

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 Article XXIII:2, to examine the matter (DS10/2). The Council agreed to establish the Panel on 3 April 1990 and authorized its Chairman to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/240).

2. On 16 May 1990, the Council was informed that the Panel would have the following terms of reference and composition:

A. Terms of reference

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in document DS10/2 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2" (C/M/241).

B. Composition

Chairman: Mr. Rudolf Ramsauer
Members: Mr. Pekka Huhtaniemi
Mr. Adrian Macey

3. Additionally, the Council took note of the following understanding between the Parties (C/M/241):

- "(i) The United States agreed to present its first submission in advance of Thailand's first submission and to allow the Thai authorities a reasonable period to prepare their own first submission;
- (ii) The two parties understand that Thailand will make a request for the Panel to consult with competent international organizations on technical aspects such as the health effects of cigarette use and consumption. It is further understood that if Thailand makes such a request, the Panel may so consult;
- (iii) The two parties agree that the "relevant GATT provisions" referred to in the terms of reference include the Protocol of Accession of Thailand (BISD, 29S/3) and the CONTRACTING PARTIES decision of 17 June 1987 (BISD 34S/28)."

4. At the meeting of the Council held on 3 April 1990, the European Communities reserved the right to intervene in the Panel proceedings (C/M/240).

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 the Panel at the meeting held on 27 July 1990. The Panel submitted its report to the parties on 21 September 1990.

II. FACTUAL ASPECTS

A. Restrictions on imports

6. Under Section 27 of the Tobacco Act, 1966, the importation or exportation of tobacco seeds, tobacco plants, tobacco leaves, plug tobacco, shredded tobacco and tobacco is prohibited except by licence of the Director-General of the Excise Department or a competent officer authorized by him. Section 4 of the said Act defines tobacco as "cigarettes, cigars, other tobacco rolled for smoking, prepared shredded tobacco including chewing tobacco". Licences have only been granted to the Thai Tobacco Monopoly, which has imported cigarettes on only three occasions since 1966, namely in 1968-70, 1976 and 1980.

B. Internal taxes

7. Cigarettes are subject to the payment of an excise tax, a business tax and a municipal tax.

(i) Excise tax:

8. The schedule of fees and tobacco stamp rates appended to the Tobacco Act, 1966, provides that the ceiling rate of excise tax for domestic cigarettes is 60 per cent of the retail selling price given in notifications of the Director-General of the Excise Department, while the ceiling rate for imported cigarettes is 80 per cent of the retail selling price given in notifications of the Director-General of the Excise Department or 0.60 baht/gram. The Act permits the Ministry of Finance to set the rate of tax at levels which do not exceed those laid down in the schedule. Until 11 July 1990, the rates of excise tax on domestic cigarettes were based on the amount of Thai tobacco leaf contained in the cigarette, with the maximum rate set at a level slightly below the ceiling laid down in the Tobacco Act.

9. The sales weighted average rate of excise tax on domestically produced cigarettes in 1989 was 54.69 per cent of the retail selling price. The excise tax which would be applied to imported cigarettes was set at 0.50 baht per gram. In the absence of cigarette imports, the ad valorem equivalent of this tax in 1989, as computed by the Thai authorities, would have been 35.83 per cent, assuming a c.i.f. price of 11.50 baht per packet.

10. On 11 July 1990, the Ministry of Finance issued a regulation which set the rate of excise tax at 55 per cent ad valorem, for both domestic and imported cigarettes, with immediate effect.

(ii) Business and municipal taxes

11. Business tax is currently assessed on both domestically produced and imported cigarettes at a rate of 1.5 per cent of the retail selling price and the municipal tax is set at 10 per cent of the business tax. Section 5 bis of the Tobacco Act, 1966, exempts from business tax "tobacco manufacturers on the sale of shredded tobacco or smoking tobacco, and sellers of shredded tobacco or smoking tobacco made from native tobacco leaves". As indicated in paragraph 6, the Act defines the term tobacco to include cigarettes. The Thai Tobacco Monopoly is the only licensed manufacturer of cigarettes. Under the Municipal Revenue Act of 1954, the municipal tax is collected as a percentage of the business tax, and products exempted from the business tax are also exempted from the municipal tax. On

18 August 1990, the King approved a Royal Decree which explicitly exempts as of 22 August 1990 all imported cigarettes from payment of business and therefore municipal taxes.

III. MAIN ARGUMENTS

A. Findings and recommendations requested by the Parties

12. The United States requested the Panel to find that:

(i) Restrictions on imports

- the restrictions on imports of cigarettes by Thailand were inconsistent with Article XI of the General Agreement and were not justified by the exception contained in Article XI:2(c), because cigarettes were not an agricultural or fisheries product in the meaning of Article XI, the restrictions operated as an import prohibition, they were not imposed in conjunction with domestic supply restrictions and they had a disproportionate effect on imports;
- the same restrictions could not be justified under Article XX(b) since as applied by Thailand they were not necessary to protect human health;
- these restrictions were not covered by Thailand's Protocol of Accession to the GATT since the Tobacco Act of 1966 on which they were based did not impose mandatory import restrictions;
- the restrictions were not covered by any other exception to the General Agreement;

(ii) Internal Taxes

- Thailand's excise tax on cigarettes was inconsistent with Article III:1 and III:2 because it permitted the application of a higher rate for imported cigarettes than for like domestic products, in the event that imports of cigarettes were authorized;
- Thailand's business and municipal taxes on cigarettes were also inconsistent with Article III:1 and III:2 because only domestic products or imports effected by local manufacturers were exempted from payment of the taxes.

13. The United States requested the Panel to recommend that:

- Thailand eliminate its quantitative restrictions on imports of cigarettes and that it bring its tax laws and practices into conformity with its obligations under the General Agreement.

14. Thailand requested the Panel to find that:

(i) Restrictions on imports

- its restrictions on imports were justified by Article XI:2(c) because cigarettes were an agricultural product within the meaning of Article XI and the Thai cabinet had taken action to reduce the area in which tobacco could be planted and the production of cigarettes;

- 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 recent panel reports¹ which had been adopted by the CONTRACTING PARTIES, had confirmed that the activities of state-controlled import monopolies must conform to a number of rules contained in the General Agreement, including those of Article XI:1, the United States asked the Panel not to accept an artificial distinction between the activities of state-trading monopolies and other government acts and policies to restrict trade. Such a finding would essentially vitiate one of the most effective provisions for achieving the objectives of the General Agreement, i.e. the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade.

C. Exceptions to Article XI:1

(i) Article XI:2

17. Thailand recognized the existence of a virtual prohibition on imports of cigarettes. However, it contended that this restriction was justified under Article XI:2(c). There was a long-standing practice in GATT which had been accepted in past rounds of trade negotiations and followed by panels in other cases, to treat products falling under Chapters 1 to 24 of the CCCN or the HS nomenclatures as agricultural products within the meaning of Article XI. Therefore, cigarettes which were classified under the CCCN as 24.02.B and the HS nomenclature as 2402.20 were agricultural products. Thailand contended that import restrictions on cigarettes were "necessary to the enforcement of governmental measures which operated to restrict the quantities of the like domestic product". Allowing cigarette imports would undermine government policy to reduce the tobacco planting area and cigarette production.

¹Report of the Panel - "Republic of Korea's Restrictions on Imports of Beef, paragraph 115 (L/6503). Report of the Panel - "Japan's Restrictions on Imports of Certain Agricultural Products", paragraph 5.2.2.2. (BISD, 35S/163).

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 part, from an agricultural product;
- (c) the import restrictions imposed by Thailand on cigarettes were not necessary to ensure enforcement of governmental measures which operate to restrict the quantities of the like domestic product permitted to be marketed or produced since there was no effective governmental policy to restrict the quantities of Thai cigarettes permitted to be marketed or produced. The Cabinet resolutions that the Thai Government presented as measures to restrict marketing and production of cigarettes did not have the effect of law. Moreover, Thailand had not presented any concrete plans for implementing the Cabinet resolutions. The like domestic product referred to in Article XI:2(c)(i) was cigarettes rather than tobacco leaf. Current constraints consisted of limited capacity while Thailand had a stated policy of promoting cigarette exports and a record of increasing levels of production and sales of cigarettes. In spite of anti-smoking activities in Thailand, no constraints had been put on cigarette production. Various plans to increase capacity had been considered but had not been acted upon because of the United States' request to enter the market. Thailand simply wanted to satisfy domestic demand in cigarettes through sales of domestic products. It also wanted to maintain the income of tobacco growers and of those in related industries, to protect employment in the cigarette industry and ensure a predictable and high level of government revenue. A recent Panel report² had noted that the drafters of Article XI had agreed that the exception "was not intended to provide a means of protecting domestic producers against foreign competition" and "should not be construed as permitting the use of quantitative restriction as a method of protecting the industrial processing of agricultural or fisheries products";

¹Report of the Panel on "Japan - Restrictions on Imports of Certain Agricultural Products" (BISD, 35S/230-231, paragraph 5.3.1.2). Report of the Panel on "United States - Prohibition of Imports of Tuna and Tuna Products from Canada", (BISD, 29S/91).

²Panel report on "Japan - Restrictions on Imports of Certain Agricultural Products", paragraph 5.1.2 (BISD, 35S/163)

- (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 been passed in 1938, no imports of cigarettes had been allowed, except on a few critical occasions when insignificant quantities had been imported during short periods of time. Thus, it could not be argued, as the United States did, that the restriction had the effect of reducing the proportion of imports which might be expected to rule in the absence of restrictions.

(ii) Article XX(b)

21. Thailand contended that the prohibition on imports of cigarettes was justified by the objective of public health policy which it was pursuing, namely to reduce the consumption of tobacco which was harmful to health. It was therefore covered by Article XX (b). The production and consumption of tobacco undermined the objectives set out in the Preamble of the General Agreement which were: to raise the standard of living, ensure full employment and a large and steadily growing volume of real income and effective demand, develop the full use of the resources of the world and expand the production and exchange of goods. Instead, smoking lowered the standard of living, increased sickness and thereby led to billions of dollars being spent every year on medical costs, which reduced real income and prevented an efficient use being made of resources, human and natural. The production of tobacco had not altogether been prohibited in Thailand because this might have led to production and consumption of narcotic drugs having effects even more harmful than tobacco, such as opium, marijuana and kratom (a plant with fragrant yellow flowers and intoxicating leaves). Historically, the manufacturing of cigarettes in Thailand had been aimed at providing a legal substitute for narcotic products which were themselves outlawed. Cigarette production in Thailand was a state-monopoly under the Tobacco Act, because the government felt the need to have total control over such a product which, even though legal, could be extremely harmful to health. A main objective of the Act was to ensure that cigarettes were produced in a quantity just sufficient to satisfy domestic demand, without increasing such demand. While a certain quantity of foreign cigarettes was smuggled into Thailand, this was unlikely to be done without the manufacturers' consent, since prior to the total ban on cigarette advertising which had been implemented on 10 February 1989, foreign cigarette manufacturers had advertised on Thai television, in mass circulation newspapers and on billboards. Indirect advertising had also taken place and the logos of cigarette manufacturers had appeared on clothing and many other non-tobacco products.

22. The United States noted the intent of the drafters of the General Agreement that measures which a contracting party seeks to justify under the provisions of Article XX(b) should reflect similar domestic safeguards. The drafting history of Article XX(b) indicated that the language in the preamble to Article XX stating that measures not be disguised restrictions on international trade had this meaning in the context of Article XX(b). The United States further noted that safeguards comparable to an import prohibition did not exist with respect to domestic cigarettes.

23. The United States noted that a recent panel¹ had found that a contracting party could not justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is also available to it. It had also found that in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The United States considered that Thailand, like other contracting parties, could pursue the objective of seeking to prevent the increase in the number of smokers without imposing a ban on imports. The experience of other countries had shown that decreases in the level of smoking resulted from diminished demand achieved through education and the recognition of the effects of smoking rather than restraints on the availability of cigarettes. Moreover, the United States considered that Thailand could not argue that the ban on imports was necessary to protect human life or health since domestic production, sales and exports of cigarettes and tobacco remained at high levels. Between 1979 and 1988, total domestic sales of Thai cigarettes had risen by 2.6 per cent annually. They had risen by 5.76 per cent in 1987, after the active anti-smoking campaign had started, and by 7.4 per cent in 1988. Most recent data suggested that sales rose by about 8 per cent in 1989. They were forecast to rise again in 1990. These figures indicated that there was an ongoing substantial increase in the number of smokers or a substantial increase in the number of cigarettes consumed by current smokers. The anti-smoking campaign had been unsuccessful in actually diminishing the absolute level of cigarette production and sales in Thailand, while all legitimate imports had been banned. There existed in Thailand a well-established demand for foreign cigarettes, met by illegal imports unauthorized by legitimate producers, which accounted for 4 to 5 per cent of the market.

24. Thailand replied that the exception contained in Article XX(b) reflected the recognition that public health protection is a basic responsibility of governments. With the support of non-governmental organizations, the Thai government had taken action to control smoking by, inter alia:

- adopting a comprehensive national programme for the control of tobacco use;
- establishing a body, the National Committee for Control of Tobacco Use (NCCTU), to implement the national programme;
- imposing a total ban on direct and indirect advertising of cigarettes in all media, legally enforced under the authority of the Consumer Protection Act;
- informing the general public about the dangers of smoking;
- requiring the printing of seven rotatory health warnings on the packages of cigarettes, in accordance with the Consumer Protection Act;
- prohibiting smoking in all public transport, health establishments and other public places;
- improving data collection on smoking and health;
- promoting research on smoking and health.

¹Panel report on "United States - Section 337 of the Tariff Act of 1930", paragraph 5.26 (L/6439).

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 effects in international trade in goods, this did not apply to cigarettes. Governments in many countries, including the United States and Thailand, tried to discourage or control tobacco and cigarette consumption. Competition would lead to the use of better marketing techniques (including advertising), a wider availability of cigarettes, a possible reduction of their prices, and perhaps improvements in their quality. This might have the undesirable effect of leading to an increase in total consumption, especially among women and the young, which would run contrary to public health objectives. Some American cigarettes were specifically targeted at women of whom only 3.5 per cent smoked in Thailand compared to 30 per cent in Western countries. A recent report of the Council on Scientific Affairs of the American Medical Association stated that at a time when cigarette smoking is falling in developed nations, it is increasing in Africa, Latin America and Asia as tobacco companies seek new markets. According to this report, the United States leads the world in tobacco exports, and its cigarette exports to Asia had increased by 75 per cent in 1988 alone. Since the health consequences of the opening of cigarette markets constituted one of the major justifications for Thailand's cigarette import régime, Thailand deemed it necessary that the panel consult with experts from the World Health Organization (WHO) on recent experience in countries which had been made to open their markets for cigarettes. This showed that once a market was opened, the United States cigarette industry would exert great efforts to force governments to accept terms and conditions which undermined public health and governments were left with no effective tool to carry out public health policies. Advertising bans were circumvented and modern marketing techniques were used to boost sales. Hence, Thailand was of the view that an import ban was the only measure which could protect public health. Any other measure which allowed imports in any amounts would not be effective.

28. Thailand also argued that cigarettes manufactured in the United States may be more harmful than Thai cigarettes because of unknown chemicals placed by the United States cigarette companies in their cigarettes, partly to compensate for lower tar and nicotine levels. United States cigarette companies also used other additives which increased the health risks of smoking. One such additive was cocoa, which according to one study increased the risk of cancer. Others included deer tongue, ethyl butyrate,

linayle acetate, isoamyl acetate, 2,3,5 trimethyl and pyrazine. According to the United States Surgeon-General's 1984 report, "a characterization of the chemical composition and adverse biological potential of these additives is urgently required, but is currently impossible because cigarette companies are not required to reveal what additives they employ in the manufacture of tobacco" (USDHHS, 1984). According to Thailand, some United States cigarettes contained nicotine which was extracted from tobacco leaf, resprayed back into the leaf as part of a process called "reconstituting" the tobacco. Re-adding nicotine in chemical form to tobacco leaf may make United States cigarettes different from Thai cigarettes in the strict sense of the word and make them more addictive, since it could make inhalation easier and absorption of nicotine by the bloodstream and the brain more efficient.

29. The United States replied that the health hazards of smoking had been the subject of extensive documentation in a number of countries. The existence of such hazards was not the real issue in this dispute. The United States did not believe that Thailand had established that its import ban served the purpose of protecting public health or that such a measure was necessary to accomplish that purpose. The Thai Tobacco Monopoly produced at least 15 brands of cigarettes appealing to all types of consumers. It had consciously attempted to imitate "American blend" cigarettes, clearly in response to perceived consumer demand. These "American-style" brands were among the Monopoly's best sellers. Its distribution system was both extensive and well-established at the wholesale and retail levels. Few barriers were imposed to entry into the retail cigarette business. Currently, Thailand had over 40,000 licensed cigarette retailers. The marketing techniques of the Thai Tobacco Monopoly were as effective as those of American manufacturers. No decision had been adopted by the Thai Cabinet to reduce cigarette production until 6 March 1990, i.e. after the United States had requested the establishment of the panel. In the past, the Thai Tobacco Monopoly had ignored earlier Cabinet decisions. For example, it had not implemented the six labelling requirements mentioned by Thailand and was negotiating with the government to weaken two of them. Moreover, three major expansion plans had been initiated by the Thai Tobacco Monopoly between July 1987 and January 1990, despite government policy, and new orders had been placed for machinery which would enable the Monopoly to increase its production by 10 billion cigarettes in 1991. While the Ministry of Agriculture had been instructed in January 1988 to formulate a plan for reducing tobacco acreage, this was not relevant to the object of the dispute which was cigarettes. Furthermore, Thailand had not presented any information on a concrete plan to decrease acreage and Thai statistics showed, if anything, that tobacco acreage increased, rather than decreased, in the 1988/1989 season.

30. According to the United States, the reasons identified by Thailand for the increasing consumption of cigarettes, namely a switch from traditional tobacco products to manufactured cigarettes were of declining importance as the economic situation of Thailand changed. Increased availability would lead to increased consumption if there was demand that was not currently satisfied. Thus, as had happened in other Asian markets which had recently liberalized import policies, opening the Thai market would lead to a shift in consumption from the Thai Tobacco Monopoly cigarettes to imported products, rather than to an increase in total demand. If the real issue was over advertising and concern over the creation of new customers and new demand, that problem should be addressed directly and not through a GATT-inconsistent import prohibition. The United States could not accept the view that the import ban on cigarettes was justified because of the lack of an alternative tool to carry out public health policy effectively. Any measures that could be taken in pursuance of such objectives should be taken on a national treatment basis.

31. The United States denied that its cigarettes raised special health concerns. Indeed, the Thai government had recognized that United States and other foreign cigarettes were less harmful than Thai cigarettes because of their significantly lower tar and nicotine content. Cigarettes exported from the United States were the same product as the ones sold in the United States. Their ingredients had been disclosed to the Department of Health and Human Services since 1985, in pursuance of the Federal Cigarette Labelling Act. That Department had raised no issue with any of the items on the list of

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 cigarettes. Thailand, however, had no regulations or restrictions on ingredients or flavourings used in cigarettes. The United States noted that the Thai Government admitted that the Thai Tobacco Monopoly used additives in its cigarettes. With respect to the ingredients that the Thai Government cited as raising health concerns, the United States noted that the US cigarette industry, unlike the Thai Tobacco Monopoly, did not use deer tongue, also known as coumarin. The Thai Tobacco Monopoly also purchased cocoa which it used as flavouring and which was on the list of approved ingredients of every country that maintained one. It was also a substance frequently consumed as food or beverage. 2,3,5 trimethyl was a flavoured aroma ingredient commonly used in food products and approved by the US Food and Drug Administration. Reconstituted tobacco had less nicotine than full leaf tobacco and the Thai Tobacco Monopoly intended to use this technique in the future. According to independent studies, tar and nicotine levels in Thai cigarettes were higher than in foreign cigarettes illegally imported into Thailand. While it was true that United States cigarette exports to Asia had increased in recent years, this increase, which was due to the dismantling of monopolies in several countries, had been from a zero base which explained the high percentage increase in exports.

32. Thailand replied that it had never recognized that foreign cigarettes were less harmful than Thai cigarettes. Even though their tar and nicotine contents might be lower, they were more addictive than Thai cigarettes because smokers tended to consume a higher number of low tar and nicotine cigarettes, in order to obtain the amount of nicotine to which they were used. Artificial flavourings and other ingredients were added to low tar/nicotine cigarettes to compensate for the milder taste of such cigarettes. Thailand, like the United States, had regulations on ingredients and flavourings. The Thai Tobacco Monopoly was required by a Cabinet resolution of February 1990 to disclose the ingredients of its cigarettes to the Ministry of Public Health. This Ministry had requested the Ministry of Finance, which supervised the Thai Tobacco Monopoly to instruct it to reduce or eliminate three of the ingredients which were considered particularly dangerous to health. Some of these, such as cocoa could be harmless when eaten or drunk, but could be carcinogenic when burned. While it was true that the list of additives to American cigarettes had been submitted to the Department of Health and Human Services since 1985, only a consolidated list of additives which was used by six manufacturers was submitted by these manufacturers, without identifying the brand (or brands) of cigarettes containing particular additives and without indicating the amount of each additive used. Thus, the nature of the information given to the Department of Health and Human Services limited the ability to conduct a thorough analysis of the potential health risks of additives. Canada had passed legislation requiring all cigarette manufacturers to disclose the additives they used, and as a result one leading United States manufacturer had withdrawn several of its brands from the Canadian market. Moreover, Thailand did not agree that cigarettes exported from the United States were the same product as those sold on the domestic market. Recent studies had shown that some foreign cigarettes sold in Asia contained a higher tar level than the same brands sold in Australia, Europe or the United States.

33. Thailand recognized that consumption of cigarettes had continued to rise in Thailand, in spite of the efforts by the government with the support of non-governmental organizations, because such campaigns took a long time to produce effects, as had been seen in the United States where consumption had continued to rise until 1981, even though the first anti-smoking campaign had been initiated in 1965. Thailand denied that the objective of its policy was to protect domestic production of cigarettes. No new factory had been built in the last 12 years and a number of plans to expand existing capacity had been rejected by the government. Any machinery installed in existing factories was only replacing equipment whose life-span had expired. While it was true that the Thai Tobacco Monopoly had delayed implementing the health warnings required by the Cabinet, and had tried to weaken two of them, it could not ignore cabinet resolutions and would have to enforce the warnings. Health considerations overrode any other policy objectives of the government. Thus, the Ministry of Finance had estimated

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 deference to public health considerations.

34. Since May 1989 Thailand had resisted bilateral pressures, under Section 301 of the US Trade Act, to open its market for cigarettes, and faced the imminent threat of retaliation against Thai exports to the United States, valued at US\$166 million. Even though exports were the linchpin of Thailand's economic success, such considerations had given way to health concerns. In the course of these bilateral pressures, the United States had made it clear that its objectives were not limited to market opening and national treatment on internal taxation but covered other areas, such as a unilateral reduction of Thailand's import duty on cigarettes to zero, a low specific rate of excise tax on cigarettes (which when converted to an ad valorem basis, would work to the advantage of higher-value American cigarettes) and the right for manufacturers of foreign cigarettes to advertise and conduct point-of-sale promotion even though such a right was denied to manufacturers of domestically-produced cigarettes. Thailand therefore sought from the Panel a recommendation as to whether Thailand was required by GATT provisions to grant such concessions to the United States. Such a recommendation was necessary to protect the credibility of the multilateral dispute settlement mechanism. Thailand also sought from the Panel confirmation of its understanding that, in the event of its market for cigarettes being opened, its obligations with regard to the pricing, distribution, advertising, promotion and labelling of cigarettes were limited to providing national treatment for foreign cigarettes.

35. In the view of the United States, there was a marginal benefit to be gained from smoking low tar and nicotine cigarettes, rather than high tar and nicotine cigarettes. With respect to tobacco additives, it considered that there was no evidence that these additives had any adverse effects and referred the panel to the findings of the American Health Foundation which were annexed to the WHO submission. Moreover, Thailand's import prohibition had always affected all cigarettes and not simply those containing additives, many of which such as menthol were also used by the Thai Tobacco Monopoly. United States cigarette manufacturers complied with the labelling and disclosure requirements of United States law. Apart from cigarettes sold in countries where local content requirements resulted in United States companies manufacturing locally for domestic consumption through licensees, and in consequent variations in tar and nicotine levels, all other cigarettes exported from the United States were identical to the product sold on the domestic market. Unless Thailand amended the Tobacco Act of 1966 to eliminate the monopoly on the manufacture of cigarettes, foreign firms would have to supply the Thai market through imports. In the case of Canada, only 1 per cent of the market had been held by United States cigarette manufacturers prior to the introduction of a reporting requirement for additives. That did not change after the implementation of the requirement as much of US manufacturing and sales were effected through Canadian licensees. Some firms had expressed concern about the protection of their trade secrets and had considered that the size of the market did not justify continuing their export effort, especially as each Canadian province had enacted individual requirements thus atomizing the market. The United States denied that it was seeking anything other than the application of national treatment in measures taken by Thailand to control the consumption of cigarettes and objected to the Panel making recommendations on issues not raised by it, as these issues were outside the terms of reference of the Panel.

(iii) Protocol of Accession

36. Thailand argued that the Thai import régime for cigarettes was in full conformity with Thailand's rights and obligations under the General Agreement as the Tobacco Act of 1966 on which the import restrictions were based, was covered by paragraph 1(b) of the Protocol for the Accession of Thailand by the General Agreement according to which:

"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 legislation existing on the date of this Protocol" (BISD, 29S/3).

37. Recalling that the recent panel report¹, adopted by the CONTRACTING PARTIES, on "Norway's Restrictions on Imports of Apples and Pears" had concluded that in order to be eligible under the Protocol, existing legislation must (a) be legislation in a formal sense, (b) predate the Protocol and (c) be mandatory in character by its terms or expressed intent, the United States argued that Thailand's restrictions on cigarette imports were not covered by its Protocol of Accession, because although they predated its accession to the GATT, they were not mandatory. Section 27 of the Tobacco Act, 1966, did not impose a mandatory prohibition on importation of cigarettes, but only empowered the Director-General of the Excise Department to issue import licences. Moreover, imports had occurred under the Act.

38. According to Thailand, the Tobacco Act of 1966, which was the legal basis for restrictions on the importation of cigarettes, constituted existing legislation within the meaning of the Protocol. The Act could satisfy each and every condition specified in the recent Panel report on Norway - "Restrictions on Imports of Apples and Pears" (L/6474, paragraph 5.7). The Act, which was adopted in 1966, predated the Protocol, which had itself been adopted in 1982. Even though the Act did not state explicitly the intent of minimizing harm to public health, it was self-evident that its intent was identical to that of its predecessor, namely the Opium Act of 1929, which was to control consumption in order to minimize the harm to health. The Tobacco Act shared the same features as the Opium Act in requiring strict control over the production, distribution, consumption etc. of the product from beginning to end. As in the case of the legislation which it had replaced, namely the Tobacco Acts of 1938 and 1943, the 1966 Act required the Thai government to control production, consumption, internal and international trade of cigarettes. The purpose of the Act was to ensure that the quality and quantity of tobacco products were such that they did not jeopardize public health. With this objective, the law regulated the supply of tobacco products from both domestic and foreign sources. The importation of tobacco, including cigarettes, was explicitly prohibited under Section 27 of the Tobacco Act of 1966. Although such prohibition could be relaxed by the Director-General of the Excise Department, the mandatory intent of the law had to be respected.

D. Article III

39. The United States recalled that paragraph 3 of the Protocol of Accession of Thailand to the GATT stated that Thailand "intends to bring into line with Article III of the General Agreement, the business and excise taxes with respect to items on which the incidence of these taxes varies according to whether the items are locally produced or imported" (BISD, 29S/3), and that the CONTRACTING PARTIES had decided to allow Thailand until 30 June 1987 to bring these taxes into line with Article III. In 1987, noting that steps had been taken to align the rates of business and excise taxes applied in Thailand to domestic and imported products and that the Thai government was in the process of introducing a value-added tax system which would impose uniform taxes on domestic and imported products, the CONTRACTING PARTIES had granted Thailand a further extension of time until 30 June 1990, for it to bring aspects of its tax system into conformity with Article III.

40. According to the United States, the discriminatory and protective aspects of the tax system applied by Thailand on cigarettes had not been addressed in the eight years which had passed since Thailand had stated in its Protocol of Accession to the GATT its intention to bring its excise and business taxes into conformity with Article III. Legislation to implement a value-added tax system had not yet been introduced in Parliament.

¹Panel on "Norway - Restrictions on Imports of Apples and Pears" (L/6474).

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 the view of the United States, cigarettes of varying tobacco mixtures were directly substitutable for the same end use. Although consumers may have different preferences resulting in a number of different brands being offered in a particular market, manufactured cigarettes shared the same general and many specific characteristics. They were therefore like products in the meaning of Article III. By imposing higher excise taxes on foreign cigarettes than on domestic ones Thailand applied internal taxes on imported products in excess of those applied to like domestic products and thus acted inconsistently with its obligations under Article III.

43. Thailand accepted that the ceiling rate for the excise tax on foreign cigarettes was 80 per cent of the retail price or 0.60 baht/gram whereas the ceiling rate for domestic cigarettes was 60 per cent of the retail price. It also recalled that Article III:2 referred specifically to applied rates of tax and not to ceiling rates. The Thai Cabinet had decided on 20 June 1990, to apply a single rate of excise tax on all cigarettes, regardless of their origin and local tobacco content, thus eliminating any possibility for the excise tax to be applied in such a manner as to afford protection to domestic production of cigarettes. On 11 July 1990, the Ministry of Finance had issued a regulation stipulating that the excise tax would be applied to domestic and imported cigarettes at a single rate of 55 per cent. Hence, Thailand had fulfilled its Article III obligations with respect to the excise tax on cigarettes.

44. The United States contended that the new regulations had not changed the statutory rate of tax that could be applied to imported and domestically produced cigarettes. Thus, the Thai law, on its face, permitted the application of a higher rate of tax on imported products than on domestically-produced cigarettes. In response to Thailand's assertion that, since no action had been taken which was inconsistent with Thailand's GATT obligations, it would be premature to claim that the Thai excise tax régime could be discriminatory, the United States stated that the Panel on "United States - Section 337 of the Tariff Act of 1930" had looked at the potential for discriminatory action rather than at specific instances of discrimination.

(ii) Business and Municipal Taxes

45. The United States argued that Thailand imposed business and municipal taxes on imported cigarettes, while exempting manufacturers and sellers of cigarettes made from domestic tobacco leaf from payment of their taxes. Thai officials had informed the United States that the Thai Tobacco Monopoly did not pay business and municipal taxes on any of its cigarette sales. This clearly resulted in imposition of internal taxes on imported products in excess of those applied to like domestic products and was thus inconsistent with Thailand's obligations under Article III.

46 Thailand responded that exemption from business and municipal taxes was not conditional upon whether the cigarettes were imported or domestically produced since cigarettes imported by "licensed tobacco manufacturers" were also exempted from payment of the taxes.

47. The United States considered that exempting cigarettes imported by licensed tobacco manufacturers from payment of business and municipal taxes failed to resolve the issue of application of an additional tax on some imported products, in that only Thai entities, with facilities in the country, had been licensed as tobacco manufacturers. Thus, only the Thai Tobacco Monopoly or one of the other entities manufacturing tobacco products in Thailand could be exempted from the business and municipal taxes, in the event that they were authorized to import cigarettes. Importers without such facilities and licenses were not exempted. The panel on "United States - Section 337 of the Tariff Act of 1930"¹ had concluded that the applicability of Article III:4 could not "be denied on the ground that most of the procedures in the case before the Panel are applied to persons rather than products, since the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products, that is whether they are of United States origin or imported". In the view of the United States a tax exemption based on the identity of the importer was inconsistent with Article III.

48. While disagreeing with this view, Thailand subsequently informed the Panel that the Ministry of Finance had decided to streamline the business and municipal tax régime on cigarettes and had proposed that a Royal Decree be issued under the Revenue Code to explicitly exempt all cigarettes, whether imported or domestically produced, from payment of these taxes. On 27 August 1990, Thailand informed the Panel that the Royal Decree was adopted on 18 August 1990 and stated that Thailand had thereby fulfilled its Article III obligations with respect to business and municipal taxes on cigarettes.

IV. Submission by the European Communities

49. The European Communities stated that, as an important manufacturer and exporter of cigarettes, they had a significant interest in the opening of the Thai market for cigarettes which was estimated to be worth approximately US\$1,500 million annually. The Communities believed that the operation of Thailand's import licensing régime for cigarettes constituted a de facto prohibition inconsistent with Article XI:1, which was not covered by the exceptions set out in Article XI:2 or Article XX(b) and could not be justified under Thailand's Protocol of Accession to the GATT. The Communities also believed that there was insufficient evidence that Thailand was bringing its internal taxes into conformity with Article III as it had undertaken to do at the time of its accession to GATT. The maintenance on cigarettes of discriminatory excise and business taxes could not be justified under the terms of paragraph 3 of Thailand's Protocol, eight years after its accession. The Communities therefore supported the United States in its request that the Panel recommend that Thailand eliminate the quantitative restrictions maintained on imports of cigarettes and bring its tax laws and practices on cigarettes into conformity with its obligations under the General Agreement.

V. Submission by the WHO

50. On the basis of the Memorandum of Understanding between the parties (see paragraph 3 above) and in pursuance of Thailand's request (paragraph 27 above), the Panel asked the World Health Organization (WHO) to present its conclusions on technical aspects of the case, such as the health effects of cigarette use and consumption, and on related issues for which the WHO was competent.

51. In submissions to the Panel which were generally supported by Thailand, representatives of the WHO explained that one of the best known effects of smoking was lung cancer but that pulmonary and cardiovascular diseases were also attributable to it, as were increased risks of miscarriage, still-births

¹Panel report on "United States - Section 337 of the Tariff Act of 1930" (L/6439).

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 an increase in mortality due to lung cancer and hypertension, which was already rising because of the increase in cigarette consumption which had occurred 10 to 20 years ago.

52. According to the representatives of the WHO, cigarette smoking was declining in industrialized nations at a rate of 1.1 per cent a year, but rising in developing countries by 2.1 per cent a year. Smoking prevalence was high among males in developing countries, but low among women and children. There were sharp differences between the cigarettes manufactured in developing countries such as Thailand and those available in developed countries. In Thailand like in other developing countries, the market was dominated by a state-owned monopoly which promoted smoking minimally, in the absence of competition. Locally grown tobacco leaf was harsher and smoked with less facility than the American blended tobacco used in international brands. Locally-produced cigarettes were unlike those manufactured in western countries in that sophisticated manufacturing techniques such as the use of additives and flavourings, or the downward adjustment of tar and nicotine were not generally available, or were primitive in comparison to the techniques used by the multinational tobacco companies. These differences were of public health concern because they made smoking western cigarettes very easy for groups who might not otherwise smoke, such as women and adolescents, and create the false illusion among many smokers that these brands were safer than the native ones which consumers were quitting. In Thailand, half of the tobacco crop was consumed in the form of hand-rolled cigars or cigarettes which yielded large amounts of nicotine and tar and were popular among the elderly. However, their use was fading as old people died. There was no indication that young women turned to manufactured cigarettes instead of the self-made ones which their elders had smoked. Approximately half of all tobacco was used in the manufacturing of cigarettes by the government-owned monopoly which had produced 30.4 billion cigarettes in 1987. An additional 1.5 billion cigarettes had been smuggled into the country the same year, and foreign cigarette companies had advertised these allegedly imported cigarettes on television and billboards despite the administrative ban on advertising which had been in effect prior to the legislative ban. Current adult smoking rates were 67 per cent for males and 6 per cent for females. The male rate had declined by 6 per cent since 1981. Adult per capita consumption had also declined from 1,100 cigarettes per person in the late 1970s to 900 in 1985. The per capita rate was far lower than in the United States where it stood at 3,200 per person per year. A major factor in the recent decline in per capita consumption of cigarettes in Thailand had been the adoption of recommended WHO smoking control policies by the small but growing Thai tobacco control programme which had recently secured passage of a law prohibiting all forms of tobacco advertising, including a ban on events sponsorship and forceful warning labels on packages. A number of events and numerous educational programmes had been held in Thailand on "World N° Tobacco Day" by the Thai Anti-Smoking Group which had been critical of the Thai Government's support of tobacco and had acted independently of the Government. If the multinational tobacco companies entered the market, the poorly-financed public health programmes would be unable to compete with the marketing budgets of these companies, as had been the case in other Asian countries whose markets had been opened. As a result, cigarette consumption and, in turn, death and disease attributable to smoking would increase.

53. The representatives of the WHO stated that the use of additives in American cigarettes had increased greatly during the 1970s with the introduction of low-yield cigarettes. They were used to restore the lost flavour of the cigarette brought about by the reduction in tar and nicotine. The US Surgeon-General reports had concluded that the lowering of tar and nicotine had only a marginal benefit in contrast to quitting. Smokers of low-yield cigarettes had been found to increase their consumption or to inhale more deeply. The health effects of cigarette additives were being analysed by the US Department of

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, many of whose recommendations had already been adopted in Thailand, had recommended to developing countries that all advertising and promotion of tobacco products be prohibited, including through the sponsorship of sporting events, that where tobacco is a commercial crop, its rôle be reduced in the economy through alternative use of land and labour for which the assistance of organizations within the UN system, such as FAO and the World Bank, would be sought. The same Committee had recommended to developed countries, *inter alia*, that any action possible be taken to curb activities aimed at promoting and selling tobacco products and that any exported tobacco products conform to standards obtaining in the exporting country in terms of health warnings, emissions and product information.

57. The representatives of WHO also stated that policies which raised the price of cigarettes, for instance through taxation, could result in a reduction in smoking. Studies showed that price elasticities were higher for younger smokers than for dependent ones. A recent study carried out in a developing country indicated that the price elasticity of smoking was higher in developing countries than in developed ones, thus making measures which raise the price of cigarettes, such as excise taxes, effective public health policy tools in such countries.

58. Responding to the submission of the WHO, the United States did not take issue with its statements regarding the effect of cigarette use or consumption on human health because this was within the WHO's area of recognized expertise. However, the United States took issue with some of the conclusions drawn by the WHO on the effect of lifting the import ban on cigarettes in Thailand as well as with the factual basis for these conclusions. The United States did not consider that the WHO was specially

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 not accurate to draw the conclusion on the basis of the experience of these countries, that smoking among Thai women would increase as a result of opening of the Thai market.

62. The United States also stated that the 1989 Report of the United States Surgeon General had concluded that there was no scientifically rigorous study available to the public that provided a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption and that the extent of the influence of advertising and promotion on the level of smoking was unknown and possibly unknowable. ("Surgeon General, Reducing the Health Consequences of Smoking" 512-12(1989).) Even if it were accepted that advertising had an effect on the level of consumption of cigarettes, restrictions on advertising and fiscal measures to affect the price of cigarettes were available to control the level of consumption. Such measures could be applied on the basis of national treatment and thus provide a GATT consistent measure of addressing the problem. The United States could not share the view that the Thai government and the anti-smoking lobby would not be able to resist the efforts of the foreign cigarette interests to permit the marketing practices that they opposed.

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 form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced ..."

The Panel noted that this provision refers to "agricultural products" and agricultural products "imported in any form", and defines the latter in the Note ad Article XI:2(c)¹ as covering

"the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective."

69. In the view of the Panel, the reference to "the fresh product" in this Note makes clear that the agricultural products subject to marketing or production restrictions must be fresh products. It noted that a previous panel had reached the same conclusion, stating that "the focus of this provision was limited to a fresh product" and that

"the domestic product subject to restrictions had to be the product produced by farmers".²

The Panel noted that this interpretation was borne out by the drafting history, which suggested that the provision was intended to enable governments to protect farmers and fishermen who, because of the perishability of their produce, often could not withhold excess supplies of fresh product from the market. At Havana, the relevant sub-committee agreed that the exception

"should not be construed as permitting the use of quantitative restrictions as a method of protecting the industrial processing of agricultural or fisheries products".³

70. The Panel found for these reasons that the only domestic marketing and production restrictions that would be relevant under Article XI:2(c)(i) were those that Thailand claimed to have imposed on the production of leaf tobacco - not those on cigarettes - and that consequently this provision would cover import restrictions only on (a) products that were "like" domestic leaf tobacco and (b) products

¹Article XXXIV makes this Note an integral part of the General Agreement.

²Report of the panel on "Canada - Import Restrictions on Ice Cream and Yoghurt" (L/6568, paragraph 66, adopted on 4 December 1989). See also: Report of the panel on "Japan - Restrictions on the Import of Certain Agricultural Products" (BISD 35S/163, paragraph 5.3.12, adopted on 22 March 1989).

³United Nations Conference on Trade and Employment, Reports of the Committees and Principal Sub-Committees, ICITO/I/8, page 94. See also: Report of the panel on "Canada - Import Restrictions on Ice Cream and Yoghurt" (L/6568, paragraph 60, adopted on 4 December 1989); Report of the panel on "Japan - Restrictions on the Import of Certain Agricultural Products" (BISD 35S/163, paragraph 5.1.2, adopted on 22 March 1988).

processed from such "like" products that met the conditions of the Note ad 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 import restrictions under Article XI:2(c)(i).¹ Since cigarettes could not be described as "leaf tobacco in an early stage of processing" because they had already undergone extensive processing and, moreover, were not intended for further processing, the Panel found that they were not among the products eligible for import restrictions under Article XI:2(c)(i).

71. Having made this finding, the Panel did not consider it necessary to examine whether Thailand had met the other requirements of Article XI:2(c)(i), in particular whether the quantities of leaf tobacco permitted to be marketed or produced had in fact been restricted; whether, in spite of the absence of imports of cigarettes during ten years, Thailand's import measure could nevertheless be regarded as an import restriction rather than an import prohibition; and whether Thailand had fulfilled the public notice and the proportionality requirements of the last paragraph of Article XI:2.

(iii) Article XX(b)

72. The Panel proceeded to examine whether Thai import measures affecting cigarettes, while contrary to Article XI:1, were justified by Article XX(b), which states in part:

"... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...
(b) necessary to protect human ... life or health".

73. The Panel then defined the issues which arose under this provision. In agreement with the parties to the dispute and the expert from the WHO, the Panel 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). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be "necessary".

74. The Panel noted that a previous panel had discussed the meaning of the term "necessary" in the context of Article XX(d), which provides an exemption for measures which are "necessary to secure compliance with laws or regulations which are not inconsistent" with the provisions of the General Agreement. The panel had stated that

"a contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."(emphasis supplied)²

¹Report of the panel on "Japan - Restrictions on the Import of Certain Agricultural Products" (BISD 35S/163, paragraph 5.3.12, adopted on 22 March 1988).

²Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

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 parties may, in accordance with Article III:4 of the General Agreement, impose laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products provided they do not thereby accord treatment to imported products less favourable than that accorded to "like" products of national origin. The United States argued that Thailand could achieve its public health objectives through internal measures consistent with Article III:4 and that the inconsistency with Article XI:1 could therefore not be considered to be "necessary" within the meaning of Article XX(b). The Panel proceeded to examine this issue in detail.

76. The Panel noted that the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand. The measures could thus be seen as intended to ensure the quality and reduce the quantity of cigarettes sold in Thailand.

77. The Panel then examined whether the Thai concerns about the quality of cigarettes consumed in Thailand could be met with measures consistent, or less inconsistent, with the General Agreement. It noted that other countries had introduced strict, non-discriminatory labelling and ingredient disclosure regulations which allowed governments to control, and the public to be informed of, the content of cigarettes. A non-discriminatory regulation implemented on a national treatment basis in accordance with Article III:4 requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement. The Panel considered that Thailand could reasonably be expected to take such measures to address the quality-related policy objectives it now pursues through an import ban on all cigarettes whatever their ingredients.

78. The Panel then considered whether Thai concerns about the quantity of cigarettes consumed in Thailand could be met by measures reasonably available to it and consistent, or less inconsistent, with the General Agreement. The Panel first examined how Thailand might reduce the demand for cigarettes in a manner consistent with the General Agreement. The Panel noted the view expressed by the WHO that the demand for cigarettes, in particular the initial demand for cigarettes by the young, was influenced by cigarette advertisements and that bans on advertisement could therefore curb such demand. At the Forty-third World Health Assembly a resolution was approved stating that the WHO is:

"Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... comprehensive legislative bans and other restrictive measures to effectively control the direct and the indirect advertising, promotion and sponsorship of tobacco".¹

¹Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

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 manner consistent with the General Agreement. The Panel noted that contracting parties may maintain governmental monopolies, such as the Thai Tobacco Monopoly, on the importation and domestic sale of products.³ The Thai Government may use this monopoly to regulate the overall supply of cigarettes, their prices and their retail availability provided it thereby does not accord imported cigarettes less favourable treatment than domestic cigarettes or act inconsistently with any commitments assumed under its Schedule of Concessions.⁴ As to the pricing of cigarettes, the Panel noted that the Forty-third World Health Assembly, in its resolution cited above, stated that it was:

"Encouraged by ... recent information demonstrating the effectiveness of tobacco control strategies, and in particular ... policies to achieve progressive increases in the real price of tobacco."

It accordingly urged all member states

"to consider including in their tobacco control strategies plans for ... progressive financial measures aimed at discouraging the use of tobacco"⁵

For these reasons the Panel could not accept the argument of Thailand that competition between imported and domestic cigarettes would necessarily lead to an increase in the total sales of cigarettes and that Thailand therefore had no option but to prohibit cigarette imports.

¹Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

²On the requirement of equal competitive opportunities, see the Report of the panel on "United States - Section 337 of the Tariff Act of 1930" (L/6439, paragraph 5.26, adopted on 7 November 1989).

³Cf. Articles III:4, XVII and XX(d).

⁴Cf. Articles III:2 and 4 and II:4.

⁵Forty-third World Health Assembly, Fourteenth plenary meeting, Agenda Item 10, 17 May 1990 (A43/VR/14; WHA43.16).

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 also examined the Report of the WHO Expert Committee on Smoking Control Strategies in Developing Countries. The Panel observed that a common consequence of import restrictions was the promotion of domestic production and the fostering of interests in the maintenance of that production and that the WHO Expert Committee had made the following recommendation relevant in this respect:

"Where tobacco is already a commercial crop every effort should be made to reduce its role in the national economy, and to investigate alternative uses of land and labour. The existence of a tobacco industry of any kind should not be permitted to interfere with the implementation of educational and other measures to control smoking."¹

81. In sum, the Panel considered that there were various measures consistent with the General Agreement which were reasonably available to Thailand to control the quality and quantity of cigarettes smoked and which, taken together, could achieve the health policy goals that the Thai government pursues by restricting the importation of cigarettes inconsistently with Article XI:1. The Panel found therefore that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not "necessary" within the meaning of Article XX(b).

(iv) Protocol of Accession

82. The Panel then proceeded to examine whether Thailand's Protocol of Accession exempted import measures taken under the Tobacco Act from the application of Article XI:1 of the General Agreement. Paragraph 1(b) of the Protocol contains the usual existing legislation clause which states:

"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 its legislation existing on the date of this Protocol."²

Section 27 of the Tobacco Act states that "the importation ... of tobacco is prohibited except by licence of the Director-General". The United States argued that the existing legislation clause covered only legislation which was mandatory and that Section 27 of the Tobacco Act, although expressed as a prohibition, in fact provided for licensing of tobacco imports. Thailand argued that the intent of the Tobacco Act was to restrict imports of cigarettes and that it was therefore mandatory.

83. The Panel noted that previous panel reports had concluded that legislation had to meet three criteria in order to qualify under the existing legislation clause. It had to

- "(a) be legislation in the formal sense,
- (b) predate the Protocol and
- (c) be mandatory in character by its terms or expressed intent"³

¹1982 Expert Committee on "Smoking Control Strategies in Developing Countries", page 69; cited at page 16 in the WHO Submission to the Panel of 19 July 1990.

²Thailand Protocol of Accession (BISD 29S/3).

³Report of the panel on "Norway - Restrictions on Imports of Apples and Pears" (L/6474, paragraph 5.7, adopted on 21 June 1989).

The mandatory character required for such legislation was examined in a 1949 Working Party report which stated that the existing legislation clause applied only to

"legislation which is of a mandatory character by its terms or expressed intent - that is, it imposes on the executive authority requirements which cannot be modified by executive action"¹

The Panel noted that, while the Tobacco Act was legislation in the formal sense and predated the Protocol of Accession of Thailand, it did not, by its terms or expressed intent, impose on the Thai executive authorities a requirement to restrict imports that could not be modified by executive action. On the contrary, Section 27 of the Act explicitly gives the Thai executive authorities the power to grant import licences. The Panel therefore found that the existing legislation clause in Thailand's Protocol of Accession did not exempt the restrictions on the importation of cigarettes from Thailand's obligations under the General Agreement.

C. Internal Taxes on Cigarettes

(i) Excise Tax

84. The Panel then turned to the issue of internal taxation and examined whether excise taxes which could be levied by Thai authorities on foreign cigarettes were consistent with Article III. The United States argued that the higher ceiling (80 per cent versus 60 per cent) on imported cigarettes was inconsistent with Article III:2 which provided for national treatment on internal taxes. In addition, the actual rate charged for domestic cigarettes was calculated as a proportion of the domestic tobacco content which, by affording protection to domestic production, contravened Article III:1. Thailand replied that on 11 July 1990 the Ministry of Finance had issued a regulation stipulating that the excise tax would be applied at a single effective rate of 55 per cent for all cigarettes, domestic or imported. The United States argued that it was not sufficient under Article III for the rates effectively levied to be the same; the maximum rates that could be levied under the legislation also had to be non-discriminatory. The Panel noted that previous panels had found that legislation mandatorily requiring the executive authority to impose internal taxes discriminating against imported products was inconsistent with Article III:2, whether or not an occasion for its actual application had as yet arisen; legislation merely giving the executive the possibility to act inconsistently with Article III:2 could not, by itself, constitute a violation of that provision.² The Panel agreed with the above reasoning and found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was not sufficient to make it inconsistent with the General Agreement.

(ii) Business and Municipal Tax

85. The Panel then examined whether the exemption from Thai business and municipal taxes, which benefited local manufacturers and sellers of cigarettes made from domestic tobacco leaf, was contrary to Article III. The United States argued that this provision was inconsistent with Article III since it resulted in the imposition of internal taxes on the imported product in excess of those on the domestic product. Thailand replied that on 18 August 1990 it had issued a regulation which would remove business and municipal taxes on cigarettes.

¹Working Party on "Notifications of existing measures and procedural questions" (BISD III/49, paragraph 99 at 62; approved by the CONTRACTING PARTIES on 10 August 1949); Report of the panel on "Norway - Restrictions on imports of apples and pears" (L/6474 at paragraph 5.6, adopted on 21 June 1989).

²Report of the panel on "EEC - Regulation on Imports of Parts and Components" (L/6657 at paragraph 5.25, adopted on 16 May 1990). Report of the panel on "United States - Taxes on Petroleum and Certain Imported Substances" (BISD 34S/160, 164, adopted on 17 June 1987).

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.