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

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE PHILIPPINES

REQUEST FOR CONSULTATIONS

The following communication, dated 4 July 2017, 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"),¹ 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)*.² 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");³
- (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;⁴
- (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;⁵

¹ WT/DS371/16.

² WT/DSB/M/299.

³ Panel Report, para. 8.2(b).

⁴ Panel Report, para. 8.2(c).

⁵ 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;⁶
 - (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;⁷
 - (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;⁸
 - (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;⁹
 - (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;¹⁰
 - (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;¹¹
 - (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;¹²
 - (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;¹³
 - (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;¹⁴
 - (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;¹⁵ 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.¹⁶

⁶ Panel Report, para. 8.2(e).

⁷ Panel Report, para. 8.2(f).

⁸ Panel Report, para. 8.2(g).

⁹ Panel Report, para. 8.3(a).

¹⁰ Panel Report, para. 8.3(b).

¹¹ Panel Report, para. 8.3(c).

¹² Panel Report, para. 8.4(a).

¹³ Panel Report, para. 8.4(c).

¹⁴ Panel Report, para. 8.4(e).

¹⁵ Panel Report, para. 8.4(f).

¹⁶ Panel Report, para. 8.4(g).

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.¹⁷ 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.¹⁸

3. On 1 June 2012, the Philippines and Thailand agreed upon the Sequencing Arrangement regarding the procedures that would apply under Articles 21 and 22 of the DSU for purposes of this dispute.¹⁹ 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.

4. On 4 May 2016, the Philippines requested consultations in its first recourse to Article 21.5 in this dispute.²⁰ Those consultations failed to resolve the dispute, and therefore, on 29 June 2016, the Philippines requested the establishment of a panel in its first recourse to Article 21.5.²¹ Since that time, Thailand has taken additional measures that are properly regarded as measures taken to comply, and that are inconsistent with Thailand's WTO obligations. Consequently, the Philippines requests consultations once again in this second recourse to Article 21.5.

II. MEASURES AT ISSUE AND CLAIMS MADE IN THESE PROCEEDINGS

5. In the paragraphs to follow, the Philippines identifies the measures taken to comply at issue in this second recourse to Article 21.5, and indicates the legal basis for claims against those measures.

A. Criminal Charges against PM Thailand and Its Former Employee Regarding Customs Valuation on Entries Imported in 2002-2003

6. In its first recourse to Article 21.5, the Philippines raised claims with respect to criminal charges, filed on 18 January 2016, by the Thai Public Prosecutor against PM Thailand and seven of its current and former employees in respect of 272 entries of cigarettes that cleared Thai Customs between 28 July 2003 and 24 June 2006 (the "2003-2006 Charges").²²

7. In August 2006, when the Department of Special Investigation ("DSI") initiated the investigation that resulted in the 2003-2006 Charges, it also commenced a second criminal investigation into entries imported by PM Thailand in the 2000-2003 period. That second investigation resulted in the Thai Public Prosecutor filing a second set of criminal charges, on 26 January 2017, against PM Thailand and one of its former employees in respect of 780 entries of cigarettes that cleared Thai Customs between 22 January 2002 and 14 August 2003 (the "2002-2003 Charges"). The competent Thai criminal court accepted and issued the Charges. It is these 2002-2003 Charges that are at issue in this second recourse to Article 21.5.

8. Specifically, the 2002-2003 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. The 2002-2003 Charges state that they pertain to 780 entries of cigarettes that cleared Thai Customs between 22 January 2002 and 14 August 2003. For each entry, an annex attached to the Charges states both the "declared" price (the alleged "false" price) and the "found" price (the alleged "actual" price). However, neither the 2002-2003 Charges nor the annex state the basis for the conclusions that the declared prices are "false" and that the declared prices should be replaced by alternative "actual" customs values. Based on the alleged "actual" prices, the 2002-2003 Charges and annex specify that the duty-paid value of the cigarettes imported by PM Thailand is THB 4,953,456,655.93.

¹⁷ WT/DS371/12.

¹⁸ WT/DS371/14.

¹⁹ WT/DS371/16.

²⁰ WT/DS371/17.

²¹ WT/DS371/18.

²² See WT/DS371/18, paras. 11-16.

9. The 2002-2003 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.

10. The 2002-2003 Charges are a "measure taken to comply" because they have a close nexus with the DSB's recommendations and rulings in the original proceedings in this dispute and Thailand's declared measures taken to comply. To recall, in the original proceedings, the DSB found that the long delay in the BoA's consideration of the appeals concerning 210 entries imported by PM Thailand in 2002 was inconsistent with Articles X:3(a) and X:3(b) of the GATT 1994.²³ On 16 November 2012, the BoA finally issued its ruling in respect of these 210 entries (the "BoA Ruling"), which Thailand declared to be a measure taken to comply,²⁴ and which is a measure at issue in the Philippines' first recourse to Article 21.5 in this dispute.²⁵ The 2002-2003 Charges share a close nexus with the DSB's recommendations and rulings regarding the BoA's delay in its treatment of the appeals concerning the 210 entries just mentioned and with the BoA Ruling because they involve: the same importer and same importing country (PMTL and Thailand); the same exporter and same exporting country (PT Philip Morris Indonesia ("PTPMI") and Indonesia); the same product and brand (*Marlboro* cigarettes produced by PTPMI); and some overlapping entries (205 of the entries at issue are identical).

B. Other Subsequent Measures

11. 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

12. 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.

13. 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.

²³ Panel Report, paras. 8.4(e)-(g).

²⁴ WT/DS371/15/Add.8.

²⁵ See WT/DS371/18, paras. 9-10.