

Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines
(WT/DS371)

Oral Statement of the United States
at the Third-Party Session of the First Substantive Meeting of the Panel with the Parties

June 11, 2009

1. The United States appreciates the opportunity to present this oral statement as a third party in these proceedings. We recognize that a number of issues in this dispute are factual in nature, and the United States takes no position on the measures at issue. The United States does, however, have a substantial interest in the interpretation of provisions in the covered agreements raised in this dispute and would like to comment in particular on certain issues regarding the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (“Customs Valuation Agreement” or “CVA”) and Article X of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

2. The United States would first like to address four specific issues relating to the Customs Valuation Agreement: (1) the approach to related-party transactions under Article 1.2 of the CVA; (2) the application of the deductive value method under Article 5; (3) the importance of the obligations to protect confidential information under Article 10; and (4) the references made by the parties to a letter from the World Customs Organization Secretariat. The United States would then like to address whether Article X:3(b) of the GATT 1994 requires a Member to maintain tribunals or procedures for the review and correction of guarantees. Finally, the United States would like to comment briefly on the scope of the Panel’s terms of reference in this dispute.

Article 1.2 of the CVA

3. The United States is concerned by certain statements in Thailand’s first written submission regarding the responsibilities of a customs authority examining a related party transaction. By way of background, the United States notes that the determination of customs value is a transaction-specific process.

4. The Customs Valuation Agreement sets forth a specific sequence of methods of valuation that customs authorities must follow. The CVA clearly establishes the transaction value as the primary basis for valuation. Article 1 of the CVA provides, “The customs value of imported goods *shall be* the transaction value, that is the price actually paid or payable . . .,”¹ except under certain specified circumstances.

5. Article 1 provides further that, even where the buyer and seller are related, the customs value shall be the transaction value, provided that the transaction value is acceptable under Article 1.2. Article 1.2(a) explicitly states:

¹ (Emphasis added.)

the fact that the buyer and the seller are related . . . shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price.

6. Article 1.2(a) must be “read and applied in conjunction with”² the Interpretive Notes to Article 1. Those notes make clear that a customs authority need not examine the relationship between the buyer and seller in every case.³ The customs valuation process typically begins when the importer presents a declaration. In most cases, the customs authority accepts the value submitted in the declaration. In other cases, where the buyer and seller are related and the customs authority has “doubts” about the acceptability of the price, the customs authority may conduct an examination into the relationship between the buyer and the seller.⁴

7. Where the buyer and seller are related and the customs authority considers that further inquiry is necessary, as just noted, Article 1.2(a) provides that the customs authority shall examine the circumstances of the sale. Article 1.2(a) provides further that if the customs authority “has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond.” These “grounds” must be communicated in writing if the importer so requests.

8. In light of this background, the United States generally agrees with Thailand⁵ that the “doubts” that give rise to further inquiry by the customs authority, and the “grounds” on which the customs authority bases its conclusion that the relationship between the buyer and seller influenced the price, are distinct concepts. However, the United States is concerned by certain statements in Thailand’s first written submission – such as that the “importer [must] *establish* that the relationship did *not* influence the price”⁶ – and in the April 12, 2007, response of Thailand’s customs authority to the importer that “it cannot be proven whether the relationship has an influence on the determination of customs value or not.”⁷ The United States wishes to emphasize that the relevant inquiry for the Panel under Article 1.2(a) is whether “the customs administration ha[d] grounds for considering that the relationship influenced the price.”

9. Bearing in mind that Article 1.2(a) provides that “the transaction value shall be accepted provided that the relationship did not influence the price,” and that “the fact that the buyer and the seller are related . . . shall not in itself be grounds for regarding the transaction value as unacceptable,” a customs authority is obligated to accept the transaction value unless it has

² Customs Valuation Agreement, Article 14.

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

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

⁵ First Written Submission of Thailand, paras. 146, 165.

⁶ First Written Submission of Thailand, para. 142 (emphasis added).

⁷ Exhibit PHL 70-B; First Written Submission of Thailand, paras. 168-69.

“grounds” – in other words, a sufficient reason or reasons⁸ – for concluding that the relationship influenced the price. While the United States takes no position on whether all of the facts before Thailand’s customs authority constituted “grounds” for rejecting transaction value, the United States would note that the language in the customs authority’s April 12, 2007, response⁹ calls into question whether the authority identified any grounds to reach its conclusion or in fact applied the correct standard. The failure by an importer to prove a negative, specifically to prove that the relationship did not influence the price, does not relieve the customs authority of its obligation to accept the transaction value unless it has grounds for considering that the relationship influenced the price. As noted in Article 1.2(a), after considering the information provided by the importer or otherwise, it is incumbent on the customs authority to have grounds for not accepting transaction value and to communicate those grounds to the importer.

Article 5 of the CVA

10. If, after undertaking all of the necessary steps, the customs authority determines that the transaction value is not acceptable, the customs authority must follow the sequence of valuation methods set forth in the Customs Valuation Agreement in determining the final customs value.

11. Where valuation is not possible under Article 2 or 3, the CVA dictates that the customs authority next proceed to the deductive value method set forth in Article 5 (unless the importer requests that the valuation method of Article 6 be applied). Article 5 provides that the value of imported goods shall be based on the unit price of identical or similar imported goods sold in the country of importation in the condition as imported in the greatest aggregate quantity, or the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity in the country of importation, subject to certain specified deductions, including “the additions usually made for profit and general expenses.”

12. If valuation is not possible under Article 5 of the Customs Valuation Agreement, the customs authority must proceed to the computed value method set forth in Article 6 (unless the importer has requested that the order of Articles 5 and 6 be reversed). If valuation is not possible under Article 6, then the customs authority may use the last valuation method in the sequence set forth in the Customs Valuation Agreement, found in Article 7.

13. Paragraphs 184 through 187 of Thailand’s First Written Submission indicate that Thailand’s customs authority applied the deductive method under the method corresponding to Article 7 in its domestic law, rather than Article 5, because the importer had not provided audited financial statements for the year of importation. However, the United States agrees with the Philippines (as set forth in paragraph 338 of the Philippines’ First Written Submission) that Article 5 of the Customs Valuation Agreement does not permit a WTO Member to make the use

⁸ See *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1150, meaning 6b; (Exhibit US-1).

⁹ Exhibit PHL 70-B; First Written Submission of Thailand, paras. 168-69.

of the method set out in that article contingent on the submission of audited financial statements from the year of importation.

Article 10 of the CVA

14. With respect to the claims brought by the Philippines under Article 10 of the Customs Valuation Agreement, the United States does not express a view as to whether officials in Thailand in fact provided information to the press that was by its nature confidential or provided on a confidential basis. However, the United States considers that the obligations of Article 10 are an important element supporting the entire customs valuation system, as a failure to protect confidential information may prevent customs authorities from obtaining proprietary information that is critical to making the valuation decision, particularly in related party transactions.

Letter from the WCO Secretariat

15. The United States notes that both the Philippines and Thailand have cited a letter from the World Customs Organization Secretariat in presenting their respective positions. Specifically, the Philippines argues that this letter contradicted what the Philippines characterizes as one of Thailand's justifications for rejecting transaction value.¹⁰ Thailand explains, in contrast, that Thailand's customs authority determined that it would be appropriate to make further inquiries into the relationship between the buyer and the seller "in light of" the letter from the WCO Secretariat.¹¹ The United States appreciates the work of the WCO, including its cooperation with the WTO. However, the United States submits that the relevant inquiry in this dispute is whether Thailand complied with the obligations of the Customs Valuation Agreement, not to what extent Thailand acted consistently with a letter from the WCO Secretariat.

Article X of the GATT 1994

16. The United States would now like to turn to an issue relating to the GATT 1994. In particular, we would like to comment on the question of whether Article X:3(b) of the GATT 1994 requires a Member to maintain tribunals or procedures for the review and correction of guarantees imposed in accordance with Article 13 of the Customs Valuation Agreement.

17. Article X:3(b) requires each contracting party to maintain "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."

18. The United States is aware that the parties dispute, as a factual matter, whether Thailand in fact provides for an appeal of guarantee values, and, again, the United States does not take a

¹⁰ First Written Submission of the Philippines, paras. 247-51.

¹¹ First Written Submission of Thailand, para. 39.

position with respect to the facts in dispute. However, Thailand's suggestion¹² that the lack of any reference to an appeal in Article 13 of the Customs Valuation Agreement with respect to guarantees means that Members have no obligation to provide such an appeal merits comment.

19. The United States does not agree that the absence of a reference to an appeal in Article 13 of the Customs Valuation Agreement resolves the question of whether Article X:3(b) of the GATT 1994 requires such appeals. The relevant inquiry under Article X:3(b) is whether the determination of the amount of the guarantee is within the scope of the term "administrative action related to customs matters," and, if so, whether a Member has provided tribunals or procedures for the prompt review and correction of that action.

20. In support of its argument that Article X:3(b) of the GATT 1994 does not apply to the determination of guarantee values, Thailand contrasts the lack of any reference to an appeal in Article 13 in the Customs Valuation Agreement with the explicit obligation in Article 11 to provide for an appeal of the "determination of customs value."¹³ 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 is not so limited, however. The meaning of "administrative actions related to customs matters" should not be equated with "a determination of customs value."

Terms of Reference

21. Finally, the United States notes that the request by the Philippines for the establishment of a panel in this dispute identifies one of the measures at issue as "the general rule and/or methodology providing for the systematic rejection of transaction value, and the imposition of a higher pre-determined value, including any calculation methodology underpinning the pre-determined value, applicable at the time of entry as well as at the time of final assessment."¹⁴ The United States notes that when bringing a challenge against an unwritten measure, a complaining party must clearly establish, through arguments and supporting evidence, both the existence of the alleged measure, and its precise content.¹⁵ The United States does not express a view as to whether, in either its First Written Submission or its first oral statement to the Panel (which, of course, the United States has not seen), the Philippines has done so. However, such a methodology would appear to be within the Panel's terms of reference.

22. Mr. Chairman, members of the Panel, this concludes the oral statement of the United States. Thank you for your attention, and we hope that the comments provided by the United States will prove to be useful to the Panel.

¹² First Written Submission of Thailand, paras. 299-300.

¹³ First Written Submission of Thailand, paras. 299-300.

¹⁴ Request for the Establishment of a Panel by the Philippines, WT/DS371/3, para. 13.

¹⁵ *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, paras. 196-98.