THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

(AB-2011-1/DS371)

Third Participant Oral Statement of Australia

Geneva, 18 April 2011

A. INTRODUCTION

Members of the Division.

1. Thank you for the opportunity to present Australia's views on this appeal. Australia has provided a written submission identifying some key issues of systemic and legal interest raised by Thailand's appeal on the Panel's findings in this dispute. Australia would like to briefly address some of those key issues.

B. THE ISSUES UNDER APPEAL

(a) "internal taxes or other charges" (Article III:2 of GATT 1994, first sentence)

2. Australia notes a fundamental difference between how the principal parties have identified the measure at issue in relation to Article III:2 of GATT 1994. The Philippines contends that the measure at issue is the obligation to pay, or the exemption from the obligation to pay, VAT. In contrast, Thailand argues that the measure comprises only the administrative mechanisms used to collect the VAT. In Australia's view, the correct identification of the measure at issue is a critical threshold matter. Only when that matter is decided can it be determined whether the Panel was correct in finding that the measure falls within both the first sentence of Article III:2 and Article III:4 of GATT 1994.

3. Australia considers that if the measure is the obligation to pay VAT then it is well understood that such a measure would fall within the scope of "internal taxes or other internal charges" for the purposes of Article III:2. On other hand, while an administrative mechanism for the collection of taxes does not *a priori* fall outside the scope of Article III:2, such a measure requires further examination to determine whether it should be appropriately characterised as "internal taxes or other internal charges" within the scope of the first sentence of Article III:2.[1]

4. As noted in our written submission, *Argentina - Hides and Leather* and *US-Malt Beverages* provide examples of matters which have been taken into account by previous panels in undertaking such an examination.[2] Based on the findings of the panels in those disputes, Australia considers that it was a matter for the Panel to determine, on the basis of the available information, whether the characteristics of Thailand's administrative requirement for collection of VAT are such that the requirement amounts to an "internal tax or other charge" and therefore falls within the scope of the first sentence of Article III:2.

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[1] Panel Report, *Argentina – Hides and Leather*, paras. 11.143 – 11.144.

[2] Australia, *Third Party Written Submission of Australia*, 15 March 2011, paras. 9-10 ciiting: Panel Report, *Argentina – Hides and Leather*, paras. 11.143 – 11.144; and GATT Panel Report, *US – Malt* Beverages, para 5.21- 5.22.

(b) "in excess of" (Article III:2 of GATT 1994, first sentence)

5. In relation to the Panel's finding that Thailand's VAT measure applied internal taxes or other charges to imported cigarettes "in excess" of those applied to domestic cigarettes, Australia notes Thailand's claim that in practice the cumulative total VAT payable is the same for both domestic and imported cigarettes. Thailand argues that the different treatment merely relates to the regulatory arrangement by which the VAT scheme is applied and collected.

6. In considering the application of Article III:2 to Thailand's VAT scheme, Australia supports the Panel's finding that Thailand's VAT scheme imposes VAT liability on resellers of imported cigarettes which is not automatically offset without the need for the fulfilment of administrative requirements. Therefore if a reseller does not exercise his or her right to make a claim for input tax credits, or if such a claim is made and subsequently rejected, it would result in the application of a higher tax burden. In Australia's view, it is significant that such a risk is not faced by resellers of domestic cigarettes as they are automatically exempt from payment of VAT.[3]

(c) "less favourable treatment" (Article III:4 of GATT 1994)

7. Thailand's appeal asks the Appellate Body to consider how likely it needs to be that a measure will result in "less favorable treatment" for imported like products in order to find that there has been a violation of Article III:4. Australia submits that this question should be determined case-by-case on the basis of supporting evidence provided to the Panel by the parties. Australia notes that previous panel decisions, including *China-Audiovisual Services*[4] and *India-Autos*,[5] illustrate the different factors and evidential requirements that may affect the determination of this issue in each case.

(d) application of Article XX(d) of GATT 1994

8. I now turn to 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. Australia submits that the panel's reasoning in applying this Article raises some inconsistencies in the identification of the "laws or regulations" under consideration, and the measure alleged to be designed so as to "secure compliance" with such laws or regulations. Australia notes that these inconsistencies may be the result of a clerical error in the Panel's report as identified by the Philippines in its submission. The Philippines asserts that the Panel's report incorrectly refers to the "administrative requirements" as the "laws or regulations", when in fact it should have referred to the obligation to pay VAT.[6] Australia submits that this matter should be resolved to assist the consideration of Thailand's appeal on the Panel's findings in relation to the applicability of Article XX(d).

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[3] Panel Report, paras. 7.635 – 7.637.
[4] Panel Report, *China – Audiovisual Services*, para 7.1471.
[5] Panel Report, *India – Autos*, para. 7.201.
[6] Philippines, *Appellee Submission*, 14 March 2011, paras. 231-232, citing Panel Report, para 7.758.

(e) "administrative action" (Article X:3(b) of GATT 1994)

9. Turning to Article X:3(b), Australia notes that the Panel found that in some situations, "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)".[7] Based on such reasoning, Australia considers that the provisional nature of a decision is relevant, if not determinative, of whether a particular decision falls outside of the scope of Article X:3(b).

10. Further, Australia suggests that the application of the Panel's reasoning would require that the obligation to provide review of a decision under Article X:3(b) should be assessed on a case-by-case basis, taking into account the nature and characteristics of the security and the particular circumstances in which it is applied. In Australia's view such an assessment should consider the broader systemic implications of requiring review procedures to be available in respect of such ancillary matters, including whether the nature of the decision is such that it would be an inefficient and inappropriate use of resources to conduct external review. For example, it may be inappropriate to review a provisional decision where liability only arises at the time of the final decision. Additionally, it may be inefficient and unnecessary to provide for a review of a provisional decision where that decision becomes redundant by the making of a final decision, which itself is subject to review on request.

C. CONCLUSION

11. Members of the Division, Australia would be pleased to provide answers to any questions on these or any other matters related to the appeal.

[7] Panel Report, para. 7.1035.