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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

COMMUNICATION FROM THE PANEL

The following communication, dated 30 May 2018, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body.

On 15 May 2018, the Philippines submitted a request for a procedural ruling concerning third-party access to the Final Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU.

On 24 May 2018, the Panel issued the attached procedural ruling to the parties and third parties participating in the Philippines' second recourse to Article 21.5 of the DSU.

After consulting the parties to the dispute, the Panel decided to inform the Dispute Settlement Body (DSB) of the contents of its procedural ruling and enclosed additional working procedures to ensure transparency to all WTO Members. Therefore, I would be grateful if you would circulate this letter and the attached procedural ruling to the DSB.

PROCEDURAL RULING CONCERNING THIRD-PARTY ACCESS TO THE FINAL REPORT OF THE PANEL
IN THE PHILIPPINES' FIRST RECOURSE TO ARTICLE 21.5 OF THE DSU

24 May 2018

1 INTRODUCTION

1.1. The Philippines has requested that the Members participating as third parties in its second recourse to Article 21.5 of the DSU receive a copy of the confidential Final Report that was already issued to the parties in its first recourse to Article 21.5 of the DSU, and that is not expected to be translated and publicly circulated before the last quarter of 2018.

1.2. After consulting with the parties, the Panel has decided to grant the Philippines' request. This procedural ruling relates to the working procedures of both the first and second compliance panels, and will therefore be annexed to the Reports of the Panel in both the first and second compliance panel proceedings.

2 FACTUAL BACKGROUND

2.1. In the context of the Philippines' first recourse to Article 21.5 of the DSU, the Panel informed the Dispute Settlement Body (DSB) that it expected to issue its Final Report to the parties in the first quarter of 2018.¹ The Panel did so. Following the issuance of the Report to the parties, the Secretariat informed the parties that the translation of the Final Report into Spanish and French was not expected to be completed before the last quarter of 2018.

2.2. At its meeting on 27 March 2018, the DSB established a second compliance panel to examine the matter referred to by the Philippines in its second recourse to Article 21.5 of the DSU in this dispute. As set forth in its request for the establishment of a second compliance panel², the two sets of measures at issue in the Philippines' second recourse to Article 21.5 are related to the measures at issue in the first compliance proceeding:

- a. The Philippines challenges Notices of Assessment that Philip Morris (Thailand) Limited (PMTL) received in November 2017 from Thailand's Customs Department, rejecting PMTL's declared transaction values, and determining revised customs values, for 1052 shipments of cigarettes imported over the period 2001-2003. These 1052 shipments include 208 shipments whose customs values were previously assessed by a ruling of the Board of Appeals that was issued on 16 November 2012. The November 2012 Board of Appeals Ruling is the subject of the Philippines' first recourse to Article 21.5 of the DSU.
- b. The Philippines challenges a set of criminal charges filed by the Public Prosecutor against PMTL and one of its former employees on 26 January 2017, in respect of 779 shipments of cigarettes imported in 2002-2003. This second set of charges was filed one year after a first set of criminal charges was filed by the Public Prosecutor against PMTL and seven of its current and former employees on 18 January 2016, in respect of 272 shipments of cigarettes imported between 2003-2006. The first set of criminal charges is the subject of the Philippines' first recourse to Article 21.5 of the DSU.

2.3. With respect to both sets of measures at issue in the second compliance proceeding, the Philippines' panel request claims that the Thai authorities acted inconsistently with various obligations under the Customs Valuation Agreement (CVA) and the GATT 1994, including *inter alia*:

- a. Articles 1.1 and 1.2(a) of the CVA, by rejecting PMTL's transaction values without conducting a proper examination of the circumstances of sale, by failing to communicate the grounds for considering that the relationship between the buyer and seller influenced the price, and by failing to give the importer any opportunity to comment on the information under consideration;

¹ WT/DS371/20, dated 15 May 2017.

² WT/DS371/22, dated 14 March 2018.

- b. the relevant provisions of Articles 2 through 7 of the CVA, by failing to comply with the applicable valuation rules when determining the revised customs values of the imported goods; and
- c. Article 16 of the CVA, by failing to provide, upon written request, a written explanation as to how the customs values of the imported goods were determined.

2.4. The Panel observes that these claims are similar, if not identical, to the legal claims raised in the first compliance panel proceeding pertaining to both the November 2012 Board of Appeals Ruling and the first set of criminal charges filed on 18 January 2016. These legal claims are the subject of the Panel's findings in the Final Report that was already issued to the parties in the first quarter of 2018.

2.5. The DSB was informed on 9 May 2018 that the second compliance panel is composed of the same individuals serving on the first compliance panel.³ On 24 May 2018, the Panel adopted its timetable and working procedures, based on a draft timetable and a draft set of working procedures jointly agreed and proposed by the parties. In accordance with the timetable proposed by the parties and subsequently adopted by the Panel, the complainant is expected to file its first written submission before the end of May. The agreed timetable further provides that the parties' remaining written submissions, the third-party written submissions, and the written responses to any pre-hearing questions, will all be received before the last quarter of 2018. The timetable further provides that the substantive meeting with the parties (including the third-party session), and any post-hearing written questions and responses, will take place within the last quarter of 2018.

3 THE PHILIPPINES' REQUEST AND THAILAND'S RESPONSE

3.1. On 15 May 2018, the Philippines requested that the working procedures governing the conduct of the first compliance panel proceeding, which were adopted by the Panel on 25 January 2017, be amended so as to make the Final Report available to the third parties participating in this second compliance proceeding. In its request, the Philippines recalled that under paragraph 28 of those working procedures, the Final Report of the Panel is to be treated as "strictly confidential" and thus could not be shared with WTO Members, besides the Philippines and Thailand, until it is circulated. The Philippines presented this request at the same time that the parties presented the Panel with their agreed timetable and working procedures.

3.2. In its request, the Philippines confirmed that the interpretations developed by the Panel in its Final Report relate to issues that will also arise in the context of this second compliance proceeding. The Philippines observed that both proceedings concern criminal charges brought by the Thai authorities against the same importer, and that some of the claims that the Philippines brings in this case are identical to the claims that it made in the first compliance proceeding. The Philippines further noted that there is an overlap in the shipments of cigarettes covered by each of the two sets of measures at issue in the second compliance proceedings, on the one hand, and one of the measures at issue in the first compliance proceeding (namely, the November 2012 Board of Appeals Ruling). In its request, the Philippines informed the Panel that it intends to refer to the Final Report in its submissions in this second compliance proceeding, including in its first written submission due to be filed before the end of May.

3.3. The Philippines recalled that Article 10 of the DSU provides that the third parties must be given access to the submissions of the parties in order to participate in the second compliance proceedings, but observed that if paragraph 28 of the working procedures is left as it is, the Philippines would be obliged to prepare a redacted and incomplete version of its submissions for the third parties. In the Philippines' view, this would necessarily deny the third parties full access to the submissions and thereby prejudice their right to participate in the proceedings in a full and meaningful fashion. The Philippines noted that without access to the Final Report, the third parties would be denied the ability to make submissions informed by the Final Report because they would be unaware of, and unable to address, an important part of the jurisprudence relevant to the second compliance proceeding and also to the parties' arguments in that respect. In the Philippines' view, providing the Final Report to a limited number of Members participating in this proceeding as third parties would not be tantamount to the circulation of the Report, because

³ WT/DS371/23, dated 9 May 2018.

those Members participating as third parties would still be subject to the obligation to preserve the confidentiality of the Report.

3.4. At the organizational meeting with the Panel held on 19 May 2018, Thailand indicated that it had serious reservations and concerns regarding the Philippines' request because of the systemic issues that it raised. Thailand considered that it was for the Panel to decide, but emphasized that if the Panel chose to grant the request, any such decision should be taken on the grounds that there are *sui generis* circumstances so as to avoid creating a broader precedent.

3.5. Thailand expressed its doubts whether there were circumstances in this case that would warrant a decision to sacrifice the important rule of "strict confidentiality" of the Final Report, and queried whether the Philippines was in effect proposing to advance the circulation date simply for its own convenience. Thailand emphasized two points. First, Thailand suggested that the present case was not so exceptional insofar as it is quite common for Members and legal counsel involved in multiple WTO dispute settlement proceedings to have access to a Report or ruling in one proceeding that, regardless of its relevance, cannot be shared or referenced in the context of another proceeding. Second, Thailand observed that delays in the translation of panel reports were not exceptional either. Therefore, Thailand suggested that if the Panel chose to grant the Philippines' request in this case, the delay in translation should not be treated as *sui generis* circumstance or otherwise given undue weight in the reasoning justifying that course of action.

3.6. As to the modalities for how access would be granted to the third parties if the Panel chose to do so, Thailand indicated that in its view it was too late to modify the working procedures governing the conduct of the first compliance panel. Thailand also noted that the Members participating as third parties in the first and second compliance panel were not identical. For these reasons, Thailand suggested that if the Panel were inclined to grant the Philippines' request, the issue should be addressed in the context of the working procedures of this second compliance panel.

4 EVALUATION BY THE PANEL

4.1. We would stress at the outset that this case involves a particular combination of circumstances, which are as follows:

- a. there are two consecutive compliance panel proceedings in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371) between the same disputing parties and before two compliance panels composed of the same individuals;
- b. the Final Report in the first compliance proceeding has already been issued to the parties, and therefore the Panel's findings and reasoning are no longer subject to any further modification by the Panel;
- c. prior to filing its first written submission, the Philippines informed the Panel that by virtue of the overlapping subject-matter of the two compliance proceedings, its submissions will refer to the Final Report to an extent that will necessitate third-party access to the Final Report if they are to participate in the proceeding in a full and meaningful fashion;
- d. the Secretariat has informed the parties and the Panel that the Final Report will not be circulated until some point (yet to be determined) in the last quarter of 2018, which is after the dates for the parties to file all of their written submissions and the date for the filing of the third-party written submissions, and possibly also after the substantive meeting with the parties and the third-party session;
- e. the Philippines has specifically requested that the Panel modify its working procedures to grant third-party access to the Final Report pending its translation; and
- f. ten Members have already notified their third-party interest in these proceedings, and these third parties are therefore legally entitled to receive all of the parties' submissions filed prior to the substantive meeting.

4.2. Clearly, the Panel does not have the authority to unilaterally authorize the circulation of a panel report prior to its translation into all three official languages of the WTO. The General Council's Decision on Procedures for the Circulation and Derestriction of WTO Documents⁴ states unequivocally that official WTO documents, including reports of panels⁵, shall be made available via the WTO website to facilitate their dissemination to the public at large "[o]nce translated into all three official WTO languages".⁶ It is true that the same decision states that the translation of panel reports shall be completed "expeditiously"⁷, and the Panel notes that Article 15.2 of the DSU likewise envisages that the translation and circulation of a panel's final report shall be completed "promptly". However, that requirement does not serve to qualify the rule that panel reports may only be circulated once translated into the other official languages. Insofar as time periods being experienced for the translation of panel reports warrants a review of that rule and the existing procedures governing circulation, the authority to do so is vested with the Members.⁸

4.3. The issue presented by the Philippines' request is distinct from the question of whether the Final Report can be circulated prior to its translation. The Philippines has not requested that the Panel circulate the Report prior to its translation, nor has it requested that the Panel waive the confidentiality of the Final Report prior to its public circulation. Rather, the Philippines has requested that the Panel allow those Members participating as third parties in the Philippines' second recourse to Article 21.5 of the DSU to have access, on a confidential basis, to the contents of the Final Report that has already been issued to the parties in the Philippines' first recourse to Article 21.5 of the DSU, and to which the parties are undoubtedly going to refer in their submissions to the second compliance panel.

4.4. Furthermore, the question before the Panel is not whether it should adopt special procedures to deal with the situation that the parties find themselves in, but rather what special procedures the Panel should adopt to deal with this situation. If the Panel does not adopt a special procedure for granting third parties access to the contents of the Final Report on a confidential basis, the Panel will then have to adopt one of the following alternative sets of special procedures:

- a. the Panel could decline to grant third parties access to the contents of the Final Report without modifying the timetable for the proceeding agreed by the parties, in which case the Panel would then have to adopt special procedures requiring the parties to redact all reference to the contents of the Final Report when they serve their submissions on the third parties in this second compliance panel proceeding⁹; or
- b. the Panel could decline to grant the third parties access to the contents of Final Report, and deal with the situation by modifying the timetable proposed by the parties so as to postpone the dates for filing their written submissions until such time as the Final Report has been translated and circulated sometime in the last quarter of 2018.

4.5. With these preliminary considerations and the alternative options in mind, the Panel recalls that it is well established that "the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated".¹⁰ The Panel is required to deal with a

⁴ WT/L/452, dated 16 May 2002.

⁵ WT/L/452, dated 16 May 2002, paragraph 1 and footnote 1.

⁶ WT/L/452, dated 16 May 2002, paragraph 3.

⁷ WT/L/452, dated 16 May 2002, paragraph 3.

⁸ WT/L/452, dated 16 May 2002, paragraph 5.

⁹ Such additional procedures would also require the Panel to redact any references to the Final Report from any preliminary or procedural rulings made by the Panel and served upon the third parties prior the circulation of the Final Report.

¹⁰ Appellate Body Report, *EC – Hormones*, footnote 138. The Appellate Body made that statement in *EC – Hormones*, when reviewing the panel's decision to grant the United States access to all information in the proceedings initiated by Canada (and vice versa), in the context of Canada and the United States having initiated separate dispute settlement proceedings, and each participating as a third party in the proceeding initiated by the other. The Appellate Body considered that "[a]lthough Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law". The Appellate Body considered that "in the case before us, circumstances justified the Panel's decision", and recalled that in other cases, panels have considered that "particular circumstances justified the grant to third parties of rights somewhat broader than those explicitly envisaged in Article 10 and Appendix 3 of the DSU". (Appellate Body Report, *EC – Hormones*, paras. 154-155.)

situation that is not explicitly regulated by the DSU or any other applicable rules, and it falls within the authority of the Panel to adopt appropriate arrangements to deal with this situation in accordance with due process and following consultation with the parties pursuant to Article 12.1 of the DSU. The Panel is mindful that "due process requires a balancing of various interests, including systemic interests as well as those of the parties, and both general and case-specific considerations".¹¹ The Panel has given careful consideration to the particular circumstances of the case and the parties' views, while engaging in a balancing exercise taking into account how each of the alternative options before the Panel would impact on the rights and interests of the third parties, the Panel, the parties, and the WTO membership at large. In the particular circumstances of this case, the Panel considers that due process is best served by granting the third parties access to the contents of the confidential Final Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, subject to the conditions set forth in the enclosed additional procedures adopted by the Panel.

4.6. The Panel recalls that Article 10.1 of the DSU obliges it to ensure that the interests of the third parties are "fully taken into account during the panel process". Further, it is generally understood that "the third participants' interests lie mainly in the correct legal interpretation of the provisions of the WTO agreements".¹² Providing the third parties with versions of the parties' submissions that have not been redacted so as to remove all references to the contents of the Final Report, including the relevant legal interpretations contained therein and the parties' legal arguments based on those interpretations, would therefore ensure that the third parties are able to exercise their right to participate in these proceedings "in a full and meaningful fashion"¹³, as guaranteed by Article 10 of the DSU. Conversely, requiring the parties to serve third parties with redacted versions of their submissions, which would remove all references to the Final Report including all of the parties' argumentation directly referencing any interpretations by the first compliance panel, may infringe upon the right of the third parties to receive "the submissions" of the parties prior to the first meeting with the panel as provided for in Article 10.3 of the DSU. As to the alternative option of delaying the proceedings until the Final Report of the Panel is circulated in both Spanish and French, the submissions of the parties in this proceeding are in English. It is not clear how any third party would be prejudiced by receiving access only to the English version of the Final Report while its translation is pending, given that the principal reason for granting third-party access to the Final Report is to enable the Members participating in this proceeding as third parties to have access to, understand, and meaningfully comment on the legal arguments contained in the submissions of the parties.

4.7. The Panel considers that meaningful third-party participation in this proceeding is instrumental to the Panel's own function of making an objective assessment of the matter before it, and in particular to ensuring that the Panel arrives at the correct legal interpretation of the provisions of the WTO agreements. This again favours granting third parties access to non-redacted versions of the parties' submissions, as a means of ensuring that the third parties can provide meaningful views on the parties' legal arguments. Conversely, if the third parties are unable to access the parties' argumentation, the Panel may receive a number of third-party submissions advancing argumentation on the interpretation of CVA obligations that were prepared without sufficient knowledge of what the parties are actually arguing before this second compliance panel, and without the knowledge of the jurisprudence that may serve as the basis for those arguments. The Panel considers that if it is denied the benefit of informed third-party submissions in this manner, this could compromise the Panel's own ability to make an objective assessment of the matter as required under Article 11 of the DSU. Alternatively, if the Panel were to stay the proceeding by at least four to six months against the wishes of the parties and leave all dates in the air pending the public circulation of the Report, the Panel would not be acting consistently with its general duty to conduct the proceedings in a fair and orderly manner, or with its specific obligation to fix the timetable as required by Article 12.3 of the DSU.¹⁴

¹¹ Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

¹² Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling and Additional Procedures to Protect Sensitive Information, para. 23.

¹³ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 249. See also Appellate Body Report, *Japan – DRAMS (Korea)*, para. 279, cautioning panels against sweeping redactions that could render a report unintelligible to third parties.

¹⁴ Article 12.3 of the DSU provides that the timetable for the panel process is to be fixed "as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon".

4.8. The Panel does not consider that granting access to the contents of the Final Report on a confidential basis to the third parties would prejudice the interests of either the responding party or the complaining party in the circumstances of this proceeding. Thailand has indicated that its concerns and reservations are "systemic" in nature, and has not suggested that sharing the Final Report with third parties would prejudice its interests in the context of this proceeding. For its part, the Philippines specifically requested that the Final Report be shared with the third parties, and argued that its own due process rights may be affected if its request is not granted. In contrast, the Panel considers that prejudice to the due process rights of one or both parties would indeed arise if the Panel adopted special procedures providing for the redaction, or postponement, of the parties' written submissions. The first scenario would, as already explained, give rise to a very real possibility of the third parties preparing submissions without adequate knowledge of the parties' submissions, and in particular without adequate knowledge of the parties' arguments regarding the correct interpretation of the WTO obligations at issue in this proceeding, or the jurisprudence that may serve as an important basis for the parties' arguments. Requiring the parties to dedicate their time and resources to responding to third-party submissions prepared in such circumstances may entail an "uneconomical use of time and resources"¹⁵ by the parties. Alternatively, the Panel considers that the prejudice visited upon the complaining party would be even greater if the Panel sought to deal with the situation confronting it by postponing the filing of the parties' submissions until the Final Report has been circulated. While this option for dealing with the delay in translation would fully safeguard the interests of the third parties and ensure their meaningful participation, it would do so at the expense of the complaining party's due process rights¹⁶ and the overall object and purpose of the DSU.¹⁷

4.9. Finally, the Panel has considered the rights and systemic interests of the WTO membership at large, particularly from the perspective of contemplating how granting access to the contents of the Final Report to third parties in this proceeding could potentially affect other Members in their capacity as parties in any other parallel panel proceedings. In general, those Members receiving a confidential copy of the Final Report for the purpose of enabling them to develop their argumentation in this panel proceeding would enjoy no advantage over other Members in the context of any parallel proceeding, given that those Members who receive a copy of the Final Report would be prevented from referencing the contents of the Final Report outside of the context of the present proceeding.¹⁸ Having said that, the Panel recognizes that if there are parallel proceedings involving similar issues to those examined in the Final Report, and if one of the parties to those proceedings has access to the contents of the Final Report and the other disputing party does not, such knowledge could potentially inform that party's argumentation in a manner that could give rise to due process issues. However, the Panel considers that insofar as this is a concern for any Member, that concern is appropriately and fully addressed by circulating this procedural ruling enclosing the additional working procedures to the DSB, and thereby putting all WTO Members on an equal footing.

4.10. The Panel agrees with Thailand that preserving the confidentiality of the contents of the Final Report pending its circulation to all Members in the three official languages is an important principle. However, the Panel does not consider that its decision to grant interested third parties access to the contents of the Final Report on a confidential basis, for the sole purpose of allowing them to exercise their right to participate in a meaningful and full way in this second compliance panel proceeding, sacrifices that principle. The Report remains confidential. As elaborated in the enclosed procedures, which establish particularized arrangements for the purpose of this proceeding, the Panel has decided that the Final Report may be provided upon request to an

¹⁵ Appellate Body Report, *EC – Hormones*, para. 152. In this scenario, the potential burden on the parties could be compounded if the Final Report were circulated prior the conclusion of the briefing phase of the second proceeding, and at a late stage of this proceeding one or more the third parties requested leave from the Panel to provide a supplemental third-party submission prepared in the light of the information in the Final Report to which it finally had access.

¹⁶ The Appellate Body has also stated that "due process" requires a panel to take appropriate account of the complaining party's "right to have recourse to an adjudicative process in which it can seek redress in a timely manner". (Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.)

¹⁷ Article 3.3 of the DSU provides that the "prompt settlement" of disputes is "essential to the effective function of the WTO". The Appellate Body has confirmed that this is part of the "overall object and purpose" of the DSU. (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.)

¹⁸ Furthermore, we understand that in the event of a breach of its confidentiality, another panel would be precluded from considering the contents of the Final Report prior to its circulation. See *China – Raw Materials*, Communication from the Panel, 18 May 2010, WT/DS394/9, WT/DS395/9, WT/DS398/8, paras. 43-44.

interested third party on the basis of several interlocking conditions aimed at ensuring that the confidentiality of the Final Report is preserved.

4.11. The Panel agrees with Thailand that it is common for Members and legal counsel involved in multiple WTO dispute settlement proceedings to have access to a Report or ruling in one proceeding that, regardless of its relevance, cannot be shared or referenced in the context of another proceeding. This procedural ruling is not meant to suggest otherwise, or to open the door to panels, parties or third parties receiving advance copies of panel reports in translation whenever two different proceedings have overlapping subject-matter. In the circumstances of this case, the disputing parties and the Panel already have the Final Report, and will refer to it in their submissions to the Panel. The decision to grant third-party access to the Final Report has not been taken because of the degree of overlapping subject-matter as an autonomous consideration, but rather because the Panel expects that by virtue of the overlapping subject-matter between the two compliance proceedings, the parties' submissions in the second compliance proceeding will refer to the Final Report from the first compliance proceeding in a manner that will necessitate third-party access to the contents of the Final Report if they are to participate in the second compliance panel proceeding in a full and meaningful fashion. In other words, the principal reason for granting third-party access to the Final Report is simply to enable the third parties to have access to, understand, and meaningfully comment on the submissions of the parties.

4.12. The parties have provided the Panel with alternative views on the modalities for granting third parties access to the Final Report. In its request, the Philippines requested that the Panel amend paragraph 28 (regarding the strict confidentiality of both the Interim and Final Reports) of the working procedures adopted by the panel on 25 January 2017, in its capacity as the first compliance panel. The Philippines indicated that it could then attach the Final Report as an exhibit to its first written submission in this second compliance proceeding. However, Thailand considers that the modalities for implementing any decision to grant access to third parties should instead relate to the working procedures in this second compliance proceeding, because in its view it is too late for the Panel to amend the working procedures governing the first compliance proceeding. Thailand also notes that there is no identity between the third parties in the first and second compliance proceedings.

4.13. Having considered the parties' view on the modalities for providing third parties with access to the contents of the Final Report, the Panel has concluded as follows:

- a. If third parties are to be given access to the contents of the Final Report, they should be given a copy of the Final Report rather than merely being able to receive non-redacted versions of the parties' submissions and the passages of the Report that are referenced or extracted therein. The reason is to avoid inducing one or both parties to insert lengthy, multi-page extracts from the Final Report in their submissions (which would erase the formal distinction between third parties having a copy of the Final Report versus not having one, and leave the parties, third parties and Panel having to work with needlessly long, extract-laden submissions).
- b. The Panel accepts that either party attaching the Final Report to its submission could be one practical way of making it available to all of the third parties, but the Panel considers that it would be more appropriate for the Panel itself to provide a copy of the Final Report to the third parties, and to limit such provision to only those third parties that specifically request it.
- c. The Panel considers that it is not necessary to amend the terms of paragraph 28 of the working procedures adopted in the first compliance panel proceeding, because the Panel considers that making the contents of the Final Report available to third parties, in accordance with the confidentiality and permissible use provisions of paragraphs 2 to 4 of the enclosed additional procedures, does not constitute "disclosure" of the Report within the meaning of paragraph 28 of the working procedures adopted by the Panel on 25 January 2017.
- d. Only the Panel in the first proceeding has the legal authority to grant third-party access to the contents of its Final Report. The Panel considers that it still has the authority to take appropriate action in its capacity as the first compliance panel, notwithstanding that

it has already issued its Final Report.¹⁹ At the same time, the Panel agrees with Thailand that because the third parties are not identical in the first and second compliance proceedings, any procedures governing access to the Final Report cannot be made effective solely through a change to the working procedures of the first compliance panel. In the light of the foregoing, the enclosed additional working procedures will be annexed to the Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, and also incorporated by reference into the working procedures adopted by the Panel for the purposes of the Philippines' second recourse to Article 21.5 of the DSU.

¹⁹ A panel's authority to take procedural decisions does not lapse upon the issuance of its final report to the parties. By way of illustration, a panel that has issued its final report to the parties still has the authority to suspend the proceedings upon request of a party pursuant to Article 12.12 of the DSU.

Additional Working Procedures concerning Third-Party Access to the Final Report of the Panel
in the Philippines' first recourse to Article 21.5 of the DSU

1. Following consultation with the parties, the Panel has adopted these additional procedures pursuant to its authority under Article 12.1 of the DSU and taking into account the particular circumstances of these proceedings.
 2. Pending the translation and public circulation of the Final Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU (the Final Report), the Panel will provide an electronic copy of the Final Report to any Member participating as a third party in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Second Recourse to Article 21.5 of the DSU by the Philippines* (Philippines' second recourse to Article 21.5) subject to the following conditions:
 - (a) the electronic copy of the Report obtained under these procedures may be referenced by a third party only for the purpose of enabling it to prepare its third-party written submission, third-party oral statement, or responses to questions in the Philippines' second recourse to Article 21.5, and for no other purpose; and
 - (b) no person may have access to the Report except an employee of a third party, and an outside adviser acting on behalf of the third party for the purposes of this dispute, and each third party shall have responsibility in this regard for its employees as well as any outside advisers used for the purposes of this dispute.
 3. Any Member participating as a third party in the Philippines' second recourse to Article 21.5 that wishes to receive a copy of the Final Report subject to these conditions shall request a copy of the Final Report from the Panel. To promote the orderly conduct of the proceeding, any interested third party is invited to make any such request promptly upon becoming aware of these additional procedures.
 4. The parties and third parties are free to refer to the contents of the Final Report in their submissions to the Panel in the Philippines' second recourse to Article 21.5 of the DSU. Pending the translation and public circulation of the Final Report, any reference to the contents of the Final Report included in the parties' and third parties' written submissions, oral statements or responses to questions in the context of the Philippines' second recourse to Article 21.5 of the DSU shall be treated as confidential information by the parties and third parties and shall not be publicly disclosed. Accordingly, if a party or third party makes its submissions publicly available, any reference to the contents of the Final Report shall be redacted from the public version of its submission pending the translation and public circulation of the Final Report.
 5. In accordance with paragraph 28 of the Working Procedures adopted by the Panel on 25 January 2017 in the context of the Philippines' first recourse to Article 21.5 of the DSU, the Final Report is strictly confidential and shall not be disclosed. For greater clarity, granting third parties access to the contents of the Final Report in accordance with paragraphs 2 to 4 of these additional procedures does not constitute "disclosure" within the meaning of paragraph 28.
 6. These additional working procedures concerning third-party access to the Final Report of the Panel will be annexed to the Report of the Panel in the Philippines' first recourse to Article 21.5 of the DSU, and have been incorporated by reference into the working procedures adopted by the Panel in the context of the Philippines' second recourse to Article 21.5 of the DSU.
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