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

COMMUNICATION FROM THE PHILIPPINES

The following communication, received on 9 March 2020, was received from the delegation of the Philippines with the request that it be circulated to the Dispute Settlement Body (DSB).

1. The Philippines thanks the Chair for the opportunity to present its request, under Article 22.2 of the DSU for authorization to suspend the application to Thailand of concessions or other obligations under the covered agreements, in the dispute *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, or "DS371".

2. The Philippines regrets that the work of the DSB has been delayed this week and thanks the Chair for resuming the meeting to take up all matters in the agenda. The Philippines appreciates that the DSB is now properly taking up consideration of our Article 22.2 request.

3. The Philippines notes with respect Thailand's concerns relating to the application of the provisions of the Sequencing Understanding and the current impasse at the AB level of the WTO dispute resolution system which we have just discussed today under Agenda item 9. As Thailand has stated, there are far reaching implications for the rules-based WTO system and this serves as well now as an opportunity for Members to express their own views on this important matter of a conflict between Article 22 and 21.5 rights and obligations and procedures, while also touching upon the viability and integrity of the WTO dispute settlement system.

4. The Philippines takes exception however to the characterization that the Philippines is attempting to act unilaterally. This is the very reason the Philippines is before the DSB today and also last February 28, *i.e.*, in order to seek proper and appropriate multilateral authorization to suspend concessions pursuant to the clear provisions of Article 22 of the DSU.

5. Thailand had already agreed to two reasonable periods of time (RPTs) for the implementation of the DSB's adopted recommendations and rulings, which apply to distinct measures. The first period expired on 15 May 2012, and the second expired on 15 October 2012.

6. On 1 June 2012, the Philippines and Thailand did conclude a Sequencing Understanding which was notified to the Chair of the DSB on 7 June 2012 for distribution to the members of the DSB in WT/DS371/16, which was expressly stated to be without prejudice to their respective rights and obligations under the DSU, including the Philippines rights under Article 22, and Thailand expressly committed not to object to the exercise of the Philippines rights under Article 22 and Thailand expressly preserved its rights to Article 22.6 arbitration.

7. In good faith, the Philippines did pursue parallel Article 21.5 compliance proceedings, and the first compliance Panel Report was issued on 12 November 2018. The Philippines also obtained a second compliance Panel Report on 12 July 2019. Both compliance Panels did confirm that Thailand had failed to comply with the DSB's recommendations and rulings. Under the Sequencing Understanding between the two parties, any appeal of said 21.5 panel reports was to be mandatorily resolved within 90 days from their initiation. The 90-day period for the first and second compliance

appeals have well expired since 2019. On 10 December 2019, the AB Division in each appeal informed the parties that it had indefinitely suspended its work.

8. In the sequencing understanding, the parties have agreed to cooperate to find a prompt solution to any procedural issue not addressed in the understanding. The sequencing understanding does not address the procedural *impasse* at the Appellate Body but its spirit requires us to cooperate and find solutions, and the Philippines is prepared to do so.

9. The Philippines therefore is fully respecting the procedures and the sequencing understanding and should not be prevented from asserting its valid and substantial rights under Article 22. We have at various times expressed a need to adopt the 21.5 panel reports and to obtain full compliance by Thailand with the duly adopted DSB recommendations (15 July 2011).

10. The Philippines remains open to constructive and time-bound solutions to the current situation, that respects the spirit of the Sequencing Understanding mandatory 90-day period for appeals to be resolved. We therefore call on Thailand and members of the DSB under the leadership of the Chair to guide the Philippines on obtaining full compliance by Thailand with the DSB recommendations and rulings, or to afford and respect the right of the Philippines to be compensated or to be authorized to suspend concessions.

11. In consultations, the Chair has mentioned the possibility of referring the resolution of the pending appeals to alternative methods and rules, including but not limited to Article 25 of the DSU. The Philippines has expressed its openness to this suggestion, as well as our open-ness to resort to Article 22.6 arbitration or any other hybrid alternative. Our open-ness remains and we welcome and solicit views to be expressed today by members of the DSB.

12. From the Philippines' perspective, if Thailand does not accept some solution to complete Thailand's appeals promptly under alternative procedures, including through resort to Article 25 of the DSU, this matter will have to inevitably return to the DSB for decision under the mandatory decision-making rules mandated by Article 22.6 of the DSU.

13. The Philippines is prepared to be guided by the Chair and the DSB on compromise approaches and can formally communicate this to the Chair and Thailand, but the Philippines would not be in a position to an indefinite suspension of its exercise of its Article 22 rights. The mandatory decision-making rules in Article 22.6 of the DSU are designed precisely to prevent a respondent from frustrating WTO dispute settlement in such manner.

14. In these circumstances, Mr Chairman, the Philippines does formally present its request to the DSB for authorization to suspend concessions or other obligations under the covered agreements, subject, to our willingness to suspend consideration of this matter pending further consultations among the parties as well as hearing members' views today, and subject to the condition that the DSB will revert to and retain this agenda item at the next and subsequent meetings in order to preserve all rights and remedies of the Philippines.

15. We reserve our right to speak again after hearing other members' perspectives and update members as well of any developments at our next meeting.
