

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

**(DS371)**

**Third Party Oral Statement of Australia**

Geneva, 11 June 2009

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## Introduction

1. Chair, Members of the Panel, Parties and Third Parties, Australia welcomes this opportunity to present its oral statement today. As a general remark, Australia considers that where customs duties are applied by WTO Members, the security and predictability of the multilateral trading system is contingent upon the correct application of the WTO *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the 'CVA'). Central to the CVA is the importance of transparency in determining the customs valuation methodology used by the customs authorities of WTO Members.

2. In our statement, Australia will address the following issues:

- a. The obligation to maintain transparency in determining the methodology used to arrive at a customs value;
- b. Australia's practice in the event of doubt on declared customs valuations; and
- c. The Philippines claims under Article III:2 of the GATT 1994.

## Transparency Issues in Customs Valuation

3. It is apparent that the complainant and respondent in this case have divergent views on the obligations of importers and customs authorities to communicate with each other, as provided for in the CVA. This is nowhere more evident than in their respective positions when grounds exist to doubt the declared value claimed by an importer where the buyer and seller are 'related' for the purposes of CVA Article 1(d). Australia recalls that it is not contested that PM Thailand and PM Philippines are 'related' within the meaning of the CVA.<sup>1</sup>

4. Australia considers full transparency should be provided in such cases to prove that the relationship between the importer and the seller has not influenced the price. In Australia's view, the importer can only effectively attempt to prove that its relationship with the seller has not influenced the price *if* the customs authority fully communicates its doubts to the importer in writing. It is only then that the importer can meaningfully 'respond' to

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<sup>1</sup> Australia understands PM Thailand and PM Philippines are 'related' pursuant to Article 15.4(f) of the CVA. See footnote 86 to First Written Submission of the Philippines.

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those doubts as provided for in Article 1.2(a) of the *CVA*. This response should also be provided in writing. Australia agrees with the European Communities that it is only after the customs authority has examined the 'relevant aspects of the transaction ... in order to determine whether the relationship influenced the price' that customs authorities can properly reject the declared value and consider alternative customs valuation methods.<sup>2</sup> In order to ensure full transparency, if the importer requests the grounds for rejecting the customs value in writing the customs authority should provide it even though the *CVA* does not require it to do so.

5. Australia considers that Article 1.2(a) of the *CVA* establishes a clear obligation on the customs authority to communicate its grounds that the relationship between the importer and the seller has influenced the price. In addition, if an importer requests the grounds for considering that the relationship influenced the price in writing, the failure to communicate these grounds in writing would be inconsistent with this Article.

6. A further provision in the *CVA* relevant to transparency and communication is Article 16. Article 16 contains an obligation on the customs authorities of the importing country to provide an explanation in writing as to how the importer's goods were valued whenever the importer makes a request in writing for this information. This obligation applies irrespective of which valuation method is used.

### **Australia's Practice in Case of Doubt Regarding Declared Transaction Values**

7. It may assist the Panel for Australia to spend a moment to outline its practice in the application of Australian law giving effect to the *CVA*, in situations where the transaction value may have been influenced by the relationship between the buyer and seller. Firstly, a written notice is sent to the buyer outlining the Australian Customs' concerns. This notice will include the view that the relationship may have affected the price rendering the Australian Customs unable to use the transaction value method. The buyer is then invited to respond and provide sufficient evidence to satisfy Australian Customs that the relationship has not affected the price. A period of no less than 28 days is provided for a response.

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<sup>2</sup> Third Party Written Submission of the European Communities, para. 36.

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8. If Australian Customs is satisfied that the information provided has established that the relationship has not affected the price, then the declared transaction value is applied. However, if Australian Customs is not satisfied with the explanation or no reply is received, the transaction value method is held to be inapplicable and an alternate method is used following the requisite sequence in the *CVA*.<sup>3</sup> Australian Customs will then convey this determination in writing to the importer and secondly, when a new customs valuation is determined, this methodology is provided in writing to the importer.

### **The Philippines Claims Under GATT 1994 Article III:2**

9. Australia will now address the Philippines' claims under Article III:2 of the GATT 1994. In order for the Philippines to establish that Thailand has acted inconsistently with Article III:2, it must demonstrate that Thailand subjected imported cigarettes to a tax 'in excess of' that applied to 'like domestic products.' In the present case, it appears likely that domestic and imported cigarettes are 'like products' within the meaning of Article III:2. Further, Australia notes Thailand acknowledges that this 'may' be the case.<sup>4</sup> However, Australia recognises the need for the Panel to undertake a thorough analysis on this point.

10. As established by the Appellate Body in *Japan – Alcoholic Beverages*,<sup>5</sup> the Panel must then determine whether dissimilar taxation has been applied so as to afford protection to domestic products. This may be done through an analysis of 'the design, the architecture, and the revealing structure of a measure.'<sup>6</sup>

11. Australia understands that Thailand applies a value added tax (VAT) that is proportional to the retail sales price of goods. While VAT is normally payable on the actual retail sale price of goods, for both domestic and imported cigarettes, the VAT tax base is the maximum retail sale price (MRSP) which is set by the Thai Government.<sup>7</sup> This VAT-MRSP value is therefore fixed and is payable independently of the actual sale price. Thailand states

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<sup>3</sup> As noted by the Panel in *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, paras. 7.136-7.142, where the customs value cannot be determined under the provisions of Article 1 of the *CVA*, the *CVA* provides a set of procedures that are to be applied to determine this value. Under the *CVA*, customs authorities are to apply sequentially Article 1 through Article 7 in order to determine a customs valuation.

<sup>4</sup> Australia recalls the statement of Thailand that it 'does not dispute that particular pairs of imported and domestic cigarettes may be like products ..', First Written Submission of Thailand, para. 221.

<sup>5</sup> Appellate Body in *Japan – Taxes on Alcoholic Beverages*, WT/DS11/AB/R page 29, cited in the First Written Submission of Thailand, paras. 206-7.

<sup>6</sup> *Ibid.*

<sup>7</sup> First Written Submission of Thailand, paras. 97-101.

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that 'the VAT burden on the domestic and imported *product* is the same' (emphasis in original).<sup>8</sup>

12. As this absolute VAT-MRSP value is fixed, the effective or marginal VAT rate increases as a percentage when imported or domestic cigarettes are sold at prices below the MRSP. The factual question before the Panel is therefore whether the design, architecture or structure of the tax measure operates so as to afford protection to domestic products. That is, does the evidence show that the tax burden on imported cigarettes is higher because they are more often sold at prices below the MRSP.

13. While Australia understands that imported cigarettes are commonly sold below their MRSP,<sup>9</sup> the Philippines claim that the retail price for domestic cigarettes had '*never*' been below the MRSP for the three year period prior to this dispute.<sup>10</sup> If this factual situation is found to be the case by the Panel, then the marginal VAT rate may, on occasion, be higher for imported cigarettes than that for domestic cigarettes and thus may constitute an internal tax 'in excess of those applied ... to like domestic products.'<sup>11</sup> Australia notes that Thailand claims in its first written submission that Exhibit PHL-127 shows exceptions to this assertion.<sup>12</sup> In the view of Australia this, in itself, does not invalidate the claims of the Philippines.

14. As a final point, Australia recalls that there is no prohibition that would prevent Thailand from regulating the sale price of particular products. However, where a Member opts to set a sale price, it must ensure that it does not apply measures to imported or domestic products so as to afford protection to domestic production contrary to Article III of the GATT 1994.

## **Conclusion**

15. Australia would like to thank the Panel for the opportunity to provide its views in this case. This dispute has highlighted the importance of transparency in the application of the *CVA*, which, when applied correctly, is an integral part in the maintenance of security and predictability of the multilateral trading system.

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<sup>8</sup> First Written Submission of Thailand, para. 100.

<sup>9</sup> First Written Submission of the Philippines, see para. 459 and paras. 493-498.

<sup>10</sup> First Written Submission of the Philippines, para. 499.

<sup>11</sup> Article III:2 of the GATT 1994.

<sup>12</sup> First Written Submission of Thailand, para. 227.