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## **1 ARTICLE 11**

### **1.1 Text of Article 11**

#### **Article 11**

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.
2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.
3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

### **1.2 Text of interpretative note to Article 11**

#### **Note to Article 11**

1. Article 11 provides the importer with the right to appeal against a valuation determination made by the customs administration for the goods being valued. Appeal may first be to a higher level in the customs administration, but the importer shall have the right in the final instance to appeal to the judiciary.
2. "Without penalty" means that the importer shall not be subject to a fine or threat of fine merely because the importer chose to exercise the right of appeal. Payment of normal court costs and lawyers' fees shall not be considered to be a fine.
3. However, nothing in Article 11 shall prevent a Member from requiring full payment of assessed customs duties prior to an appeal.

### **1.3 Article 11.3**

1. In relation to the obligation under Article 11.3 to give reasons, the Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*) stated:

"On the basis of the foregoing, we consider that the obligation on appellate tribunals under Article 11.3 to give 'reasons' requires that they must make clear and give details of the reasons for their decisions. Such reasons may be expected to include the basis for rejecting the transaction value, the identification of the method used to determine the final customs value, and a description of how that method was applied. Fundamentally, such reasons must be sufficient to meet the purpose of enabling importers, WTO Members and superior courts within the domestic legal system of the

Member concerned, to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations."<sup>1</sup>

#### 1.4 General

##### 1.4.1 Relationship with Article 16 of the Customs Valuation Agreement

2. The Panel in *Thailand – Cigarettes (Philippines)* touched upon Article 11 in the context of interpreting Article 16 of the Customs Valuation Agreement. In the context of interpreting the scope of the requirement to provide an explanation under Article 16, the Panel stated that:

"We also heed the transparency and due process objective that Article 16 is intended to achieve. As the Philippines submits, an explanation under Article 16 enables importers and foreign governments to effectively exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations. It provides a window through which domestic tribunals and WTO panels review and understand a customs authority's valuation determination. ... [O]ur objective assessment of the Philippines' claims under Articles 1.1 and 1.2(a) required us to base our evaluation of Thai Customs' examination of the circumstances of the sale on, *inter alia*, its explanation provided pursuant to Article 16."<sup>2</sup>

##### 1.4.2 Relationship with Article X:3(b) of the GATT 1994

3. In *Thailand – Cigarettes (Philippines)*, the Philippines alleged a violation of Article X:3(b) of the GATT 1994. Thailand responded that there is no obligation to provide a possibility of appeal to the importer for "guarantee" decisions under Article X:3(a), because Article 11.1 of the Customs Valuation Agreement, which lays down an obligation to provide for a right to appeal against "a determination of customs value", should be read as *lex specialis* to Article X:3(b) in customs value matters. In this regard, Thailand argued that Article 11.1 specifies the requirements in Article X:3(b) such that only *final* determinations of customs value, not intermediate steps towards those decisions, would be subject to appeal. The Panel was not persuaded by Thailand's argument, and in the course of its analysis stated:

"Although both provisions address an obligation to provide for the right of appeal concerning customs issues, namely 'administrative action relating to customs matters' under Article X:3(b) and 'a determination of customs value' under Article 11.1, we do not consider that these two matters can necessarily be considered as the *same* subject matter such that they would trigger the application of the *lex specialis* principle. For one, as the parties seem to agree, the scope of the subject matter under Article X:3(b) ('administrative action relating to *customs matters*') is broader than that under Article 11.1 ('a determination of customs value'). We recall our understanding above in this regard that the imposition of a guarantee is an administrative action that is distinct from the final determination of a customs value and considered as falling under the scope of 'administrative action relating to customs matters'.

Furthermore, Article 11.2 provides that 'an initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority'. The obligation under Article 11.1 to provide for the right of appeal against a determination of customs value, read in the light of Article 11.2 as context, thus focuses on the right to appeal to a *judicial* authority. This should be contrasted to Article X:3(b) that sets forth the obligation to maintain or institute tribunals or procedures *independent* of the agencies entrusted with administrative enforcement, whether judicial, arbitral or administrative, for the prompt review and correction of administrative action relating to customs matters. Therefore, insofar as a

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<sup>1</sup> Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.388.

<sup>2</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.234.

determination of customs value is concerned, Members are obliged under Article 11 of the Customs Valuation Agreement to provide for the right of appeal to a judicial authority although an initial right of appeal may be to an authority within the customs administration or to an independent body. We note that to the extent 'a determination of customs value' can also fall within the scope of 'administrative action relating to customs matters', Members must maintain or institute independent tribunals or procedures for the prompt review and correction of the concerned determination, which could simultaneously be satisfied if the right to appeal to a judicial authority is already provided under Article 11.1. This, however, does not affect the Members' obligation under Article X:3(b) with respect to 'administrative action relating to customs matters'.

As discussed above, Article X:3(b) provides importers with the right to have a wide range of administrative actions relating to customs matters that immediately cause an adverse impact on importers, reviewed and corrected. In this light, the right to appeal a determination of a customs value to a judicial authority provided under Article 11.1 would not address the obligations envisaged under Article X:3(b), namely to maintain an independent tribunal or procedure for the prompt review and correction of administrative actions that adversely affect importers concerning customs matters. Considered together, if Thailand's position were to be accepted, the rights and obligation of the WTO Members under Article X:3(b) of the GATT 1994 would lose their *raison d'être*."<sup>3</sup>

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Current as of: December 2024

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<sup>3</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.1047-7.1049.