

**THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES
FROM THE PHILIPPINES**

Request for the Establishment of a Panel by the Philippines

The following communication, dated 29 September 2008, from the delegation of the Philippines to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

I. INTRODUCTION

1. On 7 February 2008, the Philippines requested consultations with the Kingdom of Thailand pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Article 19 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the "*Customs Valuation Agreement*") with respect to certain customs valuation and internal tax measures. The Philippines request was circulated on 12 February 2008 as document WT/DS371/1, G/L/847, and G/VAL/D/9. Consultations were held on 23 April 2008 and on 9 September 2008, but failed to produce a mutually agreed solution.

2. The Philippines considers that the measures at issue nullify or impair the benefits accruing to the Philippines under the GATT 1994 and the *Customs Valuation Agreement*. Pursuant to Article XXIII:2 of the GATT 1994, Article 19.1 of the *Customs Valuation Agreement*, and Article 6 of the DSU, the Philippines therefore requests the Dispute Settlement Body ("DSB") to establish a panel with standard terms of reference under Article 7.1 of the DSU in order to examine the matter and measures described below.

II. CLAIMS UNDER ARTICLES X:3(A) AND X:3(B) OF THE GATT 1994

3. The Philippines is a major exporter of cigarettes to Thailand. The Thai Tobacco Monopoly ("TTM") is the only business entity authorized by Thai law to produce cigarettes in Thailand. TTM has a market share of approximately 80 per cent. TTM's products are, therefore, the main competitor of the Philippines cigarettes in the Thai cigarette market.

4. There are numerous personal and institutional links between the Thai government and TTM that create serious conflicts of interests in the administration of Thai fiscal and customs legislation pertaining to cigarettes, and lead to biased, partial, and unreasonable administration of Thai law. By way of example, TTM is a business unit of the Thai Ministry of Finance, which is responsible for the administration of the value added, excise, health and television taxes, as well as customs duties. Furthermore, the Minister of Finance has authority to appoint and remove directors on the TTM Board of Directors, and the TTM Board of Directors includes or has included senior Ministry

officials, such as the Director General for Excise and the Director General for Customs, who are engaged in the administration of customs duties and taxes on cigarettes.

5. These pervasive institutional and personal links between TTM and the Thai government lead to conflicts of interest, and partial and unreasonable administration of Thai fiscal and customs measures. In particular, Thailand administers in a partial and unreasonable manner:

- the customs valuation measures in paragraph 13;
- the excise tax measures in paragraph 19;
- the health tax measures in paragraph 20;
- the television tax measures in paragraph 21; and
- the value added tax ("VAT") measures in paragraph 26.

6. In addition, in determining the guarantee or cash amount that importers of cigarettes may be required to deposit upon entry, Thailand administers its legal provisions pertaining to guarantees in a partial and unreasonable manner. In particular, Thailand administers in a partial and unreasonable manner:

- the provisions of the Customs Act B.E. 2469¹ (1926) (as amended) in respect of guarantees (specifically, Sections 112, 112 bis, 112 ter, and 112 quater);
- Customs Regulation No. 2/2550 (2007) Guideline to determine customs price valuation; and,
- any amendments, implementing measures, or measures related to the measures listed in this paragraph.

7. Moreover, Thailand's Department of Special Investigations (DSI) is conducting an investigation of the importer in relation to the declared customs value of imports from the Philippines. This investigation has been conducted in an unreasonable manner and is taking undue time to conclude. The unreasonable nature of this investigation is highlighted by the fact that Thai Customs has conducted a parallel investigation to that of the DSI and, on 19 June 2008, concluded with a finding that the importer had engaged in no wrong-doing.

8. Furthermore, Thailand does not administer the customs valuation measures and the VAT measures in a reasonable manner because of undue delays in its administrative decision making. For instance, the Board of Appeals (BoA), an administrative tribunal within the Ministry of Finance, which operates under Section 112 sexies to Section 112 undevicies of the Customs Act, to which an appeal against a customs valuation decision is initially made, has a substantial backlog of appeals filed by the importer dating as far back as March 2003. The excessive delays violate Articles X:3(a) and also X:3(b), which requires WTO Members to maintain tribunals for the purpose of the "prompt review and correction of administrative action relating to customs matters".

9. Thailand also routinely ignores a 90-day deadline set in Thai law in Section 45 of the Administrative Procedure Act B.E. 2539 (1996) for administrative decisions in appeals against the maximum retail selling prices (MRSPs) set by the Thai Excise Department, which serves as the tax

¹ The "B.E." year number designates the year in the Buddhist calendar. The year number in parentheses designates the corresponding year A.D.

basis for VAT. By way of example, the relevant body took more than 15 months to deliver its decision in respect of an appeal submitted by the importer in September 2006. Other appeals, as yet unresolved, have been pending for approximately 15 months. These delays are incompatible with Article X:3(a).

10. Finally, Thailand does not provide for judicial or administrative review of the customs authorities' decisions relating to the imposition and collection of guarantees, pending the issuance of a notice of assessment, covering the customs duties and excise, health and television taxes that may become payable. Given that Thailand has taken 16 months to issue Notices of Assessment, and that guarantees are collected as either bank guarantees or in cash for the full amount of duties potentially payable, it is not reasonable administration under Article X:3(a) to deny recourse to judicial or administrative review. Equally, this failure is contrary to the duty in Article X:3(b) to provide for "prompt review" of administrative actions relating to customs matters.

11. For all these reasons, Thailand violates Articles X:3(a) and X:3(b) of the GATT 1994.

III. CLAIMS PERTAINING TO CUSTOMS VALUATION

12. Between 2003 and August 2006, the Customs Department of the Kingdom of Thailand ("Thai Customs") routinely accepted as the basis for customs valuation the transaction value declared by importers on entries of imported cigarettes. However, from August 2006, Thai Customs rejected the transaction value declared by importers on such entries as the basis for valuation, both for purposes of determining the amount of monies that importers are required to deposit as guarantees for the duties that may be payable on such entries, as well as for purposes of the final assessment of duties. Instead, on a general and prospective basis, Thai Customs arbitrarily pre-determined values that were higher than the declared transaction values and applied these values to all entries of imported cigarettes, in place of the declared transaction values. Thai Customs allowed the importer to withdraw the subject goods from customs only if the importer made a payment on the basis of the declared transaction value and deposited a guarantee of customs duties² covering the difference between the declared transaction value and the applicable pre-determined value. Subsequently, Thai Customs issued a final assessment of customs value that was higher than the declared transaction value and that reflected the applicable pre-determined value, which was changed from time to time.

13. The measures at issue include:

- 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;
- individual determinations made by Thai Customs for entries of cigarettes exported from the Philippines and entered between 4 August 2006 and 17 March 2008, including:
 - (a) the Notices of Assessment for the entries listed in Annex I to this request; and,
 - (b) the assessment of value for purposes of setting the guarantee or cash deposit at the time of entry for the entry listed in Annex II to this request;
- Customs Act, B.E. 2469 (1926), including all amendments;

² As well as guarantees of excise, health and television taxes (effective 1 January 08).

- Ministerial Regulation No. 132 B.E. 2543 (1990) issued under authority of the Customs Act B.E. 2469 (1926) and the amending Ministerial Regulation No. 145 B.E. 2547 (2004) and Ministerial Regulation No. 146 B.E. 2550 (2007);
- Notification No. 23/2549 (2006) of Thai Customs, containing guidelines on customs valuation;
- Customs Regulation No. 2/2550 (2007) Re: amendment of the Customs Formalities and Guidelines Code B.E. 2544 (2001) re: Customs formalities to prevent Customs value duty evasion, and amendment of Customs Department Regulation No. 14/2549 (2006) re: Guideline for Fixing of Customs Value;
- Customs Regulation No. 14/2549 (2006), re Guideline for Fixing of Customs Value, as amended by Customs Regulation No. 2/2550 (2007);
- Customs Notification No. 29/2549 (2006) Procedure in requesting duty fee assessment; and
- any amendments, implementing measures, or measures related to the measures listed in this paragraph.

14. As a result of these measures, Thailand has failed to use transaction value as the basis for customs value, contrary to Articles 1.1, 1.2(a), and 1.2(b) of the *Customs Valuation Agreement* and the interpretative Notes to these provisions, as well as paragraphs 1 and 2 of the General Introductory Commentary. In so doing, Thailand failed to communicate the grounds for considering that the relationship between the parties influenced the declared price, as required by Article 1.2(a). Thailand also failed to conform to the sequence of valuation methods mandated by the *Customs Valuation Agreement*, and used a valuation method that has no basis in the *Customs Valuation Agreement*. These actions are inconsistent with Articles 2, 3, 4, 5, 6, and 7, as well as the relevant interpretative Notes. These measures are also inconsistent with Article 13 of the *Customs Valuation Agreement*, as well as Article II:1(b) and II:3 of the GATT 1994.

15. Thailand has, in addition, failed to provide an explanation for the determination of the pre-determined values applied to entries at the time of importation and at the time of final assessment, breaching its obligations under Article 16 of the *Customs Valuation Agreement*.

16. The Philippines considers that, for all these reasons, Thailand also acts inconsistently with Articles VII:1, VII:2(a), VII:2(b), and VII:2(c) of the GATT 1994. Moreover, Thailand has failed to publish the bases and methods for determining the value of cigarettes imported from the Philippines. This is in violation of Article VII:5 of the GATT 1994.

17. Further, Thai government officials appear to have publicly disclosed CIF values of imported cigarettes in the Thai media. The public disclosure of such business-confidential information is in violation of Article 10 of the *Customs Valuation Agreement*.

IV. CLAIMS PERTAINING TO THE EXCISE TAX, HEALTH TAX AND TELEVISION TAX REGIMES

18. Thailand imposes an *ad valorem* excise tax, health tax, and television tax, on both imported and domestic cigarettes. For imported cigarettes, the basis for all these taxes is the CIF customs value as determined by the Thai customs authorities, whereas for domestic cigarettes it is an ex-factory price determined by the Director-General for Excise.

19. The Philippines understands that Thailand operates the excise tax regime through measures including:

- the Tobacco Act B.E. 2509 (1966), Sections 5, 5 ter, and 5 quinquies;
- Notices of Director-General for Excise, setting out the ex-factory prices. The currently applicable ex-factory prices are set out in the Notice B.E. 2550 (2007) of 29 August 2007; and,
- any amendments, implementing measures, or measures related to the measures listed in this paragraph.

20. The Philippines further understands that Thailand operates the health tax regime through measures including the Health Promotion and Foundation Act, B.E. 2544 (2001), in particular Sections 11, 12, and 13 thereof, and any amendments, implementing measures or other related measures.

21. The Philippines further understands that Thailand operates the television tax regime through measures including the Thai Public Broadcasting Service Act 2551 (2008), in particular Sections 12, 13, and 14 thereof, and any amendments, implementing measures or other related measures.

22. As developed in Section III, Thailand determines excessive customs values for Philippine exports of cigarettes inconsistently with the *Customs Valuation Agreement*, and because these customs values serve as the tax basis for imposing the excise tax, the health tax and the television tax, Thailand imposes a higher tax burden on imported products than on like and/or directly competitive or substitutable domestic products.

23. By so doing, Thailand acts inconsistently with Article III:2, first and second sentence. This discrimination against imported cigarettes is compounded by the fact that Thai law contains no procedure for cigarette importers to claim a refund of the portion of the excise tax, health tax and television tax paid as a result of the excessive customs valuation. Nor does Thai law contain a mechanism for ensuring the release of guarantees for excise tax, health tax and television tax payments that have been posted pending final determination of customs value. The failure of Thailand to provide for such procedures, as well as Thailand's failure to grant refunds for amounts of these taxes that have been overpaid, results in a violation of Article III:2, first and second sentence. It also constitutes partial and unreasonable administration of the measures referred to in paragraphs 19, 20, and 21, contrary to Article X:3(a) of the GATT 1994, and a failure to publish trade regulations, contrary to Article X:1 of the GATT 1994.

24. Thailand also has not published the regulations pertaining to the methodology for determining the ex-factory prices, which constitute the tax basis for Thailand's imposition of the excise, health and television taxes on domestic cigarettes. As a result, Thailand is in violation of Article X:1 of the GATT 1994, which requires governments to publish trade laws and regulations of general application.

V. CLAIMS PERTAINING TO THAILAND'S VALUE-ADDED TAX ("VAT") REGIME

A. THAILAND'S VAT REGIME

25. Under Thailand's fiscal regime, VAT on cigarettes is calculated by reference to brand-specific maximum retail selling prices ("MRSPs"). These MRSPs are determined by the Thai Government through executive acts applying solely to domestic cigarettes on one hand, and separate executive acts applying solely to imported cigarettes on the other hand. The MRSPs are modified from time to time.

In the last two and a half years, the MRSPs for imported cigarettes have been changed more frequently than those for domestic cigarettes.

26. The Philippines understands that Thailand operates the VAT regime for cigarettes through measures including:

- Sections 79/5, 81, 82/7, 88, 88/2, 88/5, 88/6, 89(4), and 89/1 of the Revenue Code of Thailand;
- Section 23 of the Tobacco Act B.E. 2509 (1966);
- Royal Decree, issued under the Revenue Code, Governing the Reduction of the Value Added Tax Rates (No. 479), B.E. 2551 (2008);
- Royal Decree issued under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (1991);
- Order of the Revenue Department No. Por 85/2542 (1999);
- Notification of the Director-General of the Revenue Department on VAT (No. 10);
- MRSP Notices issued by the Director-General for Excise. The currently applicable MRSPs are set out in the Notice B.E. 2550 (2007) of 29 August 2007 (for domestic products) and in the Notice B.E. 2551 (2008) of 19 August 2008 (for imported products); and
- any amendments, implementing measures or other measures related to the measures listed in this paragraph.

27. The MRSPs for imported brands of cigarette, including those exported by the Philippines, are set at significantly higher levels than the MRSPs for like and/or directly competitive or substitutable domestic brands. Moreover, the MRSPs for imported cigarettes are set significantly above the actual retail selling price of those cigarettes, whereas the MRSPs for domestic cigarettes are set at the level of the actual retail selling price of those cigarettes. The higher MRSPs for imported products result in a higher fiscal burden for these products than for like and/or directly competitive or substitutable domestic products, and thereby afford protection to the domestic products. Therefore, the Philippines considers that the VAT imposed on imported products as a result of these measures is inconsistent with Article III:2, first and second sentence, of the GATT 1994.

28. Thailand also has not published the regulations pertaining to the determination of the MRSPs, which constitutes the tax base for Thailand's imposition of VAT on domestic and imported cigarettes. This failure is a violation of Article X:1 of the GATT 1994. Moreover, Thailand has not published any rules governing VAT refunds in the event of a revision of the MRSP or of an element thereof, giving rise to another violation of Article X:1 of the GATT 1994. Finally, Thailand's failure to grant refunds in these circumstances for overpaid amounts of VAT is contrary to Article III:2 of the GATT 1994.

B. OTHER VAT-RELATED REQUIREMENTS

29. Thailand imposes different VAT-related requirements on wholesale and retail sellers of cigarettes, depending on whether they sell domestic or imported products. In particular, these sellers are subject to VAT when they sell imported products but are exempt when they sell like and/or directly competitive or substitutable domestic products. Moreover, because wholesale and retail

sellers of imported cigarettes are subject to VAT, whereas wholesale and retail sellers of domestic cigarettes are not, the former are also subject to VAT administrative requirements that are not imposed on sellers of the like and/or directly competitive or substitutable domestic product. The Philippines understands that the measures in which these discriminatory requirements are contained include Sections 81 and 82/7 of the Revenue Code, Royal Decree issued under the Revenue Code Governing Exemption from Value Added Tax (No. 239) B.E. 2534 (1991), and Order of Revenue Department Por 85/2542, and any amendments, implementing measures or other related measures.

30. The Philippines considers that these measures are inconsistent with Articles III:4 and III:2, first and second sentence, of the GATT 1994.

ANNEX I

**LIST OF ENTRIES FOR WHICH DEFINITIVE ASSESSMENT NOTICES
HAVE ALREADY BEEN ISSUED**

NUMBER	IMPORTS ENTRY NO	DATE OF LANDING	DATE OF CLEARANCE
1	0505-0084980242	11 June 2006	15 August 2006
2	0505-0084980687	11 June 2006	15 August 2006
3	0505-0084980688	17 June 2006	15 August 2006
4	0505-0084980243	24 June 2006	15 August 2006
5	0505-0084980689	24 June 2006	15 August 2006
6	0505-0084980244	3 July 2006	15 August 2006
7	0505-0084980690	3 July 2006	15 August 2006
8	0505-0084980245	11 July 2006	15 August 2006
9	0505-0084980691	11 July 2006	15 August 2006
10	0505-0084980247	24 July 2006	15 August 2006
11	0505-0084980693	24 July 2006	15 August 2006
12	0505-0084980246	26 July 2006	11 August 2006
13	0505-0084980692	26 July 2006	15 August 2006
14	0505-0084980248	30 July 2006	15 August 2006
15	0505-0084980694	30 July 2006	15 August 2006
16	0505-0084980249	31 July 2006	15 August 2006
17	0505-0084980695	31 July 2006	15 August 2006
18	0321-0084902292	5 August 2006	18 August 2006
19	0321-0084902229	5 August 2006	18 August 2006
20	0321-0084906059	20 August 2006	24 August 2006
21	0321-0084907903	28 August 2006	1 September 2006
22	0321-0084907964	28 August 2006	31 August 2006
23	0321-0084907956	28 August 2006	31 August 2006
24	0321-0094900553	4 September 2006	7 September 2006
25	0321-0094902458	11 September 2006	13 September 2006
26	0321-0094904405	16 September 2006	22 September 2006
27	0321-0094906102	25 September 2006	27 September 2006
28	0321-0104900059	2 October 2006	5 October 2006
29	0321-0104904282	16 October 2006	19 October 2006
30	0321-0104904177	16 October 2006	19 October 2006
31	0321-0104904464	16 October 2006	19 October 2006
32	0321-0104906134	21 October 2006	25 October 2006
33	0321-0104906133	23 October 2006	25 October 2006
34	0321-0104908031	30 October 2006	2 November 2006
35	0321-0104908413	30 October 2006	2 November 2006
36	0321-0104907945	30 October 2006	2 November 2006
37	0321-0114901060	5 November 2006	29 January 2007
38	0505-0015081406	18 November 2006	23 January 2007
39	0505-0015081407	18 November 2006	23 January 2007
40	0505-0015081443	2 December 2006	23 January 2007
41	0505-0025080093	2 December 2006	5 February 2007
42	0505-0015081444	11 December 2006	23 January 2007
43	0505-0025080094	11 December 2006	5 February 2007
44	0505-0025080095	11 December 2006	5 February 2007

NUMBER	IMPORTS ENTRY NO	DATE OF LANDING	DATE OF CLEARANCE
45	0505-0025080562	11 December 2006	12 February2007
46	0505-0015081442	18 December 2006	23 January 2007
47	0505-0015081440	18 December 2006	23 January 2007
48	0505-0025080096	18 December 2006	5 February2007
49	0505-0025080097	18 December 2006	5 February2007
50	0505-0025080563	18 December 2006	12 February2007
51	0505-0015081441	25 December 2006	23 January 2007
52	0505-0025080098	25 December 2006	5 February2007
53	0505-0025080564	25 December 2006	12 February2007
54	0505-0025080101	13 January 2007	5 February2007
55	0505-0025080099	15 January 2007	5 February2007
56	0505-0025080100	15 January 2007	5 February2007
57	0505-0025080565	15 January 2007	12 February2007
58	0505-0025080566	15 January 2007	12 February2007
59	0505-0025080567	22 January 2007	12 February2007
60	0505-0025081290	29 January 2007	21 February2007
61	0505-0025081289	29 January 2007	21 February2007
62	0505-0025081291	5 February 2007	21 February2007
63	0321-0025003881	11 February 2007	16 February2007
64	0505-0025081808	19 February 2007	28 February2007
65	0505-0035080539	26 February 2007	9 March 2007
66	0505-0035080540	5 March 2007	9 March 2007
67	0505-0035080541	5 March 2007	9 March 2007
68	0505-0035081176	12 March 2007	16 March 2007
69	0505-0035081177	12 March 2007	16 March 2007
70	0505-0035081178	12 March 2007	16 March 2007
71	0505-0035081179	12 March 2007	16 March 2007
72	0505-0035081651	19 March 2007	23 March 2007
73	0505-0035081652	19 March 2007	23 March 2007
74	0505-0035081653	19 March 2007	23 March 2007
75	0321-0035007837	26 March 2007	28 March 2007
76	0321-0045000370	2 April 2007	4 April 2007
77	0321-0045000358	2 April 2007	4 April 2007
78	0321-0045004200	9 April 2007	19 April 2007
79	0321-0045004175	9 April 2007	19 April 2007
80	0321-0045005032	16 April 2007	25 April 2007
81	0321-0045005880	23 April 2007	25 April 2007
82	0321-0045005874	23 April 2007	25 April 2007
83	0321-0045008416	30 April 2007	3 May 2007
84	0321-0045008421	30 April 2007	3 May 2007
85	0321-0055000164	30 April 2007	3 May 2007
86	0321-0055002134	7 May 2007	11 May 2007
87	0321-0055001895	7 May 2007	11 May 2007
88	0321-0055004026	14 May 2007	17 May 2007
89	0321-0055003067	14 May 2007	17 May 2007
90	0321-0055005939	21 May 2007	23 May 2007
91	0321-0055005654	21 May 2007	23 May 2007
92	0321-0055007319	28 May 2007	30 May 2007
93	0321-0055007327	28 May 2007	30 May 2007

NUMBER	IMPORTS ENTRY NO	DATE OF LANDING	DATE OF CLEARANCE
94	0321-0065000474	4 June 2007	7 June 2007
95	0321-0065000518	4 June 2007	7 June 2007
96	0321-0065002831	11 June 2007	13 June 2007
97	0321-0065002822	11 June 2007	13 June 2007
98	0321-0065005236	18 June 2007	20 June 2007
99	0321-0065007027	25 June 2007	27 June 2007
100	0321-0065007026	25 June 2007	27 June 2007
101	0321-0065009038	2 July 2007	5 July 2007
102	0321-0065009039	2 July 2007	5 July 2007
103	0321-0075002062	9 July 2007	11 July 2007
104	0321-0075002036	9 July 2007	11 July 2007
105	0321-0075004181	16 July 2007	18 July 2007
106	0505-0085080140	16 July 2007	3 August 2007
107	0321-0075006402	23 July 2007	25 July 2007
108	0321-0075008334	30 July 2007	3 August 2007
109	0321-0085000004	30 July 2007	3 August 2007
110	0321-0085001654	6 August 2007	9 August 2007
111	0321-0085001285	6 August 2007	9 August 2007
112	0321-0085003945	13 August 2007	16 August 2007
113	0321-0085003944	13 August 2007	16 August 2007
114	0321-0085005555	20 August 2007	23 August 2007
115	0321-0085005531	20 August 2007	23 August 2007
116	0321-0085007597	27 August 2007	29 August 2007
117	0321-0085007572	27 August 2007	29 August 2007
118	0321-0095002684	10 September 2007	13 September 2007

ANNEX II

**LIST OF ENTRIES FOR WHICH VALUE HAS BEEN ASSESSED
FOR PURPOSES OF SETTING THE GUARANTEE OR CASH DEPOSIT
AT THE TIME OF ENTRY AND FOR WHICH DEFINITIVE
ASSESSMENT NOTICES HAVE NOT YET BEEN ISSUED**

NUMBER	IMPORTS ENTRY NO	DATE OF LANDING	DATE OF CLEARANCE
1	0321-0035007838	26 March 2007	28 March 2007
