



January 25, 2019

The Honorable Werner Zdouc
Director of the Appellate Body Secretariat
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
1211 Geneva 2
Switzerland

Re: Thailand's appeal in *Thailand - Customs and Fiscal Measures affecting Cigarettes from the Philippines (Article 21.5 of the DSU)*

Dear Director Zdouc:

This letter is submitted in the above captioned appeal on behalf of four leading U.S. business associations: the U.S.-ASEAN Business Council ("US-ABC"); the United States Council for International Business ("USCIB"); the National Association of Manufacturers ("NAM"); and the National Foreign Trade Council ("NFTC"). These four business associations provided a submission to the Panel in these proceedings on May 12, 2017, which we attach for your ease of reference ("Submission").

As the Submission elaborates, each of the associations authoring this submission has a direct interest in improving the flow of trade and promoting investment activities in the ASEAN region. We work on behalf of our members—who are significant participants in the international trade system—to foster an open and fair international trade and investment regime.

We recognize the important contribution that the World Trade Organization's ("WTO") multilateral rules-based system makes to promoting greater security and predictability in international trade, including the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ("Valuation Agreement"). That Agreement relies on simple and equitable

criteria that are consistent with normal business practices, and it ensures a consultative process between the customs administration and importers that is fair and transparent. For the members of our associations, the proper implementation of the Valuation Agreement is important.

In our Submission, we expressed concerns with Thailand's implementation of the Valuation Agreement. We noted that several WTO Members have drawn attention to repeated problems with Thailand's administration of customs rules and procedures, including criminal enforcement of alleged customs fraud. We mentioned as a particular problem Thailand's legislative scheme for reward sharing as part of Thailand's customs enforcement, which entitles officials to receive a sizeable share of any fines imposed on importers. The United States has observed that the scheme "creates conflicts of interest, provides incentives for rent-seeking and hampers trade."¹ The U.S. Department of Commerce has identified Thailand's rewards scheme as a potential impediment for U.S. businesses operating in Thailand.² The Department also noted that Thailand's "customs valuation procedures" are a "[m]ajor problem area."³

Against that background, which is more fully explained in our Submission, any conclusion contrary to the Panel's finding would create an obvious and unacceptable opportunity for importing countries to evade the WTO's valuation rules: the initial collection of duties would be subject to the Valuation Agreement, but subsequent action under criminal rules to enforce the payment of duties would not. Allowing an importing country to use different, WTO-inconsistent valuation rules when taking steps to enforce duty collection would deprive importers of the security and predictability that the Valuation Agreement is intended to confer.

We are also troubled by Thailand's appeal because it is contrary to basic features of the valuation process that help to ensure decision-making that is informed, fair, and transparent.

¹ Thailand's 2015 Trade Policy Review, minutes of meeting, WT/TPR/M/326, para. 4.79.

² See Thailand - Market Challenges <https://www.export.gov/article?id=Thailand-market-challenges>.

³ See Thailand - Market Challenges <https://www.export.gov/article?id=Thailand-market-challenges>.

Sincerely,

U.S.-ASEAN Business Council
United States Council for International Business
National Association of Manufacturers of the United States of
America
National Foreign Trade Council

Attachment: Submission by Four Associations, dated May 12, 2017

Attachment



May 12, 2017

Chairman of the Panel
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
1201 Geneva 21
Switzerland

Re: *Thailand - Customs and Fiscal Measures affecting Cigarettes from the Philippines*

Dear Mr. Chairman:

This amicus submission is jointly authored by four leading U.S. business associations: the U.S.-ASEAN Business Council ("US-ABC"); the United States Council for International Business ("USCIB"); the National Association of Manufacturers of the United States of America ("NAM"); and the National Foreign Trade Council ("NFTC"). We thank the Panel for this opportunity to share our views on the issues raised in this dispute.¹

This submission is based on the Philippines' panel request filed at the World Trade Organization ("WTO") on June 29, 2016, which raises complaints against Thailand under, among others, the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, more commonly known as the Valuation Agreement. Of particular concern to our organizations are the allegations that Thailand has engaged in improper customs valuation.

¹ We note that the Appellate Body has held that panels in dispute settlement proceedings may accept and consider the views of non-governmental organizations. See Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 110. We therefore respectfully request that the Panel give due consideration to our views as presented herein.

Each of the business associations authoring this submission has a direct interest in improving the flow of trade and promoting investment activities in the ASEAN region:

- The US-ABC is the premier advocacy organization for over 150 U.S. corporations operating within ASEAN, and works to promote mutually beneficial trade and investment relationships between the United States and Southeast Asia. More information on the US-ABC may found at <https://www.usasean.org/>.
- The USCIB has a membership of over 300 global corporations, professional firms and industry associations, and advocates for an open system of world trade, finance and investment. More information on the USCIB may found at <http://www.uscib.org/mission-statement-ud-2664/>.
- The NAM is the largest manufacturing association in the United States, and has worked since its creation to foster an open and fair global economy to increase market access for the U.S. manufacturing sector. More information on the NAM may found at <http://www.nam.org/>.
- Finally, the NFTC works on behalf of its members to advocate for public policies that foster an open, rules-based international trade and investment regime. More information on the NFTC may found at <http://www.nftc.org/?id=1>.

Many of our respective members operate through interconnected commercial relationships and supply and production chains with producers and suppliers throughout the United States and foreign countries. These supply and production chains often involve related-party transactions of the type at issue in the present dispute. Our member companies rely on these supply and production chains to produce goods as efficiently as possible and to access international consumers in the global marketplace.

Inefficient and overly burdensome customs procedures can constitute a significant barrier to international trade, costing billions of dollars. The Organisation for Economic Cooperation and Development ("OECD") has repeatedly pointed to the "hidden" costs of trade from, among other things, "inefficient border procedures" and "costly customs procedures," which act as impediments to trade and "ultimately

make goods more expensive for the consumer".² The WTO Trade Facilitation Agreement, which Thailand ratified in 2015, reaffirmed the importance of predictable and transparent customs procedures to reduce costs and streamline trade.

The WTO's multilateral rules-based approach has successfully provided greater uniformity and predictability in customs valuation across the WTO membership. The WTO Valuation Agreement requires implementation of simple and equitable criteria that are consistent with normal business practice, and with procedures that are fair and transparent. The Thai measures challenged by the Philippines violate those rules in a number of respects, as discussed below.

I. The Criminal Charges

The Philippines challenges criminal charges brought by Thailand's Public Prosecutor against Philip Morris (Thailand) Limited ("PM Thailand") for the alleged under-declaration of customs value on a number of import entries. According to the Philippines, these criminal charges allege that PM Thailand's declared prices are "false," and are lower than the alleged "actual" prices that should have been declared, which are the purchase prices paid by a Thai duty-free operator for duty-free cigarettes.

These criminal charges raise two issues of concern to our organizations. As an initial matter, the charges are brought against the backdrop of Thailand's legislative scheme for reward sharing, which entitles officials and informants to receive a sizeable share of any fines imposed on importers. The investigating officials bringing charges, therefore, have personal financial incentives to pursue unjustified criminal charges to the detriment of international trade. We are also concerned that the criminal charges appear to be based on improper customs valuation decisions, particularly with respect to the comparison that appears to be the basis for

² See OECD Policy Brief, *The Costs and Benefits of Trade Facilitation* (October 2005), page 1 (<http://www.oecd.org/trade/facilitation/35459690.pdf>). See also OECD Trade Policy Studies, *Overcoming Border Bottlenecks: The Costs and Benefits of Trade Facilitation* (2009), page 11 (http://www.keepeek.com/Digital-Asset-Management/oecd/trade/overcoming-border-bottlenecks_9789264056954-en#.WQDF79IrJpg).

deciding that the transaction value was too low and must be adjusted upwards.

A. Thailand's reward sharing scheme

Thailand's reward sharing scheme creates a conflict of interest for government officials tasked with enforcing the proper declaration of customs values. In fact, a variety of U.S. government and other stakeholders have raised concerns on this same subject.

The United States, along with other WTO Members, has repeatedly drawn attention to the issue at the WTO. In that context, as far back as 2011, the United States explained that Thailand's "penalty and reward scheme" creates an environment that is "punitive and debilitating to trade."³ In 2015, the United States reiterated that the scheme "creates conflicts of interest, provides incentives for rent-seeking and hampers trade."⁴ Australia, the European Union, and Canada have echoed the United States' concerns.⁵

In addition, the U.S. Department of Commerce ("Commerce") has identified the scheme as a potential impediment for U.S. businesses operating in Thailand, noting the serious criminal penalties for even inadvertent undervaluing of customs entries.⁶ In outlining the issues facing U.S. companies interested in pursuing opportunities in Thailand, Commerce explained that:

Major problem areas include Thailand's customs penalty regime and customs valuation procedures. The penalty for undervaluing imports into Thailand, even if done through negligence or by mistake, can be

³ Thailand's 2011 Trade Policy Review, minutes of the meeting, WT/TPR/M/255, para. 181.

⁴ Thailand's 2015 Trade Policy Review, minutes of the meeting, WT/TPR/M/326, para. 4.79.

⁵ See Thailand's 2011 Trade Policy Review, minutes of the meeting, WT/TPR/M/255, para. 181 (the European Union); Thailand's 2011 Trade Policy Review, question and answers, WT/TPR/M/255/Add.1, page 24 (Australia); Thailand's 2007 Trade Policy Review, minutes of the meeting, WT/TPR/M/91, para. 63 (the European Communities), para 58 (Canada).

⁶ See Thailand - Market Challenges (June 1, 2016) (<https://www.export.gov/article?id=Thailand-market-challenges>).

accompanied by a prison sentence of up to ten years. This system is incentivized by the distribution of rewards from these penalty payments to customs officials involved in the investigation of each case.⁷

U.S. exporters have also experienced customs valuation issues in Thailand. In a publicly available letter from 2013, the U.S. Trade Representative ("USTR") expressed concern to Thailand over Thai Customs' treatment of a U.S. exporter, in circumstances that bear a resemblance to the facts at hand. Specifically, the USTR stated that:

We note with particular concern that a key provision of Thai customs law may be contributing to Thai Customs' questionable treatment of [a U.S. exporter]. That is the reward sharing provision, which allows Thai customs officers to keep a large percentage of duties and penalties collected in investigations such as this one. Reward sharing is inconsistent with international practice and ... causes conflict of interest such that key actors, including customs officers, may have a greater interest in collecting large payments from traders than in ensuring effective customs administration.⁸

These statements indicate an ongoing, systemic problem in Thailand, as the reward sharing scheme incentivizes the bringing of inappropriate criminal charges against importers rather than the transparent, predictable administration of customs rules. Exposure to the risk of large fines, imposed on an arbitrary basis by officials that stand to gain personally from the fines, makes doing business in Thailand unpredictable and risky for the companies that we represent.

B. The criminal charges' improper customs valuation

Turning to the substance of the valuation decisions, the Philippines explains that the basis for the accusation against

⁷ See Thailand - Market Challenges (June 1, 2016) (<https://www.export.gov/article?id=Thailand-market-challenges>).

⁸ See Letter from U.S. Trade Representative Michael B.G. Froman to Deputy Prime Minister and Minister of Finance H.E. Kittirat Na-Ranong (July 26, 2013) (<http://thaipublica.org/wp-content/uploads/2013/11/%E0%B8%88%E0%B8%94%E0%B8%AB%E0%B8%A1%E0%B8%B2%E0%B8%A2%E0%B8%88%E0%B8%B2%E0%B8%81USA.pdf>).

PM Thailand in the criminal charges is a comparison between PM Thailand's declared transaction prices on the import entries at issue and the purchase prices paid by a Thai duty-free operator for duty-free cigarettes. In other words, because the declared prices were lower than the alleged "actual" (duty-free) prices, the Thai Public Prosecutor concluded that PM Thailand had under-declared the customs values on these entries.

While every WTO Member retains its own domestic authority to take proper steps to enforce the collection of customs duties and taxes, WTO members must, when doing so, comply fully with all WTO rules in those activities that seek to ensure transparent, fair and non-arbitrary and non-discriminatory application of rules.

In this case, the criminal charges are, at their core, a customs valuation decision. Thailand's government determined that the declared prices are allegedly "false" and, on the other hand, the duty-free prices are deemed to be the "actual" prices. Given that this determination was a customs valuation determination, the Panel should apply the rules of the Valuation Agreement and undertake a vigorous review to ensure that Thailand is complying with commitments it made in order to provide security and predictability to importers in Thailand.

We share the concern that the criminal charges appear to violate a number of provisions of the Valuation Agreement. Most importantly, the underlying principle of the Valuation Agreement is that the primary basis for customs value is the price actually paid or payable for the goods when sold for export to the country of importation. This principle reflects a simple, equitable criterion, consistent with commercial principles, and is a significant element of the Valuation Agreement's pursuit of security and predictability in customs valuation.

We recognize that the transaction value can sometimes be rejected. But a relationship between the buyer and seller is not enough, in itself, for rejection. As the original panel in this dispute explained, if a customs authority has doubts as to the acceptability of the declared transaction value, it must conduct an examination of the circumstances of sale in order to determine whether the relationship did, in fact,

influence the price.⁹ The original panel also emphasized that this must be a rigorous process, involving "critical consideration, inquiry into, and investigation of, the relevant situation."¹⁰ An authority may only reject an importer's declared transaction value if its examination reveals valid grounds for doing so. We are concerned that the Philippines' WTO Panel Request indicates that the Thai government did not engage in that rigorous process or take the appropriate steps to investigate the relevant situation.

It is worth recalling that, before countries adopted the rules in the Valuation Agreement, the rejection of the declared transaction value was often arbitrary. Under Article VII:2(a) of the General Agreement on Tariffs and Trade 1947, the declared value was often replaced by "actual values" that had little to do with the realities of the import transaction in question. Customs authorities developed benchmarks that did not reflect normal business practice. Some countries rejected transaction value just because parties were related.

Before the agreement, there were no safeguards for the transaction value and valuation was not rooted in how prices were agreed in the market. Furthermore, there was no predictability or protection of tariff concessions. Against that background, the safeguards attached to the transaction value in the Valuation Agreement take on particular importance as they were negotiated to address these failings.

As noted above, Thailand's rejection of the allegedly "false" declared prices for the entries subject to the criminal charges appears to have been based on a comparison between PM Thailand's duty-paid prices, on the one hand, and the price paid by a Thai duty-free operator for duty-free cigarettes, on the other. This is not, in our view, a valid basis to reject the declared transaction values, as *duty-free* cigarettes are not an appropriate benchmark to determine if a relationship between the buyer and seller influenced the prices of *duty-paid* cigarettes. Duty-free prices are a valuation benchmark

⁹ Panel Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines* ("Thailand - Cigarettes (Philippines)"), paras. 7.189-7.200.

¹⁰ Panel Report, *Thailand - Cigarettes (Philippines)*, paras. 7.159.

that has nothing to do with the realities facing duty-paid transactions.

This is, of course, because the payment of duties affects the price of duty-paid cigarettes, whereas the prices of duty-free cigarettes are not affected by duties. We agree with the Philippines that, if PM Thailand's declared transaction values were rejected in the criminal charges on the basis of a comparison between duty-free and duty-paid prices, this would (at a minimum) violate Articles 1.1 and 1.2(a) of the Valuation Agreement.

Further, we also agree that, to the extent the criminal charges calculate alternative "actual" prices on the basis of those same duty-free prices, this would violate Articles 2.1(a) and (b), 3.1(a) and (b), or 7.1 and 7.2 of the Valuation Agreement.

II. The Appeals Board Ruling

The Philippines also challenges a ruling by the Thai Board of Appeals ("Appeals Board"), an administrative tribunal that resolves administrative appeals of customs valuation decisions, concerning a different series of import entries. The Philippines alleges that the Appeals Board improperly rejected PM Thailand's declared transaction values for these entries and improperly determined alternative customs values using a deductive method.

As with the customs valuation decisions in the criminal charges, the Appeals Board must accept PM Thailand's declared transaction values unless it has evidence that the relationship between the buyer and seller influenced the price. Absent such evidence, we would agree with the Philippines that the Appeals Board's rejection of the transaction values violates Articles 1.1 and 1.2(a) of the Valuation Agreement.

Even if it were appropriate for the Appeals Board to determine alternative customs values using a deductive method, it is important that all the required deductions are made. The Philippines makes claims about the deductions for profits and general expenses, provincial taxes, transportation charges, and sales allowances. We note that, in the original proceedings, the panel ruled that Thailand had not made appropriate deductions for three of these same items

(provincial taxes, transport costs, and sales allowances). Inadequate deductions for relevant items result in an improperly inflated customs value and therefore the overpayment of customs duties, which places an unfair and inappropriate burden on our members.

Before concluding, we wish to emphasize the importance of a customs administration engaging in customs valuation in a fair and transparent way. The original panel described valuation as a process of consultation between the administration and the importer. An administration must give an importer reasonable opportunities to provide relevant information, and an administration must explain its decisions in a way that allows importers to properly understand them. This does not require every detail to be explained, but it does require that an importer be given enough information to understand the important aspects of the valuation decision. These are basic requirements of transparency that promote good governance in valuation matters. Again, in the original proceedings, the panel found that Thailand violated these procedural requirements.

III. Conclusion

The rules-based approach to customs valuation enshrined in the Valuation Agreement, including the principle that transaction values are to be the primary basis for customs valuation, is of utmost importance for facilitating international trade, and therefore of direct interest to the members of the US-ABC, USCIB, NAM, and NFTC. To the extent the measures taken by Thailand at issue in this dispute encroach on those rules, we urge the Panel to find that Thailand has violated its obligations under the Valuation Agreement so as to preserve and protect the multilateral rules-based approach.

Sincerely,

U.S.-ASEAN Business Council
United States Council for International Business
National Association of Manufacturers of the United States of
America
National Foreign Trade Council