THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

(WT/DS371/R)

Third Party Written Submission of Australia

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US – Malt Beverages	GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R – 39S/206, adopted on 19 June 1992

I. INTRODUCTION

1. Thailand's appeal in respect of certain aspects of the Panel's findings in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* ('the Panel Report') under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) raises systemic issues concerning the application of obligations of WTO Members under the General Agreement on Tariffs and Trade 1994 (GATT 1994). In particular, the appeal raises systemic issues under Articles III:2, first sentence, III:4 and X:3(b) as well as the application of the exception at Article XX(d).

II. PANEL FINDINGS SUBJECT OF APPEAL

2. Thailand has appealed a number of aspects of the Panel Report. Australia will address the following issues in its submission:
   - whether administrative requirements related to the collection of VAT were correctly characterised as falling within the scope of Article III:2, first sentence;
   - whether 'could potentially affect' is a sufficiently high threshold to find that a measure accords less favourable treatment to imported like products within the meaning of Article III:4;
   - whether the Panel correctly applied Article XX(d) in relation to violations of Article III:4; and
   - whether acceptance of a guarantee for the payment of customs duties in the course of determining the customs value of imported goods amounts to an 'administrative action' within the scope of Article X:3(b) and, in any event, whether the availability of a review procedure on that decision after the final valuation notice has been issued (but before it is applied) is sufficient for the purposes of Article X:3(b) obligations.

III. AUSTRALIA'S SUBMISSION ON THE PANEL'S FINDINGS

A. ARTICLE III:2, FIRST SENTENCE

3. Thailand argues in its appeal that the Panel erred in its findings, primarily due to the Panel's characterisation of a requirement which Thailand states is 'fundamentally administrative' as falling within the scope of Article III:2, first sentence[1].

4. The measure at issue relates to Thailand's Value Added Tax (VAT) scheme and the appeal is specifically concerned with the different mechanisms applied to the collection of VAT in relation to resellers of domestic as compared with imported cigarettes. Australia understands that under Thailand's VAT scheme resellers of domestic cigarettes are exempt from VAT whereas resellers of imported cigarettes are not exempt, but may claim input tax credits on VAT paid in purchasing the imported product through compliance with certain administrative requirements[2].

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[1] Thailand, *Appellant Submission*, 22 February 2011, para. 78.
[2] Panel Report, paras 7.572 – 7.592.

5. Thailand argues that:
   (a) certain VAT administrative requirements applied to imported products are not 'internal taxes or other internal charges' and therefore fall outside the scope of Article III:2 of GATT 1994[3], and
   (b) even if such requirements do fall within the scope of Article III:2, the measure does not subject imported cigarettes to such taxes or charges 'in excess' of the like domestic product[4].

6. Australia submits that consideration of this ground of appeal must first examine the threshold issue of whether the measure at issue has been correctly characterised by the Panel as falling within the scope of Article III:2. A first step therefore is to examine whether the Panel correctly identified the measure at issue. In Australia's view, the Panel is unclear as to whether the measure at issue is the VAT scheme *per se*, which by its nature is clearly an 'internal tax' and therefore falls within the scope of Article III:2, or whether the measure comprises the mechanisms used to collect the VAT. The latter view would confine consideration to the VAT exemption provided to resellers of domestic cigarettes and the additional administrative reporting requirements for resellers of imported cigarettes.

7. Thailand's appeal argues that mechanisms for collecting the VAT and the additional administrative reporting requirements for resellers of imported cigarettes which facilitate this process should be considered in isolation from consideration of Thailand's VAT scheme. Thailand argues that 'these requirements are fundamentally administrative rather than fiscal in nature...'[5], and therefore do not fall within the scope of Article III:2. That is, the 'risk' of excess tax burden arises not from the calculation of the level of taxation, but from the non-compliance with an administrative requirement[6].

8. In Australia's view, it is difficult to separate each component of Thailand's VAT regime if each component contributes to and affects the overall tax burden. That is, whether a sale of a product is exempt from or whether a reseller may apply for input tax credits to relieve itself of the tax burden is, in Australia's view, relevant and indistinguishable from the tax regime itself.

9. The application of Article III:2 to a mechanism for the collection of certain taxes was considered by the panel in *Argentina - Hides and Leather*. In that case, the measure in question provided for a pre-payment of taxes. The panel found that such measures fell within the scope of Article III:2, stating:

> We consider that RG 3431 and RG 3543 [the measures] are properly viewed not as taxes in their own right, but as mechanisms for the collection of the IVA [value-added tax] and IG [income tax]. What is special, however, about RG 3431 and RG 3543 as mechanisms for the collection of the IVA and IG is that they provide for the imposition of charges. We recall that Article III:2 covers 'charges *of any kind*' (emphasis added). The term 'charge' denotes, *inter alia*, a 'pecuniary burden' and a 'liability to pay money laid on a person …'. There can be no

[3] Thailand, *Appellant Submission*, 22 February 2011, paras 34 - 86.
[4] Thailand, *Appellant Submission*, 22 February 2011, paras 87 – 105.
[5] Thailand, *Appellant Submission*, 22 February 2011, para. 78.
[6] Thailand, *Appellant Submission*, 22 February 2011, para. 80.

> doubt, in our view, that both RG 3431 and RG 3543 impose a pecuniary burden and create a liability to pay money.
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> ...We agree that Members are free, within the outer bounds defined by such provisions as Article III:2, to administer and collect internal taxes as they see fit. However, if, as here, such 'tax administration' measures take the form of an internal charge and are applied to products, those measures must, in our view, be in conformity with Article III:2. There is nothing in the provisions of Article III:2 to suggest a different conclusion. If it were accepted that 'tax administration' measures are categorically excluded from the ambit of Article III:2, this would create a potential for abuse and circumvention of the obligations contained in Article III:2. It must be stated, moreover, that the applicability of Article III:2 is not conditional upon the policy purpose of a tax measure. On that basis, we cannot agree with Argentina that charges intended to promote efficient tax administration or collection *a priori* fall outside the scope of Article III:2[7].

10. Based on the reasoning in *Argentina – Hides and Leather,* Australia submits that the administrative nature of Thailand's tax collection mechanism tax measure does not mean *a priori* that it falls outside the scope of Article III.2. For example, in the *US – Malt Beverages* dispute under GATT 1947, the panel held that a measure preventing imported products from being sold in a manner that would enable them to avoid taxation was considered within the scope of Article III.2, first sentence, because it assigned a higher tax rate to the imported products[8]. Similarly, in that case, a measure granting tax exemptions to products using local ingredients which was not made available to imported like products was found to fall within the scope of Article III:2[9].

11. If we are to apply this reasoning to the consideration of whether the collection mechanism for Thailand's VAT scheme falls within the scope of Article III:2, Australia notes that the collection mechanism affects the calculation of the cumulative VAT payable because the non-fulfilment of the administrative requirements for resellers of imported cigarettes (or indeed the rejection of a claim for input tax credits from such resellers) directly results in a higher tax burden on that imported product. In contrast, the VAT exemption applied to the resale of domestic cigarettes provides relief from payment of VAT. Australia submits that the collection mechanism itself, even considered separately from the VAT scheme, constitutes a 'tax' for the purposes of Article III:2 as it potentially results in a higher cumulative tax burden on the reseller of imported cigarettes.

12. If the measure does fall within the scope of Article III:2, first sentence, the investigation of its consistency with that Article requires a determination of whether imported and domestic cigarettes amount to 'like products', as well as whether the taxes or charges applied directly or indirectly to the imported products are 'in excess of' those applied to the domestic product[10].

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[7] Panel Report, *Argentina – Hides and Leather*, paras. 11.143 – 11.144.
[8] GATT Panel Report, *US – Malt* Beverages, para 5.21.
[9] GATT Panel Report, *US – Malt* Beverages, para 5.22.
[10] See for example the Appellate Body Report, *Japan-Alcoholic Beverages II*, pp. 18-19:

> Read in their context and in the light of the overall object and purpose of the *WTO Agreement*, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are 'like' and, second, whether the taxes applied to the imported products are 'in excess of' those applied to the like domestic products. If the imported and domestic products are 'like products', and if the taxes applied to the imported products are 'in excess of' those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

13. Thailand does not contest the Panel's findings that imported and domestic cigarettes are 'like products' within the same price segments[11]. Instead, Thailand focuses on the question of whether the 'internal taxes and other charges' are applied to the imported cigarettes 'in excess' of the domestic product.

14. Australia notes that the panel in *Japan - Alcoholic Beverages II* found that the phrase 'not in excess of' 'should be interpreted to mean at least identical or better tax treatment'[12]. The Appellate Body in the same dispute confirmed this view, stating that '[e]ven the smallest amount of "excess" is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard'[13].

15. Further, the panel in *Argentina-Hides and Leather* stated that:

> Article III:2, first sentence, is not concerned with taxes or charges as such or the policy purposes Members pursue with them, but with their economic impact on the competitive opportunities of imported and like domestic products.[14]

16. Similarly, in *Japan – Taxes on Alcoholic Beverages II*, the Appellate Body looked to the broader legal purpose of Article III of GATT 1994 stating:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products." [T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs."[15]

17. Having regard to those findings in *Japan – Alcoholic Beverages II* and *Argentina - Hides and Leather*, Australia's view is that the application of the term 'in excess' involves an analysis of the economic impact of the measure and its effect on competitive opportunities between the imported and domestic like products. This analysis is to be undertaken in light of the Appellate Body's view that '[e]ven the smallest amount of "excess" is too much'[16].

18. Thailand argues in its appeal that the Panel's finding of a violation of Article III:2 is not based on the relative tax burdens, but on the regulatory requirements for imposition of VAT. Thailand contends that in practice, under Thailand's VAT regime, the cumulative total VAT payable is the same for both domestic and imported

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[11] Panel Report, para. 7.451.
[12] Panel Report, *Japan-Alcoholic Beverages II*, para. 6.24.
[13] Appellate Body Report, *Japan-Alcoholic Beverages II*, p. 23.
[14] Panel Report, *Argentina - Hides and Leather*, paras. 11.182-183.
[15] Appellate Body Report, *Japan-Alcoholic Beverages II*, p. 16, citing *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345, para. 5.10; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; *Japan - Customs Duties,Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b); and *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, para. 11.
[16] Appellate Body Report, *Japan-Alcoholic Beverages II*, p. 23.

cigarettes, even though the VAT is applied and collected by different processes (i.e. VAT on domestic cigarettes is collected from the manufacturer and VAT on imported cigarettes is collected from the consumer). As Thailand notes, the same conclusion is reached in the transaction chart included in the reasoning of the Panel Report[17].

19. However, as Thailand acknowledges in its appeal, 'a risk of excess taxation may give rise to a violation of Article III:2'[18]. Therefore, in Australia's view consideration of this issue must also take into account the risk of a rejection of a claim from a reseller of imported cigarettes for input tax credits. Based on Australia's understanding of Thailand's VAT regime, where a claim for input tax credit by a reseller is rejected the actual tax burden is higher, whereas this risk is not faced by resellers of domestic cigarettes which are automatically exempt from VAT. Australia further notes Thailand's contention that there is no such risk as only claims which are not in fact legitimate (or cannot be proved) are rejected. However, domestic cigarette resellers are not required to provide any such proof in order to claim an exemption from VAT. In Australia's view the additional administrative requirement applicable to resellers of imported cigarettes and inherent risk of a higher tax burden if this requirement is not met should be a consideration in determining whether the taxes are 'in excess' under Article III:2, first sentence.

B. ARTICLE III:4

20. In broad terms, the national treatment obligation embodied in Article III:4 requires WTO Members to provide 'equality of competitive conditions for imported products in relation to domestic products.'[19] In determining whether Thailand's VAT regime violated Article III:4 of GATT 1994, the Panel examined three issues: '(i) whether the Thai regulations at issue impose an extra-administrative burden on resellers of imported cigarettes; (ii) whether this alleged extra-administrative burden, if found to exist, has any negative impact on the competitive conditions for imported cigarettes in the Thai market; and (iii) whether Thailand demonstrated that this alleged modification of the competitive conditions could still be justified under Article III:4'[20].

21. In relation to the first and second issue, the Panel found that the 'VAT-related requirements under the Thai law may potentially modify the conditions of competition for the imported cigarettes in the Thai market[21]'. To support its findings, the Panel considered evidence in relation to: (i) the accumulated burden of administrative requirements; (ii) cross-price elasticity; (iii) the impact on decisions of suppliers; and (iv) the overall tax burden.

22. In its appeal, Thailand argues that the Panel's analysis and findings were insufficient to support a finding of 'less favourable treatment' under Article III:4 of GATT 1994. Thailand argues that the findings are based on 'the theoretical possibility that the

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[17] Panel Report, p. 273.
[18] Thailand, *Appellant Submission*, 22 February 2011, para. 81.
[19] Apellate Body Report, *Japan-Alcoholic Beverages II*, pp. 16-17.
[20] Panel Report, para. 7.667.
[21] Panel Report, para. 7.733.

differences *could* affect the costs and *could potentially affect* the competitive position of imported cigarettes in a negative manner'[22]. (original emphasis)

23. Thailand argues that the Panel's finding that the different measures 'could potentially affect' was not a high enough threshold to determine that a measure was in violation of the 'less favourable treatment' obligation under Article III:4. It argues that the establishment of such a low threshold would potentially result in an inability to provide for any 'different' measures without violating Article III:4. Such an outcome would be contrary to existing WTO jurisprudence establishing that a measure may provide for different treatment of imported and domestic like products without necessarily amounting to 'less favourable treatment'[23].

24. Australia notes, however, that Thailand argues that 'the right to treat imported products differently may include the right to impose additional or more complicated requirements so long as they do not amount to "less favourable" treatment'[24] (emphasis added). Australia submits that GATT 1994 provides no such 'rights'. Rather, the application of Article III:4 by panels and the Appellate Body merely indicates that different treatment is not sufficient for a finding that Article III:4 has been violated. For example, in *Korea – Beef*, the Appellate Body said that:

> A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated 'less favourably' than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products. [25]

25. Equally it has been established that a measure need not be 'less favourable' in every case to be found inconsistent with Article III:4[26]. However, the question at issue in this appeal is how probable does the risk of 'less favourable treatment' need to be in order for the measure to be found inconsistent with Article III:4, that is, what is the threshold of risk that determines whether different treatment constitutes treatment 'no less favourable'.

26. While any determination of less favourable treatment must be made on a case-by-case basis on the facts of each matter, in Australia's view consideration of the thresholds applied in previous WTO disputes is a useful starting point. For example, the panel in *China –Audiovisual Services* stated that:

> [t]hus, the burden is on the United States to demonstrate that the challenged measures may reasonably be expected to adversely modify the conditions of competition, not necessarily that

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[22] Thailand, *Appellant Submission*, 22 February 2011, para. 120.

[23] See for example, Panel Report, *China – Publications and Audiovisual Products*, para 7.1469:

> [n]ot every form of differential treatment has an impact on competitive opportunities. Therefore, the burden is on the United States to demonstrate, through supporting evidence, that a measure adversely affects the competitive opportunities of imported products in relation to their distribution. Mere assertion is not enough.

[24] Thailand, *Appellant Submission*, 22 February 2011, para. 129.

[25] Appellate Body Report, *Korea – Beef*, para. 137.

[26] See for example, Appellate Body Report, *US – FSC (Article 21.5)*, para 221; and Panel Report, *Canada - Wheat*, para. 6.349.

> those measures have actually had an adverse effect or would have one in every instance..[27] (emphasis added)

27. In *India – Autos* the panel considered whether the potential adverse impact of a measure on a manufacturer's choice of product amounted to less favourable treatment, and stated that:

> the very nature of the indigenization requirement generates an incentive to purchase and use domestic products and hence creates a disincentive to use like imported products. This requirement is more than likely to have some effect on manufacturers' choices as to the origin of parts and components to be used in manufacturing automotive vehicles.[28] (emphasis added)

28. Although not exhaustive, in Australia's view these disputes provide useful points of reference in the application of Article III:4[29]. In Australia's view, the terms 'may reasonably be expected' and 'is more than likely' stipulate a higher threshold than that applied by the Panel of 'may potentially modify'. Australia submits that the consideration of this issue by the Appellate Body should take account of the broader systemic implications of a lower threshold in relation to the treatment 'no less favourable' standard. We note that it is a separate matter to determine whether, in light of the appropriate threshold, the Philippines submitted sufficient evidence in this dispute to satisfy that threshold.

C. ARTICLE XX

29. Thailand has further appealed the Panel's findings that Thailand could not rely on the defence under Article XX(d) of GATT 1994 in respect of any claims under Article III:4. In reaching this conclusion, the Panel applied the two pronged test articulated by the Appellate Body in *Korea – Beef*[30]:

> [f]irst the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance.[31]

30. The Panel found that as the measure was itself inconsistent with a provision of GATT 1994, Article XX(d) could not be relied upon. However, Thailand argues in its appeal that this is a misapplication of the exception as the Panel's finding in respect of Article XX(d) is based on the determination that the VAT regime as a whole is inconsistent with Article III:4, a determination that contradicts the Panel's earlier finding that it is the 'VAT-related administrative requirements imposed on resellers of imported cigarettes' which are inconsistent with Article III:4, rather than the imposition of a VAT *per se*[32].

31. Having regard to that earlier finding by the Panel, Thailand argues that the VAT regime constitutes the 'laws or regulations' that are themselves consistent with GATT

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[27] Panel Report, *China – Publications and Audiovisual Products*, para 7.1471.
[28] Panel Report, *India – Autos*, para. 7.201.
[29] See also Appellate Body Report, *China – Autos*, paras 195-196; Panel Report, *US – FSC (Article 21.5)*, para 8.158; and Appellate Body Report, *Dominican Republic Cigarettes*, para 96.
[30] Panel Report, para. 7.757.
[31] Appellate Body Report, *Korea – Beef*, para 157.
[32] Panel Report, para 7.738.

1994, and the 'VAT-related administrative requirements imposed on resellers of imported cigarettes' is the measure that is 'necessary' to secure compliance with the VAT regime.

32. Australia is concerned that the Panel failed to clearly identify the 'laws or regulations' under consideration, and the measure alleged to be designed so as to 'secure compliance' with such laws or regulations. As Thailand referenced in its appeal, the panel in *US-Shrimp (Thailand)* stated in its consideration of Article XX(d):

> [a] necessary step in this analysis is thus to identify which are those US laws or regulations the compliance with which the EBR is aimed at securing, whether they are not themselves WTO-inconsistent, and whether the EBR is itself designed to secure compliance with the aim[33].

In our view the seeming failure by the Panel to undertake this identification compromised its ability to consider the XX(d) defence.

33. If, as Thailand argues, it is not the VAT regime itself that has been found inconsistent with Article III:4, but the mechanism for the implementation of that regime, then the Panel should have considered whether that mechanism could be justified under Article XX(d). This would require the application of the test stated by the Appellate Body in *Korea-Beef* [34]to first determine whether the mechanism for implementation of the VAT was designed to 'secure compliance' with the VAT regime. In our view, based on the evidence before the Panel, the design of the measure is 'at least in part' to secure such compliance[35].

34. The second consideration is to determine whether the measure is 'necessary', to secure such compliance. The Appellate Body in *Korea-Beef* stated that:

> ...determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[36]

35. In undertaking such analysis consideration should also be given to 'the range of possible alternative measures' that could similarly secure compliance with the VAT regime[37]. In Australia's view, this requires consideration of the different implementation mechanisms applied to resellers of imported and domestic cigarettes to determine whether the difference in the mechanisms is 'necessary' to secure compliance with Thailand's VAT regime. In this respect, Australia notes the Philippines' arguments before the Panel that the defence under Article XX(d) must fail because that Article cannot justify both the VAT-related administrative

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[33] Panel Report, *US-Shrimp (Thailand)*, para 7.174; see also Thailand, *Appellant Submission*, 22 February 2011, para. 149.
[34] Appellate Body Report, *Korea – Beef*, para 157.
[35] Appellate Body Report, *Korea – Beef*, para 153.

[36] Appellate Body Report, *Korea – Beef*, para 164.
[37] Appellate Body Report, *Korea – Beef*, para 168.

requirements imposed on resellers of imported cigarettes and the exemption accorded to resellers of domestic cigarettes[38].

D. ARTICLE X:3

36. Thailand's appeal of the Panel's findings in respect of Article X:3(b) focuses on two key issues: (i) whether the acceptance of guarantees for the payment of customs duties in the course of determining the customs value of imported goods amounts to an 'administrative action' within the scope of Article X:3(b); and (ii) whether Article X:3(b) is complied with by making available a review process in relation to the acceptance of such a guarantee where such review is made available after the issuing of the final valuation notice (but before it is applied).

37. The Panel found that the acceptance of a guarantee for the payment of customs duties fell within the scope of Article X:3(b) because: (i) 'administrative action' under Article X:3(b) is not limited to final administrative determinations[39]; (ii) Article X:3(b) extends to 'so-called intermediary actions taken prior to the final determination where the actions result in an immediate adverse affect on traders'[40]; and (iii) the acceptance of a guarantee is not a mandatory step in the determination of a customs valuation and is therefore a decision in its own right related to the securing of payment of the final customs duty.[41]

38. Thailand's appeal repeats arguments made before the Panel that the acceptance of a guarantee is a provisional decision and therefore does not fall within the scope of Article X:3(b) of GATT 1994. Australia supports this view, noting that the Panel identifies the purpose of the acceptance of a guarantee as being 'a tool in the form of a surety or a deposit that enables importers to withdraw their goods from customs when it becomes necessary for a customs office to delay the final determination of the customs value of imported goods.'[42] Australia submits that it is difficult to distinguish such a decision from the final determination of the customs value of the imported goods. In our view the decision should be characterised as a provisional, or interlocutory, decision made pending the final decision as to customs valuation. Australia remains of the view 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).'[43]

39. Australia observes that while the Panel found that Article X:3(b) was not limited to final decisions, it also held that:

> [a]t the same time, however, we can think of a situation where the provisional characteristics of an administrative action or determination would render such an action or determination to fall outside the scope of Article X:3(b). For example this would be the case if subjecting the concerned action or determination to an independent review would result in unduly interfering

[38] Panel Report, para. 7.751, citing Philippines' first oral statement, para. 228.
[39] Panel Report, para. 7.1035.
[40] Panel Report, para. 7.1035.
[41] Panel Report, para. 7.1043.
[42] Panel Report, para. 7.1039.
[43] Australia's response to Panel questions p. 8.

> with a domestic agency's decision-making process, mainly due to the provisional nature of the action.[44]

Australia notes that the Panel does not then consider whether the acceptance of guarantees for the payment of customs duties in the course of determining the customs value of imported goods may be such a case. Australia submits that an external review process on this provisional decision could effectively pre-empt and thereby interfere in the final valuation decision being undertaken by the domestic agency.

40. In relation to the second aspect of Thailand's appeal in this Article, Australia again refers to its previous statements to the Panel in this dispute that '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.'[45] Australia further submits that Members are under no obligation to provide such review mechanisms for interlocutory decisions under Article X:3(b).

IV. CONCLUSION

41. Australia considers that this appeal raises important systemic issues which have broad implications for the interpretation of Member's obligations under Articles III:2, first sentence, III:4 and X:3(b) of GATT 1994, as well as for the application of the exception at Article XX(d). In this submission, Australia has sought to draw attention to specific aspects of the appeal which in its view should be taken into account in analysing a Member's obligations under GATT 1994.

42. In particular, Australia notes the lack of clarity in the Panel's findings concerning the characterisation and identification of the measure, or laws and regulations, at issue in relation to both Articles III:2 and XX(d). Australia also identifies broader systemic concerns arising from the Panel's finding that a measure that 'may potentially modify' the conditions of competition is sufficient to constitute treatment 'no less favourable' within the meaning of Article III:4.

43. Finally, Australia considers that the Panel's application of Article X:3(b) fails to acknowledge the interlocutory nature of a decision on a guarantee for the payment of customs duties in the course of determining the customs value. Australia does not consider that Members are obliged to provide for review of such interlocutory decisions in the absence of an express reference to such a right of appeal in Article X:3(b).

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[44] Panel Report, para. 7.1035.
[45] Australia's response to Panel questions p. 9.