

## Comment on 'Thailand–Cigarettes (Philippines): A More Serious Role for the 'Less Favourable Treatment' Standard of Article III:4'

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Professors William Davey and Keith Maskus provide an excellent and succinct analysis of the legal and economic significance of the Report of the Appellate Body (AB) of the World Trade Organization (WTO) in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*<sup>1</sup> (*Thai–Cigarettes*). The modest aim of this brief comment is to further explore the distinction that the AB appeared to draw between final and provisional decisions *vis-à-vis* GATT Article X:3(b).

As discussed in *Thai–Cigarettes*, the Philippines claimed that Thailand violated Article X:3(b) by failing to provide a means to appeal promptly guarantee decisions relating to customs valuations. GATT Article X:3(b) states, in relevant part:

Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the *prompt review* and correction of *administrative action relating to customs matters*. (first italics in original)

There were thus two relevant issues in play regarding guarantee decisions in *Thai–Cigarettes*: (1) if Article X:3(b) provided a right to appeal them, and if so (2) when the appeal should be available. This comment addresses the former.

As a strict textual matter, the AB had little choice but to interpret the phrase 'administrative action relating to customs matters' expansively, as 'acts or decisions of the executive branch of a government'<sup>2</sup> regarding any 'thing'<sup>3</sup> 'hav[ing] some [rational] connection with'<sup>4</sup> 'customs'.<sup>5</sup> Indeed, nothing in the text itself

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1 Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011 (hereinafter the AB Report).

2 *Ibid.*, para. 192.

3 *Ibid.*, para. 193.

4 *Ibid.*, para. 194.

5 *Ibid.*, para. 193.

meaningfully cabins its scope. But the AB also stated that this language should be interpreted in light of the object and purpose of the GATT, including in light of the principles of due process, transparency, and procedural fairness.<sup>6</sup> The AB gave little substantive content to these principles, but did quote the Panel Report from *EC – Selected Customs Matters* for the proposition that GATT Article X:3(b) ‘ensure[s] that a trader who has been adversely affected by a decision . . . has the ability to have that adverse decision reviewed’.<sup>7</sup> However, in uttering this statement, *EC – Selected Customs Matters* was deciding a different issue *vis-à-vis* GATT Article X:3(b).

The AB did, however, appear to potentially limit the article’s scope in its application of the law to the facts,<sup>8</sup> rather than in its legal analysis.<sup>9</sup> In that section, the AB appeared to draw a distinction between ‘provisional’ and ‘final’ decisions in that the AB found guarantee decisions ‘final’ and therefore appealable.<sup>10</sup> The AB, however, did not explicitly address the question of whether guarantee decisions could still have fallen within the scope of GATT Article X:3(b) if such decisions were ‘provisional’. Nor did it either disavow or adopt the Panel’s reasoning that ‘the term “administrative action relating to customs matters” . . . is not necessarily limited to *final* administrative determinations.’<sup>11</sup>

Therefore, it is unclear to what extent the AB Report in *Thai–Cigarettes* stands for the proposition that a legal distinction between provisional and final decisions exists in this context. Indeed, as discussed above, nothing in the text as interpreted by the AB in its legal analysis required the distinction, nor did the AB borrow such a distinction from any other WTO agreement. Thus, the issue appears open to interpretation. Further, the AB does not explicitly invoke the principles of due process, procedural fairness, or transparency in its relevant factual analysis to decide the case.<sup>12</sup>

6 *Ibid.*, para. 202. See also Vienna Convention on the Law of Treaties, Article 31(1), 23 May 1969, S. Exec. Doc. L, 92-1, 1155 U.N.T.S. 331 (‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’) (hereinafter the Vienna Convention).

7 AB Report, para. 202, quoting Panel Report, *European Communities – Selected Customs Matters*, para. 7.536, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report, WT/DS315/AB/R, DSR 2006:IX-X, 3915.

8 *Ibid.*, part V.B.2.a.

9 *Ibid.*, part V.B.1.

10 *Ibid.*, para. 215 (‘It is a *final*, and *not an intermediate*, administrative act . . . The fact that a guarantee provides security for a claim stemming from another administrative action does not change the fact that the imposition of a guarantee *is an administrative action in its own right*.’) (emphasis added).

11 Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, para. 7.1035, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report, WT/DS371/AB/R (emphasis in original).

12 The AB does, however, reject Thailand’s argument that due process *did not* compel the conclusion that there must be a right of appeal against guarantee decisions. AB Report, para. 214. But the AB draws on prior analysis to do so, not by affirmatively invoking principles of due process to decide the case against Thailand. *Ibid.*, para. 215.