

BEFORE THE WORLD TRADE ORGANIZATION

Panel established pursuant to the Understanding on Rules and Procedures Governing
the Settlement of Disputes

**THAILAND - CUSTOMS AND FISCAL MEASURES ON
CIGARETTES FROM THE PHILIPPINES (DS371)**

**REQUEST FOR PERMISSION TO SUBMIT
INFORMATION TO THE PANEL BY NON-PARTIES**

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INFORMATION FOR SUBMISSION TO THE PANEL

ON BEHALF OF

The Tobacco Law Center, Inc.
William Mitchell College of Law
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
Doug.Blanke@wmitchell.edu
Benn.McGrady@gmail.com

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REQUEST FOR PERMISSION TO SUBMIT INFORMATION TO THE PANEL BY NON-PARTIES

1. The panel has authority to receive information

1.1 Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) governs the right of the panel to seek information. Article 13 states:

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

1.2 In *US - Shrimp* the Appellate Body confirmed that Article 13 of the DSU permits a panel to accept information and advice whether requested by a panel or not.¹ The undersigned applicant requests that the panel exercise this power, accept the attached information and take it into account in determining the outcome of *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*.²

1.3 Although there are no formal rules governing the acceptance of unsolicited information, the applicant submits that the factors set out below weigh in favor of the panel accepting the attached information.

2. The identity of the applicant

2.1 The Tobacco Law Center, www.tobaccolawcenter.org, is an incorporated nonprofit nongovernmental organization (NGO) exempt from taxation under the laws of the United States of America. The applicant is an affiliate of the William Mitchell College of Law, a century-old independent school of law and the largest school of law in the State of Minnesota.

2.2 A public interest law and policy think tank, the Tobacco Law Center was established in the year 2000 to promote public health by assisting health experts in addressing the effects of tobacco use. As suggested by its tagline 'improving health through the power of law,' the Center assists in the development of legislation and public policies, the defense of litigation threatening to public health, and analysis of related legal issues.

¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras 102 - 107

² *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, Request for the Establishment of a Panel by the Philippines, World Trade Organization, WT/DS371/3, 6 October 2008

2.3 The Center coordinates the legal network supporting tobacco control efforts in the United States, the Tobacco Control Legal Consortium. In that capacity, it frequently submits legal briefs as *amicus curiae* in courts of the United States, both on its own behalf and on behalf of other organizations, including, for example, the American Medical Association, American Cancer Society, American Lung Association, American Heart Association and American Public Health Association. It has submitted briefs before the Supreme Court of the United States, lower federal courts and the supreme courts of various states of the United States.

2.4 The Center also supports effective public health measures at the international level. As a consultant to the World Health Organization (WHO), the Center has edited the WHO's guidebook on effective tobacco control legislation, written its report on the use of litigation to address the effects of tobacco use and participated in WHO expert consultations on legislation and litigation.

2.5 The Center helps train national officials in effective public policies, including, for example, a 2005 training workshop for legislators of the MERCOSUR countries and a 2004 training for Eastern European health officials. One of the Center's publications is being translated from English to Portuguese by the Brazilian Cancer Institute (INCA), for use in training judges in Brazil.

2.6 The Center has a particular interest in the success of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), the first international public health treaty developed under the authority of the WHO. As a representative of the International Union Against Cancer (UICC) and the International Union Against Tuberculosis and Lung Disease (IUATLD), the Center participated actively as an NGO observer in the negotiation of the WHO FCTC. As a member of the Framework Convention Alliance, the global network of NGOs working for successful implementation of the treaty, the Center has participated actively in the subsequent Conferences of the Parties to the treaty and served as a Rapporteur for the Working Group of Parties that developed official guidelines for smoking regulation under Article 8 of the treaty.

2.7 The Center also has a particular interest in protecting public health measures against interference from tobacco manufacturers. The Center's director served as a consultant to the Committee of Experts appointed by the WHO in 1999 to study tobacco companies' interference with WHO activities, and as facilitator of the WHO's 2007 expert consultation on tobacco industry interference with tobacco control worldwide. On behalf of the Framework Convention Alliance, the Center recently participated actively in development of official guidelines for implementation of FCTC provisions designed to protect public health policies against interference from the commercial or other vested interests of the tobacco industry. The Center's publication on U.S. judicial findings about tobacco industry misconduct has been translated into Portuguese and widely circulated in Brazil, http://actbr.org.br/uploads/conteudo/98_1209-livro-veredicto-final.pdf, where it has recently been cited by a Brazilian court.

3. The applicant has interests in the dispute

3.1 The applicant's interests relate to the potential implications of this dispute for public health. The applicant has an interest in ensuring (1) that resolution of the

dispute does not have negative impacts of a systemic character on the application of WTO law to public health measures and (2) that the panel's report is not a source of unwarranted 'regulatory chill'.

3.2 *Resolution of the dispute may have systemic implications for the relationship between WTO law and public health*

Without knowing the precise arguments that the Philippines and Thailand will make, it is difficult to predict all of the potential implications of this dispute for public health. Nonetheless, it is possible to identify two kinds of potential implications.

3.3 First, the panel's decision may have narrow implications for public health in Thailand. Resolution of the dispute in favor of the Philippines could result in a reduction in taxes applied to tobacco products imported into Thailand, thereby undermining tax measures as a means of discouraging tobacco consumption and internalizing the external costs of tobacco consumption.

3.4 Second, the panel's decision may have broader systemic implications for the treatment of public health measures under WTO law. For example, depending on the arguments raised by the parties, the panel's decision could have systemic effects upon issues such as:

- (i) customs valuation procedures and their flow-on effects for health-based taxation measures;
- (ii) the relationship between the WHO FCTC and the WTO Agreement;
- (iii) whether WTO law obliges members to provide remedies to private enterprise under domestic law; and
- (iv) the application of exceptions such as Article XX(b) of the GATT 1994 to public health measures.

3.5 While the applicant is concerned about the potential impact of this dispute on tobacco control in Thailand, the attached submission addresses only the broader systemic implications that may flow from the panel's decision. That is, the applicant has a general interest in the implications of WTO law for public health.

3.6 *There is potential for the panel's report to dissuade lawful regulation*

The applicant is concerned that WTO Members may be dissuaded from implementing lawful public health measures based upon erroneous beliefs that these measures may violate WTO law. As an organization working to protect public health, the applicant has an interest in ensuring that the panel's report does not contribute to this so-called 'regulatory chill'.

3.7 The tobacco industry's attempts to influence public health policy-making are so pervasive that particular caution should be taken regarding regulatory chill in the context of tobacco products. The pervasiveness of tobacco industry lobbying is reflected in Article 5.3 of the WHO FCTC, which states that '[i]n setting and implementing their public health policies with respect to tobacco control, parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.' This provision is of such significance in the

context of tobacco control that the parties to the WHO FCTC have adopted a detailed set of guidelines for its implementation.³

3.8 More specifically, tobacco companies regularly use WTO law in attempts to dissuade WTO Members from implementing lawful public health measures. For example, in 2008 JT International Philippines (a member of the Japan Tobacco Group) made a submission to legislators in the Philippines.⁴ The submission argued that proposed laws banning the use of terms such as 'light' and 'mild' (which are widely recognized to be misleading and deceptive) on tobacco products would per se violate the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Agreement on Technical Barriers to Trade. This submission distorted WTO law and was made despite the fact that the WHO FCTC requires parties to implement bans of this type and the fact that many parties have done so. There are numerous other known examples of the tobacco industry making similarly misleading submissions to health authorities in the territory of WTO Members.

3.9 In light of these circumstances, the applicant urges the panel to exercise caution in its report so as to minimize the possibility that it may be used by the tobacco industry in an unintended manner.

4. Issues that the applicant intends to address

4.1 The specific issues addressed in the attached submission reflect the applicant's interests in the systemic impacts of the panel's decision and in the avoidance of regulatory chill. These issues include:

- (i) the role of tobacco tax measures in promoting public health;
- (ii) the relevance of the WHO FCTC to the tax measures in question and the relationship between that treaty and the WTO Agreement;
- (iii) the relationship between customs valuation and illicit trade in tobacco products;
- (iv) the claim that Article III:2 of the GATT 1994 obliges Thailand to provide remedies to tobacco manufacturers for overpayment of taxes, including the potential impacts of this argument on public health and on WTO law more generally;
- (v) the application of the principle of judicial economy to claims under Article III:2 of the GATT 1994 that flow from arguments relating to customs valuation; and
- (vi) the application of Article XX(b) of the GATT 1994 to tobacco control measures.

4.2 Given that the applicant has not had access to the submissions of the parties to the dispute, it is not possible for the applicant to know the extent to which these issues are addressed in the submissions of the parties or third parties to the dispute. Nonetheless, the distinct public health perspective of the applicant and the fact that the attached submission focuses on systemic issues from that perspective suggest that

³ See Decisions, Conference of the Parties to the WHO Framework Convention on Tobacco Control, Third Session, Durban, South Africa, 17-22 November 2008, FCTC/COP/3/DIV/3, 16 February 2009 available at http://www.who.int/gb/fctc/PDF/cop3/FCTC_COP3_DIV3-en.pdf

⁴ JT International, Philippines, House Bill, NO. 3364, (Picture Based Health Warning Act) on file with the author.

the brief may address the issues identified in a manner not addressed by the parties to the dispute.

4.3 The applicant also requests that the panel treat the issues identified above as severable, so that the potential redundancy of a submission on one of these issues should not affect the acceptance of the other submissions as relevant.

5. The applicant is independent of the parties

5.1 A number of factors support the conclusion that the applicant's submission is not a partisan submission and that the applicant does not make its submission in order to support either party to the dispute.

5.2 First, the applicant does not express a position on the question whether the dispute should be resolved in favor of one disputant or another. Although the applicant's submissions, if accepted, are capable of affecting the panel's decision, this is an inevitable consequence of providing relevant material, and this alone does not suggest partisanship.

5.3 Second, as described above, the applicant's interests in this dispute relate to its systemic implications for public health. This is consistent with the identity of the applicant and its mission. This interest is also reflected in the nature of the submissions.

5.4 Third, the applicant has not had access to the submissions of either party to the dispute or to the submissions of third parties. As a courtesy to the parties to the dispute, the applicant has forwarded a hard copy of this document to:

The Permanent Mission of the Republic of the Philippines to the WTO
80-82 Rue de Lausanne,
CH1202 Geneva,
Switzerland

The Permanent Mission of Thailand to the WTO
Case postale 1848
1215 Geneva 15
Switzerland

The applicant has also forwarded electronic copies of this document to mission@philippineswto.org and gsa@thaiwto.com.

6. The applicant's submission may contribute to decision-making

6.1 The attached submission, if accepted, could contribute to decision-making in at least three ways. First, the attached submission sets out the broader political and social context of the dispute and the potential implications of the panel's decision for public health.

6.2 Second, the attached submission sets out legal analysis of issues arising under treaties outside the scope of the WTO Agreement but potentially relevant to resolution of the dispute. For example, legal analysis of the WHO FCTC and its relationship to

the WTO Agreement could assist the panel in determining that relationship and its implications.

6.3 Third, the attached submission includes factual material that may be taken into account in resolution of the dispute.

7. The applicant stands ready to provide further information

7.1 Should the panel wish to consult with the applicant, it stands ready to provide the panel with further information.

8. The panel should also consult other bodies

8.1 The applicant encourages the panel to consult other bodies with relevant expertise, such as the WHO Tobacco Free Initiative.

INFORMATION FOR SUBMISSION TO THE PANEL

1. The applicant submits that:
 - (a) tobacco taxes play an important role in protecting public health and advancing economic development;
 - (b) where relevant, the Panel should take account of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) in interpretation of WTO covered agreements;
 - (c) customs valuation procedures provide an opportunity for tax avoidance in a context where illicit trade in tobacco products is a large scale problem;
 - (d) the Panel should apply the principle of judicial economy to claims relating to Thailand's health tax (excise) laws;
 - (e) WTO law does not create an obligation to refund any overpaid taxes; and
 - (f) in the event that Thailand relies upon Article XX(b) of the GATT 1994, the panel should recognize the threat posed to health by tobacco products and the importance of the goals of tobacco control.

2. Tobacco taxes play an important role in protecting public health and advancing economic development

2.1 Although the legitimacy and lawfulness of tobacco taxation per se is not at issue in the present dispute, the purposes underlying tobacco taxation constitute an important backdrop to the dispute. In a submission developed in further detail below, the applicant argues that the WTO covered agreements should be interpreted in a manner sensitive to public health law and policy. For this reason, it is worth outlining the purposes of tobacco taxation measures, as well as the treatment of these measures in international law.

2.2 Tobacco consumption causes the premature deaths of approximately 50 percent of regular smokers in middle age.⁵ Consumption of and exposure to tobacco products are believed to have caused approximately 5 million premature deaths in the year 2000⁶ and 5.4 million deaths in the year 2006.⁷ Tobacco consumption also has adverse impacts on economic development. It is well established that good population health contributes to economic development and encourages investment.⁸ It is also clear that tobacco consumption contributes to poverty by diverting household income away from basic necessities such as food, healthcare and education.⁹ The allocation of public health care resources to preventable tobacco related illness results in significant economic costs and in the diversion of health care resources as well as resources from other areas of government spending.

⁵ R Doll, R Peto, K Wheatley, et al, 'Mortality in Relation to Smoking: 50 Years' Observation on Male British Doctors,' 309 British Medical Journal, (8 Oct. 1994) 901 – 911

⁶ Majid Ezzati and Alan Lopez, 'Estimates of Global Mortality Attributable to Smoking in 2000', 362 (Iss 9387) Lancet, (2003), 847 – 852

⁷ Tobacco Free Initiative, World Health Organization, Facts and Figures about tobacco, June 2007, available at http://www.who.int/tobacco/framework/cop/facts_and_figures_about_tobacco.pdf (visited 01/02/08)

⁸ See Dean T. Jamison, Investing in Health, in Dean T. Jamison *et al*, Disease Control Priorities in Developing Countries, 2nd ed. Oxford University Press New York; Washington, DC: World Bank, 2006 pp 3 - 35

⁹ On the relationship between tobacco and poverty see Katharine Esson and Stephen Leeder. The Millennium Development Goals and Tobacco Control : An Opportunity for Global Partnership, World Health Organization, 2004, available at http://www.who.int/tobacco/publications/mdg_final_for_web.pdf (visited 12/12/07)

2.3 The burden of tobacco-related disease suffered by developing countries is gradually increasing. In the year 2000, approximately half of the global deaths associated with tobacco consumption were in developing countries, whereas it is predicted that approximately 70 percent of tobacco related global deaths in the year 2030 will occur in developing countries.¹⁰ According to a World Bank commissioned report, trade liberalization constitutes one cause of this shift in consumption.¹¹

2.4 In recognition of the problems caused by tobacco consumption, the international community concluded the WHO FCTC. At present, 164 states have ratified, accepted, approved or acceded to the WHO FCTC, including 131 of the WTO's 153 Members. 13 other WTO Members are signatories to the WHO FCTC. Through this treaty, the vast majority of WTO Members have recognized the importance of tobacco control in order to promote public health, human rights and economic development. Both Thailand and the Philippines are parties to the treaty.

2.5 The preamble to the WHO FCTC recalls *inter alia* the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹² Article 12 of ICESCR obliges parties to take steps to ensure the realization of the right to the highest attainable standard of health and imposes an immediately binding obligation upon states parties to prevent, treat and control epidemic diseases. In its General Comment 14, the Committee on Economic, Cultural and Social Rights expressly referred to 'the failure to discourage production, marketing and consumption of tobacco' as a violation by States parties of the obligation to protect individuals within their jurisdiction from the infringement of their rights by third parties.¹³

2.6 While the basic responsibility of government to engage in tobacco control is reflected in the right to the highest attainable standard of health, the WHO FCTC imposes more specific obligations. Article 6 of the WHO FCTC governs 'price and tax measures to reduce the demand for tobacco' and states:

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

¹⁰ Judith MacKay & Michael Eriksen, *The Tobacco Atlas*, World Health Organization, 2002 available at <http://www.who.int/tobacco/en/atlas11.pdf> (visited 28/02/09)

¹¹ Taylor, Allyn, Chaloupka, Frank and Guindon, Emmanuel et al, 'The Impact of Trade Liberalization on Tobacco Consumption' in Jha, Prabhat and Chaloupka, Frank, (eds), *Tobacco Control in Developing Countries*, World Bank and World Health Organization, Oxford University Press, (2000), 343 – 364

¹² International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967)

¹³ The Right to the Highest Attainable Standard of Health, General Comment 14, Committee on Economic, Social and Cultural Rights, Twenty-second session, E/C.12/2000/4, 11 August 2000, para. 51

(b) prohibiting or restricting, as appropriate, sales to and/or importations by international travelers 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.

2.7 Recognition of the importance of tobacco tax measures in Article 6.1 builds upon a significant body of evidence, which demonstrates that tobacco taxation reduces tobacco consumption, particularly among youth, less educated persons and lower income groups.¹⁴ For this reason, tobacco taxation is considered a central component of public health strategies to reduce tobacco consumption.¹⁵

2.8 Tobacco taxes also have an economic justification as a means of correcting market failures. Tobacco taxes can internalize external costs associated with tobacco consumption, such as public health care costs.¹⁶ The internalization of externalities in this manner is also necessary to prevent importing states from experiencing economic losses as a consequence of trade in tobacco products.¹⁷

3. The Panel should take account of the WHO Framework Convention on Tobacco Control in interpretation of WTO covered agreements

3.1 The applicant submits that the panel should take account of the WHO FCTC in interpretation of the WTO covered agreements wherever that convention is relevant.

3.2 The panel possesses a power to take the WHO FCTC into account in interpreting the WTO covered agreements. The existence of this power is reflected in the fact that treaties and international instruments extraneous to the WTO Agreement have been drawn upon in a number of disputes.¹⁸

3.3 The need to promote coherence in international law also suggests that the panel should exercise this power. As the Appellate Body has stated, the WTO covered agreements should not be interpreted in 'clinical isolation from public international law.'¹⁹

3.4 There are a number of ways in which the panel should take account of the WHO FCTC. In the specific submissions below, examples of the ways in which the panel should take account of the WHO FCTC are set out. Beyond these specific submissions, the manner in which the panel might take account of rules such as

¹⁴ Frank Chaloupka, Teh-Wei Hu, and Kenneth Warner *et al*, 'The Taxation of Tobacco Products' in Jha, Prabhat and Chaloupka, Frank, (eds), *Tobacco Control in Developing Countries*, World Bank and World Health Organization, Oxford University Press, (2000), 237 – 272

¹⁵ *Ibid*.

¹⁶ See generally Prabhat Jha, Philip Musgrove, Frank Chaloupka et al, 'The Economic Rationale for Intervention in the Tobacco Market,' in Jha, Prabhat and Chaloupka, Frank, (eds), *Tobacco Control in Developing Countries*, World Bank and World Health Organization, Oxford University Press, (2000)

¹⁷ On the economic losses associated with importing goods with negative externalities see Jagdish Bhagwati, TN Srinivasan, *Lectures on International Trade*, Cambridge Mass, MIT Press 1983, 245 - 251

¹⁸ For a discussion see Petros Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts', 102 *American Journal of International Law*, July 2008, 421 - 474

¹⁹ Appellate Body Report, *US – Gasoline*, p. 17

Article 6 of the WHO FCTC depends upon the arguments made by the parties to the dispute. In this respect, there are two primary ways in which the panel may take account of the WHO FCTC.

3.5 First, the WHO FCTC may be taken into account in interpreting the scope of provisions in the covered agreements or, in applying those provisions to the facts in issue. Just as a dictionary may guide interpretation, the WHO FCTC sets out a normative context that may be drawn upon in determining the meaning of terms in the WTO covered agreements. This normative context should also guide interpretation where the ordinary wording of a covered agreement presents two permissible interpretations. Where this is the case, an interpretation conducive to the use of measures for the protection of human health ought to be preferred.

3.6 Taking the WHO FCTC into account in this manner does not bind any WTO Member, without its consent, to the terms of the WHO FCTC. Nor does this approach necessarily prejudice the rights of such a member. To the contrary, as is identified below, WTO panels and the Appellate Body often take account of treaties and legal instruments extraneous to WTO law without having this effect.

3.7 Second, WHO FCTC rules may be used as evidence of facts in issue. For example, Article 6 of the WHO FCTC constitutes objective evidence of the importance of the regulatory goals underlying tobacco taxation to the international community.

4. Customs valuation procedures provide an opportunity for tax avoidance in a context where illicit trade in tobacco products is a large scale problem

4.1 In paragraphs 14 - 17 of its Request for the Establishment of a Panel, the Philippines alleges that Thai customs valuation procedures violate Article VII of the GATT 1994 as well as numerous provisions of the Customs Valuation Agreement. Although the applicant does not have an interest in the resolution of each and every one of these claims, the applicant submits that the panel should consider the following two factors in applying the Customs Valuation Agreement.

4.2 First, commercial enterprises can exploit customs valuation procedures in order to circumvent lawful taxation. In the context of tobacco products, the exploitation of customs valuation procedures in this manner would undermine international efforts to prevent tax avoidance on tobacco products. Article 15 of the WHO FCTC seeks to address illicit trade in tobacco products and the parties to the WHO FCTC are currently negotiating an optional protocol on illicit trade in tobacco products.²⁰

4.3 Second, there is good reason for Thai authorities to question the transaction value of Philip Morris cigarettes. In 2004, Philip Morris entered into the Anti-Contraband and Anti-Counterfeit Agreement and General Release with the European Community (EC).²¹ This deed of settlement followed a claim filed by the European Union against Philip Morris in the United States under the Racketeer Influenced and

²⁰ For documentation relating to this ongoing negotiation see <http://www.who.int/gb/fctc/>

²¹ Available at http://ec.europa.eu/anti_fraud/budget/agreement.pdf (visited 28/02/09)

Corrupt Organizations (RICO) Act. The EC claim alleged Philip Morris involvement in organized crime in pursuit of a 'massive, ongoing smuggling scheme.' The claim also alleged that Philip Morris 'engaged in a pattern of racketeering activity, including but not limited to money laundering, wire fraud, mail fraud' and other illegal acts.²²

5. The Panel should apply the principle of judicial economy to claims relating to Thailand's health tax (excise) laws

5.1 In paragraphs 18 - 22 of the Request for the Establishment of a Panel, the Philippines argues that the Thai excise tax, health tax and television tax regimes violate the first and second sentences of Article III:2 of the GATT 1994. More specifically, the Philippines argues that the basis for calculating these taxes upon imported cigarettes is the 'CIF customs value as determined by the Thai customs authorities'.²³ It follows, according to the Philippines, that 'because these customs values serve as the tax basis for imposing the excise tax, the health tax and the television tax, Thailand imposes a higher tax burden on imported products than on like and/or directly competitive or substitutable domestic products.'²⁴ The applicant submits that the panel should exercise the principle of judicial economy and decline to rule on this claim.

5.2 The panel has the general power to elect not to address issues that need not be addressed in order to resolve the dispute between the parties.²⁵ This discretion may be exercised so long as a finding on a claim is not necessary 'to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members"'.²⁶

5.3 A finding on the claim in question is not necessary to resolve the dispute between the parties. The claim turns solely on the question whether Thai laws are applied in a manner consistent with rules governing customs valuation, an issue that the panel must consider prior to considering the claim in question.

5.4 In the event that the panel finds that Thai laws are not applied in a manner consistent with rules governing customs valuation, non-compliance with a covered agreement will be established. In this context, there would be no need to consider the claim that non-compliance with customs valuation rules also results in non-compliance with Article III:2 of the GATT wherever the non-complying customs valuations are used in calculating the taxes in question. Rather, bringing laws into compliance with the Customs Valuation Agreement would also bring them into compliance with Article III:2. Similarly, in the event that the panel finds that Thai laws are applied in a manner consistent with rules governing customs valuation, the basis for the claim under Article III:2 falls away because it is dependent on a favorable decision concerning arguments relating to customs valuation.

²² A copy of the claim is available at <http://projects.publicintegrity.org/docs/Tobacco/EUSuit.pdf> (visited 28/02/09), pp 2 - 3

²³ Request for the Establishment of a Panel by the Philippines, para. 18

²⁴ Request for the Establishment of a Panel by the Philippines, para. 22

²⁵ Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595, para. 71

²⁶ Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 223

5.5 In addition, it is not necessary to rule on the claim in question in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance. Since the claim turns entirely on issues of customs valuation and not on the structure or application of the taxes themselves, any recommendations and rulings will also relate only to customs valuation. Consequently, the panel need not address the claim in question in order to resolve the dispute completely.

5.6 Although the panel should use its discretion to exercise the principle of judicial economy for reasons of prudence alone, the applicant submits that concerns relating to regulatory chill reinforce the merit of applying this principle. Any conclusion to the effect that tobacco excise and health tax laws – which are an important means of tobacco control – are inconsistent with Article III:2 of the GATT 1994 has the potential to undermine regulation in the interests of public health. Past events (including those referred to above) suggest that a conclusion to this effect might dissuade public health authorities from implementing lawful public health measures. Additionally, the previous conduct of the tobacco industry suggests that any such conclusion might be used by the tobacco industry in arguments against lawful public health regulation.

5.7 In the alternative, in the event that the panel does consider the claims under Article III:2 (in light of a violation of rules governing customs valuation), the applicant submits that the panel should expressly define the limits of its decision so as to minimize the potential for regulatory chill. The Appellate Body report in *US - Shrimp* provides an example of how the panel could approach this. In that report, the Appellate Body sought to clarify the effect of its ruling, stating:

185. In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

186. What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.²⁷ [footnote omitted]

²⁷ Appellate Body Report, *US - Shrimp*, paras 185 - 186, emphasis in original

5.8 This submission also has application beyond the scope of arguments relating to Article III:2. The applicant submits that the panel should seek to limit the potential for any aspect of its report to have a chilling effect on regulation.

6. WTO law does not create an obligation to refund any overpaid taxes

6.1 In its Request for the Establishment of a Panel, the Philippines argues that the failure of Thailand to provide refund procedures for overpaid taxes and guarantees violates a number of provisions of the GATT 1994. The Philippines argues that alleged discrimination against imported cigarettes is:

compounded by the fact that Thai law contains no procedure for cigarette importers to claim a refund of the portion of the excise tax, health tax and television tax paid as a result of the excessive customs valuation. Nor does Thai law contain a mechanism for ensuring the release of guarantees for excise tax, health tax and television tax payments that have been posted pending final determination of customs value. The failure of Thailand to provide for such procedures, as well as Thailand's failure to grant refunds for amounts of these taxes that have been overpaid, results in a violation of Article III:2 first and second sentence. It also constitutes a partial and unreasonable administration of the measures referred to in paragraphs 19, 20 and 21 [of the Philippines request], contrary to Article X:3(a) of the GATT 1994, and a failure to publish trade regulations, contrary to Article X:1 of the GATT 1994.²⁸

6.2 The applicant submits that this argument should be rejected. It misconstrues WTO law and, if upheld, could foment regulatory chill and undermine the state centric character of the WTO Agreement and WTO dispute settlement.

6.3 In essence, the argument advanced by the Philippines is that where the *levying* of taxes violates Article III:2 of the GATT 1994, *retaining* the offending tax is a separate violation of the same provision. This argument is an attempt to introduce remedies for non-state entities into WTO law through the back-door of Article III:2 of the GATT 1994.

6.4 The DSU does not expressly oblige WTO Members to create domestic procedures that provide remedies to non-state entities for violation of WTO law. Notwithstanding this, the argument advanced by the Philippines necessarily implies that Article III:2 of the GATT 1994 obliges WTO Members to (a) provide compensation to non-state actors in certain circumstances and (b) provide domestic legal procedures that enable non-state actors to claim compensation. These implications necessarily flow from the argument advanced by the Philippines because it is argued that failure to refund allegedly overpaid taxes constitutes a violation of Article III:2 of the GATT 1994 in the context in question.

6.5 As Article 22(1) of the DSU suggests, the most appropriate remedy for violation of a WTO covered agreement is for the WTO Member in question to bring its laws into compliance with the covered agreement. This means that if Thailand has violated Article III:2 in *levying* taxes, the laws governing the levying of those taxes should be brought into compliance with Article III:2 of the GATT 1994 so as to prevent future unlawful taxation. Nothing in the DSU, however, suggests that Thailand would be obliged to provide an additional remedy relating to taxes collected prior to a finding of non-compliance.

²⁸ Request for the Establishment of a Panel by the Philippines, para. 23

6.6 The claim made by the Philippines also suggests that WTO Members are obliged to compensate non-state entities for loss caused by conduct that violates WTO law by a Member *prior in time to* a WTO panel finding a measure to be non-compliant. This would entail the creation of domestic systems of dispute settlement mandated to determine whether a member's actions are consistent with WTO law earlier in time than the WTO Dispute Settlement Body is requested to rule on compliance with a covered agreement (assuming that a request is actually made). This could undermine the state centric character of WTO law and the role of dispute settlement within the WTO system. For these reasons, it is submitted that neither Article III:2 nor Article X of the GATT 1994 require Thailand to maintain a standing mechanism to refund taxes overpaid due to excessive customs valuation.

6.7 If the argument advanced by the Philippines should not be read to suggest that Thailand should maintain such a mechanism, then the argument contemplates the grant of a retrospective remedy. This view of the argument made by the Philippines would imply that Thailand is obliged to compensate non-state entities for taxes paid earlier in time than resolution of this dispute by the panel. In contrast, as a general rule, the remedies available under the DSU are prospective in character and, as discussed above, are intended to induce future compliance with the covered agreements.

6.8 In conclusion, the argument advanced by the Philippines in paragraph 23 of its Request for the Establishment of a Panel has no basis in WTO law and is inconsistent with some of the central characteristics of dispute settlement embodied in the DSU. From a public health perspective, acceptance of the argument advanced by the Philippines would attach private law consequences to the violation of the covered agreements, thereby strengthening the capacity of non-state entities (such as tobacco companies) to engender unwarranted regulatory chill.

7. In the event that Thailand relies upon Article XX(b) of the GATT 1994, the panel should recognize the threat posed to health by tobacco products and the importance of the goals of tobacco control

7.1 Article XX(b) of the GATT 1994 states:

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:

...

(b) necessary to protect human, animal or plant life or health;

7.2 As the applicant has not seen the submissions of the parties to the dispute the applicant cannot set out a detailed submission concerning how Article XX(b) should be applied in the present context. Nonetheless, the applicant has an interest in those aspects of Article XX(b) that have a systemic significance for the relationship between public health and WTO law.

7.3 The application of Article XX(b) requires a two-step analysis. In the first step the panel should consider whether the Thai measure is necessary to protect human health. If so, the panel should appraise the measures under the introductory clauses of

Article XX (*the chapeau*).²⁹ The applicant seeks only to make some general submissions on the first step in this process.

7.4 *The scope of Article XX(b) encompasses a range of tobacco control measures*
In determining the necessity of the Thai measure, the first issue to be addressed is whether the measure in question falls within the range of policies considered to protect human health or life.³⁰ In answering this question, a panel should first determine whether a risk to health exists. Where such a risk does exist, the objective of the measure should be assessed to determine whether the policy underlying the measure is to reduce that risk. If the answer to each of these questions is in the affirmative, the measure is a measure to protect human health or life.³¹

7.5 With respect to the first of these questions, it is well-established that tobacco consumption poses a risk to health. In *Thailand - Cigarettes*, a GATT panel relied upon expert evidence from the WHO and ‘accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b).’³² This conclusion is reinforced by the WHO FCTC, which itself is evidence of the general acceptance that tobacco consumption poses a risk to health. In this respect, the fifth paragraph of the preamble to the WHO FCTC recognizes ‘that scientific evidence has unequivocally established that tobacco consumption and exposure to tobacco smoke cause death, disease and disability’.

7.6 The applicant does not have sufficient information to comment conclusively on whether the policy underlying the impugned aspects of the Thai measure is to reduce the risks posed by tobacco consumption. Nonetheless, in drawing its conclusion, the panel should consider the following two factors. First, Article 6.1 of the WHO FCTC constitutes objective evidence of the relationship between taxation and tobacco consumption and, therefore, between taxation of tobacco products and the protection of human health. A large body of empirical evidence also confirms this relationship.³³

7.7 Second, the fact that Thailand is a Party to the WHO FCTC might constitute objective evidence of Thailand's regulatory purpose in taxing tobacco products.

7.8 *The goals of tobacco control are of the highest importance*
After considering whether the measure in question is a measure for the protection of human health, the panel should weigh and balance various factors in order to determine the necessity of the measure.³⁴ These factors, which include the trade

²⁹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 20

³⁰ See for example Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243, paras 156 – 163

³¹ Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007, para. 7.42

³² GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted 7 November 1990, BISD 37S/200, para. 73

³³ See note 14 above

³⁴ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5, para. 164

restrictiveness of a measure and the contribution of a measure to its regulatory goal, are ordinarily weighed in light of the importance of the regulatory goal in question.³⁵ The applicant submits that the goals associated with the protection of human health, tobacco control and tobacco taxation are important to the highest degree.

7.9 In considering a ban on the sale of asbestos products, the Appellate Body stated in *EC – Asbestos* that:

the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.³⁶

7.10 The panel in *Brazil – Measures Affecting Imports of Retreaded Tyres* drew upon this statement and concluded that ‘to the extent that this same value is being protected here, the same reasoning would apply.’³⁷ On this basis, the panel concluded that ‘the objective of protecting human health and life against life threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree’.³⁸

7.11 Other factors also suggest that the goals of tobacco control and tobacco taxation are important to the highest degree. As described above, tobacco consumption is one of the leading causes of death and disease globally. The widespread ratification of the WHO FCTC, including by the vast majority of WTO Members, also suggests that concerns associated with tobacco consumption are common among WTO Members.

7.12 The importance of tax measures as a means of protecting public health is also recognized in Article 6.1 of the WHO FCTC. That provision states that ‘[t]he 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.’

8. Conclusion

In summary, the applicant submits that:

- (a) tobacco taxes play an important role in protecting public health and advancing economic development;
- (b) the panel should take account of the WHO FCTC in interpretation of the WTO covered agreements;
- (c) customs valuation procedures provide an opportunity for tax avoidance in a context where illicit trade in tobacco products is a large scale problem;
- (d) the panel should be cautious in relying upon evidence provided by Philip Morris;
- (e) the panel should apply the principle of judicial economy to claims relating to Thailand's health tax laws found in paragraphs 18 - 22 of the Request for the Establishment of a Panel;

³⁵ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para. 306;

³⁶ Appellate Body Report, *EC – Asbestos*, para. 172

³⁷ Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, para. 7.111. This conclusion was not in question on appeal.

³⁸ Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, para. 7.111

- (f) WTO law does not create an obligation to refund any overpaid taxes; and
- (g) in the event that Thailand relies upon Article XX(b) of the GATT 1994, the panel should recognize the threat posed to health by tobacco products and the importance of the goals of tobacco control.

Respectfully submitted by:

Dr. Benn McGrady

An Australian lawyer under the terms of the Legal Profession Act 2004 (Vic)

Benn.McGrady@gmail.com

On behalf of:

The Tobacco Law Center, Inc.

William Mitchell College of Law

875 Summit Avenue

Saint Paul, Minnesota 55105 USA

Doug.Blanke@wmitchell.edu