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## THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

### RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE PHILIPPINES

#### REQUEST FOR CONSULTATIONS

The following communication, dated 4 May 2016, from the delegation of the Philippines to the delegation of Thailand and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

My authorities have instructed me to request the Kingdom of Thailand ("Thailand") to enter into consultations pursuant to Articles 4 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 19 of the *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* (the "*Customs Valuation Agreement*" or "*CVA*"), and paragraph 1 of the Understanding between the Philippines and Thailand of 1 June 2012 regarding Procedures under Articles 21 and 22 of the DSU ("*Sequencing Arrangement*"),<sup>1</sup> in connection with a disagreement concerning Thailand's implementation of the recommendations and rulings of the Dispute Settlement Body ("DSB") in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* ("*Thailand – Cigarettes (Philippines)*") (WT/DS371).

#### I. BACKGROUND TO THIS REQUEST

1. On 15 July 2011, the DSB adopted the Appellate Body Report, and the Panel Report, as modified by the Appellate Body Report, in *Thailand – Cigarettes (Philippines)*.<sup>2</sup> In these reports, various Thai measures were found to be inconsistent with provisions of the GATT 1994 and the *Customs Valuation Agreement*, as follows:

- (i) Thailand acted inconsistently with Articles 1.1 and 1.2 of the *CVA* by rejecting the declared transaction values for entries of cigarettes imported by the Thailand branch office of Philip Morris (Thailand) Limited ("PM Thailand");<sup>3</sup>
- (ii) Thailand acted inconsistently with Article 1.2(a) of the *CVA* by failing to communicate its "grounds" for considering that the relationship between PM Thailand and Philip Morris Philippines Manufacturing Inc. ("PM Philippines") influenced the price paid by PM Thailand;<sup>4</sup>
- (iii) Thailand acted inconsistently with Article 16 of the *CVA* by failing to provide an adequate explanation as to how the Thai Customs Department ("Thai Customs") determined the customs values for the imported cigarettes;<sup>5</sup>

<sup>1</sup> WT/DS371/16.

<sup>2</sup> WT/DSB/M/299.

<sup>3</sup> Panel Report, para. 8.2(b).

<sup>4</sup> Panel Report, para. 8.2(c).

<sup>5</sup> Panel Report, para. 8.2(d).

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- (iv) Thailand acted inconsistently with Article 7.1 of the *CVA* by improperly assessing the customs values of the imported cigarettes using a deductive method;<sup>6</sup>
  - (v) Thailand acted inconsistently with Article 7.3 of the *CVA* by failing properly to inform PM Thailand in writing of the customs values determined under Article 7 and the method used to determine these values;<sup>7</sup>
  - (vi) Thailand acted inconsistently with Article 10 of the *CVA* by disclosing to the Thai media confidential customs valuation information provided by PM Thailand to Thai Customs;<sup>8</sup>
  - (vii) Thailand acted inconsistently with Article III:2 of the GATT 1994 by subjecting imported cigarettes to value added tax ("VAT") liability in excess of that applied to like domestic cigarettes with respect to the Maximum Retail Selling Prices ("MRSP") determined in the MRSP Notices of December 2005, September 2006, March 2007, and August 2007;<sup>9</sup>
  - (viii) Thailand acted inconsistently with Article III:2 of the GATT 1994 by subjecting imported cigarettes to VAT liability in excess of that applied to like domestic cigarettes by granting an exemption from VAT solely upon resale of domestic cigarettes, and not imported cigarettes;<sup>10</sup>
  - (ix) Thailand acted inconsistently with Article III:4 of the GATT 1994 by subjecting imported cigarettes to less favourable treatment than like domestic cigarettes by exempting resellers of cigarettes from certain administrative requirements, related to VAT liability, upon resale of domestic cigarettes, and not imported cigarettes;<sup>11</sup>
  - (x) Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to publish the methodology used to determine the tax base for VAT;<sup>12</sup>
  - (xi) Thailand acted inconsistently with Article X:1 of the GATT 1994 by failing to publish the general rule pertaining to the release of guarantees collected pending the determination of customs value;<sup>13</sup>
  - (xii) Thailand acted inconsistently with Article X:3(a) of the GATT 1994 by failing to administer, in a reasonable manner, its laws and regulations pertaining to customs valuation due to delays by the Board of Appeals ("BoA"), an administrative tribunal within the Ministry of Finance, in resolving administrative appeals of customs valuation decisions taken by Thai Customs in respect of 210 entries imported by PM Thailand in 2002;<sup>14</sup>
  - (xiii) Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent tribunals or procedures for the prompt review and correction of customs valuation determinations;<sup>15</sup> and,
  - (xiv) Thailand acted inconsistently with Article X:3(b) of the GATT 1994 by failing to maintain or institute independent review tribunals or procedures for the prompt review and correction of guarantees collected pending the determination of customs value.<sup>16</sup>

2. On 11 August 2011, Thailand informed the DSB that it intended to comply with its WTO obligations in this dispute, but that it would require a reasonable period of time to do so.<sup>17</sup>

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<sup>6</sup> Panel Report, para. 8.2(e).

<sup>7</sup> Panel Report, para. 8.2(f).

<sup>8</sup> Panel Report, para. 8.2(g).

<sup>9</sup> Panel Report, para. 8.3(a).

<sup>10</sup> Panel Report, para. 8.3(b).

<sup>11</sup> Panel Report, para. 8.3(c).

<sup>12</sup> Panel Report, para. 8.4(a).

<sup>13</sup> Panel Report, para. 8.4(c).

<sup>14</sup> Panel Report, para. 8.4(e).

<sup>15</sup> Panel Report, para. 8.4(f).

<sup>16</sup> Panel Report, para. 8.4(g).

<sup>17</sup> WT/DS371/12.

Pursuant to Article 21.3(b) of the DSU, the Philippines and Thailand agreed that there would be two reasonable periods: *first*, a period of 10 months, expiring on 15 May 2012, with respect to the findings addressed in points (i) through (vii) and (x) through (xiv) above; and, *second*, a period of 15 months, expiring on 15 October 2012, with respect to the findings addressed in points (viii) and (ix) above.<sup>18</sup>

3. On 1 June 2012, the Philippines and Thailand agreed the Sequencing Arrangement regarding the procedures that would apply under Articles 21 and 22 of the DSU for purposes of this dispute.<sup>19</sup> Paragraph 1 of the Sequencing Arrangement provides that, should the Philippines consider that the situation described in Article 21.5 of the DSU exists, the Philippines may request consultations at any time, and that the parties to the dispute will hold those consultations within 15 days.

## **II. MEASURES AT ISSUE AND CLAIMS MADE IN THESE PROCEEDINGS**

4. In its status reports and statements to the DSB, Thailand has reported on a number of measures taken to comply with the DSB's recommendations and rulings. In addition, there are certain measures, which, although not referred to in Thailand's status reports and statements, are nevertheless properly regarded as measures taken to comply. In the paragraphs to follow, the Philippines identifies the compliance measures at issue, and indicates the legal basis for claims against those measures.

### **1. BoA Ruling on 210 Entries Imported by PM Thailand in 2002, and Related Revised Notices of Assessment**

5. As reported by Thailand in its status report of 7 December 2012, in implementation of the DSB's recommendations and rulings under points (xii) and (xiii) above, on 16 November 2012, the BoA issued its determination in PM Thailand's appeal of the customs valuation of 210 entries imported by PM Thailand in 2002 ("BoA Ruling"). In its ruling, the BoA rejected the declared transaction value for the 210 entries, and determined an alternative customs value using a deductive method under Article 5 of the CVA. On the basis of the BoA Ruling, Thai Customs issued revised notices of assessment for 180 of the entries, which impose revised customs duties and other taxes based on the customs value established by the BoA Ruling. For the remaining 30 entries, due to currency fluctuations, the customs value determined by the BoA is lower than the value originally determined by Thai Customs.

6. The BoA Ruling and the related revised notices of assessment constitute measures taken to comply that the Philippines contends are inconsistent with Articles 1.1, 1.2(a), 5.1(a), 7, 11.3 and 16 of the CVA. The BoA Ruling and the related revised notices of assessment also involve non-uniform and unreasonable administration of Thailand's customs laws and regulations, in violation of Article X:3(a) of the GATT 1994.<sup>20</sup>

### **2. Criminal Charges against PM Thailand and Certain of Its Current or Former Employees Regarding Customs Valuation**

7. In August 2006, the Thai Department of Special Investigations initiated a criminal investigation into the transaction values declared by PM Thailand for cigarettes imported from the Philippines. On 18 January 2016, the investigation culminated in the filing of criminal charges by the Thai public prosecutor against PM Thailand and seven of its current and former employees ("the Charges"), alleging violations of Thai customs law. The competent Thai criminal court accepted and issued the Charges on the same day.

<sup>18</sup> WT/DS371/14.

<sup>19</sup> WT/DS371/16.

<sup>20</sup> On 29 October 2014, the Thai Tax Court upheld an appeal by PM Thailand against the BoA Ruling. However, on 28 January 2015, Thai Customs appealed the Tax Court's decision to the Thai Supreme Court. The appeal is currently outstanding. On appeal, Thai Customs has argued that the DSB's recommendations and rulings under points (xii) and (xiii) above bind only the Philippines, and not Thailand. All actions by Thailand to uphold the BoA Ruling are measures taken to comply that are inconsistent with the provisions cited in paragraph 6.

8. The Charges allege that PM Thailand under-declared the customs values of imported cigarettes, with the declared transaction values described as "false" prices that were lower than the alleged "actual" prices. An annex specifies that the Charges pertain to 272 entries of cigarettes that cleared Thai Customs between 28 July 2003 and 24 June 2006. For each entry, the annex states the declared transaction value (the alleged "false" price) and the alleged "actual" price, which the annex specifies is the price paid by a duty-free operator for the purchase of duty-free cigarettes. Based on this comparison between the prices of duty-paid and duty-free cigarettes, the annex specifies that the duty-paid value of the cigarettes imported by PM Thailand is THB 20.2 billion.

9. The Charges constitute "a measure taken to comply" that violates Articles 1.1, 1.2(a), 2, 3, 4, 5, 6 and 7 of the CVA. The Charges also involve non-uniform and unreasonable administration of Thailand's customs laws and regulations, in violation of Article X:3(a) of the GATT 1994. The Charges further violate Article III:2 of the GATT 1994, as the additional duties and taxes due on the basis of a WTO-inconsistent customs valuation will result in excess taxation of imported cigarettes.

10. Finally, press articles addressing the Charges indicate that Thailand has disclosed to the Thai media the declared transaction values for entries covered by the Charges.<sup>21</sup> The disclosure of this business confidential information constitutes a measure taken to comply that is inconsistent with Article 10 of the CVA.

### 3. VAT Base

11. As reported by Thailand in its statement to the DSB on 24 May 2012, the Thai Excise Department issued two regulations on 15 May 2012 eliminating the use of MRSPs as the tax base for VAT payable on sales of cigarettes in Thailand.<sup>22</sup> On 31 August 2012, in order to provide for a replacement VAT base, the Thai Revenue Department adopted "Notification No. 187 on VAT – Determination of tax base, categories and types of tobacco for sale for which the value of the tax base is required to be calculated according to the rules under Section 79/5(2) of the Revenue Code" ("Notification 187"). On 7 January 2013, the Thai Revenue Department provided further information on the VAT tax base in "Order Por. 145-2555 – Calculation of Tax Base for Importation and Sale of Tobacco According to the Category and Type Prescribed by the Director-General and Approved by the Minister Under Section 79/5 of the Revenue Code, and Preparation of Tax Invoice In Case of Sale of Tobacco Under Section 86/5(2) of the Revenue Code" ("Order Por. 145-2555").

12. Pursuant to Clause 5(2) of Notification 187 and Clause 5(1)(b) of Order Por. 145-2555, in June of each year, an importer of cigarettes is obliged to notify the "average price of the market price actually purchased and sold in general on the date on which the value added tax liability occurs". If the notified actual market price is higher than the importer's C.I.F. price plus specified taxes, duties and marketing cost, the notified price will be used as the VAT base until June of the following year, absent notification of a revised actual market price. Pursuant to Clause 4(2) of Notification 187 and Clause 4(b) of Order Por. 145-2555, this notification requirement is identical for the domestic monopoly tobacco manufacturer, the Thailand Tobacco Monopoly ("TTM").

13. Under Thai competition law, an importer of cigarettes cannot dictate the actual market price charged by retailers. As a result, an importer is unable to notify, in advance, the actual market price that will be charged by retailers during the subsequent year. In contrast, due to an exemption from domestic competition laws, TTM dictates the actual market price for its cigarettes and, hence, is able to comply with the requirement in Notification 187 and Order Por. 145-2555 to notify the actual price in advance.

14. Notification 187 and Order Por. 145-2555 are measures taken to comply that violate Article X:3(a) of the GATT 1994 by imposing an unreasonable notification requirement on importers with which they cannot comply. Additionally, to the extent that Thailand has adopted a general rule to the effect that importers may comply with Notification 187 and Order Por.

<sup>21</sup> King-Oua Laohong, "Philip Morris tax evasion case reaches court", Bangkok Post, 19 January 2016, available at <http://www.bangkokpost.com/news/general/831708/philip-morris-tax-evasion-case-reaches-court> (last visited 31 March 2016) (stating that the declared customs value for L&M cigarettes as THB 5.88 per pack and for Marlboro it was THB 7.76 per pack).

<sup>22</sup> WT/DSB/M/316, para. 58.

145-2555 by notifying a *recommended* retail selling price instead of the *actual* market price, Thailand has failed to publish that general rule, contrary to Article X:1 of the GATT 1994.

15. Further, by treating equally the different situations of TTM and importers, Notification 187 and Order Por. 145-2555 result in discriminatory taxation under Article III:2 of the GATT 1994 and/or accord less favorable treatment in respect of measures affecting the sale of cigarettes, inconsistently with Article III:4 of the GATT 1994.

16. Finally, by exempting TTM from the prohibition under Thai competition law against dictating the actual market price for its cigarettes, while subjecting importers of cigarettes to that prohibition, Thailand accords to imported products treatment less favourable than that accorded like products of national origin, contrary to Article III:4 of the GATT 1994.

#### **4. Refund of Excess Customs Duties, Excise Tax and Health Tax Paid**

17. As a result of a BoA ruling of 12 September 2012 to the effect that the 118 entries of imported cigarettes by PM Thailand covered by the DSB's recommendations and rulings under points (i) through (v) above were improperly valued by Thai Customs, PM Thailand was granted refunds of excess customs duties paid, and is due refunds of excess excise and health taxes paid. Nonetheless, Thailand has, to date, not provided PM Thailand with refunds of such excess taxes paid. There is no published measure in Thai law setting forth the procedures, including documentary requirements, for an importer to claim a refund of excess taxes paid.

18. Similarly, as a result of the 16 November 2012 BoA Ruling addressed in Section II.1 above, PM Thailand is due refunds of excess customs duties paid, as well as of excess excise and health taxes paid, on certain (30) of the 210 entries covered by that BoA Ruling. Nonetheless, Thailand has not, to date, provided PM Thailand with refunds of such excess customs duties and taxes paid. Again, there is no published measure in Thai law setting forth the procedures, including documentary requirements, for an importer to claim a refund of excess customs duties and taxes paid.

19. The failure to refund PM Thailand for excess customs duties and taxes paid, and the failure to do so in a timely manner, represents an omission by Thailand that is a measure taken to comply.

20. Thailand's omission to refund excess customs duties and taxes paid constitutes a failure to comply fully with the DSB's recommendations and rulings, in violation of Articles 19.1 and 21.5 of the DSU. Thailand's omission to refund excess customs duties and taxes paid, as well as its failure to do so in a timely manner, also constitutes WTO-inconsistent administration, under Article X:3(a) of the GATT 1994. In addition, Thailand's failure to refund excess taxes paid results in internal taxes in excess of those applied to like domestic products, in contravention of Article III:2 of the GATT 1994.

21. Finally, Thailand's failure to publish the procedures, including documentary requirements, for claiming a refund of excess customs duties and taxes paid, constitutes a measure taken to comply that is inconsistent with Article X:1 of the GATT 1994.

#### **5. Other Subsequent Measures**

22. This request for consultations also concerns any amendments to the measures identified above, as well as any subsequent closely connected measures taken to comply that are adopted by Thailand, including, but not limited to, acts or omissions taken in relation to the measures (acts and/or omissions) and/or entries mentioned above by: the Attorney General, the BoA, the DSI, the Excise Department, the Public Prosecutor, Thai courts, Thai Customs, or other institutions or agencies whose conduct is attributable to Thailand.

### **III. CONCLUSION**

23. In accordance with paragraph 1 of the Sequencing Arrangement, the Philippines looks forward to Thailand's response to this request, and to holding consultations within 15 days.

24. The Philippines reserves all of its rights in respect of Thailand's compliance with its WTO obligations in this dispute. It also reserves its rights to raise additional factual and legal claims during the course of the consultations and in any request for the establishment of a panel.

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