PROBLEMS OF COLLECTING TAX OF IMPORTED TOBACCO IN THAILAND UNDER THE EXCEPTION OF WORLD TRADE ORGANIZATION

BY
MS. KANOKBHORN BOONRAWD

AN INDEPENDENT STUDY PAPER SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAWS
(BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

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Independent Study Paper Title : Problems of Collecting Tax of Imported Tobacco in Thailand under the Exception of World Trade Organization

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ABSTARCT

The overall objective of this independent study is to study the problems of collecting tax on imported tobacco in Thailand under World Trade Organization (WTO) which includes the method of collecting tax under GATT Valuation and Tax Measure for protect public health under Framework Convention Tobacco Control (FCTC) of World Health Organization (WHO). When Thailand is legally binding both treaties, they became the conflict of law that Free Trade principle will be the barrier of protection public health under FCTC. Thailand, as the developing country, is face with serious mortality by smoking.

This Independent Study Paper found that current international rules for valuation of imports in purpose of assessing customs duties are well settled by World Trade Organization that enforced members to observe GATT by adjusting their tax laws. Meanwhile, Thailand is legally binding on the Framework Convention Tobacco Control (FCTC) of WHO which aims at protecting public health of the tobacco epidemic. Thus, free trade of WTO can devastate tobacco control policies by enforcing the States to remove related trade barriers and hamper efforts to reduce domestic consumption of tobacco by imposing excise taxes, duties and then its higher price thereby. Moreover, WTO should have realization on public health by categorizing tobacco as exempted goods in Article XX (b) of GATT and allow tax barrier to be imposed to the imported tobacco products. World todays has much changes than before. Moreover, in the present statistic of tobacco killing had shown tobacco killing more than million human's life. Therefore, it's time to concern that economy growth must grow together with health of people. Public health should be the prior reason in order to protect population's health from hazardous products like tobacco. As we know,

Tax measure is the most effective measure to control of domestic mortality by smoking in Thailand. Hence, collecting tax as excise, VAT and customs duties should raise the rate in every year and also amend the law by apply the new measure of Uruguay Case as fully applying of prohibited sell of sub-brands in the shop and various selling units all over the country which the state can consider applying as domestic law in order to develop the law to battle with epidemic smoking

Eventually there are the recommendation propose to solve the problems in order to improve the laws that although, economy growth will create better life but also killing approximately million lifer a year. It's time that the economy growth should grow together with public health. Hence, tobacco should be the exemption goods thought Article XX (b) and categorize as harmful goods in GATT in order to protect human's life.

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Kanokbhorn Boonrawd

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Chapter 1
Introduction

1.1 Background and General Statement of the Problems

International trade is dispensable for rapid economic growth, reduces poverty and boosts development for developing countries. The free trade regime under General Agreement on Tariff and Trade (GATT) over the past several decades has influenced and brought about the countries' trade transformation and compliance. Several settlements under World Trade Organization (WTO) mainly aim at boosting economic growth and eliminating poverty by free trade and fair competition. However, many countries have still controlled or imposed barriers in their international trade by mechanism of policies and laws. Customs duty is a significant tariff measure applied with import products.

As for customs duty is one major source of revenue of many countries customs valuation system has been applied. Its efficient system could engender efficient tax collection protection of public interest and domestic industry as well as legal actions against the false declaration of importer or exporter. Those potential effects lead to a significant development of customs valuation system called as "GATT Valuation Agreement" of WTO whose members must be binding and observed since becoming member and signatory of the WTO agreements. However, the least developed counties have generally interpreted the rules in term of "protection benefit of state" in different way, in comparison to the developed countries' interpretation.

Since becoming the WTO's member, Thailand' has adjusted many laws and regulations in conformity with WTO Customs Valuation System. Thailand has also

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Thailand has been a WTO member since 1 January 1995 received priority rights and privileges from the member currently 164 countries covering all region worldwide, both developed and developing ones, who are required to observe WTO's fair free trade and principle, and from WTO's general principles like non-discriminatory treatment (MFN and National Treatment), transparency, protection for domestic manufacturers with tariffs only, etc. including from those obligations bound

claimed a right to postponement of enforcement of this agreement until December 31[5] 1999 with reference to a regulatory leniency that a developing country status in the WTO is entitled to certain rights.

In respect of GATT rules' intent, firstly, international trade should be fair and free. Secondly, WTO agreement on customs valuation aims for a fair, uniform and neutral system for the valuation of goods for customs purposes. The abovementioned reasons are why many countries decided to be the State members of WTO, with their expectation of acquiring guarantee on such fair and free trade. WTO allowed the State's power to apply a policy with foreign products imported into its territory by probably imposing less restrictive than domestic products such as subsidy. Nevertheless, this sort of restrictive trade policy can be relatively concluded unlawful under GATT 1994 of WTO. In fact, regardless of their level of development, most countries (including Thailand) anyway have to protect at least their domestic producers, benefit of state and public health of their population. In many jurisdictions, WTO has been viewed that WTO should support healthy of world population that free trade of some imported products may harmful to human health as tobacco.

Nowadays, it is evident that smoking trend is rising which means the more quantity of cigarette is highly supplied. Like other countries, this situation caused serious mortality in Thailand, as smoking is a major cause of disease such as cancer, heart attack, respiratory disease, chronic obstructive pulmonary disease because tobacco contains nicotine which is highly addictive psychoactive drug. The smoking rate of the developed countries annually decreases while the smoking rate of the least developed or developing countries increases higher.

Thailand became the member of Framework Convention on Tobacco Control (FCTC) which was the first international health agreement established by World Health Organization (WHO) and aimed at protecting public health among tobacco epidemic. The FCTC is also a dynamic mechanism to reduce the mortality caused by

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members in sub-agreements on tariff reduction, subsidies, and obstacles to trade, free trade opening for agricultural goods, free trade opening for textile goods, and adoption of sanitation standards, which must be fair and non-discriminatory.

tobacco especially people in the least developed and the developed countries, 180 countries are parties to the WHO FCTC including Thailand.[2]

As for concept of free trade enhances rapidly growth of the economy, free trade of tobacco also affects the human's health. Article 6 of the FCTC provided the price and tax measures to reduce the demand for tobacco. By this, such tax on cigarettes should be increased according to WHO recommendation and exclude cigarettes should be excluded in the list of goods on FTA and WTO agreement categorized as "unhealthy goods" that harmful to public health.

Even though GATT provided general exception in article XX (b) that allows countries to protect health of human, animal or plant life, WTO panels have interpreted this provision narrowly by requiring public health regulation affecting trade must be non-discriminatory, necessary and reasonable impeding enforced tobacco control.

Thus, it was not effective for resolution the extensive smoking problem in Thailand. Moreover, the general exception on the Dispute Settlement Body of WTO had hardly achieved victory excepting "Asbestos case" between Canada as respondent to France ban on asbestos and asbestos containing products which Chrysotile asbestos considered as highly toxic material threatening human health. Moreover, a US report found out that Nicotine addiction is powerful, or even more powerful than heroin addiction but tobacco being still categorized as the normal goods and being the exception in article XX of GATT 1994 because cigarette itself is harmful to human health as same as heroin and being a significant cause of death in Thailand.

With regard to the case "Thailand- Customs and Fiscal Measures on Cigarettes from the Philippines" in October 2008, the Philippines accused Thailand to Dispute Settlement Body (DSB), the organization of WTO of Thailand acted inconsistently with the national treatment principle of GATT and GATT Valuation Code in rejecting the transaction value of the imported cigarettes because it failed to properly examine the circumstances of the transaction between importer and seller. Even though its decision on such dispute was already done but some troubles have still existed. Thai

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[2] World Health Organization, Parties to the WHO Framework Convention on Tobacco Control, at http:// www.who.int/fctc/signatories_ parties/en', (last visited 26 July 2016).

prosecutors accused Philip Morris of evading taxes on imported cigarettes by under-declaring import prices for 272 batches of Marlboro and L&M Brand cigarettes from the Philippines between 2003 and 2006. This case was brought to the Criminal Court on 18 January 2016 so as to claim for 80 billion baht of the tax amount.

This independent study emphasizes on the problem of collecting tax imposed on tobacco which includes the method of collecting tax under GATT Valuation and analysis the exception of collecting tobacco tax.

1.2 Hypothesis of the Study

Current international rules for valuation of imports in purpose of assessing customs duties are well settled by World Trade Organization that enforced members to observe GATT by adjusting their tax laws. Meanwhile, Thailand is legally binding on the Framework Convention Tobacco Control (FCTC) of WHO which aims at protecting public health of the tobacco epidemic. Thus, free trade of WTO can devastate tobacco control policies by enforcing the States to remove related trade barriers and hamper efforts to reduce domestic consumption of tobacco by imposing excise taxes, duties and then its higher price thereby. A phenomenon of contradiction between WTO and WHO is found under the fact that Thailand itself has jurisdiction and responsibility of protecting public health and enforcing independently the laws. WTO should have realization on public health by categorizing tobacco as exempted goods in Article XX (b) of GATT and allow tax barrier to be imposed to the imported tobacco products.

1.3 Objective of the Study

1. To study background, principles, rules and interpretations of Customs Valuation of WTO Customs Valuation Agreement and Thai laws on customs
2. To study principles and interpretation of GATT/ WTO rules and exceptions.
3. To study principles and rules of Framework Convention on Tobacco Control (FCTC) in relation to protection of public health
4. To indicate possible suggestions into application to implement tobacco control under free trade regime

1.4 Scope of the Study

This research paper emphasizes on background, concepts, principles rules and interpretations of WTO Valuation Agreement or called Agreement on Implementation of Article VII of the GATT, their exceptions, Framework Convention on Tobacco Control (FCTC), Thai Customs Valuation and Thai related policies, laws and their interpretations.

1.5 Study Methodology

The methodology of this research is the documentary research and information from both domestic and foreign databases.

1.6 Expectation of the Study

1. To understand background, principles, rules and interpretations of Customs Valuation of WTO Customs Valuation Agreement and Thai laws on customs
2. To understand principles and interpretation of GATT/ WTO rules and exceptions.
3. To understand principles and rules of Framework Convention on Tobacco Control (FCTC) in relation to protection of public health.
4. To provide appropriate suggestions on laws and policies to implement tobacco control under free trade regime

Chapter 2
The General Development, Concept, Principle of Customs Law related to WTO Customs Valuation System and Thai Customs Valuation

2.1 Development and Background of WTO Customs Valuation

In the 1950s, the method of Customs valuation for assessment of import duties for most countries was Brussels Definition of Value (BDV). Under this method, a normal market price, defined as "the price that a good would fetch in an open market between a buyer and seller independent of each other", was determined for each product. Factual deviations from this price were fully taken into account where the declared value was higher than the listed value. This method caused widespread dissatisfaction among traders, as price changes and competitive advantages of firms were not reflected until the notional price was adjusted by the customs office after certain periods of time. New and rare products were often not captured in the lists, which made determination of the normal price difficult.[3]

2.1.1 The Tokyo Round of Multilateral Trade Negotiation

Between 1973 and 1979, a new phase in the history of valuation was in the making. During that period, the GATT multilateral trade negotiations known as the "Tokyo Round" took place in Geneva, representing one of the most significant trade policy events. One of the results of these negotiations was the adoption of the Agreement on the Implementation of Article VII of the GATT, establishing a positive system of Customs valuation based on the price actually paid or payable for the imported goods. It is intended to provide a fair, uniform, and neutral system of valuation of goods for Customs purposes, conforming to commercial realities and

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[3] World Trade Organization, Technical information on Customs Valuation, at https://www.wto.org/english/tratop e/cusvate/cusval info e.htm, (last visited 4 April 2016).

outlawing the use of arbitrary or fictitious Customs values. The Agreement recognizes that Customs valuation should as far as possible, be based on the actual price of the goods to be valued, which is generally shown on the invoice. This price, subject to certain adjustments, is known as the Transaction Value.

A protocol to the 1979 Agreement, deemed to form an integral part thereof, contained provisions concerning special problems and trading needs of developing countries, permitting them to flexibly apply the Agreement. This has become Annex III of the GATT 1994 Valuation Agreement. The Agreement entered into force in 1981.[4]

2.1.2 The Uruguay Round of Multilateral Trade Negotiation

The goal of the Uruguay Round negotiations, as it related to customs valuation, was to "improve, clarify, or expand, as appropriate," the Tokyo Round Code, and thereby win it wider acceptance among the GATT parties. At the time that the Uruguay Round was formally launched, less than one-third of the GATT contracting parties had signed the GATT Valuation Agreement.

The limited participation in the valuation and other Tokyo Round Codes, particularly by developing countries, had been a concern to GATT contracting parties and became an important focus of GATT activity in the years leading up to the Uruguay Round. Both in the GATT Valuation Committee and the Technical Committee in the early 1980s, GATT contracting parties and observers were consulted, special meetings were held, and surveys were produced on the "obstacles" developing countries foresaw in adopting the Valuation Code.

Broadly speaking, three main factors were said to influence the decision of countries not yet signatories to the Valuation Code:

1. The need to take the decision collectively or in a coordinated fashion in the framework of a regional grouping,

2. Concern that the Agreement might not give customs adequate possibilities to deal with false invoicing and to maintain government revenue,

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[4] East African Community Customs Valuation, A Guide to the Customs Valuation of Imported Goods in the East African Community, (East American Community: EAC, 2012), p. 2, (unpublished manuscript).

3. The legal and administrative requirements to be fulfilled by signatories, for example the need to adapt national legislation and procedures and to train staff.

That second point became the main focus of the discussions in the Uruguay Round negotiating group on valuation.

The negotiations on valuation were very much driven by developing-country concerns. It was made clear at the outset by some members within the negotiating group that a new customs valuation agreement or complete overhaul of the existing Tokyo Round Code was not on the table. Rather, countries were asked to identify their particular difficulties with the existing agreement, and to come forward with proposals for change to the existing text.[5]

In the end, the main subjects of negotiations on valuation were largely defined by two proposals.[6]

2.1.3 The Doha Ministerial Conference

The Doha Development Agenda, more popularly known as the Doha Round, is considered by many scholars and economists to be a highly divisive and controversial subject, with volumes of literary works being devoted to its incredible complexity and spotted track record. Officially commencing at the WTO's 5th Ministerial Conference on 2001 in Doha, Qatar and continuing to this day, it has become the longest running trade round in global trade history, now in its 14th year with no definitive end in sight. But what exactly is the Doha Round, what are its main objectives, who are the central players most directly involved in its negotiations, and what are the potential repercussions should this round continue to stagnate or fail

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[5] Sheri Rosenow, World Trade Organization, and Brian O'Shea, A Handbook on the WTO Customs Valuation Agreement, (United Kingdom: Cambridge University Press, 2010), pp.16-22.

[6] One, which was tabled by India, concerned the burden of proof in cases of suspected importer fraud. The second, submitted by Kenya on behalf of the members of Preferential Trade Area for Eastern and Southern African States (PTA), sought to allow the continued use by developing countries of certain valuation practices of the BDV system.

altogether? Answering these questions not only requires a close examination of the Doha Round itself, but also entails an understanding of the prime actors and the socio-economic climate that surrounded it, as well as an understanding of prevailing opinions of the WTO and global trade.[7]

From the beginning, A number of developing countries had asked to extend their five-year transition period for implementing the Customs Valuation Agreement's provisions. This applied to developing countries that had not signed the plurilateral agreement under GATT.

The Customs Valuation Committee had discussed these requests, and approved some extensions effective immediately. The ministers took note of the committee's actions.

In addition, least-developed countries have asked for a further delay in the deadline to implement the agreement. The Doha Implementation Decision urges the Goods Council to consider these requests positively, taking into account the countries' specific circumstances when setting the terms and conditions.

One of the key questions in dealing with customs fraud is to verify whether the declared value of imported goods is correct. Cooperation with the customs authorities in the exporting country can be important for the customs authorities in the importing country.

The implementation decision says member governments have to cooperate in exchanging information, including on export values, within their domestic laws and regulations. The ministers instruct the Customs Valuation Committee to look at practical approaches to verifying the accuracy of declared values, including the exchange of information on export values. The committee has to report to the General Council by the end of 2002.[8]

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[7] William E. Keating, The Doha Round and Globalization: A Failure of World, Economic Development, (New York: The City University, 2015), pp. 26-27.

[8] World Trade Organization, The Doha implementation decision (Customs valuation (GATT Article VII), at https://www.wto.org/english/tratop_e/dda e/ implem explained e.htm, (last visited 4 April 2016).

2.2 Concept and Principle of Customs Valuation under Article VII of GATT

2.2.1 Transparency in Customs Valuation Methods and Procedures

Customs valuation should not always be a subject of dispute between the government and the business community. Hence, a congenial environment should be created so that importers declare the price actually paid or payable for the goods imported.[9] Transparency, fairness and competency in valuation process will guarantee trust of the investors and also affected the rate of growth economy.

Transparency is a major element in the WTO itself (i.e. in the Agreement Establishing the WTO). It is retained also in general requirements imposed by GATT Article X for trade policies and regulations affecting trade in goods, and in more specific requirements built into many other Uruguay Round agreements. These key elements which shaped the functioning of the old GATT system, and which are still present under the GATT1994, will not be discussed further here. Numerous studies of these principles, pitched at every level of detail and sophistication, have been published over the years since the GATT came into force, and have passed judgement on their economic and political effect. The purpose of recalling them here is only to underline that they will continue to operate, and presumably to have similar effects, under the WTO. The discussion which follows will turn instead to changes introduced into the GAIT rules by the Uruguay Round agreements.[1°]

Pushpa Raj Rajkarnikar, Implemantation of the WTO Customs Valuation Agreement in Nepal : An Ex-ante Impact Assessment, (Asia-Pacific Research and Training Network on Trade Working Paper Series, No.18, 2006), p.27. at http://www.unescap.org/sites/default/files/AWP%20No.%2018.pdf, (last visited 4 April 2016).

[1°] The WTO Agreement Series, General Agreement On Tariffs and Trade, at https://www.wto.org/english/res e/booksp e/agrmntseries2gatt_e.pdf, (last visited 6 April 2016).

2.2.2 Non-Arbitrary in Customs Valuation

GATT recognizes the principle that customs value affecting foreign products should not applied arbitrary or fictitious values providing in Article XX of GATTI 994 as a term of "General Exceptions"

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures."

Customs Value shall not be based on value of merchandise of national origin, or customs value arbitrary or fictitious values. Thus, Non-arbitrary is the one of significant principle setting up to guarantee neutralization for WTO' s members.

2.2.3 Non- Distortion in International Trade

The principle of Non-Distortion in International trade existed on agreements that members should not distort transaction value. If the actual value is not ascertainable, customs value should be valuate following the new method came into existence as a consequence of the multilateral agreement on implementation of Article VII.4 Articles 1 through 7 of the agreement define the methods for determination of customs valuation. For cases in which there is no transaction value, or where the transaction value is not acceptable as the customs value because the price distortions by virtue of certain conditions, the Agreement provides five other methods of customs valuation, to be applied in the prescribed hierarchical order. The following six methods constitute the governing code for the determination of values.[12]

However, false declaration still be existed that each country has to provide for adequate penal provisions in its domestic legislation to tackle valuation fraud. Such fraud needs to be curbed with a heavy hand as it not only deprives the

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II Distort transaction value; for customs valuation for protection domestic industries, declaration arbitrary value, or customs valuation against dumping.

[12] Azimuddin Law Associates, GATT Code of Valuation: Transaction Value and the Role of List Prices, at https://www.hg.org/article.asp?id=30642, (last visited 6 April 2016).

state of its legitimate revenue but also causes trade distortion and puts honest traders at a disadvantage. At the same time, unintentional mis-declaration on account of a wrong understanding of the valuation provisions should be dealt with leniently.[13]

2.2.4 Valuation based on Actual Value

The first significant international agreement on customs valuation was reached at 1994 GATT negotiations that established principle to be adhered to by trading partners. These principles, embodied in GATT's Article VII, emphasize that customs value should not be arbitrary, fictitious, or based on value of indigenous goods. It should be real and based on **"actual value",** which is the price of the imported merchandise, or like merchandise, in sales in the ordinary course of trade under fully competitive conditions. Customs value should derive from a sale of offer of sale in the ordinary course of business under fully competitive conditions If the actual value is not ascertainable, customs value should be based on the nearest ascertainable equivalent of such value using prescribed criteria. Customs value shall not be based on value of merchandise of national origin, or arbitrary of fictitious values. These principles have remained the basis for customs valuation since then.[14]

2.2.5 Protection of Confidential Information

Disclosure of confidential commercial information is crucial for the smooth functioning of the system. Much of the information required for the determination of the value of imported goods may be sensitive, in particular when customs undertake special inquire regarding, *inter alia,* royalty arrangements, arrangement between related companies or costs and profits or commissions of importers and exporters.

Article X of the GATT gives a broad definition of what is to be considered confidential "all infoimation which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation." It also

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[13] Mongolian Customs, at http://www.customs.gov.mn/en/k2-items/ 2014-03-25-01-14-12, (last visited 6 April 2016).

[14] Luc De Wulf and Jose B Sokol, Customs Modernization Handbook, (Washington DC.: The World Bank, 2005), p.157.

requires that such information be treated as strictly confidential "by the authorities concerned." This means that customs authorities must give assurance and respect such assurance that the confidential information will be used only for the purposes for which it is furnished by the parties to the transaction. This should prevent the customs authorities from sharing such information with another government department in the same country (e.g. tax authorities) or even the customs authorities of another country. Article X also provides that disclosure may only take place with the specific permission of the person or government providing the information, except insofar as required in the context of judicial proceedings. Ultimately, the efficacy of this provision will largely depend on how Members implement it in their respective laws.'[5]

2.3 Customs Valuation Methodology under Article VII of GATT

There are six methods of valuation applicable to all goods, namely:

1. The transaction value method
2. The transaction value of identical goods
3. The transaction value of similar goods
4. The deductive method
5. The computed method
6. The fall-back value

The methods listed above must be applied in sequence. However, importers may opt for reversal of the order of application of methods (4) and (5). Importers of certain fruit and vegetables also have the option of using a simplified procedure (SPV),[16]

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[15] Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer., The World Trade Organization: Legal, Economic and Political Analysis Volume I, (United States of America: Springer Science Business Media, Inn., 2005), p.566.

[16] European Union Revenue, Customs Manual on Valuation, at https://www, google. co .th/url?sa=t&rct=j &q=&esrc=s&source=web&cd=l&cad=rj a&uact=8&ved= OahUKEwj I03 5j qHPAhVIKo8KHac6BfgQFggcMAA&url=http°/03A%2F%2Fwwvv.revenue. ie%2Fen%2Fabout%2Ffoi°/02,F s16%2Feustoms%2Fvaluation%2Fvaluation.pdf

2.3.1 The Transaction Value Method

The transaction value is defined as "the price actually paid or payable"[17] to the seller, for the goods being imported, when they are sold for export to the customs territory of the Community, subject to the adjustments detailed in paragraph 3.8.[18]

%3Fdownload%3Dtrue&usg—AFQj CNHOEZCseoGPhTP1tVnZgS0xGcv3hQ&sig2=. oFu4XSip7-rOJFFhy5Gntw, (last visited 20 April 2016).

[17] The price actually paid or payable is the total payment made or to be made by the buyer to, or for the benefit of, the seller for the imported goods. It includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller. It may also include payments made by the buyer to a third party to satisfy an obligation of the seller.

[18] (i) There are no restrictions as to the disposal or use of the goods by the buyer other than restrictions which:

(a) Are imposed or required by law or by the public authorities e.g. an import licence;

(b) Limit the geographical area in which the goods may be resold; or

(c) Do not substantially affect the value of the goods;

(ii) The sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued. Where the value of the condition or consideration can be determined it will be regarded as an indirect payment by the buyer to the seller and part of the price actually paid or payable. This applies provided that the condition or consideration does not relate to activities undertaken by the buyer on his/her own account, other than those for which an adjustment is provided in paragraph 3.7.

(iii) No part of the proceeds of any subsequent resale, disposal or use of the goods will accrue directly or indirectly to the seller, unless an adjustment can be made under paragraph 3.7(f); and

(iv) The buyer and seller are not related, see paragraphs 3.4 and 3.5. The only condition that the buyer has to satisfy is that of being a party to the contract of sale. She does not have to be resident or established in the Community.

When reasonable doubts exist regarding the amount submitted as the price actually paid or payable for goods when sold for export to the Customs territory of the Community, customs will notify the importer of the basis for doubting the value and their intention to adjust the value accordingly. Where the proposed adjustment will adversely affect the importer, he/she must be given an opportunity to respond to the customs query and to express their point of view under the "Right to be Heard" provisions before a final decision is taken. If customs decide after they have given the importer the right to be heard to adjust upwards the value declared, the final decision must be notified in writing to the importer and stating clearly that the importer may appeal this decision.[19]

The definition of related persons provides in Article 15(4)[20] of Agreement on Implementation of Article VII. For the purposes of the valuation system, persons, whether natural or legal, may be associated in business with one another. For example one is the sole agent of the other. They will be deemed to be related only if they fall within one of the relationships outlined above.[21]

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[19] European Union Revenue, Customs Manual on Valuation, Ibid., pp.8-9.

[20] For the purposes of this Agreement, persons shall be deemed to be related only if:

(a) they are officers or directors of one another's businesses;

(b) they are legally recognized partners in business;

(c) they are employer and employee;

(d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;

(e) one of them directly or indirectly controls the other;

(f) both of them are directly or indirectly controlled by a third person;

(g) together they directly or indirectly control a third person; or

(h) they are members of the same family.

[21] World Trade Organization, Customs Valuation: Technical Information on Customs Valuation, at https://www.wto.org/english/tratop e/cusval e /cusval info e.htm, (last visited 30 May 2016).

In a sale between related persons, the transaction value will also be accepted as the value wherever the importer demonstrates that such value closely approximates to one of the following occurring at or about the time of importation:

1) the transaction value in sales between buyers and sellers who are not related for identical or similar goods for export to the Community; or

2) the customs value of identical or similar goods, which has been determined under the deductive method or the computed method.

It should be noted that it is a matter for the importer, not customs, to decide whether to apply these tests. Where the tests are applied, due account must be taken of demonstrated differences in commercial levels, quantity levels and the additions. Account must also be taken of any costs incurred by the seller in sales to non-related buyers, which are not incurred in sales to related buyers. The tests may only be used for purposes of comparison. They may not be used to establish substitute values.[22]

2.3.2 The Transaction Value of Identical Goods

This method is defined as the transaction value of identical goods sold for export to the Community and exported at or about the same time as the goods being valued.

In establishing the customs value under the identical goods method, a sale at the same commercial level and in substantially the same quantity should be used to establish the customs value. Where no such sale exists, a sale at a different commercial level and/or in different quantities may be used. Appropriate adjustments must be made to take account of these differences. This can only be done where evidence is made available to show clearly the reasonableness and accuracy of such adjustments. Adjustments will also be permitted to take account of significant differences in transport, handling and insurance charges arising from differences in distances and modes of transport.

In establishing the customs value under the identical goods method, precedence should be given to a transaction value for goods produced by the same person. If no such comparison is possible, then a transaction value for goods produced

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[22] European Union Revenue, Customs Manual on Valuation, Ibid., pp.7-14.

by a different person may be used. If more than one transaction value of identical goods is found, the lowest value should be taken to determine the customs value of the imported goods.

Only those customs values of identical goods determined under the transaction value method can be used in establishing the customs value under the identical goods method. A customs value established, for example, under the deductive method cannot be used.[23]

2.3.3 The Transaction Value of Similar Goods

Refer to Article 3, the transaction value is calculated in the same manner on similar goods if:

1. goods closely resembling the goods being valued in terms of component materials and characteristics
2. goods which are capable of performing the same functions and are commercially interchangeable with the goods being valued
3. goods which are produced in the same country as and by the producer of the goods being valued. For this method to be used, the goods must be sold to the same country of importation as the goods being valued. The goods must be exported at or about the same time as the goods being valued.[24]

2.3.4 The Deductive Value

Using the deductive method the customs value is calculated on the basis of the unit price at which the goods are sold in the Community. The unit price used can be for the imported goods or identical or similar imported goods. They must be sold in the condition as imported and in the greatest aggregate quantity. The buyer and seller cannot be related.

The price is subject to the following deductions:

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[23] European Union Revenue, Customs Manual on Valuation, Ibid., pp.14-15.

[24] World Trade Organization, Technical Information on Customs Valuation, at https://vvyvw.wto.org/english/tratop e/cusval e/cusval info e.htm#4, (last visited on 21 February2017).

(i) Either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in the Community of imported goods of the same class or kind. These include the direct and indirect costs of marketing the goods in question;

(ii) The usual costs of transport and insurance and associated costs incurred within the Community; and

(iii) The customs duties and other taxes payable in the Community by reason of the importation or sale of the goods.

The unit price is defined as the price at which the greatest number of units is sold at the first commercial level after importation at which such sales take place. Sales at or about the time of importation of the goods being valued should normally he used under this method. Where, however, such sales do not occur, sales at the earliest date thereafter should be used. This is provided such sales take place within 90 days from the date of importation. The "earliest date thereafter" is defined as the date by which sales of the imported goods or of identical or similar imported goods are made in sufficient quantity to establish the unit price. Provision also exists whereby the importer may request that a sale of the imported goods after further processing may be used. This would arise when the imported goods, identical or similar imported goods are not sold in the Community in the condition as imported. Due allowance must be made for the value added by such processing and the deductions provided for above.

The deductive method can only be used provided, insofar as the post-importation sale is concerned, that:

1. the buyer and seller are not related; and

2. the buyer has not supplied, either directly or indirectly, free or at reduced cost, any of the elements, such as assists, for use in connection with the production and sale for export of the imported goods.

Staff should be aware that importers have the option of proceeding to the computed method of valuation before using the deductive method, if they so wish.[25]

[25] European Union Revenue, Customs Manual on Valuation, Ibid., pp.15-16.

2.3.5 Computed Value

Computed value, the most difficult and rarely used method, determines the customs value on the basis of the cost of production of the goods being valued, plus an amount for profit and general expenses usually reflected in sales from the country of exportation to the country of importation of goods of the same class or kind. "

The computed method is used where the seller is the actual producer of the goods and has access to all information relating to the production of the imported goods. The customs value is determined by calculating the sum of the following elements:

1. The cost or value of materials and fabrication or other processing employed in producing the imported goods;

2. An amount for profit and general expenses. The direct and indirect costs of producing and selling the goods for export which are not included under (i) above would constitute such an expense. This amount should equal that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the Community; and

3. The cost of transport and insurance of the imported goods.

The cost or value referred to in indent (i) includes the cost of containers and packing. It also includes the value, apportioned as appropriate, of the items listed in paragraph 3.7(e) (i.e. assists) provided they were used in the production of the goods. The value of design work, etc., is allowable only to the extent that it is charged to the producer.[27]

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[26] World Trade Organization, Customs Valuation: Technical Information on Customs Valuation (Transaction value of Computed Value), at https://www.wto.org/english/tratop e/cusval e/cusval info e.htm#2, (last visited 16 September 2016).

[27] European Union Revenue, Customs Manual on Valuation, at https://www.google .co .th/url ?sa=t&rctij &q=&esrc=s&source=web&cd=l&cad--=rj a&uact=8 &ved=OahUKEwj1035j qHPAhV IKo8KHac6BfgQFggcMAA&url=http%3A%2P/02Fvvww.revenue. ie%2Fen%2Fabout%2Ffo i%2Fs16%2Fcustoms°/02Fvaluation%2Fvaluation.pdf%3Fdownload%3Dtrue&usg—AFQj CNHOEZCseoGPhTP1tVnZgS0xGcv3hQ&sig2=oFu4XSip7-rOJFFhySGntw, (last visited 20 April 2016).

2.3.6 The Fall-Back Value

Definition

"Customs value determination based on "reasonable means consistent with the principles and general provisions of the Agreement, Article VII GATT and on the basis of available data". When the customs value cannot be determined under any of the previous methods, it may be determined using reasonable means consistent with the principles and general provisions of the Agreement and of Article VII of GATT, and on the basis of data available in the country of importation. To the greatest extent possible, this method should be based on previously determined values and methods with a reasonable degree of flexibility in their application.

Valuation criteria not to be used, under the fall-back method, the customs value must not be based on:

1. the selling price of goods in the country of importation (i.e. the sale price of goods manufactured in the importing country);
2. a system which provides for the acceptance for customs purposes of the higher of two alternative values (the lowest should be used);
3. the price of goods on the domestic market of the country of exportation (valuation on this basis would go against the principle in the Preamble that "valuation procedures should not be used to combat dumping");
4. the cost of production other than computed values which have been determined for identical or similar goods (valuation must be arrived at on the basis of data available in the country of importation);
5. the price of goods for export to a third country (two export markets are always to be treated as separate and the price to one should not control the customs value in the other);
6. minimum customs value (unless a developing country has taken the exception which allows for use of minimum values);
7. arbitrary or fictitious values (these prohibitions are aimed at systems which do not base their values on what happens in fact in the marketplace, as reflected

in actual prices, in actual sales, and in actual costs, reason of the importation or sale of the goods are also to be deducted.[28]

2.4 Thai Customs Valuation

2.4.1 Development and Background of Thai Customs Valuation

The customs value of imported goods is determined mainly for the purposes of applying taxes duties. It constitutes the taxable basis for Customs duties. It is also an essential element for compiling trade statistics, monitoring quantitative restrictions, and collecting national taxes. Customs duty presumed levied before the reign of King Ramkhamhaeng of Sukhothai and evolving conform with economy, social and current world.[29]

In those days, dated back to the reign of King Rama IV, a "Tax House" was established to collect Customs duties and taxes on imported goods. Later, the Government in the reign of King Rama V recommended a tax collection system which was first governed by the public sector. The Customs House was later founded and accountable for the collection of all kinds of duties and taxes. The House is presently known as the Customs Department.[3°]

1. Early GATT initiatives on Customs Valuation rules

Before the implementation of the GATT Valuation System, the valuation system of Thailand was based on the notional concept of "true market value". "True Market Value" or "Value" of any goods means the wholesale cash price

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[28] World Trade Organization, Customs Valuation: Technical Information on Customs Valuation (Transaction value of Fall-back method), at https://www. wto.org /english/tratop e/cusval e/cusval info e.htm#2, (last visited 21 April 2016).

[29] Dawadee Dejyuwawes, "WTO Customs Valuation Agreement: An analysis on Thai Customs Practices in Automobile Sector," (Master Degree, Graduate school, Thammasat University, 2010), p. 31.

[3°] The Customs Department, Historical Background, at http://search. customs .go .th: 8090/CustomsEng/Administrator/Historical . j sp?menuNme=AboutUs, (last visited 21 April 2016).

(exclusive of duty in the case of imports), for which goods of the like kind and quality would be sold without loss at the time and place of importation or exportation, as the case may be, without any deduction or abatement.

2. GATT Customs Valuation system

Today, almost all Customs administrations of the current members of WTO value imported goods in terms of the provisions of the WTO Agreement on Customs Valuation. This Agreement establishes a Customs valuation system that primarily bases the Customs value on the transaction value of imported goods, which is the price actually paid or payable for the goods when sold for export to the country of importation, plus, certain adjustments of costs and charges.

Similar to other WTO members, the current valuation system of Thailand is based on the GATT Valuation System that came into effect on 1 January 2000. To implement the GATT Valuation System in Thailand, the national legislation as well as relevant regulations/practices listed below was enacted:

1. Customs Act (No 17) B.E. 2543
2. Ministerial Regulation No 132 B.E. 2543
3. Ministerial Regulation No 145 B.E. 2547
4. Ministerial Regulation No 146 B.E. 2550
5. Customs Code of Practices
6. Customs Notifications and Orders [31]

2.4.2 Commitment and Legislation Thai law related with Article 7 under GATT

WTO concerned that WTO members have to apply the same customs valuation for ensuring neutral that became the adoption of the Agreement on the Implementation of Article VII of the GATT, establishing a positive system of Customs valuation based on the price actually paid or payable for the imported goods. It is intend to provide a fair, uniform, and neutral system of valuation of goods for Customs

[31] Thailand Customs Department, GATT Valuation, at http://www.customs.go.th/wps/wcmJcormect/custen/traders+and+business/customs+valuation/gatt+valuation/gatt, (last visited 21 April 2016).

purposes, conforming to commercial realities and outlawing the use of arbitrary or fictitious Customs values, the result of Tokyo Round effected WTO members had enacted WTO customs valuation to be their law. The GATT Valuation Code bound only those GATT Members that elected to accept its terms.

The principle that the customs value shall be determined on the basis of the transaction value raises difficulties for many developing countries since it entails the risk that customs revenue is forgone due to fraudulent declaration practices of importers. This risk is particularly serious for developing countries which frequently rely on customs duties as a major source of government revenue and is increased by a lack of computerized systems and databases that are required for price comparison to detect customs fraud.[32]

However, the Customs Valuation Agreement also provides for transitional periods for developing country as Thailand to delay application of its provisions for five years from the date of entry into force of the Agreement (Article 20.1); the Protocol provided for the possibility of further extension of this period of delay for implementing their law. And Annex III paragraph 1 to the Customs Valuation Agreement recognized that these five years might be insufficient for certain developing country members to implement the obligation of the agreement allows country Members for whom five years delay in the provisions of the Agreement provided for in Article 20.1 is insufficient to request, before the end of the five-year period, an extension of such a period, it being understood that the Members will give sympathetic consideration to such a request in cases where the developing country member in question can show good cause.[33]

Similar to other WTO members, the GATT Valuation System that came into effect to Thailand, waiver into forced the Customs Valuation Agreement as following;

- Delay application of the agreement for five years from January 1, 1995 to December 31, 1999.

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[32] Isabel Feichtner, The Law and Politics of WTO Waivers, (United Kingdom: Cambridge University Press, 2012), p. 68.

[33] Ibid., p.70.

- Delay application of use the computed value after January 1, 2000 for three years.[34]

Now, the transitional period expired and Thailand had rectified GATT Customs Valuation as Thai Customs Law completely.

2.4.3 Thai Customs Valuation Methodology under GATT Valuation System

Under the GATT Valuation System, the Customs Value of imported goods is the "transaction value". Accordingly, the transaction value is the usual method for establishing the Customs value. It is the price actually paid or payable for imported goods. The transaction value can also be adjusted by the addition of other charges including commissions, assists (materials supplied by the importer), packing costs, proceeds of resale accruing to the seller, inland freight charges (paid to the seller), royalties, and license fees. In addition, the acceptance of transaction value is also subject to certain conditions;

1. There are no restrictions as to the use of the goods by buyers, except those required by laws;
2. The sale or price is not subject to some conditions or considerations for which a value of goods cannot be determined;
3. There are no parts of any subsequent resale of goods will accrue, directly or indirectly to the seller; and
4. The buyer and seller are not commercial-related.

Where the transaction value cannot be applied, the following methods are used in sequential order of application:

1. Transaction Value of Identical Goods (i.e. the transaction value of identical goods sold for export to Thailand)
2. Transaction Value of Similar Goods (i.e. the transaction value of similar goods sold for export to Thailand)
3. Deductive Value (i.e. the sale price of the goods in Thailand adjusted for costs incurred after shipment)
4. Computed Value (i.e. value based on cost of production, general expenses and profits in country of origin relating to the imported goods)

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[34] Dawadee Dejyuwawes, Ibid., p.114.

5. Fall Back Value: The value is determined by Customs and based on flexible interpretation of all the previous methods. Nevertheless, under this method, no Customs value shall be determined on the basis of:

1) Price of similar goods produced in Thailand
2) A system which accepts the higher of two alternative values;
3) Price of same goods on the domestic market of the country of exportation;
4) The cost of production other than computed value;
5) Minimum Customs values; and
6) Arbitrary or fictitious values.

Where a dispute arises between importers and Customs officers regarding the values of any particular products or articles, the importers can file an appeal to the Customs Department within 30 days after receiving Valuation Notification from Customs officers.[35]

2.5 Case Study: Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines

2.5.1 Background

On 7 February 2008, the Philippines requested consultations with Thailand concerning a number of Thai fiscal and customs measures affecting cigarettes from the Philippines. Such measures include Thailand's customs valuation practices, excise tax, health tax, TV tax, VAT regime, retail licensing requirements and import guarantees imposed upon cigarette importers.

The Philippines 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 the measures and claims set out below.

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[35] The Customs Department, Valuation, at http://search.customs.go.th:8090/CustomsEng/Valuation/Valuation.jsp?menuNme=Valuation, (last visited 24 April 2016).

On 29 September 2008, the Philippines requested the establishment of a panel. At its meeting on 17 November 2008, the Dispute Settlement Body ("DSB") established a panel in accordance with Article 6 of the DSU (WT/DSB/M/259), with standard terms of reference, to examine the matter referred to the DSB by the Philippines in document WT/DS371/3. Australia, China, the European Union3, India, Chinese Taipei and the United States have reserved their rights to participate in the Panel proceedings as a third party.[36]

2.5.2 Legal Issues

I. Violated Customs Valuation Agreement

The Philippines claimed that Thai Customs improperly rejected the transaction values of the cigarette entries that were cleared between 11 August 2006 and 13 September 2007 in violation of Articles 1.1 and 1.2(a) of the Customs Valuation Agreement. Under the Customs Valuation Agreement, the main basis for the valuation of imported goods is the transaction value declared by the importer. When Customs questions the declared transaction value, it must follow the procedural rules set out in the Customs Valuation Agreement in examining the circumstances of the transaction between the importer and the exporter and respect the sequential order of valuation methods in using another method to establish the valuation.

Thailand contested the Philippines' claims and claimed that Thai Customs acted consistently with its obligations under the Customs Valuation Agreement in rejecting PM Thailand's declared transaction value. Although the main basis for valuation of goods is the importer's declared transaction value under the Customs Valuation Agreement, in a related-party transaction as was the case here, customs authorities may examine the circumstances of the sale to determine the acceptability of the declared transaction value (i.e. that it was at arms' length). In doing this, however, the customs authority must follow certain procedural obligations set out in Articles 1.1, 1.2(a) and 16 of the Customs Valuation Agreement, including

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[36] World Trade Organization No.DS371 (2011), Thailand -Customs and Fiscal Measures on Cigarettes from the Philippines.

the obligation to give the importer a reasonable opportunity to respond to the customs authority's preliminary consideration. In this regard, Thailand mainly took the position that the burden of establishing that the relationship did not influence the transaction price was on the importer under the Customs Valuation Agreement. According to Thailand, therefore, the decision by its Customs office to reject PM Thailand's (the importer) declared transaction value was consistent with the obligations under the Customs Valuation Agreement because the importer had failed to provide Thai Customs with sufficient information to prove that its relationship with the exporter (PM Philippines) did not influence the transaction price.

The Panel found that the valuation decisions by Thai Customs were inconsistent with both substantive and procedural obligations under, *inter alio,* Articles 1.1 and 1.2(a), and 16 of the Customs Valuation Agreement. The record at the time of Thai Customs' decision to reject PM Thailand's declared transaction value, showed Thai Customs' explanation that the importer had failed prove that its relationship with PM Philippines did not influence the price. The Panel found this explanation insufficient as a basis for Thai Customs' decision to reject the importer's declared transaction value and to give a different customs value to the transaction. As a result, its final valuation decisions were found to be invalid under the obligations of the Customs Valuation Agreement. Particularly, the Panel also found that Thai Customs failed to "examine" the circumstances of sale in accordance with the obligations under Article 1.2(a).

The Philippines further argued that Thai Customs applied the deductive valuation method inconsistently with the obligations under Articles 5 and 7 in determining the customs value of the cigarettes. The Philippines also submitted that Thailand violated procedural obligations under both Article 10, not to disclose confidential information, and Article 16, to provide an explanation for the determination of the final customs value.

The Panel found that Thailand failed to apply the alternative valuation method it used in this case — the deductive valuation method — in accordance with the principles set forth in Articles 7 and 5. Thailand attempted to justify its application of the deductive valuation method to the cigarettes at issue, but failed to disprove the Philippines' argument that Thai Customs had not consulted the importer for any further relevant information as required under Article 7 of the Customs

Valuation Agreement. Thai Customs deducted certain expenses that should have been deducted in accordance with Article 5 of the Customs Valuation Agreement.

2. Violated GATT1994

1) National Treatment (Article 111:2 and 111:4)

ATT Article 111:2 (national treatment — taxes and charges);

The Philippines also challenged a number of measures imposed on imported cigarettes under the Thai VAT regime. It argued that Thailand determined the tax base (MRSP) for VAT on imported cigarettes in such a way that the VAT on imported cigarettes is in excess of that imposed on like domestic cigarettes, in violation of the first sentence of Article 111:2 of the GATT1994. The Philippines further claimed that imported cigarettes are also subject to VAT liability in excess of that applied to like domestic cigarettes, in violation of the first sentence of Article III: 2, as the VAT exemption is only given to domestic cigarette resellers. According to the Philippines, the excessive tax liability imposed on the imported cigarette resellers also results in additional administrative requirements for these resellers.

Thailand argued that in deciding the tax base for VAT, it had applied a general methodology in the same manner to both imported and domestic cigarettes. Further, under Thai law, resellers of domestic cigarettes are exempt from a VAT liability and the related administrative requirements. Thailand argued that this exemption given only to resellers of domestic cigarettes did not result in an excess tax as resellers of imported cigarettes receive tax credits for the potential liabilities.

In the specific instances that were at issue in this case, the Panel concluded that Thai Excise had deviated from its general methodology in determining the tax base for VAT for imported cigarettes, while at the same time applying this methodology to domestic cigarettes. This resulted in excess taxation for imported cigarettes in a manner contrary to Article 111:2, first sentence of the GATT 1994. Moreover, given the strict standard under Article 111:2, first sentence of the GATT 1994, the Panel found that even the mere possibility of imported cigarettes being subject to an internal tax in excess of that which is applied to domestic cigarettes was inconsistent with Thailand's obligations under Article 111:2, first

sentence. The Panel found therefore that these specific aspects of the Thai VAT regime violated Thailand's obligations under Articles IIL•2 and I1L•4 of the GATT 1994.

GATT Article 111: 4 (national treatment — domestic laws and regulations);

The analysis must be grounded in close scrutiny of the "fundamental thrust and effect of the measure itself'. Such examination normally requires an identification of the implications of the measure for the conditions of competition between imported and like domestic products in the marketplace; this may be discerned from the design, structure, and expected operation of the measure and need not be based on empirical evidence as to the actual effects. When imported and like domestic products are subject to a single regulatory regime with the only difference being that imported products must comply with additional requirements, this would provide a significant indication that imported products are treated less favourably. The Appellate Body upheld the Panel's finding that Thailand treats imported cigarettes less favourably than like domestic cigarettes by imposing additional administrative requirements only on resellers of imported cigarettes.

2) Prompt review of administrative action on customs matters (Article X: 3(b))

The Philippines asserted that Thailand violated various due process obligations under Article X of the GATT1994in connection with its customs and fiscal measures.

In particular, the Philippines challenged the Thai government system under which certain government officials simultaneously served on the board of TTM, a state-owned domestic cigarette manufacturer. According to the Philippines, this is inconsistent with the obligations under Article X:3(a) to administer customs matters in a reasonable and impartial manner. The Philippines also alleged that Thailand acted inconsistently with Article X:3(a) through the alleged unreasonable delays caused in the administrative review process for appeals against customs determinations. Furthermore, the Philippines argued that the determinations by Thai Excise of the tax base for VAT as well as its use of a guarantee value in calculating the

excise, health and television taxes, are non-uniform, unreasonable and partial, and therefore in violation of Article X:3(a).

Regarding the Philippines' Article X:3(a) claims, the Panel concluded that the Philippines failed to establish that appointing government officials to serve on the board of TTM was an unreasonable and partial administration of Thai customs and tax laws within the meaning of Article X:3(a). The Panel, however, found that Thailand acted inconsistently with Article X:3(a) through the delays caused in the administrative review process. As for the Philippines' claim on the use of a guarantee value in calculating the Excise, Health and Television taxes, the Panel concluded that the Thai government's use of the guarantee value as the tax base and the absence of an automatic refund mechanism for these taxes, concern the substantive aspects of such laws and regulations rather than the manner in which they are put into practical effect. Accordingly, the Panel found that the Philippines' claim under Article X:3(a) in respect of the administration of Thai Excise, Health and Television taxes was improperly brought under Article X:3(a).

The Philippines further claimed that Thailand failed to maintain an independent tribunal or process for the prompt review of administrative actions relating to customs matters, particularly customs value decisions and guarantee decisions, inconsistently with the obligations under Article X:3(b). The Panel found that Thailand violated Article X:3(b) by failing to maintain an independent tribunal for the *prompt review* of the concerned administrative actions relating to customs matters. The Panel also found that Thailand acted inconsistently with Article X:3(b) by failing to maintain or institute independent review tribunals or process for the prompt review of guarantee decisions.

The Panel also agreed with the Philippines that Thailand violated Article X:1 by failing to publish laws and regulations pertaining to the determination of a VAT for cigarettes and the release of a guarantee imposed in the customs valuation process.[37]

[37] Thailand v. the Philippines, WTO Case DS371. (2011).

2.6 A Prosecution order to Thai Criminal Court

The cigarette manufacturer added that their import valuations complied with World Trade Organization agreements and had been cleared by local Thai customs officials.

The investigation first surfaced in 2006 under the administration of Thaksin Shinawatra, shortly before his ousting in a military coup.

Thailand has since been hit by a decade of political instability with frequent government changes and a second coup in 2014.

In 2011, the attorney general at the time recommended against charging the tobacco giant, but the prosecution was restarted two years later.[38]

On 19 January 2016, Tobacco giant Philip Morris is taken to court in Thailand. Thai prosecutors charged PMTL with tax evasion for allegedly under-declaring the value of 272 batches of cigarettes imported from the Philippines between 2003 and 2006. The total cost of the imported goods and duties was estimated to be more than 20 billion baht ($557 million). If it loses the case, PMTL will have to face a fine four times the estimated cost of the imported goods, including taxes.

The court read the charges against the eight defendants and asked whether they would plead guilty or innocent. They all denied the charges and vowed to fight the case.

Because the case is complicated and involves many witnesses and evidences, the court set June 27 for the prosecution and the defendants to examine the evidences before the hearing scheduled on October 10.[39]

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[38] Rappler, Philip Morris pleads not guilty to huge Thai tax dodge, at http://www.rappler.com/business/211-governance/119550-philip-morris-tax-evasion-thailand, (last visited 31 May 2016).

[39] Rappler, Philip Morris faces tax evasion case in Thailand, at http://www.rappler.com/business/2 I 1-governance/119550-philip-morris-tax-evasion-thailand, (last visited 31 May 2016)

Chapter 3
General Study about World Trade Organization and Framework Convention on Tobacco Control

3.1 Concept of WTO related to Framework Convention on tobacco control

3.1.1 Principles of the trading system of WTO

1. Non-Discrimination

Non-discrimination is a fundamental principle of the multilateral trading system and is recognized in the Preamble to of the WTO Agreement as a key instrument to achieve the objectives of the WTO. In the Preamble, WTO members express their desire to eliminate discriminatory treatment in international trade relations. Non-discrimination in the WTO is embodied by two principles, the most favoured nation (MFN) treatment obligation and the national treatment obligation.[40]

Most-favoured-nation (MFN): Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (CATS) (Article 2) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group

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[40] World Trade Organization, Introduction to WTO Basic Principles and Rules, at https://ecampus.wto.org/admin/files/Course 385/Module 1562/Module Documents /BP-L1 -R1-E.pdf. (last visited 20 September 2016).

discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners — whether rich or poor, weak or strong.[41]

National treatment: Treating foreigners and locals equally Imported and locally produced goods should be treated equally at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of "national treatment" (giving others the same treatment as one's own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these. National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.[42]

2. Free Trade

Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. From time to time other issues such as red tape and exchange rate policies have also been discussed.

Since GATT's creation in 1947-48 there have been eight rounds of trade negotiations. A ninth round, under the Doha Development Agenda, is now underway. At first these focused on lowering tariffs (customs duties) on imported

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[41] World Trade Organization, Understanding the WTO, 5th ed. (Switzerland: WTO Publications, 2015), pp. 10-11.

[42] World Trade Organization, Ibid., p. 11.

goods. As a result of the negotiations, by the mid-1990s industrial countries' tariff rates on industrial goods had fallen steadily to less than 4%.

But by the 1980s, the negotiations had expanded to cover non-tariff barriers on goods, and to the new areas such as services and intellectual property.

Opening markets can be beneficial, but it also requires adjustment. The WTO agreements allow countries to introduce changes gradually, through "progressive liberalization". Developing countries are usually given longer to fulfill their obligations.[43]

3. More Fair Competitive

The WTO is sometimes described as a "free trade" institution, but that is not entirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition.

The rules on non-discrimination, MFN and national treatment are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.

Many of the other WTO agreements aim to support fair competition: in agriculture, intellectual property, services, for example. The agreement on government procurement (a "plurilateral" agreement because it is signed by only a few WTO members) extends competition rules to purchases by thousands of government entities in many countries. And so on.[44]

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[43] World Trade Organization, Ibid., p. 11.

[44] World Trade Organization, Ibid., pp. 12.

4. Predictable

Foreign companies, investors and governments should be confident that trade barriers (including tariffs and non-tariff barriers) should not be raised arbitrarily, tariff rates and market-opening commitments are bound in the WT0.[45]

Sometimes, promising not to raise a trade barrier can be as important as lowering one, because the promise gives businesses a clearer view of their future opportunities. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition — choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable.

In the WTO, when countries agree to open their markets for goods or services, they "bind" their commitments. For goods, these bindings amount to ceilings on customs tariff rates. Sometimes countries tax imports at rates that are lower than the bound rates. Frequently this is the case in developing countries. In developed countries the rates actually charged and the bound rates tend to be the same.

A country can change its bindings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade. One of the achievements of the Uruguay Round of multilateral trade talks was to increase the amount of trade under binding commitments. In agriculture, 100% of products now have bound tariffs. The result of all this: a substantially higher degree of market security for traders and investors.

The system tries to improve predictability and stability in other ways as well. One way is to discourage the use of quotas and other measures used to set limits on quantities of imports, administering quotas can lead to more red-tape and accusations of unfair play. Another is to make countries' trade rules as clear and public ("transparent") as possible. Many WTO agreements require governments to disclose their policies and practices publicly within the country or by notifying the WTO. The regular surveillance of national trade policies through the Trade Policy

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[45] Ching Cheong and Ching Jung Yee, Handbook on China's WTO Accession and its Impacts, (Singapore: World Scientific Publishing Co.Pte.Ltd., 2003), p. 31.

Review Mechanism provides a further means of encouraging transparency both domestically and at the multilateral level.[46]

5. More Beneficial for Less Developed Countries

The WTO system contributes to development. More beneficial for less developed countries, giving them more time to adjust, greater flexibility, and special privileges that developing countries need flexibility in the time they take to implement the system's agreements and the agreements themselves inherit the earlier provisions of GATT that allow for special assistance and trade concessions for developing countries.

Over three quarters of WTO members are developing countries and countries in transition to market economies. During the seven and a half years of the Uruguay Round, over 60 of these countries implemented trade liberalization programs autonomously. At the same time, developing countries and transition economies were much more active and influential in the Uruguay Round negotiations than in any previous round, and they are even more so in the current Doha Development Agenda.

At the end of the Uruguay Round, developing countries were prepared to take on most of the obligations that are required of developed countries. But the agreements did give them transition periods to adjust to the more unfamiliar and, perhaps, difficult WTO provisions, particularly so for the poorest, "least-developed" countries. A ministerial decision adopted at the end of the round says better-off countries should accelerate implementing market access commitments on goods exported by the least-developed countries, and it seeks increased technical assistance for them. More recently, developed countries have started to allow duty-free and quota-free imports for almost all products from least-developed countries. On all of this, the WTO and its members are still going through a learning process. The current Doha Development Agenda includes developing countries' concerns about the difficulties they face in implementing the Uruguay Round agreements.[47]

[46] World Trade Organization, Ibid., p. 12.

[47] World Trade Organization, Ibid., pp.10-13.

3.1.2 Principles of Non-Discrimination under General Agreement of Tariffs and Trade (GATT)

1. Most-Favoured-Nation

One of the fundamental rules of GATT is that each member will grant any other member the best possible treatment it grants to anyone else. If a Member grants to a country a special favour (such as a lower customs duty on one of its products) it must grant the favour immediately and unconditionally to all WTO members. For example, assume that Rauritania's MFN duty (duty applicable to all WTO Members) for tomatoes is 10%. Medatia is a big tomato producer interested in increasing its exports of tomatoes to Rauritania. If during a WTO negotiating round, the Government of Medatia initiates tariff negotiations on tomatoes with Rauritania. After long and difficult bilateral meetings, Rauritania agrees to give Medatia a duty free access (0%) for tomatoes. However, according to the MFN principle, Rauritania should extend the 0% duty on tomatoes to all WTO Members. This is because all WTO Members should enjoy the most favourable treatment for tomatoes granted by Rauritania.

GATT Article I:1 contains the specific rules for MFN treatment for goods following as;

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

The general effect of Article 1.1 is to create the obligation among WTO Members to give each other like products the best existing market access opportunities without discrimination in law or in fact.[48]

2. National Treatment

GATT Article III requires that WTO Members provide national treatment to all other Members. Article III:1 stipulates the general principle that Members must not apply internal taxes or other internal charges, laws, regulations, and requirements affecting imported or domestic products so as to afford protection to domestic production.

In relation to internal taxes or other internal charges, Article 111:2 stipulates that WTO Members shall not apply standards higher than those imposed on domestic products between imported goods and "like" domestic goods, or between ¡mported goods and "a directly competitive or substitutable product." With regard to internal regulations and laws, Article 111:4 provides that Members shall accord ¡mported products treatment no less favourable than that accorded to "like products" of national origin.

In determining the similarity of "like products," GATT panel reports have relied on a number of criteria including tariff classifications, the product's end uses in a given market, consumer tastes and habits, and the product's properties, nature, and quality. WTO panels and the Appellate Body reports utilize the same criteria.[49]

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[48] World Trade Organization, Introduction to WTO Basic Principles and. Rules, at https://ecampus.wto.org/admin/files/Course 3 8 5/Module 1 5 62/.../BP-L 1 -R1 -E.pdd, (last visited 19 September 2016).

[49] World Trade Organization, National Treatment Principle, at https:// www, google. co .th/tirl ?sa=t&rct=j &q=&esre=s&source=web&cd= 1 5 &cad=rj a&uact=8&ved =OahUKEwiTq7m2naDPAhVGsI8KHSKKAvMQFgheMA4&url=http%3 A%2F%2F www. meti. go .j p%2Fenglish%2Freport%2Fdownloadfiles%2FgCTO2 1 3 e .pdf&usg=AF Qj CNE2danj L 8 R5 yneN20 C2dLOtL0zUw& sig2=sfc3 HbtI elhAG1-YDg0Ifw, (last visited 19 September 20 1 6).

The national treatment obligation for goods is provided in Article III of the GATT 1994. The relevant portions of GATT Article 111[50] are paragraphs 1, 2 and 4 as well as the explanatory Ad Note to Article III. [51]

3.1.3 General Exception of GATT for protect public health (Article XX(b))

At the Third Session of the United Nations Ad Hoc Interagency Task Force on Tobacco Control held in December, 2000, a WTO representative explained: the WTO has never put into question the level of health or environmental protection that its members have chosen to pursue. What is sometimes put into question in the WTO is the approach that a country takes to achieve a certain level of protection but not the level itself. WTO rules provide significant leeway for countries to put

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[50] Article III of GATT

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any Member imported in to the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 as "The products of the territory of any Member ¡mported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, transportation, and requirements affecting their internal sale, offering for sale, purchase, transportation distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

[51] World Trade Organization, Ibid., p. 9.

measures in place to protect human health and the environment. The November 2001 WTO Ministerial Conference in Doha, Qatar, reiterated in its Ministerial Declaration that the Article XX(b) exception allows countries to pursue public health objectives, stating that "under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health.

Nonetheless, it may still be a challenge for the WHO to develop tobacco control measures that do not conflict with free trade principles. In order to develop WTO-compliant measures, it is necessary to consider basic principles derived from the language of the relevant GATT and WTO agreements, as well as the trade cases. The WTO representative speaking at the Third Session of the Interagency Task Force identified two principles of free trade that should be considered in order to evaluate health protecting measures: nondiscrimination and necessity. This paper adds to this analysis the principle of reasonableness, given the importance the Dispute Settlement Body attributed to this factor in the Asbestos and Hormones cases. If a tobacco control measure does not conflict with these three principles under international trade law, it should not suffer adverse treatment by the Dispute Settlement Body. A brief review of each of these principles follows.

Nondiscrimination

The obligations under GATT Article I, concerning most favored nation status, and Article III, regarding national treatment, essentially require that measures do not accord different treatment to like products on the basis of their origin. If there is no discrimination, there is no case against a measure under Articles I and III. However, a tobacco control measure may violate either of those articles and still survive WTO scrutiny under Article XX(b). Because the chapeau of Article XX also speaks of "arbitrary or unjustifiable discrimination" and "disguised restriction[s] to trade," some measure of discrimination may be allowed, so long as it is not found to be arbitrary or unjustified, or a disguised restriction to trade.

Necessity

Assuming that a tobacco control measure relies on the GATT Article XX(b) exception (or the Article 2.2 exception of the TBT) it will have to be shown that the measure is necessary to achieve the health objectives in question. It is not clear how the provision will be applied in future panel and Appellate Body reports. For example, in the Thailand Cigarettes case, the GATT panel applied it in a manner that

was relatively unforgiving of Thai health policy. Alternatively, in applying the provision in the Asbestos case, the WTO Dispute Settlement Panel implied that a determination of necessity would not be extensively reviewed, so long as the decision to enact a measure is motivated by a reasonable determination. The trade cases demonstrate that a measure will usually withstand Dispute Settlement Body necessity analysis if it has the following qualities: (1) it is aimed at meeting a specific objective; (2) it is the least trade restrictive measure available; and conversely, (3) there are no other less restrictive measures available that would meet the same objective.

Reasonableness

In the event that a tobacco control measure relies on the GATT Article XX(b) exception or the TBT Article 2.2 exception, the Dispute Settlement Body may apply a reasonableness analysis in several ways. This standard is a relatively easy one to satisfy, and it is noteworthy that the Asbestos panel referred to reasonableness on several points, even considering reasonableness in its analysis of necessity. If, for example, a measure does impose some kind of discrimination, reasonableness will be considered in the process of determining whether the measure is arbitrary or unjustified, or a disguised barrier to trade.[53]

In order to better understand the principles of free trade obligations and, more importantly, the criteria for successfully applying exceptions like Article XX(b), several relevant trade cases are discussed below.

1. Case Study related on Article XX (b)

1) Meat Hormones Case (DS48)

In 1997, a dispute focusing on health related regulations arose between Canada, the United States, and the European Community (EC) regarding a series of EC directives that forbade the sale of imported or domestic meat derived from hormone treated farm animals. Because the regulations in question dealt with

[53] Joseph N. Eckhardt, Balancing Interests in Free Trade and Health: How the WHO's Framework Convention on Tobacco Control Can Withstand WTO Scrutiny, at http ://scholarship Jaw.duke edu/cgi/viewcontent. cgi?article=1193 &context—dj cil, (last visited 5 June 2016), pp.197-217,

food, the Dispute Settlement Body and the Appellate Body applied the SPS Agreement in its analysis. The Appellate Body ruled that the EC had failed to show that it satisfied Article 5.1 of the SPS Agreement, which requires that measures to protect health be based on a scientific risk assessment. Article 2 of the SPS Agreement sets out principles much like those found in the Article XX(b) exception, allowing, to the extent necessary, measures designed to protect human health and taking scientific risk assessment into account. Having found that the EC did not base its regulations on any kind of risk assessment, the Appellate Body did not even proceed to make an Article 2 analysis to consider whether the ban on hounone treated meat was a measure necessary to protect health. [54]

2) Asbestos Case (DS135)

Until the year 2000, the WTO had yet to rule that any health measure or environmental protection measure was allowable as "necessary" and justifiable discrimination under the Article XX(b) exception. The WTO finally delivered a decision allowing an application of the Article XX(b) exception with the panel report on the French general ban on asbestos and asbestos-containing products, which found that a violation of the Article III national treatment principle was allowed under the Article XX(b) exception. The Appellate Body report that followed upheld the panel's Article XX(b) ruling, which preserved France's right to ban asbestos, and reversed one of the panel's findings that was favorable to France's opponent in the case, Canada. The asbestos dispute originated with a 1996 decree by the French Government banning the manufacture, processing, sale, and import of asbestos and asbestos-containing products, with the stated aim of protecting the health of workers and consumers. The EC, representing France, defended the decree on a number of grounds. While the panel found that France's decree did in fact violate Article 111:4 national treatment principles, it found in favor of the EC on the basis of its Article XX(b) defense.

The Appellate Body report that followed the panel report upheld the reasoning of the panel on the Article XX(b) claim, and reversed the finding of the panel that there had been an Article 111:4 violation in the first place. The panel's

[54] Rappler, Philip Morris faces tax evasion case in Thailand, Ibid., pp.210-214.

Article 111:4 finding was based on the theory that asbestos products were "like" other, less harmful microfiber products. The Appellate Body criticized this finding on several grounds but, most importantly, it found that the panel should not have denied the EC's request to include the risks "posed by the product to human health" in the consideration of "likeness." The Appellate Body explained:

"in examining the "likeness" of products, panels must evaluate all of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article 111:4 of the GATT 1994."

The finding of the Appellate Body that asbestos products were not "like" alternative, less harmful products extinguished Canada's Article 111:4 claim and ostensibly made the Article XX(b) findings of the panel moot.1 04 Nevertheless, the Appellate Body upheld the Article XX(b) findings. in its discussion of the Article XX(b) claim, the Appellate Body addressed several of Canada's appeals that followed the panel report, including an argument that the EC must "quantify" the risk associated with asbestos products in order to argue that asbestos products pose a risk to human health. The Appellate Body considered Canada's contention that the level of protection sought by France's decree was unreasonable, and perhaps unattainable, because alternative products would also pose a risk to health. Additionally, Canada had made an appeal that the panel erred in finding that "controlled use" of asbestos products was not a reasonable alternative to the ban. The Appellate Body countered that there is no general requirement to quantify a risk to health in order to prove that a measure is "necessary." The Appellate Body also rejected Canada's argument that the level of protection sought by the decree was questionable, stating, "WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation." Regarding the claim that there were reasonable alternatives to the ban on asbestos, the Appellate Body confirmed that a measure will not withstand scrutiny if an alternative measure not inconsistent with the GATT is available. Nonetheless the Appellate Body found: France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt.' Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. In reaching this conclusion, the Appellate Body explained that the

determination of whether a measure is "necessary" will be affected by the importance and value of the interest protected by a given measure. Citing language from an earlier case, the Appellate Body declared: "the more vital or important common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well know, and life threatening, health risks posed by asbestos fibers. The value pursued is both vital and important to the highest degree.[55]

3.2 Framework Convention on Tobacco Control (FCTC)

3.2.1 Background and Objective of FCTC

WHO Framework Convention on Tobacco Control: WHO FCTC is the first treaty negotiated under the auspices of the World Health Organization.

The purpose of WHO FCTC is to protect people worldwide from the dangers of tobacco use and being exposed to unintended second hand smoke. This treaty, the WHO FCTC, functions as an international measure to limit tobacco use prevalence, especially in developing countries, and stop mortality caused by cigarette smoking.

3.2.2 Overview of FCTC

WHO FCTC is comprised of 11 categories (38 Articles) with missions in many areas including academic and general management missions, tobacco demand measurement (Category No.3), tobacco supply measures (Category No.4), environmental protection (Category No.5), cooperation on technical and scientific efforts including various methods of data communication (Category No.7), and WHO FCTC management (Category No. 8-11). WHO members (Parties) are responsible for enforcement of those measures at the local and national levels and also to support the following international measures:

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[55] Canada v. European Communities, Asbestos, WTO case No.DS135. (2001).

1. General Mission

The WHO FCTC's general mission stipulates working on public health policies on tobacco control: Parties shall protect those public health polices with respect to tobacco control from commercial and other vested interests of the tobacco industry. (Article 5.3)

2. Measures to reduce the demand for tobacco

The treaty requires Parties to consider and employ various approaches to reduce the demand for tobacco:

1) Price and tax measures (Article 6)[61]

2) Non-price measures to reduce the demand for tobacco such as management measures, legislation, government management and other effective measures (Article 7)

3) The protection from exposure to tobacco smoke in offices, public places inside, transportation and other public places (Article 8)

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[61] WHO FCTC Article 6

1. The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.

2. Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include:

- Implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption; and
- Prohibiting or restricting, as. appropriate, sales to and/or importations by international travellers of tax- and duty-free tobacco products

3. The Parties shall provide rates of taxation for tobacco products and trends in tobacco consumption in their periodic reports to the Conference of the Parties in accordance with Article 21.

4) Regulation of the contents of tobacco products by proposing regulations to examine and test the quantity of various chemicals contained in tobacco products and others chemicals released as tobacco product emissions (Article 9)

5) Regulations requiring tobacco product disclosures (Article 10)

6) Packaging and labeling of tobacco products with a prohibition of misleading pictures and statements including misleading statements such as *"light"*, "mild" or *"ultra-light"*. Tobacco companies must clearly carry health warning statements describing the harmful effects of tobacco use on their cigarette packs (including cigarette containers and packing). Those warning statements should be at least 50% of the principal display areas and in the form of or include pictures or pictograms. (Article 11)

7) Education, communication, training and public awareness by using all available communication tools, as appropriate. Member countries are urged to use various measures to build comprehensive educational and public awareness about the health risks of tobacco consumption and exposure to tobacco smoke as well as the benefits of the cessation of tobacco use. (Article 12)

8) Banning of all tobacco advertising, promotion and sponsorship by tobacco companies including prohibiting cross-border promotions. (Article 13)

9) Demand reduction measures concerning tobacco dependence through cessation by promoting the cessation of tobacco use (in such locations as educational institutions, health care facilities, workplaces and elsewhere), the diagnosis and treatment of tobacco dependence through counseling services on cessation of tobacco use in national health plans, as well as collaborating with other parties to facilitate the accessibility and affordability of treatment of tobacco dependence. (Article 14)

3. Measures relating to the reduction of the supply of tobacco

WHO FCTC encourages Parties to adopt and implement effective legislative, executive, administrative or other effective measures that:

1) Prevent Illicit trade in tobacco products (Article 15)

2) Prevent sales to and by minors (to prohibit the sale of tobacco products to persons younger than 18). (Article 16)

3) Provide support for economically viable alternative activities (Article 17)

4. Protection of the environment

WHO FCTC states that Parties must be concerned with the protection of the environment and the health of persons in relation to the environment in the areas of tobacco cultivation and manufacture, (Article 18) as well as cooperate on techniques, science and information communication:

1) Research, surveillance and exchange of information; for example, the Parties shall undertake to develop and promote national research and coordinate research programs at the regional and international levels in the field of tobacco control such as the study of impacts and factors of tobacco consumption and cigarette smoke exposure, and the study of replacement crops at the national and international level. Moreover, the Parties shall establish, as appropriate, programs for national, regional and global surveillance of the magnitude, patterns, determinants and consequences of tobacco consumption and exposure to tobacco smoke. (Article 20)

2) Reporting and exchange of information: each party shall submit to the Conference of Parties information such as legislation and other measures related to WHO FCTC as well as information on surveillance and research. (Article 21)

3) Cooperation in the scientific, technical, and legal fields and the provision of related expertise. (Article 22)[62]

3.2.3 Price and tax measures (Article 6)

Tobacco use creates a significant economic burden on society at large. Higher direct health costs associated with tobacco-related disease, and higher indirect costs associated with premature loss of life, disability due to tobacco-related disease and productivity losses create significant negative externalities of tobacco use. Effective tobacco taxes not only reduce these externalities through reduced consumption and prevalence but also contribute to the reduction of governments' expenditures for the health care costs associated with tobacco consumption.

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[62] TRC Research Update, Thailand in the Direction of the Global Tobacco Control Law, Volume 2 Issue 2 (July 2010), pp.3-4.

Tax and price policies are widely recognized to be one of the most effective means of influencing the demand for and thus the consumption of tobacco products. Consequently, implementation of Article 6 of the WHO FCTC is an essential element of tobacco-control policies and thereby efforts to improve public health. Tobacco taxes should be implemented as part of a comprehensive tobacco-control strategy in line with other articles of the WHO FCTC.

1. Scope of Article 6

These guidelines focus mainly on tobacco excise taxes since these are the primary tool for raising the price of tobacco products relative to the prices of other goods or services. Other taxes or fees, such as income taxes, public fees, and investment encouragement provisions, are not within the scope of these guidelines. Value added tax (VAT) and import duties are briefly referred to in section 3.1.5.

In a broader perspective, it is important to note that tobacco taxation policies have the ability to affect the consumer price of tobacco products and thus reduce consumption, prevalence and affordability. However, tobacco taxes do not exist in a vacuum and should be implemented as part of a comprehensive tobacco-control strategy alongside other policies undertaken in line with other articles of the WHO FCTC. In that respect, broader economic policy considerations, notably the interrelationship between tax and price policies and income growth, and the consequential social effects on parts of the population, also need to be taken into account. Such an analysis, however, goes beyond the remit of the present guidelines.

Illicit trade in tobacco products is addressed in Article 15 of the WHO FCTC and the Protocol to Eliminate Illicit Trade in Tobacco Products. Many Parties have raised tobacco taxes effectively and experienced revenue increases without increases in illicit trade. Illicit trade in tobacco products undermines price and tax measures designed to strengthen tobacco control and thereby increases the accessibility and affordability of tobacco products. Curbing illicit trade enhances the effectiveness of tobacco tax and price policies in reducing tobacco use and in achieving the public health and revenue goals of tobacco taxation.

2. Principles under the implementation of Article 6

1) Determining tobacco taxation policies is a sovereign right of the Parties. All parts of the WHO FCTC respect the sovereign right of the Parties to determine and establish their taxation policies, as set out in Article 6.2 of the WHO FCTC.

2) Effective tobacco taxes significantly reduce tobacco consumption and prevalence. Effective taxes on tobacco products that lead to higher real consumer prices (inflation-adjusted) are desirable because they lower consumption and prevalence, and thereby in turn reduce mortality and morbidity and improve the health of the population. Increasing tobacco taxes is particularly important for protecting young people from initiating or continuing tobacco consumption.

3) Effective tobacco taxes are an important source of revenue. Effective tobacco taxes contribute significantly to State budgets. Increasing tobacco taxes generally further increases government revenues, as the increase in tax normally outweighs the decline in consumption of tobacco products.

4) Tobacco taxes are economically efficient and reduce health inequalities. Tobacco taxes are generally considered to be economically efficient as they apply to a product with inelastic demand. Low- and middle-income population groups are more responsive to tax and price increases; therefore consumption and prevalence are reduced in these groups by greater magnitudes than in higher-income groups, resulting in a reduction in health inequalities and tobacco-related poverty.

5) Tobacco tax systems and administration should be efficient and effective. Tobacco tax systems should be structured to minimize the costs of compliance and administration while ensuring that the desired level of tax revenue is raised and health objectives are achieved. Efficient and effective administration of tobacco tax systems enhances tax compliance and collection of tax revenues while reducing tax evasion and the risk of illicit trade.

6) Tobacco tax policies should be protected from vested interests. The development, implementation and enforcement of tobacco tax and price policies as part of public health policies should be protected from commercial and other vested interests of the tobacco industry, including tactics of using the issue of smuggling in hindering implementation of tax and price policies, as required under Article 5.3 of the

WHO FCTC and consistent with the guidelines for its implementation as well as from any other actual and potential conflicts of interests."

3. Relationship between Tobacco Taxes, Prices and Public Health

The inverse relationship between price and tobacco use has been demonstrated by numerous studies. Raising prices on tobacco products demonstrably reduces demand, particularly among young people and those of lower socioeconomic status. At the same time, higher taxes result in increased government revenues.

This section in the Guidelines recommends: when establishing or increasing their national levels of taxation, Parties should take into account arties shouldvecommend both price elasticity and income elasticity of demand, as well as inflation and changes in household income, to make tobacco products less affordable over time in order to reduce consumption and prevalence. Therefore, Parties should consider having regular adjustment processes or procedures for periodic re-evaluation of tobacco tax levels.[63]

3.3 ICSID Case of Philip Morris Brands and Oriental Republic of Uruguay

3.3.1 Background

In February 2010, three subsidiary companies of Philip Morris International (PMI), initiated an international law suit at the International Centre for the Settlement of Investment Disputes (ICSID), an arbitration panel of the World

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[64] World Health Organization, Guidelines for implementation of article 6 of the WHO FCTC, at https://www.google.co.th/url?sa=t&rct=j&q=&esrc=s& source=web &cd=2&cad=rja&uact=8&ved=0ahUKEwjwa4WxyvTQAhWKMo8KHZULCokQFggMAE&url=http%3A%2F%2Fwww.who.int%2Ftobacco%2Fpublications%2Fen tfitob tax annex.pdf&usg=AFQjCNFsQKzaDVIoD7E317HLVy74v08aMA&sig2=-WPwRyjZeaveKK25iloQ8w, (last visited 14 December 2016).

[65] World Health Organization, WHO report on the global tobacco epidemic 2015 (Raising taxes on tobacco), (Luxembourg: n.p., 2015), p.23.

Bank. PMI alleging that two of Uruguay's tobacco control laws violated a Bilateral Investment Treaty (BIT) with Switzerland. PMI brought the claim after legal challenges in Uruguay's domestic courts by the Philip Morris subsidiaries had failed. The panel of 3 arbitrators published their ruling on July 8, 2016, dismissing all PMI's claims and awarding Uruguay its legal costs ($7million).

3.3.2 Topic of Challenge and the Claims

The Two "Challenged Measures" Required:

1. Large graphic health warnings covering 80% of the front and back of cigarette packets; and

2. That each cigarette brand be limited to just a single variant or brand type (eliminating brand families to address evidence that some variants can mislead consumers and falsely imply some cigarettes are less harmful than others) - known as the Single Presentation Requirement (SPR).

The Claims: BITs are agreements between two states that are intended to encourage Foreign Direct Investment by providing certain protections and guarantees to investors from the other state. These treaties allow foreign investors to instigate international arbitration claims challenging government regulations. PMI alleged that the 80 percent health warnings left insufficient room on the packs for it to use its trademarks and branding as they were intended, and the SPR meant it could not market some of its brands such as Marlboro Gold. PM' therefore alleged that Uruguay had breached the terms of the BIT because:

1. The Challenged Measures Expropriated the property rights in PMI's trademarks without compensation;

2. The Challenged Measures were arbitrary because they were not supported by evidence to show they would work and so did not accord PMI with Fair and Equitable Treatment;

3. The Challenged Measures did not meet PMI's Legitimate Expectations of a stable regulatory environment or to be able to use their brand assets to make a profit;

4. The Uruguayan courts had not dealt properly or fairly with PMI's domestic legal challenges such that there was a Denial of Justice. Philip Morris sought

an order for the repeal of the Challenged Measures and for compensation in the region of $25 million.

3.3.3 The Tribunal's Key Findings

This highly anticipated award addressed a number of fundamental legal issues concerning the balance between investor rights and the space available for states' to regulate for public health. While there is no doctrine of binding precedent in international arbitration law, the development of an investment treaty case law and jurisprudence means that the wider value of each award can be very significant5. This ruling highlighted the importance of the WHO Framework Convention on Tobacco Control (FCTC) in setting tobacco control objectives and establishing the evidence base for measures, and confirmed that states therefore need not recreate local evidence. It addressed the wide 'margin of appreciation' and deference provided to sovereign states in adopting measures or decisions concerning public health. The tribunal also identified that a state need not prove a direct causal link between the measure and any observed public health outcomes - rather that it was sufficient that measures are an attempt to address a public health concern and taken in good faith.

The ruling sets an extremely high bar for any foreign investor seeking to bring an investment arbitration challenge against a non-discriminatory public health measure that has a legitimate objective and that has been taken in good faith.

Where the ruling is quoted directly, the paragraph number is given in square brackets. Emphasis is added with underlining.

1. Relevant for all tobacco control measures

(1) The Legal Significance of the WHO FCTC

The tribunal granted leave for the WHO and FCTC Secretariat, and for the Pan American Health Organization PAHO, to file amicus curiae briefs. The WHO/FCTC Secretariat brief stated that: "The action taken by Uruguay was taken in light of a substantial body of evidence that large graphic health warnings are an effective means of informing consumers of the risks associated with tobacco consumption and of discouraging tobacco consumption. There is also a substantial

body of evidence that prohibiting brand variants is an effective means of preventing misleading branding of tobacco products"

The PAHO amicus brief stated that: "Uruguay's tobacco control measures are a reasonable and responsible response to the deceptive advertising, marketing and promotion strategies employed by the tobacco industry, they are evidence based, and they have proven effective in reducing tobacco consumption."

The tribunal found that the Challenged Measures were based on and were in furtherance of the obligations and recommendations of the FCTC and this was the key in its determination that the Challenged Measures were not arbitrary. The tribunal noted that Law 18,256 on Tobacco Control 6, under which the Challenged Measures were made, expressly states that it is adopted in accordance with Uruguay's obligations under the FCTC. The tribunal went on to say that "It should be stressed that the Challenged Measures have been adopted in fulfillment of Uruguay's national and international legal obligations for the protection of public health"

(2) State's Rights to Regulate for Public Health, the Evidence required and the Margin of Appreciation

The 'right to regulate' in the public interest and the scope or flexibility given to states under the international investment legal regime is a contentious issue. This tribunal gave firm determinations that states are afforded a wide 'margin of appreciation' and are to be given great deference in relation to public health measures; and commented on what states are required to 'prove' in relation to public health measures.

It is true that it is difficult and may be impossible to demonstrate the individual impact of measures such as the SPR and the 80/80 Regulation in isolation. Motivational research in relation to tobacco consumption is difficult to carry out. Moreover, the Challenged Measures were introduced as part of a larger scheme of tobacco control, the different components of which it is difficult to disentangle. But the fact remains that the incidence of smoking in Uruguay has declined, notably among young smokers, and that these were public health measures which were directed to this end and were capable of contributing to its achievement. In the tribunal's view, that is sufficient for the purposes of defeating a claim under Article 5(1) of the BIT.

The remark of a general character relates to the "margin of appreciation" to be recognized to regulatory authorities when making public policy determinations. According to the Claimants, the "margin of appreciation" has no application in the present proceeding as being a concept applied by the [European Convention on Human Rights] ECHR for interpreting the specific language of Article 1 of the Protocol to the Convention, no analogous provision being contained in the BIT. The Tribunal agrees with the Respondent that the "margin of appreciation" is not limited to the context of the ECHR but "applies equally to claims arising under BITs," at least in contexts such as public health.

The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the "discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith involving many complex factors" As held by another investment Tribunal "the sole inquiry for the Tribunal is whether or not there was a manifest lack of reasons for the legislation.

In the end the Tribunal does not believe that it is necessary to decide whether the SPR actually had the effects that were intended by the State, what matters being rather whether it was a "reasonable" measure when it was adopted. Whether or not the SPR was effective in addressing public perceptions about tobacco safety and whether or not the companies were seeking, or had in the past sought, to mislead the public on the point, it is sufficient in light of the applicable standard to hold that the SPR was an attempt to address a real public health concern, that the measure taken was not disproportionate to that concern and that it was adopted in good faith.

(3) Legitimate Expectation of a Stable Regulatory Environment

Part of PMI's claim that it was not afforded Fair and Equitable Treatment was on the basis that they had a legitimate expectation that the regulatory environment would not drastically change, and in particular, that if they were permitted to lawfully register their trademarks, then they could expect to use them for the purpose they were registered.

Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed.

On the contrary, in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products. Nor is it a valid objection to a regulation that it breaks new ground.

2. Relevant for plain packaging

(1) Expropriation of Property

The tribunal dismissed the claim for expropriation for two reasons. The first was that the measures did not have the effect of substantially depriving the claimants of the value of their investment *overall* (because they were able to continue their business of selling tobacco in Uruguay) — and additionally because the regulations were a valid exercise of the state's right to regulate in the public good (police powers).

Value of the Claimant's property - The Tribunal believes that in order to determine whether the SPR had an expropriation character in this case, Abel's business is to be considered as a whole since the measures affected its activities in their entirety. In the Tribunal's view, in respect of a claim based on indirect expropriation, as long as sufficient value remains after the Challenged Measures are implemented, there is no expropriation. As confirmed by investment treaty decisions, a partial loss of the profits that the investment would have yielded absent the measure does not confer an expropriation character on the measure.

(2) Tobacco Companies Right to Use their Trademarks

Ownership of a trademark does, in certain circumstances, grant a right to use it. It is a right of use that exists vis-à-vis other persons, an exclusive right, but a relative one. It is not an absolute right to use that can be asserted against the State. Nothing in any of the legal sources cited by the Claimants supports the conclusion that a trademark amounts to an absolute, inalienable right to use that is somehow protected or guaranteed against any regulation that might limit or restrict its use. Moreover, as the Respondent has pointed out, this is not the first time that the

tobacco industry has been regulated in such a way as to impinge on the use of trademarks.

The Tribunal concludes that under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State's regulatory power.[66]

3.4 The Case of Philip Morris Asia and Australia

3.4.1 Background

On December 17, 2015, the arbitral tribunal constituted to decide Philip Morris's claim against Australia concerning Australia's plain packaging laws (enacted in 2011) ruled that it had no jurisdiction to decide Philip Morris Asia Limited's claim under the Hong Kong—Australia BIT (the Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments of 1993). The tribunal was unanimous in upholding Australia's jurisdictional challenge.

In domestic courts and before international tribunals that have been commenced by tobacco companies and other countries in response to measures taken by governments to regulate the appearance of packaging used to contain tobacco products. These measures restrict the ability of tobacco companies to differentiate their brands in the design of the packaging. Australia, by introducing plain packaging legislation, is the first country to standardize the appearance of all cigarette packaging. All cigarettes sold in Australia are now required to be packaged in standard-sized boxes with an unappealing color and look (by design); tobacco companies operating in Australia can no longer include their logos or marketing content (apart from the brand name and variant names, in standard font) on their products.[67]

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[66] Philip Morris v Uruguay, ICSID Case No. ARB/10/7

[67] Samuel Leong, Philip Morris Asia v Australia, (May 2016), at http://www.nortonrosefulbright.com/knowledge/publications/139441/philip-morris-asia-v-australia, (last visited 22 February 2017).

3.4.2 Topic of Challenge and the Claims

The Philip Morris claim

In April 2010, the Commonwealth Government of Australia signaled that it would be adopting a plain packaging regime for the sale of tobacco products under this regime, all tobacco packaging was to be generic, with all branding, colors, imagery and corporate logos and trademarks removed; the size, font and color of the brand name are mandated by regulation, together with a requirement for health warnings, toxic contents and tax paid stamps.

The legislation was passed in December 2011, and came into effect in stages in late 2012. New Zealand, France, United Kingdom and Ireland are all introducing or considering similar laws. New Zealand has announced that it is awaiting the outcome of the arbitration.

In November 2011, Philip Morris Asia Limited issued a notice of arbitration against the Commonwealth of Australia in terms of article 10 of a 1993 agreement between the Government of Hong Kong and the Government of Australia for *The Promotion and Protection of Investments;* a bilateral investment treaty *(BIT).*

The notice, invoking arbitration under article 3 of the UNCITRAL Arbitration Rules 2010, claimed that Australia's plain packaging legislation "virtually eliminates Philip Morris' branded business by expropriating its valuable intellectual property." Philip Morris brands include Marlboro, Long beach Peter Jackson and 20 or so other brands.

In essence, Philip Morris' argument was that the legislation bars the use of its valuable branding, reducing Philip Morris to the supplier of generic commoditized tobacco products. This, it was argued, is an expropriation in breach of the BIT.

Australia's response

In its response to the notice, the Commonwealth of Australia confirmed that the purpose of the legislation was to reduce smoking, *"one of the leading causes of preventable death and disease in Australia"* and raised a number of objections to the claim:

(1) The shares in Philip Morris Australia were transferred to Philip Morris Asia in February 2011, after the Government had announced that it would be

adopting the proposed plain packaging legislation (a preexisting dispute which was outside the jurisdiction of the tribunal), and

(2) The plain packaging legislation cannot be a breach of the protections of the BIT as Philip Morris Asia acquired the shares of Philip Morris Australia in the full knowledge of the policy announced by the Government.

In summary, when the plain packaging legislation was announced in April 2010, Philip Morris Asia had no investment in the Australian subsidiary, nor did it have any such investment as the dispute developed over the ensuing months. The arbitration therefore constituted an *abuse of right.*

Further, in terms of the BIT, in Australia's view, Philip Morris Asia's "investment" in Philip Morris Australia was subject to the laws and relevant policies of the Government at the time it acquired those shares.

There was a further argument raised in relation to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights *(the TRIPS Agreement)* [68]

3.4.3 The Award

The press release says little more than that the tribunal was unanimous in holding that it did not have jurisdiction to determine the dispute. That leads to the inevitable conclusion that the position of the Commonwealth of Australia in its response prevailed. Until the text of the award is released, we won't know in exactly what respect, but presumably it was on the ground that the policy was in place at the time the shares in Philip Morris Australia were transferred to the Hong Kong company, Philip Morris Asia.

In its press release, Philip Morris commented that it was considering its options and sought to head off other countries following suit:

> *There is nothing in today's outcome that addresses, let alone validates, plain packaging in Australia or anywhere else ...*

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[68] John G Walton, Philip Morris loses its case against Australia over plain packaging of tobacco, 22 December 2015, at http://johnwalton.co.nz/2015 /12/philip-morris-loses-its-case-against-australia-over-plain-packaging-of-tobacco/, (last visited 22 February 2017).

It is regrettable that the outcome hinged entirely on a procedural issue that Australia chose to advocate instead of confronting head on the merits of whether plain packaging is legal or even works.

Many will see this as a disingenuous response when Australia passed the plain packaging law on health grounds, and Philip Morris seems to have searched available jurisdictions for a BIT with Australia which had no health and safety saving (see below in relation to TRIPS and TBT); transferred its shares in its Australia company to the Hong Kong company in order to establish jurisdiction; and then raised its claim on the grounds of expropriation of intellectual property rights, rather than addressing the health and safety issues which the policy was designed to address.

It is, however, an interesting example of how investor-state dispute settlement *(ISDS)* under BITs works. Ultimately, it all depends on the wording of the treaty.

In all likelihood, this is the end of the road for the Philip Morris claim; the UNCITRAL 2010 Rules do not provide for appeals; Philip Morris went to considerable lengths to select Hong Kong as the contracting party as the Hong Kong/Australia agreement does not contain the sovereignty savings identified below; and it would appear that the tribunal favoured the more permissive test in relation to abuse of rights established in the *Pac Rim Cayman LLC v Republic of El Salvador* arbitration3 which recognizes policy announcements rather than the passage of litigation as being relevant to the timing of any restructuring.[69]

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[69] John G Walton, Philip Morris loses its case against Australia over plain packaging of tobacco, 22 December 2015, at http://johnwalton.co.nz/2015/12/philip-morris-loses-its-case-against-australia-over-plain-packaging-of-tobacco/, (last visited 22 February 2017).

Chapter 4
Analysis on the Problem of Imported Tobacco related to Free Trade Principle of GATT in contradiction with domestic tax law and Framework Convention on Tobacco Control of WHO

4.1 The Problem of Free Trade Principle of WTO on Tobacco Control

Nowadays, most of countries around the world are member of World Trade Organization for liberalizing trade throughout trade agreement to support free way, fair method and resolve trade disputes. General Agreement on Tariff and Trade (GATT) is the heart of the WTO agreements providing legal ground and rules for international trade and having main goal to help trade flow as freely as possible for developing economy especially the least developed countries. Moreover, the WTO is a place where member States negotiate for goods and services and also a forum to sort out, discuss and resolute the trade problems.

Thailand was signatory of GATT in 1995 that being legally binding to amend the customs valuation following to GATT article VII. In fact, the developed or the developing or the least developed members had postpone application or effect of the agreement for five years but finally they have to change their laws along the trade agreement that perhaps a change is unlikely for the policy areas because they are so sensitive politically. Certainly, advantages is often comes up with disadvantages that free trade may prevent developing economies from developing their infant industries under an usual attempt to diversify their economy to develop a new manufacturing industry. Many States members may be unable to do it without some tariff protection. Anyway, government of the developing countries are well aware of what the penalties are in case of such laws violate international trade agreements. As a result, it can lead to trade sanctions, or even compensation. And in several cases, State members have amended their laws in response to dispute arisen by the trade agreement.

GATT is widely-used and complex rules because it is not only having wide extent of goods and but also being source of the principles in trade system that functions based on non-discrimination, free trade, predictable, more competitive, and more beneficial for less developed countries. Free trade under WTO was settlement for support economic growth by free trade and fair competition in order to eliminate poverty. Moreover, the tobacco industry's may create an opportunity to claim privileges under trade and investment agreements in an attempt to block tobacco regulation in several countries and to discourage other FCTC parties from considering similar regulations as discrimination. Thus, enactment of tobacco control law has been in line with the FCTC which provides a significant regulation challenged with tobacco may be contrary with GATT. In a country where adopts public health rules may be worried about a trade challenge whether trade agreements consider tobacco control rules to be an exception because tobacco is unique, could kills about half of its long-term users. Accordingly, it should not be treated the same as other commodity products under trade and investment agreements.

WTO provided an exception in GATT Article XX (b), allowing nations to adopt and enforce measures necessary to protect human, animal or plant life of health. Such measures include laws, regulations, standards, and other actions. In this regard, WTO panels have interpreted this provision narrowly that a State member could not bring up the exception to protect public health from tobacco in reality. Even though there are others measures to restrict tobacco away from people without discrimination such as no smoking-campaign, advertising risk of tobacco or even packaging of tobacco, almost of these measures are rarely successful to reduce a rate of smokers. Thailand cannot, by other means, restrict effectively tobacco imported into the country; therefore to raise tax rate levying on tobacco is the most effective way to fight with demand of tobacco users especially among young and poor people.

In 2005, Thailand became member of Framework Convention on Tobacco Control (FCTC) which was the first international health agreement provided by World Health Organization (WHO) and aimed at protecting public health among tobacco epidemic. The public are widely aware of widespread use of tobacco is one of the biggest public health threats at least to social development and security, with reference a WHO factsheet indicating tobacco killing around 6 million people a year. More than 5 million of those deaths are the result of direct tobacco use while more than 600,000

are the result of non-smokers being exposed to second-hand smoke. Killing by tobacco expected to grow to 10 million by 2030. Moreover, seventy percent of the deaths are expected to occur in low and middle income nations, placing a huge strain on those health care systems. Worldwide, tobacco use is more prevalent among poor people, uneducated people, or those who are informed least about the effects of tobacco use.

In general, tobacco contains highly toxic affected to environment, being harmful to animals and human beings. Moreover, tobacco smokers caused toxic pollution and death of secondhand smoke. In legal aspect, the protection of public health which is a fundamental human rights is constitutionally recognized and core function of each State. In addition, since 1999 Thailand has been legally bound by the International Covenant on Economic, Social and Cultural Rights (ICESCR) that provided a positive duty on State member to promote and protect the health of their populations. It is necessary for the State member to advance this right stated in Article 12, providing for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

Both WTO and WHO provide rules supporting their goals which are likely to deem contradiction in some elements and cause the problem of enforcement pursuant to FCTC and in compliance with free trade regime under WTO in the same time. The free trade regime can be viewed as threatening tobacco control policies by enforcing states to remove trade barriers and hampering efforts to reduce domestic consumption of tobacco. A State member normally has authority by law to impose excise taxes and duties which results increment of market prices by entrepreneurs. The State member has authority to take action on limiting exposure to advertisement and sale of tobacco products or otherwise by other means of trade sanctions. The tobacco industry has used trade policy to undermine effective barriers to tobacco importation caused opportunity for the tobacco industry to assert its interests without concern of public health.

In addition, FCTC prioritize State member's implementation to protect public health as a result of the tobacco epidemic which causes hugely detrimental consequences to the public. Its global problem of public health calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and international level in order to reduce the prevalence of tobacco use by providing the measures relating to the reduction of demand for tobacco in Article 6 of FCTC as;

"1. The Parties recognize that price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.

2. Without prejudice to the sovereign right of the Parties to determine and establish their taxation policies, each Party should take account of its national health objectives concerning tobacco control and adopt or maintain, as appropriate, measures which may include:

(a) implementing tax policies and, where appropriate, price policies, on tobacco products so as to contribute to the health objectives aimed at reducing tobacco consumption; and

(b) prohibiting or restricting, as appropriate, sales to and/or importations by international travellers of tax- and duty-free tobacco products.

3. The Parties shall provide rates of taxation for tobacco products and trends in tobacco consumption in their periodic reports to the Conference of the Parties, in accordance with Article 21".

Unfortunately, providing tax measures of WHO cannot be fully enforced and effective because of free trade principle of GATT. The first tobacco-related case filed to the WTO since Thailand became signatory of TCBC was in February 2005. In such case the Philippines claimed that Thailand is violating GATT rules through a 'partial and unreasonable' administration of tobacco tax measures that give advantage to the Thai Tobacco Monopoly in 2008. In Thailand's defense and reason, GATT and FCTC are both international agreements. The FCTC is specific applied on tobacco and GATT applied on general goods. Thus, Thailand applied tax measure on imported tobacco for protecting public health as provided by FCTC, it's seem to be the exception.

Nowadays, people around the world realize detriment and damage caused by tobacco under the fact that figures of mortality by tobacco use in most countries have still risen. In the meantime, WHO anticipated the tobacco use can cause death up to 10 million people in 2030. For the example, in case between Uruguay and Philip Morris, which Uruguay won the lawsuit at World Bank's International Center for Settlement of Investment Disputes (ICSID) by suing Uruguay in two issues, the first was strict regulations on smoking in size of prescribed health warning of the surface of the front and back of the cigarettes packages from 50 percent to 80 percent, the second was prohibition of sub-brands that have a single image such as Marlboro Red or

Marlboro Gold that forced Philip Morris to withdraw seven of its 12 brands from shops in Uruguay. In order to protect public health, Uruguay had battled for past seven years. The award of this case was a major victory shows that countries can hold out withstanding the tobacco companies.

Thus, the Philip Morris was in the court proceedings in Thai Criminal Court. Its decision on conviction under-declaration in the value of 272 batches of cigarettes imported from the Philippines between 2003 and 2006 for $2.2 billion of fine. Under-declaration is illegal under section 27 of Customs act, B.E.2469 and section 83 and section 91 of Thai Criminal Code which the offence shall be fine of four times the amount of price of the goods including duty or to imprisonment not exceeding ten years, or to both.

However, State has authority to file a lawsuit against any wrongful act of Thai law in order to protect public interests that every sovereign state is bound to respect the independence of the courts or another government's acts done within its own territory called as "act of state". It is not acceptable to prior commercial consideration over the fundamental right to health and life. This is the first step to show that tobacco's company must respect the public health and benefit that its will save lives more than expectation and realizing to deep care about public health for the future of Thailand.

4.2 Problem of Collecting Tax levied Imported Tobacco in Thailand under Tobacco Control Measures and World Trade Organization

Tax measure is the most effective and powerful means to reduce demand of smoking that Tobacco Control providing this measure for their members and implemented into the law of Thailand since being legally bound by the framework convention on tobacco control (FCTC) of WHO in 2005. Even though imposing the tax measure on tobacco has to be concerned with free trade principle of WTO that Thailand is bound by both GATT and FCTC which are international law in different purpose.

According to the tax measure that influent to imported cigarettes it is divided into 3 types i.e. excise, VAT and customs.

Firstly, higher excise is the biggest source of public revenue that collecting high rate of tax expected to reduce the number of smokers. Thailand has taken control of tobacco and increased the excise rate every year since 2005 that being influential to lessen the number of smokers by 3 percent of every year. Accordingly, this means is evident that taking of tax measure being an efficiency to reduce rate of smokers and being opportunity for raising revenue for development of the country. Even though Thailand adjusted the excise rate increased from 87 percent to 90 percent since February 2016, the excise rate should be adjusted every year for widespread control higher rate of particular smokers who are minor or youngsters in every year.

Secondly, Value Added Tax or VAT has effected since January 1, 1992. It is an indirect tax collected upon consumption on goods or services. In case of VAT, it was one significant issue in the Thailand-Philippines dispute. The Philippines claimed Thailand exempted VAT liability only for domestic cigarettes resellers that was wrongful as national treatment in Article III: 2 first sentence of GATT. Regarding the VAT exemption for domestic cigarettes resellers, Thailand acted inconsistently with Article III: 4 by subjecting imported cigarettes to less favorable treatment than like domestic cigarettes by imposing additional administrative requirements, connected to VAT liabilities, on imported cigarette resellers. In response to this, Thailand and the Philippines had mutually agreed on the reasonable period of time for Thailand to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) and set a deadline of October 15, 2012 for Thailand to comply. Then, the Philippines allowed Thailand to have more time as some of the reforms needed legislation.

However, Thailand realized the decision and amended law following recommendations of DSB that discriminated on foreign cigarettes is unreasonable manner and unaccepted. Thus, Thailand had adjusted the law by applying VAT to domestic cigarettes since 2007 to comply with the panel's decision.

Finally, the country collected customs in the purpose of protecting domestic product and collecting in higher rate for luxury product like cigarettes in order to control consumption of population in country. The customs issue was not opposed in its rate but it relied on the method of customs valuation. The Philippines claimed that Thai customs improperly rejected the transaction value of imported cigarettes which were cleared between 11 August 2006 and 13 September 2007 in violation of Article 1.1 and 1.2(a) of the Customs Valuation Agreement. Under the Customs Valuation

Agreement, the main basis for the valuation of imported goods is the transaction value declared by the importer. When Customs questions the declared transaction value, it must follow the procedure rules set out in the Customs Valuation Agreement. As a result, in examining the circumstances of the transaction between the importer and the exporter, use of other method to establish the valuation was unreasonable.

The Philippines also claimed that examination of a related-party transaction value must follow the procedural set out in Article 1.1, 1.2(a) and 16 of the Customs Valuation Agreement which the customs authority had to be provided the importer a reason of rejection but Thai customs failed to prove its relationship which transaction value of imported cigarettes did not influent the prices.

Particularly, the Philippines argued that Thai customs applied the deductive valuation method which inconsistently with the obligations under Article 5 and 7 of the Customs Valuation Agreement. The panel found that Thailand acted inconsistently with the GATT.

In response, Thailand and the Philippines had mutually agreed to implement the recommendation and ruling of DSB that respects its WTO. Thus, from this lesson, Customs authority has to aware about using method valuated customs tax following GATT.

Moreover, Tobacco control should be the exception of WTO by the following reason in 4.1 and WTO should adjust GATT article XX (b) which has amended for long time ago by emphasizing on and caring more of public health. As for trade and related issues worldwide have changed all the time, the economic growth should be in parallel with the public health concerns.

From the lesson in 1990, a GATT panel upheld the US challenge, forcing Thailand to open its market to the multinationals and ban on cigarette imports and advertising which Thailand's 1966 Tobacco act violated GATT principle but Thai government defended the Act under GATT Article XX(b) but Panel concluded that tobacco control measures should be 'non-discriminatory, and recognized the right of the member states to adopt and implement tobacco control measures, but such measures should be equally applicable to both domestic and imported products'. Thai government subsequently promulgated modified tobacco control measures consistent with this ruling.

From the abovementioned case, customs and fiscal measures on cigarettes between Thailand and the Philippines, Thailand also failed to establish under Article)0((d) of the GATT 1994 which did not have concerns over protection of public health.

At present, GATT 1994 has still categorized all goods as normal goods including tobacco or any other harmful goods. In fact, tobacco is a unique product because it is addictive and dangerous, requiring that product-specific rules be adopted as limited exception to general trade rules. Therefore, trade agreement should typically recognize to protect public health and air pollution that tobacco should be treated as a hazardous substance, rather than as an ordinary product.

Tax measure is the most effective measure to control of domestic mortality by smoking/tobacco in Thailand which the statistic of cause of death showed more than 50,700 Thai people have passed away every year by smoking-related diseases for around 13 million of the country's 67 million inhabitants addicted to cigarettes and 2.2 million of whom are minors that Thai government and Ministry of Public Health and other concern agencies should strictly apply measures to control smoking users and raise tax rate every year on tobacco in order to restrict people away from harmful of tobacco. Moreover, raise tax on tobacco is not only to reduce tobacco consumption and improve the health of populations but also to increase fiscal revenues. Furthermore, Thai government should promote no smoking campaign, advertising risk of tobacco, warning harmful of cigarettes on packaging including the newest measure that the prohibited sell of sub-brands in the shop which Uruguay had won the lawsuit Philip Morris in ICSID and fully applied in Uruguay. To take better effective control in benefit of extensive public health of in Thai society, Thailand should widely implement and enforce those suggested measures into consistent practice in various shops, distributors and other channels of wholesale and retail units both on shelf and online.

Chapter 5
Conclusion and Recommendations

5.1 Conclusion

As for Thailand became the WTO member, like other State members Thailand is required to adjust the law in conformity with GATT and Customs Valuation Agreement in order to claim priority of GATT which provided free trade principle encouraged and enforced trade liberalization with low tax or zero rate for economic growth. However, amendment of related laws may cause different views and interpretation which brought about a trade dispute in 2008 i.e. the case of Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines.

According to the dispute, Thailand realized and conformed GATT as well as amended related laws and regulations consistent with GATT and Customs Valuation Agreement (Article VII) whether taxes and procedure of valuate customs duties. During issue of the VAT dispute that national treatment by exempting applied VAT on domestic cigarettes. Thailand realized the decision of WTO panel and adjusted the law by applying VAT to domestic cigarettes since 2007. Although customs that was not contrary to the provisions of customs and its applicable rate it is the method of Thailand's customs valuation that refused the transaction value without unreasonable and used the unacceptable method to estimate the transaction which Thai customs must use the category under Article VII providing 6 methods to estimate Customs Tax. So, Customs Officer has to be aware of using method valuated customs tax following GATT.

Nowadays, Thailand is signatory and legally bound by treaties of both World Trade Organization and World Health Organization. By law, both provided rules (including their mechanism) to support their differential goal which cause contradiction of rules in some elements became the problem of partial and ineffective enforcement of the framework convention on tobacco control (FCTC) on free trade of WTO in the same time.

The free trade regime can be viewed as threatening tobacco control policies by enforcing states to remove trade barriers and hampering efforts to reduce domestic consumption of tobacco. A State member normally has authority by law to impose excise taxes and duties which results increment of market prices by entrepreneurs and to take action on limiting exposure to advertisement and sale of tobacco products or otherwise by other means of trade sanctions. The tobacco industry has used trade policy to undermine effective barriers to tobacco importation caused opportunity for the tobacco industry to assert its interests without concern of public health.

As for Thailand and other countries were signatory and legally bound by treaties and mechanism of both WTO and FCTC. The tobacco control under WHO has better exempt rules as it is specific rule applied especially on tobacco products in order to control and reduce smoking rate. Furthermore, the country of WTO member country which is not signatory of FCTC shall accept the tradition that state has responsibility and jurisdiction of supervising public health and protecting their population away from dangerous products like cigarettes. It is high time WTO and every countries should realize priority of health of population or assurance of public health in all ages and areas more than only focusing on trade benefits and profits as well as economic growth year by year.

The recent statistic of mortality and its causes appear more than 50,700 Thai people have passed away every year by smoking-related diseases with around 13 million of the country's 67 million inhabitants addicted to cigarettes and 2.2 million of whom are minors that Thai government, Ministry of Public Health and other concern agencies should strictly apply measures to take better effective control in benefit of extensive public health of in Thai society,

Thus, the Philip Morris was in the court proceedings in Thai Criminal Court. Its decision on conviction under-declaration in the value of 272 batches of cigarettes imported from the Philippines between 2003 and 2006 for $2.2 billion of fine Under-declaration is illegal under section 27 of Customs act, B.E.2469 and section 83 and section 91of Thai Criminal Code.

Even though Philip Morris argued that they acted consistent with the GATT but every country has their law to supervise and punishment any wrongful act. Philip Morris should realize any acted in this territory has the punishment under Thai law

and this case happened in Thai territory, Philip Morris cannot allege WTO or the GATT to enforce Thailand. The case has been challenging in Thai Criminal Court that the State authority endeavors to protect the public health and protect the holy of Thai laws and mechanisms.

5.2 Recommendation

From the occurred problem, I am confident to presenting some recommends which may useful to develop gap of law or solving the similar problem in the future.

1. From the analysis problem that Thailand is signatory and legally bound by treaties of both WTO and FCTC which are international law. Referring to the GATT aims at supporting free trade, on the other hand, FCTC aims at supporting control tobacco. Hence, both are international law and Thailand has authority to fully control tobacco under FCTC and the GATT. Furthermore, FCTC is specific framework applied only on tobacco and it is likely to be the exemption of Free trade principle. Thus, the case that Thai prosecutors found Philip Morris Thailand avoided tax around 20 billion baht by under-declaring import prices for cigarettes from the Philippines between 2003 and 2006 which was under court proceedings in Thai Criminal Court. However, Thailand has authority to prosecute against any wrongful acted of defendants in order to protect public benefit and public health, having role, responsibility and authority to regulate for public health or apply any measure to protect their citizen following to the award of ICSID between Uruguay v. Philip Morris International.

2. The problem of application of the GATT article XX (b) has been occurred for long time ago, Asbestos case between European community and Canada is only one case of successful application to be the harmful product. Actually, cigarette is significant harmful to Thai human which cause 142 death per day. Thus, cigarettes should be fully applied and enforced as general exemption in Article XX (b) of the GATT. World Trade Organization should adjust ,GATT 1994 which has amended for long time ago by having more concerns and emphasis on public health. WTO should adjust proper exemption by adding tobacco to be the hazardous product.

Furthermore, GATT 1994 has still categorized all goods as normal goods including tobacco or any other harmful goods. GATT should realize the harmful of tobacco and categorize to the type of sin goods in order to supervise widespread of tobacco.

3. Moreover, application of high rate of tax whether customs tax and excise tax. Thailand should concern the new method that Uruguay that challenging with Philip Morris in ICSID for seven years and triumph the case in the end. Uruguay was successful resolution of the dispute by mentioning public health and fully applying the measure of prohibited sell of sub-brands in the shop and various selling units all over the country. Thailand should consider applying this measure actively in broader range and consistent manner in order to reduce number of smokers and mortality by smoking.

The researcher is confident that implementing the aforementioned recommendations will be the guidelines for development and elimination of gap of law in order to be justifiable for WTO members and other bindings.

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Framework Convention Tobacco Control (WHO)

Appendix

Article 7 of GATT

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:

(a) the selling price in the country of importation of goods produced in such country;

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;

(e) the price of the goods for export to a country other than the country of importation;

(f) minimum customs values; or

(g) arbitrary or fictitious values.

3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

Text of Interpretative Note to Article 7

Note to Article 7

1. Customs values determined under the provisions of Article 7should, to the greatest extent possible, be based on previously determined customs values.

2. The methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 7.

3. Some examples of reasonable flexibility are as follows:

(a) Identical goods — the requirement that the identical goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of Articles 5 and 6 could be used.

(b) Similar goods --- the requirement that the similar goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of Articles 5 and 6 could be used.

(c) Deductive method the requirement that the goods shall have been sold in the "condition as imported" in paragraph 1(a) of Article 5 could be flexibly interpreted; the "90 days" requirement could be administered flexibly.

AGREEMENT ON IMPLEMENTATION OF ARTICLE VII OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

PART

RULES ON CUSTOMS VALUATION

Article 1

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

(a) that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

(i) are imposed or required by law or by the public authorities in the country of importation;

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and

(d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;

(ii) the customs value of identical or similar goods as determined under the provisions of Article 5;

(iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

Article 2

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

Article 3

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

Article 4

If the customs value of the imported goods cannot be determined under the provisions of Articles 1, 2 and 3, the customs value shall be determined under the

provisions of Article 5 or, when the customs value cannot be determined under that Article, under the provisions of Article 6 except that, at the request of the importer, the order of application of Articles 5 and 6 shall be reversed.

Article 5

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

(i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;

(ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;

(iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and

(iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

(b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.

2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

Article 6

1. The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:

(a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;

(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation;

(c) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8 .

2. No Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any account or other record for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs value under the provisions of this Article may be verified in another country by the authorities of the country of importation with the agreement of the producer and provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

Article 7

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined

using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:

(a) the selling price in the country of importation of goods produced in such country;

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;

(e) the price of the goods for export to a country other than the country of importation;

(f) minimum customs values; or

(g) arbitrary or fictitious values.

3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

Article 8

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.

2. In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:

(a) the cost of transport of the imported goods to the port or place of importation;

(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and

(c) the cost of insurance.

3. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

4. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

Article 9

1. Where the conversion of currency is necessary for the determination of the customs value, the rate of exchange to be used shall be that duly published by the competent authorities of the country of importation concerned and shall reflect as effectively as possible, in respect of the period covered by each such document of publication, the current value of such currency in commercial transactions in terms of the currency of the country of importation.

2. The conversion rate to be used shall be that in effect at the time of exportation or the time of importation, as provided by each Member.

Article 10

All information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

Article 11

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.

2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.

3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

Article 12

Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994 by the country of importation concerned.

Article 13

If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances.

Article 14

The notes at Annex I to this Agreement form an integral part of this Agreement and the Articles of this Agreement are to be read and applied in conjunction with their respective notes. Annexes II and III also form an integral part of this Agreement.

Article 15

1. In this Agreement:

(a) "customs value of imported goods" means the value of goods for the purposes of levying ad valorem duties of customs on imported goods;

(b) "country of importation" means country or customs territory of importation; and

(c) "produced" includes grown, manufactured and mined.

2. In this Agreement:

(a) "identical goods" means goods which are the same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical;

(b) "similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar;

(c) the terms "identical goods" and "similar goods" do not include, as the case may be, goods which incorporate or reflect engineering, development, artwork, design work, and plans and sketches for which no adjustment has been made under paragraph 1(b)(iv) of Article 8 because such elements were undertaken in the country of importation;

(d) goods shall not be regarded as "identical goods" or "similar goods" unless they were produced in the same country as the goods being valued;

(e) goods produced by a different person shall be taken into account only when there are no identical goods or similar goods, as the case may be, produced by the same person as the goods being valued.

3. In this Agreement "goods of the same class or kind" means goods which fall within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods.

4. For the purposes of this Agreement, persons shall be deemed to be related only if:

(a) they are officers or directors of one another's businesses;

(b) they are legally recognized partners in business;

(c) they are employer and employee;

(d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;

(e) one of them directly or indirectly controls the other;

(0 both of them are directly or indirectly controlled by a third person;

(g) together they directly or indirectly control a third person; or

(h) they are members of the same family.

5, Persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related for the purposes of this Agreement if they fall within the criteria of paragraph 4.

Article 16

Upon 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.

Article 17

Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.