THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES
(DS371)

Australia's Responses to Questions of the Panel

Geneva, 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?

Australia considers that the Panel has the authority to make findings on measures which have expired provided they are properly within its terms of reference.[1] However, it is established jurisprudence that a panel only need address those claims which must be addressed to resolve the matter in issue in the dispute.[2] Australia recalls that the Panel in *EC – Trademarks and Geographical Indications (Australia)* stated that it could make findings with respect to expired versions of a measure 'where they serve some useful purpose in reaching conclusions with respect to measures within its terms of reference … that are currently in force.'[3] In Australia's view therefore, it is the task of the present Panel to determine if a finding on an expired measure in the present dispute will serve a purpose with respect to the measures within its term of reference.

With regard to recommendations, panels in the past have generally found it inappropriate to make recommendations on measures which no longer exist.[4] If the measure has indeed expired, the Panel should consider whether, based on the particular facts of the case, it is necessary to make findings or recommendations on the measure in order to resolve the dispute.

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.

See above.

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.

Australia's Customs and Border Protection Service (Customs) questions whether the relationship may have affected the price when it suspects that the parties are related; and that the price may have been influenced by the relationship.

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[1] Panel report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, paragraph 7.26; Panel report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, para. 14.9.

[2] Appellate Body report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, page 19; Appellate Body report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, para. 71.

[3] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, para. 7.17.

[4] For example, Appellate Body report, *US – Certain EC Products*, paragraph 81; Panel report, *Chile – Price Bands*, paragraph 7.112

Customs must write a letter to the importer saying so and setting out the reasons for forming that view. The letter must invite the importer to submit any information that may satisfy Customs that the relationship did not affect the price of the goods; or to demonstrate that the Transaction Value of the imported goods is effectively an arms-length value; and the letter must give the importer at least 28 days to respond.

To demonstrate that the imported goods are an arms-length value and that the Transaction Value method is appropriate, the importer may test the unit value of the imported goods against unit values of identical or similar goods, using the Identical Goods Value, Similar Goods Value, Deductive Value or Computed Value methods.

If Customs is thereby satisfied, the Transaction Value method is appropriate and must be used.

If after the 28 days (or longer, as specified in the letter; 28 days is the absolute minimum) has elapsed and Customs is not satisfied, then Transaction Value may not be used. The importer must be advised of such a rejection in writing. The other valuation methods must then be attempted in the required sequence.

4. (*All third parties*) What does the phrase "shall be examined" under Article 1.2(a) of the CVA mean?

Australian Customs examines the circumstances surrounding the sale. To demonstrate that the imported goods are an arms-length value and that the Transaction Value method is appropriate, the unit value of the imported goods will be tested against unit values of identical or similar goods, using the Identical Goods Value, Similar Goods Value, Deductive Value or Computed Value methods.

Article 17 of the *CVA* provides that nothing in the Agreement shall prevent Customs from satisfying itself as to the truth or accuracy of any statement, document or declaration. Such a declaration would include that made by the related buyer, explicitly or implicitly depending upon the documentation and declaration requirements of the importing country, when the transaction value method is used, i.e., "the price is not influenced because of my relationship with the seller".

4.1 Is a customs authority obliged to "request" further information from the importer?

Nothing in the *CVA* requires Customs to request information from an importer. If Customs already has enough information to make its decision it may not need to request further information. But further information may assist Customs in making its decision as paragraph 6 of Annex III and Article 17 of the *CVA* recognize that Customs may need to make enquiries concerning the truth or accuracy of any statement, document or declaration presented to them for customs valuation purposes. It also has the right to expect the full co-operation of importers in those enquiries. There is no pre-condition placed upon Customs to the effect that it must justify its reasons for enquiring into a transaction. There is, however, nothing to prevent Customs from informing an importer of the reasons for its doubts. This would be desirable if it is able to do so.

4.2 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.

Australian Customs relies on Subsection 161H(2) of the (Australian Commonwealth) *Customs Act 1901* to satisfy its obligation within the meaning of Article 1.2(a)

Subsections 161H(2) & (3) state:

Where, in relation to the goods required to be valued, a Collector:

(a) is satisfied that the purchaser and the vendor of imported goods were, at the time of the goods' import sales transaction, related persons; and

(b) considers that the relationship may have influenced the price of the goods;

the Collector shall, by notice in writing served, personally or by post, on the purchaser of the goods:

(c) advise the purchaser of:

(i) the view that the Collector has formed of the possible effect on the price of the goods of the relationship between the purchaser and the vendor;

(ii) the reasons for forming that view; and

(iii) the fact that, because of that view, the Collector may be required to decide under subsection (3) that the transaction value of the goods cannot be determined; and

(d) invite the purchaser to put before the Collector, within a period specified in the notice (not being a period of less than 28 days), such further information as the purchaser considers might serve to satisfy the Collector as to any of the matters set out in subsection (3).

(3) On the expiration of the period specified in a notice under subsection (2), the Collector shall, unless the purchaser of the imported goods has satisfied the Collector that:

(a) a relationship between the purchaser and the vendor of the goods did not influence the price of the goods; or

(b) the amount of the transaction value that would be determined in respect of the goods if the purchaser and the vendor had not been related at the time of the import sales transaction for the goods divided by the number of the units of the goods closely approximates, having regard to all relevant factors:

(i) the unit price within the meaning of section 161A of identical goods that were exported to Australia about the same time as the imported goods;

(ii) the unit price within the meaning of section 161B of similar goods that were exported to Australia about the same time as the imported goods;

(iii) the unit price of identical goods or similar goods sold in a contemporary sale within the meaning of section 161C as determined in accordance with that section; or

(iv) the computed unit price of identical goods or similar goods that were imported into Australia about the same time as the imported goods being the computed value of those identical goods or similar goods determined in accordance with section 161F divided by the number of units of those identical or similar goods;

be taken to be unable to determine the transaction value of the goods.

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?

Australia recalls that Article 16 of the *CVA* states '[u]pon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's goods was determined.'

Australian Customs does not believe that Article 16 of the *CVA* by itself includes an obligation to provide an explanation of the basis for the rejection of the importer's transaction value. It only provides that an explanation how the customs value was determined.

Subparagraph 2 (a) of Article 1 of the *CVA* does provide that, where Customs has grounds for considering that transaction value is unacceptable because the relationship has influenced the price and that Article 1 does not therefore apply to the transaction, Customs shall communicate its grounds to the importer. Moreover, the importer must be given a reasonable opportunity to respond and is entitled to be advised in writing of the grounds for Customs' beliefs.

When determining the customs value, Australian Customs provides clients with an explanation of the basis for the rejection of the importer's transaction value and an explanation as to how the customs value of the importer's goods was determined.

Article III of GATT 1994

6. *Question for the European Communities*

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?

Australia recalls that the Appellate Body in *Japan – Alcohol* stated that the definition of 'like products' in Article III:2 first sentence 'should be construed narrowly' but the matter of 'how'

narrowly, was a matter to be determined on a case by case basis.[5] In *Japan – Alcohol* the Appellate Body drew upon the basic approach for considering like products in the GATT Report of the Working Party on *Border Tax Adjustments*. This approach considered multiple factors such as a product's end-uses; consumer tastes and habits; and the properties, nature and quality of the product; as well as tariff classification.[6] In *Dominican Republic – Cigarettes* the Panel considered whether there was a relationship between quality and price as factors in the determination of likeness of products, but did not make a finding on this point.[7] Australia accordingly notes that no one factor may be considered determinative, however, when taken together, the cumulative affect of those factors may be determinative.

8. ***Question for the European Communities***

9. ***Question for the European Communities***

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?

Australia considers that a specific ruling will usually not be a ruling of "general application" unless the circumstances of that specific ruling will affect a broader class of operators than just the parties to the ruling. In this regard, Australia notes the comments of the Appellate Body in *EC – Poultry* at [113]:

> *Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules "of general application.*
> *...*
> *The approach to Article X of the GATT 1994 advocated by Brazil would require that a Member specify in advance the precise treatment to be accorded to each individual shipment of frozen poultry meat into the European Communities. Although it is true, as Brazil contends, that any measure of general application will always have to be applied in specific cases, nevertheless, the particular treatment accorded to each individual shipment cannot be considered a measure "of general application" within the meaning of Article X. The Panel cited the following passage from the panel report in United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear:*
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> > *The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application.* (emphasis added)

[5] *Japan – Taxes on Alcoholic Beverages*, DS8/AB/R, DS10/AB/R & DS11/AB/R, pages 18-21.
[6] *Japan – Taxes on Alcoholic Beverages*, DS8/AB/R, DS10/AB/R & DS11/AB/R, pages 20-21.
[7] *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, paras. 7.332-7.336.

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?

Australia considers that it is the characterisation of the legal instrument that is relevant, not the content within it. Australia notes that on the language of Article X:1 requires the publication of "laws, regulations, judicial decisions and administrative rulings of general application". Therefore the question under Article X:1 is not the question of whether data or methodology is required to be published, but rather whether something can be characterised as one of those four types of measures identified under Article X:1.

On the question of disclosure of confidential information, Australia notes that Article X:1 states that confidential information is not required to be provided where it would 'impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.' Australia notes that an example of the application of this clause can be found in *Argentina – Bovine Hides*[8] where the Panel held that confidential commercial information regarding pricing, quantities and names of exporters could be considered to fall within this confidential exception.

Addressing the obligation of a Member not to disclose confidential information, Australia recalls that Article X:1 is a negative obligation that does 'not require' a Member to disclose confidential information, or otherwise; where it would impede law enforcement; harm the public interest; or prejudice the legitimate commercial interests of, *inter alia*, private enterprises. In other words, customs authorities do not 'have to' disclose confidential information in the specific circumstances set out in Article X:1, that is, [when it concerns] the publication of laws, regulations, judicial decisions and administrative rulings of general application. It does not however, address the specific question of whether a Member may or may not disclose confidential information that has been provided to it in confidence by another Member. In Australia's view, Members should maintain the confidentiality of information provided 'in confidence' by another Member. This is reflected in Australian domestic law[9] which prevents the disclosure of protected information held by the employees of Customs. Protected information is defined as information that directly or indirectly comes to the knowledge of or into the possession of the employee when he or she is performing duties. Exceptions may only be made to this provision in circumstances when:

(a) authorised by Section 16 of the *Customs Administration Act 1985*;

(b) as required or authorised by any other law; and

(c) when disclosed by Australian Customs in the course of performing its duties.

Also, similar to other Commonwealth agencies, Customs is subject to the common law obligation of 'confidence'. This common law obligation of confidence is determined by the Australian courts. The courts would treat information received by Commonwealth agencies as

[8] *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1.
[9] *Customs Administration Act 1985*.

confidential information if, *inter-alia*, an obligation under the law of Equity to protect information as confidential information has arisen due to the circumstances of that transaction.

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?

Australia considers that the appearance of a conflict of interest, while a relevant consideration, will still depend on whether the results of the administrative process reflect that conflict of interest. This seems to be a reasonable extension of the Appellate Body statement in *EC – Customs Matters* at [225-226]:

> *The features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1 may constitute relevant evidence for establishing uniform or non-uniform administration of that legal instrument. The probative value of such evidence will, however, depend on the circumstances of each case and will necessarily vary from case to case. Thus, we may conceive of cases where a panel might attach much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, the non-uniform application of the legal instrument at issue. On the other hand, a panel might conclude, after an overall assessment of the evidence, that the consistent nature of the results of the application of the legal instrument shows that the measure at issue is administered in a uniform manner, even though differences may exist at the level of the administrative process.*
>
> *As the term "administer" in Article X:3(a) may include the administrative processes, evidence relating to the features of an administrative process can be adduced in support of a claim of a violation of Article X:3(a). However, in order to substantiate a claim of violation based on an administrative process, it is not sufficient that the complainant merely recites the features of the administrative processes; it will also have to show how and why those features necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument of the kind described in Article X:1.* (emphasis added)

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"?

Australia considers that "reasonable" refers to the quality of the decision making and not the temporality of the decision making. The Oxford English Dictionary defines "reasonable" as "**1.** having sound judgement; fair and sensible". Further, "Reasonable" comes at the end of the list of adjectives that refer to the quality of the decision making and should be read in light of them. This was how the Panel in *Argentina – Bovine Hides*[10] treated the reference to 'reasonable':

[10] *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, at 11.86.

> *In the present instance, the requirement of reasonableness, we believe, turns on the question of information flows and whether it is reasonable to allow persons access to certain information which is irrelevant to the stated purpose of the legislation in question. In our view, the requirement of impartiality in this instance turns on the question of who has access to such information by reason of their presence in the Customs process. Although the requirements of reasonableness and impartiality are distinct in nature, both relate to the question of information flows in this case.*

While Australia considers that the reference to "reasonable" is not a reference to the timeliness of the decision, nonetheless, the length of time a decision takes to be made could be a factor to consider when determining the quality of that decision. The length of time a decision takes to be made, be it particularly short or particularly long, could be a factor in determining that the decision was not "reasonable".

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?

As stated above, Australia considers that the reference to "reasonable" in Article X.3(a) is a reference to the quality not the timeliness of the decision, but that nonetheless, the length of time a decision takes to be made could be a factor to consider when determining the quality of that decision. In relation X:3(b) the reference to "promptness" is a reference to the timeliness of the decision and the speed at which the decision is made is the only consideration under that element. A review process could be reasonable, in that the decision has taken into consideration all relevant information and weighed it impartially and fairly with sound judgement, yet nonetheless not have taken place in a prompt manner. Conversely, a review process that occurs promptly may be not be reasonable if, for example, it has failed to consider relevant information, has not treated that information fairly or as not come to a sound conclusion.

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?

Australia considers this to be a question of whether there is a right to appeal at an interlocutory stage – after the guarantee value has been determined but before it has been applied. Australia considers that the only justification for such a right of appeal would seem to be a very broad reading of the words "shall govern the practice of". Such a reading would imply that the obligation that the outcome of the appeal should "govern the practice of" the valuing body creates a right to appeal during the various stages of "the practice of" that body's administrative process.

Australia considers that in the absence of an express reference to a right to appeal at an interlocutory stage, it should not be read into the language of Article X:3(b).

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 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?

Australia considers that as long as the right to appeal the final decision was capable of overturning any stage of the process, then those individual stages in the process should not have a right to appeal at interlocutory stages in the administrative process unless such a right is expressly provided for in the agreement.