

PHILIPPINES – TAXES ON DISTILLED SPIRITS

Request for the Establishment of a Panel by the European Union

The following communication, dated 10 December 2009, from the delegation of the European Union to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The European Union (the "EU") hereby requests the establishment of a panel pursuant to Articles 4.7 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXIII of the *General Agreement on Tariffs and Trade* ("GATT 1994").

This request concerns the excise tax regime in force in the Philippines with respect to distilled spirits and more particularly the measures evidenced *inter alia* by the following legal provisions, as such and as applied, in law and in fact, insofar as they relate to distilled spirits:

- Section 141 of the *National Internal Revenue Code of 1997* (Republic Act No. 8424, *an Act amending the National Internal Revenue Code as amended and for other purposes*, Official Gazette 1 June 1998, as subsequently amended, particularly by Section 1 of Republic Act No. 9334, *an Act increasing the excise tax rates imposed on alcohol and tobacco products, amending for the purpose Sections 131, 141, 142, 143, 144, 145 and 288 of the National Internal Revenue Code of 1997, as amended*); and, to the extent relevant with respect to the implementing measures set out below, Section 1 of the preceding and related Republic Act No. 8240, *an Act amending Sections 138, 139, 140 and 142 of the National Internal Revenue Code, as amended and for other purposes* (Republic Act No. 8240);
- Sections 3.I, 4 and 5 of the preceding and related *Revenue Regulations No. 02-97 Governing Excise Taxation on Distilled Spirits, Wines and Fermented Liquors*, implementing the relevant provisions of Republic Act No. 8240;
- Section 1 of *Revenue Regulations No. 17-99, Implementing Sections 141, 142, 143 and 145(A) and (C) (1), (2), (3) and (4) of the National Internal Revenue Code of 1997 relative to the Increase or the Excise Tax on Distilled Spirits, Wines, Fermented Liquors and Cigars and Cigarettes Packed by Machine by Twelve Per Cent (12%) on 1 January 2000*;
- Section 3 of *Revenue Regulations No. 9-2003 Amending Certain Provisions of Revenue Regulations No. 1-978 and Revenue Regulations No. 2-97 Relative to the Excise Taxation of Alcohol Products, Cigars and Cigarettes for the Purpose of Prescribing the Rules and Procedures To Be Observed in the Establishment of the*

Current Net Retail Price of New Brands and Variants of New Brands of Alcohol and Tobacco Products;

- Section 2 of *Revenue Regulations No. 23-2003 Implementing the Revised Tax Classification of New Brands of Alcohol Products and Variants Thereof Based on the Current Net Retail Prices Thereof as Determined in the Survey Conducted Pursuant to Revenue Regulations No. 9-2003*;
- Sections A, B and C(2)(a) of *Revenue Regulations No. 12-2004 Providing for the Revised Tax Rates on Alcohol and Tobacco Products introduced on or before 31 December 1996, and for those Alcohol and Tobacco Products Covered by Revenue Regulations No. 22-2003 and 23-2003, Implementing Act No. 9334*; and
- Sections 1 to 9 of *Revenue Regulations No. 3-2006 Prescribing the Implementing Guidelines on the Revised Tax Rates on Alcohol and Tobacco Products Pursuant to the Provisions of Republic Act No. 9334, and Clarifying Certain Provisions of Existing Revenue Regulations Relative Thereto*.

For each of the measures referred to above, this request also covers any amendments, replacements, extensions, implementing measures or other related measures.

Section 141 of the *National Internal Revenue Code of 1997* as amended and implemented, provides in part as follows¹:

"Distilled Spirits. – On distilled spirits, there shall be collected (...) excise taxes as follows:

(a) If produced from the sap of *nipa*, coconut, cassava, *camote*, or *buri* palm or from the juice, syrup or sugar of the cane, provided such materials are produced commercially in the country where they are processed into distilled spirits, per proof liter, Eleven pesos and sixty-five centavos (P11.65).

(b) If produced from raw materials other than those enumerated in the preceding paragraph, the tax shall be in accordance with the net retail price per bottle of seven hundred and fifty milliliter (750 ml.) volume capacity (excluding the excise tax and the value-added tax) as follows:

(1) Less than Two hundred and fifty pesos (P250) – One hundred twenty-six pesos (P126), per proof liter;

(2) Two hundred and fifty pesos (P250) up to Six hundred and Seventy-five pesos (P675) – Two hundred and fifty-two pesos (P252), per proof liter; and

(3) More than Six hundred and seventy-five pesos (P675) – Five hundred and four pesos (P504), per proof liter."

The Revenue Regulations referred to above, when setting out the excise tax rate applicable to each brand of spirits introduced into the Philippines market, distinguish between "local distilled spirits" (see, for example, Section A of Revenue Regulations No. 12-2004, referring to "Local Distilled spirits Brands Produced from Sap of Nipa, Coconut, etc. covered by Section 141 ... ") and "imported distilled spirits" (see, for example Section B of Revenue Regulations No. 12-2004,

¹ National Internal Revenue Code of 1997 as amended and consolidated up to 1 March 2009.

referring to "Imported Distilled Spirits Brands Produced from Grains, Cereals, and Grains covered by Section 141 ..."). The EU claims relate to the different excise tax rates applicable by the Philippines to local and imported whisky, gin, brandy, rum or rhum, vodka and other distilled spirits.

Under Section 141 of the *National Internal Revenue Code of 1997*, and the other measures referred to above, the Philippines establishes and applies a discriminatory excise tax regime that adversely affects imports of distilled spirits (code 22.08) of the Harmonised System to the Philippines. In essence, under this regime, distilled spirits produced from the sap of nipa, coconut, cassava, camote or buri palm, or from the juice, syrup or sugar of the cane, provided that such materials are produced commercially in the country where they are processed into distilled spirits, are subject to a flat tax rate (of 11.65 Pesos in 2009). These raw materials are indigenous to the Philippines. At the same time, imported spirits produced from other raw materials are subject to a system of price bands at substantially higher tax rates (between 126 Pesos and 504 Pesos in 2009).

These measures, individually and in any combination, as such and as applied, in law and in fact, are inconsistent with the Philippines' obligations under the GATT 1994 and are therefore presumed to (and do) nullify or impair the benefits otherwise accruing, directly or indirectly, to other WTO Members, including the EU. In particular, the Philippines has acted inconsistently with the first sentence of Article III:2 of the GATT 1994, by making distilled spirits imported from other WTO Members, including the EU, subject, directly or indirectly, to internal taxes or other internal charges in excess of those applied, directly or indirectly, to like domestic products. Moreover, separately and in combination with the first sentence of Article III:2, by applying internal taxes or other internal charges to imported and/or domestic products in a manner contrary to the principles set forth in paragraph 1 of Article III of the GATT 1994, the Philippines has acted inconsistently with the second sentence of Article III:2 of the GATT 1994.

On 29 July 2009, the EU requested consultations with the Philippines with a view to reaching a mutually satisfactory solution to the matter. The request was circulated in document WT/DS396/1 dated 30 July 2009. The consultations were held in Manila on 8 October 2009 on the above-mentioned measures. They have not led to a satisfactory resolution of the matter.

Therefore, the EU respectfully requests that a panel be established, with standard terms of reference under Article 7 paragraph 1 of the DSU, to consider the above complaint with a view to finding that the above measures adopted or maintained by the Philippines are inconsistent with the first and second sentences of Article III:2 of the GATT 1994, as such and as applied, in law and in fact, and are therefore presumed to (and do) nullify or impair the benefits otherwise accruing, directly or indirectly, to other WTO Members, including the EU.
