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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

Revision

The following communication, dated 21 February 2018, 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). This request replaces and supersedes the Philippines' request for consultations in its second recourse to Article 21.5 of the DSU in these proceedings, which is dated 6 July 2017.

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

¹ WT/DS371/16.

² WT/DSB/M/299.

³ Panel Report, para. 8.2(b).

⁴ Panel Report, para. 8.2(c).

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- (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
 - (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 favorable 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

⁵ Panel Report, para. 8.2(d).

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).

review and correction of guarantees collected pending the determination of customs value.¹⁶

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

5. On 26 January 2017, Thailand took the additional measure described in Section II.B below. This measure is properly regarded as a measure taken to comply, and is inconsistent with Thailand's WTO obligations. Consequently, on 6 July 2017, the Philippines requested consultations in a second recourse to Article 21.5. These consultations were held on 1 September 2017, but failed to resolve the dispute. On 29 November 2017, Thailand took the further additional measure described in Section II.A below, which is also properly regarded as a measure taken to comply, and is also inconsistent with Thailand's WTO obligations.

6. The Philippines requests consultations in this second recourse to Article 21.5 regarding both sets of additional measures described in Sections II.A and II.B below, to ensure that the outstanding matters of disagreement are addressed in a single compliance proceeding.

II. MEASURES AT ISSUE AND CLAIMS MADE IN THESE PROCEEDINGS

7. 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. Notices of Assessment for Underpayment of Taxes and Duties on 1,052 Entries Imported in 2001-2003

8. On 29 November 2017, PM Thailand received 1,052 Notices of Assessment from Thailand's Customs Department, to pay additional duties, taxes, penalties and surcharges ("duties and taxes") in a total amount of approximately THB 25,480,317,518 (approximately USD 809 million),²² within 30 days. The Notices of Assessment cover 1,052 entries of cigarettes that were imported by PM Thailand between 2001-2003. All but one of the entries cover sales made by PT Philip Morris Indonesia ("PTPMI"), a related seller. The remaining entry covers a sale made by PM Philippines, also a related seller. These 1,052 Notices of Assessment are measures subject to the Philippines' second recourse to Article 21.5 of the DSU.

¹⁶ Panel Report, para. 8.4(g).

¹⁷ WT/DS371/12.

¹⁸ WT/DS371/14.

¹⁹ WT/DS371/16.

²⁰ WT/DS371/17.

²¹ WT/DS371/18.

²² All USD amounts of current THB amounts are based on the USD/THB exchange rate of 21 February 2018. The amounts were calculated on 21 February 2018, using the online currency conversion tool available at www.xe.com/currencyconverter.

9. The Notices of Assessment reject PM Thailand's declared transaction values, and provide revised customs valuation determinations, for entries made up to, and in some cases more than, 15 years ago. In respect of 208 entries, the customs values were previously assessed by a ruling of the Board of Appeals on 16 November 2012 ("BoA Ruling"), which Thailand has declared as a measure taken to comply and which is the subject of the Philippines' first recourse to Article 21.5 of the DSU. In respect of the other entries, the customs values were assessed between ten and 15-plus years ago, with duties and taxes definitively collected at that time. Thailand declared the BoA Ruling to be a measure taken to comply with the DSB's recommendations and rulings in item (xii) in paragraph 1 above. The BoA Ruling is currently under review by Thailand's Supreme Court and also by a panel established under Article 21.5 of the DSU in this dispute. The Notices of Assessment impose higher assessed customs values than Thailand previously assessed in respect of the same entries.

10. The Notices of Assessment state that the Customs Department's valuation is based on findings by the Department of Special Investigation ("DSI") regarding the "actual value" of each entry, which was higher than the declared value. The Notices of Assessment provide that the DSI calculated the "actual value" on the basis of documents completed by PTPMI, which were obtained from the Indonesian government, but provide no further explanation of the valuation methodology.

11. The Notices of Assessment impose liability on PM Thailand for: (1) payment of the difference in import duties, excise tax, VAT and health taxes due, based on the alleged under-declaration; (2) a "surcharge" based on the alleged underpayment of import duties, excise tax, VAT and health taxes; and (3) a "penalty" relating to the alleged under-payment of excise tax and VAT. The total of these amounts in respect of all notices is approximately THB 25,480,317,518 (approximately USD 809 million).

12. The Customs Department did not inform PM Thailand that it was re-assessing the company's customs values and, therefore, gave the company no procedural opportunities during the re-assessment process. The first information that the company received that such a process was underway was when it received the new Notices of Assessment on 29 November 2017.

13. The Notices of Assessment constitute "measures taken to comply" which are inconsistent with the following provisions:

- Articles 1.1 and 1.2(a) of the CVA, because, among others, Thailand rejected the transaction values without valid basis; failed to conduct a proper examination of the circumstances of sale; failed to communicate its grounds for considering that the relationship between the buyer and seller influenced the price; and, thereby, failed to give the importer any opportunity to comment on the information under consideration;
- Articles 2, 3, 4, 5, 6 and 7 of the CVA, because, among others, Thailand failed to comply with the relevant valuation rules in establishing the alleged "actual values" of the imported goods;
- Article 16 of the CVA because, among others, Thailand has failed to provide, upon written request, a written explanation as to how the customs values of the imported goods were determined; and,
- Article III:2 of the GATT 1994, first and second sentences, because, among others, Thailand has imposed internal taxes (excise tax, VAT, and health taxes) on imported goods on a basis that exceeds the properly established customs value, which results in taxation of these goods in excess of that applied to like domestic goods and/or taxation of imported goods that is dissimilar to the taxation of directly competitive or substitutable domestic goods, which affords protection to the domestic manufacturer, the Thailand Tobacco Monopoly, which is owned by the Ministry of Finance; and,
- Article X:3(a) of the GATT 1994, because Thailand fails to administer its customs and tax laws in a manner that is uniform, impartial, and reasonable by, among others, imposing taxes and duties on imported goods in an arbitrary manner, without legal basis in domestic law, without process of law, when the claim for payment is time-barred under the applicable Thai law.

14. The 1,052 Notices of Assessment are "measures 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 measure 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, 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

15. The 1,052 Notices of Assessment 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 (PM Thailand and Thailand); the same exporter and same exporting country (PTPMI and Indonesia); the same product and brand (*Marlboro* cigarettes produced by PTPMI); and overlapping entries.

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

16. 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").²⁶

17. 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 779 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 these Charges on the same day. It is these 2002-2003 Charges that are at issue in this second recourse to Article 21.5.

18. 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 779 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 (USD 157 million).

19. The 2002-2003 Charges constitute a "measure taken to comply" which is inconsistent with the following provisions:

- Articles 1.1 and 1.2(a) of the CVA because, among others, Thailand rejected the transaction values without valid basis; failed to conduct a proper examination of the circumstances of sale; failed to communicate its grounds for considering that the relationship between the buyer and seller influenced the price; and, thereby, failed to give the importer any opportunity to comment on the information under consideration;
- Articles 2, 3, 4, 5, 6 and 7 of the CVA, because, among others, Thailand failed to comply with the relevant valuation rules in establishing the alleged "actual values" of the imported goods;

²³ Panel Report, paras. 8.4(e)-(g).

²⁴ WT/DS371/15/Add.8.

²⁵ See WT/DS371/18, paras. 9-10.

²⁶ See WT/DS371/18, paras. 11-16.

- Article 16 of the CVA because, among others, Thailand has failed to provide, upon written request, a written explanation as to how the customs values of the imported goods were determined; and,
- Article III:2 of the GATT 1994, first and second sentences, because, among others, Thailand calculates the tax base for internal taxes (excise tax, VAT, and health taxes) on imported goods on a basis that exceeds the properly established customs value, which results in taxation of these goods in excess of that applied to like domestic goods and/or taxation of imported goods that is dissimilar to the taxation of directly competitive or substitutable domestic goods, which affords protection to the domestic manufacturer, the Thailand Tobacco Monopoly, which is owned by the Ministry of Finance.

20. The 2002-2003 Charges are a "measure taken to comply" because, like the 1,052 Notices of Assessment, they have a close nexus with the DSB's recommendations and rulings in the original proceedings in this dispute and Thailand's declared measure taken to comply. As noted, 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 1994.²⁷ On 16 November 2012, the BoA finally issued its ruling in respect of these 210 entries, which Thailand declared to be a measure taken to comply,²⁸ and which is a measure at issue in the Philippines' first recourse to Article 21.5 in this dispute.²⁹

21. The 2002-2003 Charges share a close nexus with the DSB's recommendation 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 (PM Thailand and Thailand); the same exporter and same exporting country (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). The Philippines also notes that 2002-2003 Charges also cover 779 of the entries subject to the 1,052 Notices of Assessment.

C. Other Subsequent Measures

22. This request for consultations also concerns any measures that amend, modify, replace, supersede, or implement 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 Customs Department (including the BoA), the DSI, the Excise Department, the Public Prosecutor, the Revenue Department, Thai courts, and any other institutions or agencies whose conduct is attributable to Thailand.

III. CONCLUSION

23. 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. If consultations are not held within 15 days, the Philippines intends to exercise its right under the Sequencing Arrangement to request a panel.

24. 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.

²⁷ Panel Report, paras. 8.4(e)-(g).

²⁸ WT/DS371/15/Add.8.

²⁹ See WT/DS371/18, paras. 9-10.