

5 October 1990

THAILAND - RESTRICTIONS ON IMPORTATION OF
AND INTERNAL TAXES ON CIGARETTES

*Report of the Panel adopted on 7 November 1990
(DS10/R - 37S/200)*

I. INTRODUCTION

1. On 22 December 1989, the United States requested consultations with Thailand under Article XXIII:1, concerning restrictions on imports of and internal taxes on cigarettes maintained by the Royal Thai Government (DS10/1). As these consultations which were held on 5 February 1990 did not lead to a solution, the United States requested the CONTRACTING PARTIES to establish a panel under

5. The Panel held meetings with the parties to the dispute on 2 and 27 July 1990. It consulted with officials of the World Health Organization on 19 July 1990. The delegation of the European Communities made an oral submission to

- Thailand's restrictions on imports were also justified under Article XX(b) because measures which could only be effective if cigarette imports were prohibited had been adopted by the government to control smoking and because chemical and other additives contained in United States cigarettes might make them more harmful than Thai cigarettes;
- the restrictions were justified by Thailand's Protocol of Accession to the GATT because the Tobacco Act of 1966, upon which the restrictions were based, predated Thailand's accession to the GATT in 1982 and was mandatory in its expressed intent;

(ii) Internal taxes

- the excise, business and municipal taxes applied to cigarettes were not higher for imported cigarettes than for the like domestic product and were not therefore inconsistent with Article III;

15. Thailand therefore requested the Panel to reject the complaint of the United States.

B. Article XI:1

16. The United States argued that since 1966 Thailand had implemented an import licensing régime for cigarettes which was inconsistent with Article XI. The Thai Tobacco Monopoly had imported cigarettes on only three occasions and the Government refused to consider import licence applications from any other entity. The United States had repeatedly requested that Thailand eliminate its licensing restrictions and permit imports of cigarettes from other contracting parties. These requests had been turned down. Recalling that a number of

18. The United States held the view that because of the fundamental nature of the ban on quantitative restrictions, contained in Article XI:1, any exceptions to it must be narrowly construed. With respect to each exception asserted, each and every condition must be met before a measure may be considered as covered by the exception.

19. The United States argued that the import restrictions maintained by Thailand on cigarettes could not be justified by Article XI:2(c) for the following reasons:

- (a) the implementation of the import licensing system set forth in Section 27 of the Tobacco Act of 1966 acted as a de facto prohibition on imports from the United States and other contracting parties. At least two prior GATT panels had found that import prohibitions were not justified under Article XI:2(c)(i).¹ The Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" had cited the conclusion reached by the Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", which had noted that in Article XI:2(a) and (b), the words "prohibitions and restrictions" are used while in Article XI:2(c) mention is only made of "restrictions", and had concluded that "the provisions of Article XI:2(c) could not justify the application of an import prohibition";
- (b) the working assumption that a product falling under Chapters 1-24 of the CCC or HS nomenclatures is considered an agricultural product should not automatically be applied when that resulted in unnecessary and unintended exemptions from the provisions of Article XI. Consequently, a cigarette could not be considered an agricultural product simply because it is processed, in

- (d) a de facto ban on cigarettes which had been in effect since 1966, could not be considered an act to address unexpected excess supply of agricultural products, in the meaning of Article XI:2;
- (e) the restriction reduced the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions.

20. Thailand recognized that since the first Tobacco Act had

25. Most recently, on 6 March 1990, the Thai Cabinet had decided to attack the problem of smoking on both the supply and demand sides by instructing the relevant authorities to:

- reduce the production of cigarettes on a continuous basis;
- reduce the area where tobacco is grown;
- set aside funds to be used by the NCCTU in its anti-smoking campaign;
- encourage academic institutions in their role of expressing or reflecting public opinion on cigarette smoking;
- prohibit exports of cigarettes.

26. According to Thailand, the smoking rate among the Thai population over 10 years of age declined from 30.1 per cent in 1976 to 27.8 per cent in 1981, 26.4 per cent in 1986 and 25 per cent in 1988. In addition per capita consumption of tobacco declined at a rate of 2.2 per cent a year between 1974-76 and 1984-86. Aggregate consumption had increased at an average annual rate of 1.1 per cent in 1984-86 but this was largely accountable to increase in population and a higher standard of living which had encouraged smokers, particularly in rural areas, to switch from self-rolled cigarettes and traditional tobacco products to manufactured cigarettes. At the same time, while total cigarette production in Thailand was still growing, the annual growth rate had fallen from 2.8 per cent to 2.72 per cent in recent years.

27. Thailand argued that while competition had desirable

ingredients that had been reported each year. None of the other countries, such as the United Kingdom, France and the Federal Republic of Germany, which also required disclosure of ingredients, had raised problems with ingredients in United States

that the importation of cigarettes would yield an extra revenue of baht 800 million (about US\$30 million) per year which was a substantial sum for a developing country. However, the government had decided to forego this sum in

"Thailand ... shall apply to contracting parties provisionally and subject to this Protocol, ...
(b) Part II of the General Agreement to the fullest extent not inconsistent with the l

41. In the view of the United States, adoption and implementation of a value-added tax system was not the only means to address the problems raised by the application to cigarettes of the Thai business and municipal taxes. These problems should be addressed promptly and directly. Furthermore, adoption of a value-added tax on cigarettes, as planned by the Thai government, would not eliminate all of the discriminatory aspects of cigarette taxation in Thailand because the value-added tax on imported and domestic cigarettes would replace the business and municipal taxes but the excise tax, with rates tied to the amount of domestic tobacco in the cigarette and higher ceiling rates for imported cigarettes, would continue to be applied. Thus domestic production of cigarettes would still be protected by a tax system permitting imposition of a higher rate of tax on imported products than on the like domestic product.

(i) Excise Tax

42. In

or reductions in birth weights. Many other health problems had also been linked with smoking. Cigarette smoking had been shown to be the leading cause of preventable death and disease in developed nations. As far as Thailand was concerned, smoking-related cancer was not as high as in many other developing countries and was relatively low in comparison to more affluent countries. However, an increase in cigarette smoking would lead to

Health and Human Services which considered this task to be "enormously complex and expensive". Serious concerns about the presence in cigarettes of certain additives had been raised by the American Health Foundation which acted as a consultant to the Department of Health and Human Services on this issue. However, there was no scientific evidence that one type of cigarette was more harmful to health than another.

54. According to the WHO representatives, another major difference between manufacturers of American cigarettes and of Thai cigarettes was that the former designed special brands aimed at the female market. These cigarettes contained a much lower tar and nicotine level, thus making it easier for women to inhale the smoke. Some were also made to appeal to women by the addition of perfume or were made long and slender to suggest that smoking would result in thinness.

55. The WHO representatives stated that the experience in Latin America and Asia showed that the opening of closed cigarette markets dominated by a state tobacco monopoly resulted in an increase in smoking. Multinational tobacco companies had routinely circumvented national restrictions on advertising through indirect advertising and a variety of other techniques. However, one country outside Latin America and Asia had recently taken action to ban the utilization in advertising of brand imagery linked to tobacco products. Particularly concerned by the threats posed by advertising, the member states of WHO had adopted in May 1990, resolution WHO 43.16 which urged all member states:

"to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:

...

- (c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco;"

56. The representatives of the WHO stated that their organization had convened in 1982 an Expert Committee on "Smoking Control Strategies in Developing Countries" which had made a number of recommendations designed to reduce smoking. In particular, this Committee, p1 73.68 382.8 Tm/F8 11 T Tj

competent to address the "health consequences of the opening of the market for cigarettes" as requested by Thailand, but urged the Panel to limit the issues presented to the WHO to those aspects referred to in the Memorandum of Understanding between the parties (see paragraph 3 above).

59. On the question of additives contained in American cigarettes, the United States noted that the American Health Foundation had stated that for the great majority of agents in the list of tobacco additives contained in the 1988 report of the Independent Scientific Committee on Smoking and Health, they had no knowledge of adverse health effects. Nevertheless, some of the agents aroused concern.

60. The United States disagreed with the assertion that Thai cigarettes were unlike western cigarettes. In the view of the United States, the Thai Tobacco Monopoly had used additives and flavourings for some time and had imitated United States cigarettes with the help of imports of United States tobacco. While the equipment presently used by the Thai Tobacco Monopoly was not very modern, some of the machinery being purchased would permit the reconstitution of tobacco and the use of other modern cigarette manufacturing techniques. Neither did the United States agree with the view that prior to the imposition of the total ban on cigarette advertising, foreign companies had been advertising smuggled cigarettes. Some of the actions complained of could have been instances of trademark infringements or marketing of legitimate goods. Moreover, the Thai Tobacco Monopoly had been advertising its cigarettes during the period when the administrative ban had been in force. The United States noted that Thailand cited the figure of 3.5 per cent for the smoking rate among women whereas the WHO reported the figure of 6 per cent. While such statistics did not appear reliable, what seemed certain was that the level of production of cigarettes in Thailand was rising at a large and steady pace.

61. As to the effect of the lifting of restrictions on imports in other Asian countries, the United States considered that in these countries such restrictions as may have been implemented had not been effective in decreasing the level of consumption. In one of these countries consumption had declined after the cigarette market had been opened and had been accompanied by a shift in consumption from domestic to foreign cigarettes. In another country, the growth rate of consumption had slowed down after the market had been opened while in the third, consumption had not changed in the 18 months which had passed since the market had been opened. Comparisons between one of these countries and in particular Thailand were not appropriate because of developmental and cultural differences. It was therefore

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VI. FINDINGS

A. Introduction

63. The Panel noted that the issues before it arise essentially from the following facts: Thailand restricts the importation of cigarettes under the Tobacco Act of 1966, which states that "the importation ... of tobacco is prohibited except by licence of the Director-General". Tobacco is defined in the Act to include cigarettes. Import licences for cigarettes have not been granted for the past ten years. Thailand also imposes on cigarettes an excise tax and, until recently, business and municipal taxes. The Tobacco Act enables the Thai Government to impose a maximum excise tax of 60 per cent on domestic cigarettes and the higher of 80 per cent or 0.60 baht/gram on imported cigarettes. Until 11 July 1990, the excise tax on domestic cigarettes varied in proportion to their foreign tobacco content; the more foreign tobacco they contained, the higher the excise tax rate. On 11 July 1990, Thailand modified its regulations to provide for an excise tax of 55 per cent for all cigarettes. Until 18 August 1990 business and municipal taxes were payable on all cigarettes except those sold by licensed cigarette manufacturers or which were made from domestic tobacco. On 18 August 1990 Thailand modified its regulations with the effect that all cigarettes were exempt from business and municipal taxes.

64. Thailand's 1982 Protocol of Accession records its intention to bring as soon as possible its business and excise taxes into conformity with Article III of the General Agreement. The Protocol provided for a review by the CONTRACTING PARTIES if during the period ending 30 June 1987 Thailand had not made the necessary modifications. This period was subsequently extended by the CONTRACTING PARTIES until 30 June 1990, when it lapsed.

65. The United States requested the Panel to find that the cigarette import restrictions were inconsistent with Article XI:1 of the General Agreement and were not covered by any of the exceptions in the General Agreement, in particular Articles XI:2(c)(i) and XX(b), or by the provisions of Thailand's Protocol of Accession. It further requested the Panel to find that the taxes on cigarettes were contrary to the national treatment provisions of Article III. The United States asked the Panel to recommend that Thailand eliminate its quantitative restrictions on the importation of cigarettes, and that it bring its taxes on cigarettes into conformity with its obligations under the General Agreement.

66. Thailand requested the Panel to find that its restrictions on the importation of cigarettes were justified under Articles XI:2(c)(i) and XX(b) and by the provisions of Thailand's Protocol of Accession, and that its taxes on cigarettes were consistent with Article III.

B. Restrictions on the Importation of Cigarettes

(i) Article XI:1

67. The Panel, noting that Thailand had not granted licences for the importation of cigarettes during the past 10 years, found that Thailand had acted inconsistently with Article XI:1, the relevant part of which reads:

"No prohibitions or restrictions ... made effective through ... import licences ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ...".

(ii) Article XI:2(c)(i)

68. The Panel then examined Thailand's claim that its restrictions on the importation of cigarettes were necessary to enforce domestic marketing or production restrictions for leaf tobacco and cigarettes and that they were therefore justified by Article XI:2(c)(i), the relevant part of which reads:

"The provisions of paragraph 1 of this Article shall not extend to the following:

...

(c) Import restrictions on any agricultural or fisheries product, imported in any

processed from such "like" products that met the conditions of the Note and Article XI:2(c). The Panel, noting that cigarettes were not "like" leaf tobacco, but processed from leaf tobacco, examined whether cigarettes fell within the range of products covered by this Note. It recognized that a central requirement of the Note was that the product processed from the fresh product was still "in an early stage of processing". It noted that a previous panel had found that agricultural products not normally intended for further processing such as ketchup could not be regarded as eligible for

The Panel could see no reason why under Article XX the meaning of the term "necessary" under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term "necessary".

75. The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives. The Panel noted that contracting

The resolution goes on to urge all member states of the WHO

"to consider including in their tobacco control strategies plans for legislation or other effective measures at the appropriate government level providing for:

...

(c) progressive restrictions and concerted actions to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco"¹

A ban on the advertisement of cigarettes of both domestic and foreign origin would normally meet the requirements of Article III:4. It might be argued that such a general ban on all cigarette advertising would create unequal competitive opportunities between the existing Thai supplier of cigarettes and new, foreign suppliers and was therefore contrary to Article III:4.² Even if this argument were accepted, such an inconsistency would have to be regarded as unavoidable and therefore necessary within the meaning of Article XX(b) because additional advertising rights would risk stimulating demand for cigarettes. The Panel noted that Thailand had already implemented some non-discriminatory controls on demand, including information programmes, bans on direct and indirect advertising, warnings on cigarette packs, and bans on smoking in certain public places.

79. The Panel then examined how Thailand might restrict the supply of cigarettes in a

80. The Panel then examined further the resolutions of the WHO on smoking which the WHO made available. It noted that the health measures recommended by the WHO in these resolutions were non-discriminatory and concerned all, not just imported, cigarettes. The Panel

The mandatory character required for such legislation was examined

86. The Panel observed that the new Thai measure, by eliminating business and municipal taxes on cigarettes, removed the internal taxes imposed on imported cigarettes in excess of those applied to domestic cigarettes. The Panel noted that, as in the case of the excise tax, the Tobacco Act continued to enable the executive authorities to levy the discriminatory taxes. However, the Panel, recalling its findings on the issue of excise taxes, found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement.

VII. CONCLUSIONS

87. The quantitative restrictions on the importation of cigarettes maintained by Thailand under Section 27 of its Tobacco Act of 1966 are contrary to Article XI:1 and are not justified by Article XI:2(c)(i), Article XX(b), or paragraph 1(b) of Thailand's Protocol of Accession.

88. The current regulations relating to the excise, business and municipal taxes on cigarettes are consistent with Thailand's obligations under Article III of the General Agreement.

89. The Panel recommends that the CONTRACTING PARTIES request Thailand to bring its application of Section 27 of the Tobacco Act into conformity with its obligations under the General Agreement.