

Customs Valuation: New Practice of WTO

“For importers, the process of estimating the value of a product at customs presents problems that can be just as serious as the actual duty rate charged.”¹

On November 15, 2010, the WTO Dispute Panel Report in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (“**Thailand – Customs Measures on Cigarettes**”) was circulated among the WTO members². This report provides an interpretation of the provisions of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the “**Customs Valuation Agreement**”) in respect of the rules for customs valuation of imported goods.

There often arises a misunderstanding between foreign economic entities and Ukrainian customs authorities in respect of the customs valuation of imported goods. This, in particular, concerns the widely discussed problems with confirmation of the declared customs value of imported flowers in August – September of the past year³, furniture⁴, fruit and some pharmaceutical products at the beginning of current year. Unfortunately, there are quite a lot of similar examples of the problems associated with customs valuation in Ukraine⁵. Subject to the foregoing and considering the direct effect of WTO law in Ukraine, the Panel’s conclusions in *Thailand – Customs Measures on Cigarettes* are extremely important for customs valuation of imported goods.

The Panel’s conclusions in *Thailand – Customs Measures on Cigarettes* have already been analyzed in the publications of foreign practitioners and researchers, but never in Ukraine⁶. Thus, this publication briefly outlines the legal aspects of the Panel Report in *Thailand – Customs Measures on Cigarettes* in respect of the provisions of WTO agreements governing customs valuation issues and their practical importance for foreign economic entities.

The *Customs Valuation Agreement* describes the WTO members’ basic customs valuation obligations. However, for the abovementioned Agreement to be correctly applied, one should take account of the practice of the WTO Dispute Settlement Body (the “**Dispute Settlement Body**”). In particular, the WTO members acknowledge that the dispute settlement system serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements [WTO system] in accordance with customary rules of interpretation of public international law⁷.

A total of 15 dispute settlement cases were brought before the Dispute Settlement Body in respect of the provisions of the *Customs Valuation Agreement*⁸. One of the most illustrative and interesting cases is *Thailand – Customs Measures on Cigarettes*. This case contains, among others, a detailed interpretation of the provisions of the *Customs Valuation Agreement*.

¹ Source: http://www.wto.org/english/tratop_e/cusval_e/cusval_e.htm

² Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines, Panel Report WT/DS371/R, 15 November 2010 <http://www.worldtradelaw.net/reports/wtopanelsfull/thailand-cigarettesphilippines%28panel%29%28full%29.pdf>

³ Source: <http://www.kyivpost.ua/business/news/kviti-podorozhchayut-cherez-pidvischennya-mitnih-platezhiv.html>

⁴ Source: <http://focus.ua/economy/169723>

⁵ Source: <http://ukranews.com/uk/news/economics/2010/10/15/29126>

⁶ E.g., publications by Sidley Austin, source: <http://www.sidley.com/files/News/8d8a3fd2-d4d7-4c00-bd39-055ebd40ed8f/Presentation/NewsAttachment/080a2899-476e-4e03-bff5-08b001faa68d/International%20Trade%202011.16.10%20WTO%20Panel%20Clarifies.pdf>

⁷ Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

⁸ Source: official website of the World Trade Organization

http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A27#selected_agreement

Looking ahead, we would like to note that the Panel Report in *Thailand – Customs Measures on Cigarettes* was not approved by the Dispute Settlement Body since the Philippines notified of its decision to file an appeal against the Panel’s conclusions and, thus, it is too early to draw the line in this case. This issue is described in more detail below.

Brief Analysis of Panel’s Conclusions in Thailand – Customs Measures on Cigarettes

The *Thailand – Customs Measures on Cigarettes* case concerns the dispute between Thailand and the Republic of Philippines in respect of the customs valuation of cigarettes imported from the Philippines. Based on the facts of this case, the Thai customs authorities rejected the transaction value declared by the Thailand branch of Philip Morris and related company in the Philippines for customs valuation of cigarettes imported from the Philippines and, instead, used a deductive method to determine the customs value for the goods. The Philippines disagreed with such decision of the Thai customs authorities and accused Thailand of the violation of Articles 1.1 and 1.2 (a), 5, 7, 16 of the Customs Valuation Agreement and Articles III, X of the *General Agreement on Tariffs and Trade 1994* and initiated the WTO dispute settlement proceedings.

Having considered the case, the Panel found that, based on the WTO agreements, the Thai customs authorities unlawfully rejected the transaction value for assessing the customs value of imported cigarettes. The Panel also held that, in accordance with Article 1.2. of the *Customs Valuation Agreement*, the transaction value of the imported goods is the primary method for assessing the customs value of imported goods and may not be rejected simply because the buyer and the seller are related. Instead, customs authorities may reject the transaction value of the imported goods as a customs valuation method only if they have doubts about the acceptability of the declared transaction value and/or supporting documents⁹. In assessing the customs value, an importer should provide all reasonable information and customs authorities should give the importer a reasonable opportunity to collect, supply and analyze necessary information.

Therefore, the Panel established in the *Thailand – Customs Measures on Cigarettes* case that the Thai customs authorities failed to properly analyze the terms of imported goods sales effected between the Thai branch of Philip Morris and the related company in the Philippines, and acted unlawfully when they rejected the transaction value as the basis for determining the customs value¹⁰. Besides, the Panel found that the Thai customs authorities also failed to specify the reason why they so rejected the transaction value to be applied to determine the customs value of the imported goods, which constitutes the violation of Article 1.2(a) of the *Customs Valuation Agreement*¹¹.

The Panel explained that customs authorities are bound to apply the six methods of determining the customs value in the order of priority as determined in the *Customs Valuation Agreement*. In addition, the used information is to be submitted by the importer. In case of any doubt as to its reliability, customs authorities must request additional information from the importer.

If the deductive method is used to determine the customs value pursuant to Article 5 of the *Customs Valuation Agreement*, customs authorities are to deduct transportation costs and

⁹ *Thailand – Customs Measures on Cigarettes*, Panel Report, para. 7.150

¹⁰ *Thailand – Customs Measures on Cigarettes*, Panel Report, para. 7.195

¹¹ *Thailand – Customs Measures on Cigarettes*, Panel Report, para. 7.223

other costs. Thus, the Panel declared the practice of determining the price of imported cigarettes to be inconsistent with the *Customs Valuation Agreement* since the Thai customs authorities failed to deduct transportation costs, sales allowances and the local Thai tax (provincial tax).

Besides, the Panel found that, as prescribed by Article 16 of the *Customs Valuation Agreement*, customs authorities must provide, at the importer's request, a written explanation how the customs value of the transported goods was determined and provide reasons why the transaction value was not used as a method to determine the customs value of the imported goods, along with other methods to be applied pursuant to the order of priority set forth in the *Customs Valuation Agreement*¹².

Appeal Procedure

Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* provides that the parties to a dispute are entitled to appeal the conclusions contained in the panel report and are to give a respective prior notice to the Dispute Settlement Body. Thailand exercised its right of appeal by giving the notice of appeal on February 22, 2011¹³.

In its notice of appeal Thailand objected to the Panel's conclusions regarding the provisions of the *General Agreement on Tariffs and Trade 1994*, but leaved unchallenged the conclusions pertaining to the provisions of the *Customs Valuation Agreement*. Therefore, if Thailand fails to additionally change the matter in dispute, in particular fails to appeal the Panel's conclusions regarding the provisions of the *Customs Valuation Agreement*, we may reasonably assume that the Appeal Authority will as well upheld the conclusions as to the understanding of the provisions set forth in the *Customs Valuation Agreement*.

Conclusions

Thus, based on the interpretation of the *Customs Valuation Agreement*, the Panel arrived at a number of important conclusions regarding the *Thailand – Customs Measures on Cigarettes* case, as follows: (a) the transaction value is the basis for calculating the customs value even in case of related entities, (b) other methods of calculating the customs value are to be applied in order of sequence only, (c) when the cost deduction method is applied, all deductions are to be duly made, and (d) in case of any doubts as to whether the declared customs value is reliable customs authorities are to specify the reasons why they rejected such customs value.

Having analyzed the Panel's conclusions made in the *Thailand – Customs Measures on Cigarettes* case, we may presume that, from the WTO's point of view, the practice of unsubstantiated overstating of the customs value and application of the methods for customs value calculation in violation of the priority determined by the *Customs Valuation Agreement*, as well as improper customs value calculation using the deduction method, is unacceptable and should be avoided by customs authorities.

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¹² *Thailand – Customs Measures on Cigarettes*, Panel Report, para. 7.223

¹³ Source: <http://www.worldtradelaw.net/na/ds371-8%28na%29.pdf>