.

circumstances of the sale or in an analysis of whether the price approximates a test value,[5] and might resolve the valuation issue.

11. Pursuant to Article 1.2(a), if, in light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its "grounds," i.e., a sufficient reason or reasons,[6] to the importer, and the importer shall be given a reasonable opportunity to respond. We note that providing "grounds" would involve providing specific reasons and would involve a higher threshold than doubts. In responding to the customs authority, the importer might address the "grounds" and resolve the valuation issue. If not, the customs authority must appraise the merchandise using one of the valuation methods in Articles 2 through 7 applied in a hierarchical manner. After determining a final value, the customs authority must inform the importer of the value. Pursuant to Article 16, the customs authority, upon the importer's written request, must provide an explanation as to how the customs value was determined.

4. *(All third parties)* What does the phrase "shall be examined" under Article 1.2(a) of the CVA mean? Is a customs authority obliged to "request" further information from the importer? How can a customs authority satisfy the obligation to "examine" within the meaning of Article 1.2(a)? Please explain based on your own customs authority's practice and your interpretation of the CVA.

12. The Interpretive Notes make clear that the circumstances of sale need not be examined in every case, but rather only in those cases in which the authority has "doubts" about the acceptability of the price.[7] Customs valuation is a transaction-specific process, and examination of the circumstances of the sale by the customs authority, where undertaken, is conducted on a case-by-case basis. The specific steps taken by the customs authority will depend on the circumstances of the import transaction. However, the obligation in Article 1.2(a) to examine the circumstances of the sale would, in most if not all transactions, naturally require the customs authority to seek information from the importer and provide the importer with an opportunity to

[5] Pursuant to CVA Article 1.2(b), the acceptability of the transaction value may also be established by a demonstration that the transaction value closely approximates to a test value. It should be noted that this test is used at the initiative of the importer, who could not initiate use of the test if the importer was not notified that the customs authority has doubts about the declared transaction value.

[6] *See New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1150, meaning 6b; Exhibit US-1.

[7] Customs Valuation Agreement, Annex I, Note to Article 1, Paragraph 2, para. 2.

submit information.[8]

5. *(All third parties)* Do the requirements under Article 16 include an obligation to provide an explanation of the basis for the customs authority's rejection of the importers' transaction value? If yes, what is the legal basis for such an interpretation?

13. Article 16 provides, "Upon written request, the importer shall have the right to an explanation in writing from the customs administration . . . as to how the customs valuation of the importer's goods was determined" (emphasis added). The Customs Valuation Agreement establishes the primacy of transaction value in the valuation process. Article 1 provides, "The customs value of imported goods shall be the transaction value . . . ." Articles 2 through 7 establish a sequence of valuation methods that the customs authority must follow in the event that the transaction value is not acceptable. Thus, if in making the final determination as to value, the customs authority rejected the transaction value, it would necessarily have considered whether and why to do so.

14. In administering Article 16, the customs administration will provide a reasonable and concise explanation of the basis of valuation for a particular importation.[9] The level of detail required to convey this explanation may depend on the circumstances. For example, the customs administration may, where appropriate, incorporate by reference previous explanations given to the same importer with respect to a request for an explanation regarding the importation of identical or similar goods. In some cases, on the other hand, a more detailed explanation may be necessary.

Article III of GATT 1994

6. *(European Communities)* The European Communities suggests in paragraph 45 of its third-party submission that "the Panel may consider it appropriate to examine the claims made under Article X:1 before those made under Article III:2 of the GATT 1994" because the Panel's examination of the Philippines' claims under Article X:1 may reveal facts that may be relevant for its analysis of the claims made under Article III:2. Can the European Communities explain how the Panel's examination of the Article X:1 claims may reveal facts that may be relevant for its analysis of the Article III:2 claims?

[8] As explained in footnote 5, pursuant to Article 1.2(b), the acceptability of the transaction value may also be established by a demonstration that the transaction value closely approximates to a test value.

[9] Such an explanation would apply only to the importation in question. It would not affect the availability of advance ruling procedures or restrict the right of appeal under Article 11.

7. *(All third parties)* Do the third parties consider that "a retail price" is a relevant factor in determining whether imported and domestic cigarettes are like within the meaning of Article III:2, first sentence?

15. A determination of likeness is to be made on a case-by-case basis.[10] In making this determination, panels and the Appellate Body have often examined certain key criteria: (1) the properties, nature and quality of the products; (2) the end-uses of the products; (3) consumers' tastes and habits; and (4) the tariff classification of the products.[11] This is not an exhaustive list, but as the Appellate Body has stated, it provides helpful guidance for examining the likeness of two products.[12] On several occasions, the Appellate Body has explained that the term "like products" should be construed narrowly for the purposes of the first sentence of GATT Article III:2. However, "like" products need not be identical in all respects.[13]

16. A difference between the retail prices of imported products and those of domestic products may in some instances reflect differences between the products that may be relevant to an analysis of whether the products are "like." However, a difference in retail prices in and of itself does not necessarily mean that those products are not like. For instance, in some cases the difference in "retail price" may simply reflect taxes or other charges that are inconsistent with provisions of the WTO covered agreements.

8. *(European Communities)* Does the European Communities consider that Value Added Tax (VAT) has to be based on a retail sales price? Is there an obligation to that effect under the WTO Agreement? Or, could VAT be based on something else such as MRSP?

9. *(European Communities)* The European Communities states in paragraph 49 of its third-party submission that "the fact that re-sellers of domestic cigarettes are not

---

[10] *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted Apr. 5, 2001, para. 101.

[11] *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted Apr. 5, 2001, para. 101; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996, Section H.1 and H.1(a); *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted July 30, 1997, Section V.A.

[12] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996, Section H.1(a).

[13] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996, para. 6.21.

subject to VAT-related administrative requirements is a consequence of the VAT exemption granted in the first place." In light of this statement, does the European Communities consider that the exemption of re-sellers of domestic cigarettes from VAT-related administrative requirements can still be examined under Article III:4 independently of the Philippines' claim under Article III:2, first sentence? In other words, even if the Panel were to find the VAT exemption is not in violation of Article III:2, first sentence, could the exemption of VAT-related administrative requirements be still found to be in violation of Article III:4?

Article X of GATT 1994

Article X:1 - Failure to publish rules regarding determination of ex-factory prices, MRSPs and release of guarantees

10. *(All third parties)* Are administrative rulings establishing ex-factory prices and individual MRSPs announced for specific brands administrative rulings of "general application" within the meaning of Article X:1?

17. The publication requirement of Article X:1 (as well as the administration requirements of Article X:3(a)) apply to "[l]aws, regulations, judicial decisions and administrative rulings of general application." The United States takes no position as to the facts in this dispute, or as to whether Thailand has acted inconsistently with Article X:1 with respect to the publication of ex-factory prices or MRSPs. The United States understands that the Philippines and Thailand dispute whether Thailand has in fact failed to publish the methodology underlying the calculation of ex-factory prices and individual MRSPs.[14]

18. The United States is not certain how widely the administrative rulings mentioned in the question apply, including whether they apply to all persons and fact situations that fall generally within their ambit and establish a norm of conduct, or whether the rulings apply only to a particular person, good, or service in a specific case. The United States notes that in one dispute in the past, the Appellate Body considered it relevant whether the measures applied only to a single company,[15] or whether they affected an unidentified number of economic operators other than the one to which the ruling had been given.

[14] First Written Submission of the Philippines, paras. 425-26 and 446-57.

[15] *See, e.g., Appellate Body Report, EC – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted July 23, 1998, para. 113 ("We agree with the Panel that 'conversely, licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application' within the meaning of Article X.")

11. *(All third parties)* Does Article X:1 of the GATT 1994 require the publication of methodology or data or both? To what extent, can a Member not disclose data on the basis of confidentiality?

19. Article X:1 makes clear that the disclosure of confidential information is not required where such disclosure "would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of participating enterprises public or private." Whether Article X:1 requires the disclosure of specific methodologies or data, therefore, depends on (1) whether the methodology in question falls within the scope of "[l]aws, regulations, judicial decisions and administrative rulings of general application," and (2) whether the disclosure of those methodologies or data "would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of participating enterprises."

Article X:3(a) – Thai Government's ownership of the TTM

12. *(All third parties)* Under Article X:3(a) of the GATT 1994, is the complainant required to provide evidence of unreasonable or impartial "acts" by public officials or is it enough to show that there is a potential for such acts because of a conflict of interest?

20. Article X:3(a) requires each Member to "administer in a uniform, impartial and reasonable manner" certain laws, regulations, decisions and rulings. This provision is breached if a Member's administration of those laws, etc., is non-uniform, partial, or unreasonable. A complaining Member would not sustain its burden to make a prima facie case of inconsistency with Article X:3(a) merely by showing that there is a potential for such non-uniform, partial or unreasonable administration.

21. The United States recalls that in *Argentina – Hides*, the panel reasoned "that Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world. This, of course, does not require a showing of trade damage . . . [b]ut it can involve an examination of whether there is a possible impact on the competitive situation due to alleged partiality, unreasonableness, or lack of uniformity in the application of customs rules, regulations, decisions, etc."[16] In *Argentina – Hides*, the fact that a procedure allowed members of the domestic trade association to witness inspections of exports "inherently contain[ed] the possibility of revealing confidential business information" was considered to be an unreasonable

[16] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted Feb. 16, 2001, para. 11.77.

manner of administering the law.[17] Thus, in *Argentina – Hides*, while the panel did not require the complaining party to demonstrate actual effects resulting from the non-uniform, partial, or unreasonable administration of the regulations and decisions involved – "possible" impacts were sufficient – the panel did not rely on merely possible or potential non-uniform, partial, or unreasonable administration.

22. The United States takes no position on the question of whether any conflict of interest that is alleged to be present in this case could constitute actual (rather than potential) unreasonable, partial or non-uniform administration of any of the measures at issue.

Article X:3(a) and X:3(b) - Delay in the BoA's appeals process

13. (All third parties) Do the third parties consider that Article X:3(a) should not be read as imposing strict time-limits on the appeals process? If so, what factors should the panel take into account when interpreting the term "reasonable" in Article X:3(a) of the GATT 1994? Would there be any instance where the length of the time taken for an appeal in itself can be considered "unreasonable"?

23. Article X:3(a) requires each Member to "administer in a uniform, impartial and reasonable manner all" of its "[l]aws, regulations, judicial decisions and administrative rulings of general application." The United States does not consider that this provision should be read as imposing strict time limits on the appeals process or that the length of time that an administrative appeal takes can be considered "unreasonable" administration within the scope of this provision. The immediate context for Article X:3(a) is GATT Article X:3(b), which sets certain standards (including a requirement of promptness) for the review by administrative tribunals of administrative actions in customs matters. The specificity of the provisions in Article X:3(b) and its juxtaposition with Article X:3(a) indicate that Article X:3(b), not Article X:3(a), applies to such review at administrative tribunals. Furthermore, Article X:3(b) indicates that "reasonable" in Article X:3(a) is not intended to address the question of the timeliness of the review called for under Article X:3(b).

14. (All third parties) In the context of delays in the appeals process at the BoA, what are the differences, if any, between the Article X:3(a) requirement of "reasonableness" and Article X:3(b) requirement of "promptness"? Can a review process be reasonable but not prompt? Alternatively, can a review process that is prompt be unreasonable?

[17] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted Feb. 16, 2001, para. 11.94.

24. The Article X:3(a) requirement of reasonableness applies to the administration of all "laws, regulations, judicial decisions and administrative rulings of general application." The Article X:3(b) requirement of promptness applies more specifically to the "review and correction of administrative action relating to customs matters" by "judicial, arbitral or administrative tribunals."

25. The term "prompt" in GATT Article X:3(b) should be defined according to its ordinary meaning, in context, and in light of the object and purpose of the GATT 1994. The ordinary meaning of "prompt" is "without delay."[18] What it means for action to be taken without delay necessarily will depend on context. The word "prompt" does not, by itself, connote a particular passage of time that will be relevant in all contexts. In the context of review and correction of administrative action, promptness may be a function, for example, of the complexity of the case.

26. For the reasons outlined in the answer to question 13, the concept of "reasonable" in Article X:3(a) does not cover the question of the timeliness of a review process at an administrative tribunal such as the BoA. Consequently, a review process that is not "prompt" would not also be "unreasonable" within the meaning of Article X:3(a).

Article X:3(b) – Appeals against the imposition of guarantees

15. *(All third parties)* Does Article X:3(b) require a government to provide importers with a right to appeal against imposition of guarantee value, or is it sufficient to allow an importer to appeal only against the final assessed customs value?

27. Article X:3(b) requires Members to provide for review of "administrative action relating to customs matters." As indicated in the U.S. oral statement, then, the relevant inquiry in determining whether a failure to provide for review of the value of a guarantee is inconsistent with Article X:3(b) is whether the determination of the guarantee value is an "administrative action relating to customs matters." The determination of a guarantee relates to customs values, and the United States would expect that, in most circumstances, the imposition of a guarantee of a specific value would be an "administrative action." To the extent that this were the case, it would not be sufficient for purposes of complying with Article X:3(b) to provide for an appeal only against the final assessed customs value.

16. (All third parties) If there are several intermediate steps involved in the customs valuation process, is a Member state under Article X:3(b) obliged to provide an appeal

[18] *See New Shorter Oxford English Dictionary,* L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2376, meaning 2.

against each and every intermediate step? If not, then how should the Panel identify those intermediate steps with respect to which an independent right to appeal should exist?

28. It does not appear that, in this dispute, any intermediate step in the customs valuation process for which the right to appeal has not been granted has been identified other than Thailand's alleged failure to provide for review of guarantee values. As such, in the view of the United States, the Panel need not identify each intermediate step in the process as to which an independent right to appeal should exist.

29. In any event, as noted in the oral statement of the United States and in our response to Question 15, Article X:3(b) requires Members to provide for review only of (1) "administrative action" that (2) "relat[es] to customs matters." The extent to which an intermediate step in the valuation process gives rise to the right to appeal depends on whether it is such an action. Article 11 of the Customs Valuation Agreement provides that "[t]he legislation of each Member shall provide in regard to a determination of customs value for the right of appeal . . . ." Appeal of the determination of customs value would usually entail appeal of the intermediate steps in reaching that determination.