BORDER DISPUTES

Customs valuations under the spotlight

One of the biggest irritants for companies trading with Thailand is the customs system. Businesses repeatedly complain about inefficiencies, uncertainties as to charges, fees and taxes and an apparently capricious approach to enforcement.

Customs officials almost universally demand "tea money" while a bonus system under which customs officials are paid a percentage of a confiscated shipment's value is an invitation to trouble.

Many experts fear customs issues will be the single biggest limiting factor in Thailand's hopes to become a major transport, shipping and transshipment hub under the Asean Economic Community (AEC), the ambitious free market that is due to come into effect in 2015.

Businesses continue to face uncertainty due to the apparently random way customs officers value goods under the guise of fighting trade mispricing.

"Both foreign and Thai companies continue to complain about irregularities in the Thai Customs Department," the U.S. Department of State said in the 2010 Investment Climate Statement on Thailand.

Thailand imported US$161.3 billion worth of goods in 2010, and since fines for deliberate undervaluation can be up to four times the amount of a miscalculation, pennies can quickly turn into millions of dollars for a high-volume importer.

The World Trade Organization has clear, if extensive, methods of valuation, but Thailand hasn't always adhered to the international guidelines.

Most companies have little recourse against an investigation that can drag on for years.

In 2008, however, the Philippines brought a case to the WTO against Thailand on behalf of Philip Morris, alleging that Thailand was acting unfairly with regard to cigarette imports.

Thai authorities claimed that Philip Morris had undervalued its imports to the country by about US$2 billion. The WTO disagreed and in 2011 ruled that Philip Morris had done nothing wrong.

"The way it's portrayed in the media is that you're cheating Thailand out of a couple billion dollars. Sexy read – but it might not necessarily be the truth," says Michael Ramirez, an consultant at the law firm Tilleke and Gibbons in Bangkok.

Estimates for how much revenue valuation cases may generate for the Thai government are difficult or even impossible to make. Most cases end in settlement – an often undisclosed and double-edged process that opens the door for future investigations.

The incentive for investigations is high: Under Thai law, officials involved in successful remunerations share in any reward, even if the case is settled.

"Some of our clients have thought long and hard about the uncertainly of having to live in a world in which four or five years down the road, you are facing strong-arming from the DSI [Department of Special Investigation], when you have done everything in your mind that is WTO compliant," Ramirez says.

"It is an uncertainty that might not warrant you remaining in Thailand."

But to confuse the matter even more, there are genuine cases of companies and individuals trying to outwit the system through deliberate trade mispricing.

This happens when companies either under-invoice for exports or over-invoice for imports to transfer funds abroad. It has fueled a big increase in illicit financial flows (IFFs) from Thailand, critics say.

Worldwide the problem is huge. Global Financial Integrity (GFI), an organisation promoting policies aimed at curtailing the cross-border flow of illegal money, says that illicit outflows increased from US$1.06 trillion in 2006 to about US$1.26 trillion in 2008.

It says Thailand alone lost more than US$46.2 billion in illicit financial flows due to trade mispricing over the period - representing more than 70% of Thailand's total illicit financial flows.

On the Thai side, the government is reportedly working to address the issues created by the incentive scheme by changing the customs act and the bonus system, but the problem may be deeper than that.

"If they had a more open system, where foreigners could participate and the rules were very clear, I don't think you wouldn't have these problems," says Doug Mancill, a lawyer with Price Sanond Prabhas and Wynne in Bangkok,.

The opaque regulatory system "gives officials discretion to act as gatekeepers".

"I think there is a connection between protectionist economic policies – policies that restrict what for investors can do – and corruption." ■

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