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

**COMMUNICATION FROM THE PHILIPPINES**

The following communication, dated 27 February 2020, was received from the delegation of the Philippines with the request that it be circulated to the Dispute Settlement Body (DSB).

The Philippines has taken note of Thailand's letter dated 26 February 2020, requesting removal of the Philippines' request under Article 22.2 of the DSU, in *Thailand – Cigarettes* ("DS371"), from the agenda of the meeting of the Dispute Settlement Body ("DSB") on 28 February 2020.

In light of Thailand's letter, the Philippines wishes to confirm to the Membership that it maintains its Article 22.2 request on the agenda of the DSB meeting. We are ready to engage with Thailand on its concerns contained in the above-mentioned letter at the appropriate item of the agenda.

The inclusion of this item on the DSB agenda is fully in accordance with the Philippines' rights as a Member of the DSB, and Rules 3 and 4 of the *Rules of Procedure for Meetings of the Dispute Settlement Body*, particularly that the list of items proposed for the agenda "shall be open to any Member to suggest items for inclusion in the proposed agenda". The Philippines requested the inclusion of its Article 22.2 request pursuant to these Rules, and did so within the deadline for inscription of items on the DSB agenda, set by the Chair, Monday, 17 February 2020 at 5:00 PM. The Philippines' Article 22.2 request was thus properly included as item 6 of the proposed DSB agenda.

The Philippines is disappointed by Thailand's efforts to seek removal of the Philippines' Article 22.2 request from the DSB agenda. This is a transparent attempt by Thailand to prevent the Philippines from exercising its rights under Article 22 of the DSU to seek the DSB's authorization to suspend concessions in DS371. The Philippines' rights under the DSU are not diminished or otherwise modified by the parties' sequencing understanding. In fact, Thailand committed and agreed that it "**shall not** assert that the Philippines is precluded from obtaining [such] DSB authorization."<sup>1</sup> Therefore, Thailand's request that the DSB Chair amend the DSB's agenda by removing the Philippines' Article 22.2 request is inappropriate and not a matter within the Chair's discretion. According to the past practice of the DSB, where a Member has a right to request a specific decision from the DSB, another Member cannot remove that request from the DSB's agenda, *unless there is consensus at the DSB to do so*.

As Members will recall, in *EC – Bananas III*, two Members sought the removal from the DSB's agenda of a request by the United States under Article 22.2 of the DSU. As recorded in the minutes of the meeting, the DSB Chair explained that "[t]he Rules of Procedure for meetings of WTO bodies should not modify the rights and obligations of Members under the WTO Agreement".<sup>2</sup> In particular, the Rules of Procedure "should not be so interpreted as to block meetings in cases where a Member had the right to request a specific decision unless there was consensus against such request".<sup>3</sup> At the time, the Philippines agreed with the DSB Chair that "the Rules of Procedure would not prevail over

<sup>1</sup> WT/DS371/16, paragraph 7.

<sup>2</sup> Minutes of the DSB meeting dated 25 January – 1 February 1999, WT/DSB/M/54, p. 9.

<sup>3</sup> Minutes of the DSB meeting dated 25 January – 1 February 1999, WT/DSB/M/54, p. 9.

the substantive rights of Members under the DSU,"<sup>4</sup> and twenty years later, the Philippines continues to hold that view.

In its letter, Thailand raises objections to the Philippines' request. The Philippines has cogent replies to Thailand's objections. In the Philippines' view, a DSB meeting is not the appropriate forum to decide on the merits of the parties' competing legal positions, and Thailand has sufficient remedies and rights under Article 22.6 of the DSU. For example, Members will recall that, in *EC – Bananas III*, the Article 22.6 arbitrator found that it had authority to rule on the consistency of the respondent's measures taken to comply, as this legal issue bore upon the level of suspension.<sup>5</sup>

In sum, the Philippines affirms its right to seek authorization, at the DSB meeting on 28 February 2020, to suspend concessions under Article 22 of the DSU and looks forward to the DSB addressing its request.

In addition, the Philippines requests that this communication be circulated to the Members of the Dispute Settlement Body, along with Thailand's letter of 26 February 2020, to allow them to prepare for deliberations under agenda item no. 6 of its meeting on 28 February 2020.

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<sup>4</sup> Minutes of the DSB meeting dated 25 January – 1 February 1999, WT/DSB/M/54, p. 10.

<sup>5</sup> Decision of the Arbitrator, *EC – Bananas III*, paras. 4.4-4.15.