

PHILIPPINES – TAXES ON DISTILLED SPIRITS

Notification of an Appeal by the Philippines
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 23 September 2011, from the Delegation of the Republic of the Philippines, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010), the Republic of the Philippines ("the Philippines") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in *Philippines – Taxes on Distilled Spirits* (WT/DS396, WT/DS403) ("Panel Report"). As set out in this notice of appeal, and pursuant to Article 17.13 of the DSU, the Philippines requests that the Appellate Body reverse or modify various legal findings and conclusions of the Panel, that result from the errors identified below.

2. Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this notice of appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the Philippines' ability to refer to other paragraphs of the Panel Report in the context of its appeal.

I. APPEAL OF THE PANEL'S FINDINGS OF A VIOLATION OF ARTICLE III:2, FIRST SENTENCE OF THE GATT 1994

3. The Panel erred in its interpretation and application of the term "like products" under Article III:2, first sentence of the GATT 1994 and failed to apply the appropriate standard when assessing the products' physical characteristics, consumer tastes and habits, and the products' tariff classifications.

4. The Panel's errors of law and legal application include:

- (a) The Panel failed to apply the correct standard when examining the physical characteristics of the products in question, and the manner in which they compete in the Philippine market.
- (b) The Panel failed to apply the correct standard when assessing consumers' tastes and habits in the Philippine market.

- (c) The Panel failed to apply the appropriate standard when examining whether the tariff classification of non-sugar-based spirits and sugar-based spirits indicated "likeness."

5. As a result of these errors, the Philippines requests that the Appellate Body reverse the Panel's findings in paragraphs 7.39, 7.40, 7.42, 7.43, 7.45, 7.46, 7.47, 7.59, 7.60, 7.62, 7.63, 7.71, 7.74, 7.76, 7.77, 7.80, 7.82, 7.83, 7.85, 7.90, 8.2 (with respect to the claims of the European Union) and 8.2(a) (with respect to the claims of the United States) of the Panel Report.

II. APPEAL OF THE PANEL'S FINDINGS OF A VIOLATION OF ARTICLE III:2, SECOND SENTENCE OF THE GATT 1994

6. The Panel erred in its interpretation and application of the term "directly competitive or substitutable" within the meaning of Article III:2, second sentence of the GATT 1994, as well as the term "so as to afford protection". The Panel consequently also failed to apply the correct standard when assessing competition in the Philippine market.

7. The Panel's errors of law and legal application include:

- (a) The Panel failed to properly interpret and apply the term "directly" when it found that competition existed in the market due to the possibility that some consumer could purchase non-sugar-based spirits on "special occasions."
- (b) The Panel failed to apply the correct standard when it found that it was sufficient for a certain market segment to have access to both types of products.
- (c) The Panel failed to apply the correct standard when it found that potential competition existed in the Philippine market.
- (d) The Panel misinterpreted the application of the term "directly competitive or substitutable" by finding that some degree of substitutability in a non-representative sample of the market in question was sufficient to show direct competition.
- (e) The Panel erred in its interpretation of the treaty term "so as to afford protection to domestic production", and misapplied this provision in the instant case.

8. As a result of these errors, the Philippines requests that the Appellate Body reverse the Panel's findings in paragraphs 7.118, 7.119, 7.120, 7.121, 7.137, 7.138, 7.187, 7.188, and 8.2(b) (with respect to the claims of the United States) of the Panel Report.

III. APPEAL OF THE PANEL'S FAILURE TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER AS REQUIRED BY ARTICLE 11 OF THE DSU

9. The Panel acted inconsistently with Article 11 of the DSU by failing to conduct an objective assessment of the matter when examining the evidence relating to physical characteristics of the products at issue, their tariff classification, the result of the econometric study and the Euromonitor International study and the segmentation of the market.

10. The Panel's errors of law and legal application under Article 11 include:

- (a) The Panel erroneously substituted its own judgment for that of the experts in relation to the organoleptic properties of the products and the congener results.

- (b) The Panel erred when it found that the evidence on tariff classification was inconclusive.
- (c) The Panel misinterpreted the results of the econometric study and the Euromonitor International survey, and substituted its own judgment for that of the experts in violation of Article 11.
- (d) The Panel erred when it found that the Philippine market is not segmented and that "many consumers may be able to purchase high-priced spirits" on "special occasions".
- (e) The Panel erred when it concluded that there is evidence that the products are capable of being directly competitive or substitutable in the near future.

11. As a result of these errors, the Philippines requests that the Appellate Body reverse the Panel's findings in paragraphs 7.39, 7.40, 7.42, 7.43, 7.45, 7.46, 7.56, 7.57, 7.59, 7.60, 7.62, 7.76, 7.77, 7.80, 7.82, 7.90, 7.113, 7.119, 7.121, 7.127, 7.137, 7.138, 7.188, 8.2 (with respect to the claims of the European Union) and 8.2(a) and (b) (with respect to the claims of the United States) of the Panel Report.
