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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 THE ESTABLISHMENT OF A PANEL

The following communication, dated 29 June 2016, from the delegation of the Philippines to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

1. On 4 May 2016, the Philippines requested consultations with the Kingdom of Thailand ("Thailand") 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).<sup>2</sup>

2. 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.

3. Consultations were held on 2 June 2016 with a view to reaching a mutually satisfactory solution. While the consultations assisted in clarifying certain questions, they failed to resolve the dispute.

4. Accordingly, pursuant to paragraph 1 of the Sequencing Arrangement, Articles 6 and 21.5 of the DSU, Article XXIII of the GATT 1994 and Article 19 of the CVA, the Philippines respectfully requests that the DSB establish a panel to examine this matter, with the standard terms of reference described in Article 7.1 of the DSU. The Philippines notes that, pursuant to paragraph 2 of the Sequencing Arrangement, Thailand committed not to object to the establishment of a panel at the first DSB meeting at which the request appears on the agenda.

#### I. BACKGROUND TO THIS REQUEST

5. 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>3</sup> In these reports, various Thai measures were found to be inconsistent with provisions of the *Customs Valuation Agreement* and the GATT 1994, as follows:

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

<sup>2</sup> The request for consultations was circulated on 12 May 2016 in document WT/DS371/17.

<sup>3</sup> WT/DSB/M/299.

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- (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>4</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>5</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>6</sup>
  - (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>7</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>8</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>9</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>10</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 of imported cigarettes;<sup>11</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 of imported cigarettes;<sup>12</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>13</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>14</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

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

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

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

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

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

<sup>9</sup> Panel Report, para. 8.2(g).

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

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

<sup>12</sup> Panel Report, para. 8.3(c).

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

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

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>15</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>16</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>17</sup>

6. 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>18</sup> Pursuant to Article 21.3(b) of the DSU, the Philippines and Thailand agreed that there would be two reasonable periods of time: *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>19</sup>

7. The two reasonable periods of time have long expired. In its status reports and statements to the DSB, Thailand has reported a number of measures taken to comply with the DSB's recommendations and rulings.<sup>20</sup> In addition, there are certain other measures taken to comply, which are not referred to in Thailand's status reports and statements. Thailand's measures taken to comply have failed to achieve compliance with the DSB's recommendations and rulings.

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

8. In the paragraphs to follow, the Philippines identifies the measures taken to comply at issue, and provides a brief summary of 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

9. As reported by Thailand in its status report of 7 December 2012,<sup>21</sup> 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").<sup>22</sup> In the BoA Ruling, the BoA rejected the declared transaction values for the 210 entries, and determined an alternative customs value using a deductive method under Article 5 of the CVA.

10. The BoA Ruling and the related revised notices of assessment constitute measures taken to comply that the Philippines contends are inconsistent with Thailand's obligations under the CVA. Specifically, the BoA Ruling is inconsistent with:

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

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

<sup>17</sup> Panel Report, para. 8.4(g).

<sup>18</sup> WT/DS371/12.

<sup>19</sup> WT/DS371/14.

<sup>20</sup> WT/DS371/15; WT/DS371/15/Add.1; WT/DS371/15/Add.2; WT/DS371/15/Add.3; WT/DS371/15/Add.4; WT/DS371/15/Add.5; WT/DS371/15/Add.6; WT/DS371/15/Add.7; WT/DS371/15/Add.8; WT/DS371/15/Add.9.

<sup>21</sup> WT/DS371/15/Add.8.

<sup>22</sup> No. GorOr 112/2555/Por9/2555(3.1). 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 I.1.10.

- Article 1.1 of the *CVA*, because Thailand failed to use the transaction value as the basis for the customs value of the imported goods at issue;
- Article 1.2(a) of the *CVA*, because, in improperly rejecting the transaction value, Thailand failed properly to examine the circumstances of sale; it failed to communicate to the importer its grounds for considering the transaction value to be unacceptable; and it failed to give the importer a reasonable opportunity to respond;
- Article 5.1(a) of the *CVA*, because, in applying the deductive value method, Thailand failed properly to deduct profits and general expenses, provincial taxes, transportation charges, and sales allowances;
- Article 11.3 of the *CVA*, because Thailand failed to provide reasons for its decision; and,
- Article 16 of the *CVA*, because Thailand failed to provide the importer with a sufficient explanation as to how the customs value was determined.

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

11. 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 a decision taken by the Thai Public Prosecutor to file criminal charges against PM Thailand and seven of its current and former employees ("the Charges"). The competent Thai criminal court accepted and issued the Charges on the same day.

12. In the Charges, the Public Prosecutor concluded 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 to the Charges 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 records the alleged "false" prices declared by PM Thailand, and the alleged "actual" prices that should have been declared, which the annex specifies are the purchase prices paid by a Thai duty-free operator for duty-free cigarettes. Thailand has failed to explain its basis for considering that the purchase prices paid by a Thai duty-free operator for duty-free cigarettes can be used as the customs values for PM Thailand's imported cigarettes.

13. Using the duty-free operator's purchase price for duty-free cigarettes as the customs values, the Public Prosecutor specifies in the annex to the Charges that the alleged duty-paid value of the cigarettes imported by PM Thailand is approximately THB 20,200,000,000 (approximately USD 570,000,000 at current exchange rates). The penalties upon conviction include the imprisonment of seven of PM Thailand's current and former employees, and the payment of fines by PM Thailand in an amount that "shall" equal four times the duty-paid value,<sup>23</sup> which is approximately THB 80,800,000,000 (approximately USD 2,280,000,000 at current exchange rates). Thai law explicitly provides for the payment of "bribes" and "rewards" to informants and government officials assisting in bringing the Charges, in the amount of 55 percent of fines, which in this case amounts to approximately THB 44,440,000,000 (approximately USD 1,250,000,000).<sup>24</sup>

14. The Charges constitute "a measure taken to comply" that violates the *CVA*. Specifically, the Charges are inconsistent with:

- Article 1.1 of the *CVA*, because Thailand failed to use the transaction value as the basis for customs value;
- Article 1.2(a) of the *CVA*, because, in improperly rejecting the transaction value, Thailand failed properly to examine the circumstances of sale; it failed to communicate

<sup>23</sup> According to Section 27 of the Thai Customs Act. See Customs Act B.E. 2469 (1926).

<sup>24</sup> According to Section 102 ter of the Thai Customs Act. See Customs Act B.E. 2469 (1926), as amended by the Thai Customs Act (No. 12) B.E. 2497 (1954). See also Sections 7 and 8 of The Reward Giving to Offender Suppression Act, Act B.E. 2489 (1946).

to the importer its grounds for considering the transaction values to be unacceptable; and it further failed to give the importer a reasonable opportunity to respond;

- Articles 2.1(a) and (b) of the CVA to the extent that Thailand concluded, under these provisions, that the duty-free operator's purchase prices constituted transaction values of identical goods sold for export to Thailand and exported at or about the same time as PM Thailand's imported cigarettes; and that no adjustments to the duty-free operator's purchase prices were required to account for relevant differences;
- Articles 3.1(a) and (b) of the CVA to the extent that Thailand concluded, under these provisions, that the duty-free operator's purchase prices constituted transaction values of similar goods sold for export to Thailand and exported at or about the same time as PM Thailand's imported cigarettes; and that no adjustments to the duty-free operator's purchase prices were required to account for relevant differences;
- Articles 7.1 and 7.2 of the CVA to the extent that Thailand concluded, under these provisions, that the duty-free operator's purchase prices constituted the customs values for PM Thailand's imported cigarettes, because Thailand thereby failed to use reasonable means to determine the customs values; and because this means of valuation involves prohibited minimum, arbitrary, or fictitious values; and,
- Article 10 of the CVA because Thailand has disclosed to the Thai media the declared transaction values for entries covered by the Charges, which is business confidential information.

15. The Charges further violate Article III:2, first and/or second sentence, of the GATT 1994, as the additional duties and taxes due on the basis of the WTO-inconsistent customs value in the Charges will result in taxation of imported cigarettes in excess of like or directly competitive domestic products.

16. The Charges also involve non-uniform, partial, and unreasonable administration of Thailand's customs laws and regulations, in violation of Article X:3(a) of the GATT 1994. Specifically, in the administration of customs, Thailand has arbitrarily reached conflicting customs valuations decisions:

- The Public Prosecutor concluded in the Charges that the transaction values declared by the importer for entries included in the Charges involved criminal conduct, whereas other Thai authorities accepted the declared transaction values for the very same entries; and,
- The Public Prosecutor concluded in the Charges that the transaction values declared by the importer for entries included in the Charges involved criminal conduct, whereas the Public Prosecutor and other Thai authorities accepted the same declared transaction values for other entries, with the same circumstances of sale, that were not included in the Charges.

### 3. VAT Base

17. In Thailand, importers of cigarettes are responsible for paying VAT on cigarettes they distribute for retail sale in Thailand. 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>25</sup> First, 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*"). Second, 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*

<sup>25</sup> WT/DSB/M/316, para. 58.

*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").

18. 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". Clause 2(4) of Order Por. 145-2555 defines this term as the actual market price at which a cigarette brand is sold to consumers in general, or the majority of consumers, on the date of the annual notification of the price ("actual average market price").

19. If the notified actual average 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 average 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").

20. Under Thai competition law, an importer of cigarettes cannot fix the price that retailers charge consumers for the importer's cigarettes. As a result, on any given date, an importer does not know the actual average market price charged by retailers for the importer's cigarettes. An importer can obtain this information only at a subsequent date, by purchasing the information from market research companies that gather data on average market prices. Hence, on the date of the notification under Notification 187 and Order Por. 145-2555, an importer is unable to comply with the requirement, as written in Thai law, to notify the actual average market price charged by retailers on that date for the importer's cigarettes.

21. TTM enjoys an exemption from Thai competition law.<sup>26</sup> As a result, TTM is permitted to fix the price charged by retailers for TTM's cigarettes and, hence, on the date of the notification under Notification 187 and Order Por. 145-2555, TTM is able to comply with the requirement to notify the actual average market price charged by retailers on that date for TTM's cigarettes.

22. 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, first and/or second sentence, 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.

23. Further, Notification 187 and Order Por. 145-2555 violate Article X:3(a) of the GATT 1994 by imposing an unreasonable notification requirement on importers with which they cannot comply.

24. In practice, given the difficulties faced by importers in complying with Notification 187 and Order Por. 145-2555, Thai Revenue has permitted importers to notify the importer's *recommended* retail selling price prevailing on the date of notification. However, contrary to Article X:1 of the GATT 1994, Thailand has not published this rule. In the absence of publication of this rule, the importer, therefore, remains responsible in Thai law, including criminal law, for notifying the actual average market price charged by retailers, on the date of notification, for the importer's cigarettes.

25. Finally, by exempting TTM from the prohibition under Thai competition law against fixing the actual market price for its cigarettes and, thereby, facilitating TTM's ability to comply with the notification requirements under Notification 187 and Order Por. 145-2555, while subjecting importers of cigarettes to that prohibition, Thailand accords to imported products treatment less favourable than that accorded to like domestic products, contrary to Article III:4 of the GATT 1994.

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

26. As reported by Thailand in its status report of 18 September 2012,<sup>27</sup> in implementation of the DSB's recommendations and rulings, on 12 September 2012, the BoA issued its determination in PM Thailand's appeal of the customs valuation of 118 entries imported by PM Thailand between 11

<sup>26</sup> According to Section 4 of the Thai Trade Competition Act B.E. 2542 (1999).

<sup>27</sup> WT/DS371/15/Add.5.

June 2006 and 10 September 2007.<sup>28</sup> The BoA reversed the initial assessment by Thai Customs and accepted the declared transaction values. As a result, PM Thailand became entitled, under Thai law, to refunds from Thailand of excess customs duties and excise and health taxes paid on the higher customs values initially assessed. However, although Thailand has repaid the excess customs duties, it has not provided PM Thailand with a full refund of the excess excise and health taxes.

27. The failure to provide PM Thailand with a full refund for the excess excise and health taxes paid in connection with the 118 entries subject to the DSB's recommendations and rulings constitutes a violation of Articles 19.1 and 21.5 of the DSU because, even though the BoA complied with the recommendations and rulings by accepting the declared transaction values, Thai Excise undermines that compliance by refusing to grant refunds of the excess internal taxes paid on the higher customs values. The failure to provide PM Thailand with a full refund also violates Article III:2, first and/or second sentence, of the GATT 1994 as Thailand's failure to refund the excess excise and health taxes results in taxation of imported cigarettes in excess of like or directly competitive domestic products. Finally, the failure to provide PM Thailand with a full refund amounts to non-uniform, partial, and unreasonable administration of Thailand's customs laws and regulations, in violation of Article X:3(a) of the GATT 1994 because Thailand applies different customs values to the 118 entries for different regulatory purposes.

28. In addition, as Thai Customs did in connection with the 210 entries from 2002 and the 118 entries from 2006 and 2007, discussed above, Thai Customs improperly rejected the declared transactions values for 631 entries from 2000 and 2001. Following rulings by the BoA that lowered the assessed customs values for these entries, PM Thailand is also entitled to a refund of excess excise and health taxes paid in respect of these entries. However, as Thailand has done in respect of the 118 entries, Thailand has failed to refund the excess excise and health taxes due on these 631 entries from 2000 and 2001. Thailand's failure to refund fully excess excise and health taxes gives rise to internal taxation in excess of that applied to like or directly competitive domestic products, contrary to Article III:2, first and/or second sentence, of the GATT 1994. It also constitutes WTO-inconsistent administration under Article X:3(a) of the GATT 1994. The reasons underlying these claims are the same as those set out in the preceding paragraph.

29. Finally, Thailand has failed to publish the general rules it maintains regarding the procedures, including documentary requirements, to be followed when an importer seeks a refund of excess payments of excise and health taxes. Thailand's failure to publish these procedural rules is inconsistent with Article X:1 of the GATT 1994.

## **5. Other Subsequent Measures**

30. This request for the establishment of a panel 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 Department of Special Investigation, the Excise Department, the Public Prosecutor, Thai courts, Thai Customs, or other institutions or agencies whose conduct is attributable to Thailand.

31. The Philippines asks that this request be placed on the agenda for the meeting of the DSB scheduled to take place on 21 July 2016.

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<sup>28</sup> No. GorOr 81/2555/Por7/2555(4.1).