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

COMMUNICATION FROM THAILAND

The following communication, dated 6 March 2020, was received from the delegation of Thailand with the request that it be circulated to the Dispute Settlement Body (DSB).

Thailand sets forth below the content of its interventions at the DSB meeting of 28 February 2020 and 5 March 2020 regarding Item 6 of the agenda concerning the Philippines' request for suspension of concessions in the dispute *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (DS371).

1. Thailand considers that item 6 of the proposed agenda, regarding the Philippines' request for suspension of concessions in the dispute *Thailand – Cigarettes*, is not proper because of the ongoing appeals and unadopted reports in the proceedings under Article 21.5 of the DSU. In any event, to the extent that the Philippines seeks to ignore the agreed procedures under the sequencing agreement, the Philippines' request is made outside the 30-day deadline in Article 22.6 of the DSU.
2. Thailand was compelled to block the adoption of the agenda when this meeting first convened on Friday 28 February. We did not do so lightly, but, as we explained, the Philippines' request raises broad systemic issues about the status and future of the dispute settlement system. The DSB should not be rushed into pre-judging these issues on the basis of an artificial deadline of the Philippines' creation.
3. We appreciate the Chairman's involvement in consultations with the parties on this issue. As explained during the consultations, Thailand does not want the work of the DSB, including the adoption of pending reports, and consideration of efforts to unblock the Appellate Body selection process, to be impacted unnecessarily as a result of the Philippines' unilateral actions. Members should join hands in swiftly resolving the unprecedented crisis faced by this organization rather than deepening it.
4. In these circumstances, and in line with the agreement reached with the Chair and the Philippines yesterday, Thailand is willing to join consensus on adopting the agenda for this meeting solely on the clear understanding that, following any discussion on the topic, item 6 will be suspended, meaning that in this meeting the DSB will not authorize the Philippines to suspend concessions. If that understanding of the agreement reached yesterday is in any way incorrect, Thailand will be forced to continue to oppose adoption of the agenda.
5. In agreeing to this compromise for the purposes of this meeting, Thailand retains all of its rights under the DSU and the sequencing agreement between the parties. These include the right to oppose the inclusion of a request for authorization to suspend by the Philippines on the agenda of any future DSB meeting, and to oppose any action by the DSB on any such request as long as the conditions of the DSU and the sequencing agreement between the parties have not been fulfilled. Thailand urges the Philippines to exercise restraint in the interest of the system as a whole and refrain from putting this matter before the DSB. Thailand reiterates its willingness to enter into bilateral dialogue with the Philippines to explore possible ways forward.

6. Thailand also reiterates that the real issue here is the Appellate Body crisis, not any individual dispute. As Thailand stated at the General Council on Tuesday, the Appellate Body crisis has imposed significant challenges on the rules-based system, including with respect to pending disputes, such as DS371. The Philippines' request highlights the urgency of resolving this crisis. The outcome of the pending disputes will be deprived of any credibility if they are driven by the unilateral actions of a single party, in this case the Philippines. In these circumstances, Thailand has supported, and continues to support, efforts to resolve this crisis as quickly as possible¹, and we encourage the Philippines to do likewise.

A. Background of the Philippines' request

7. Thailand would like to present Members with some background to the Philippines' request. Thailand regrets that the Philippines has been presenting Members with a one-sided and inaccurate picture of the status of these disputes. The Philippines' timeline for this dispute attached to its statement on last Friday is also one-sided and does not take into account the effects of the Philippines' litigation strategies and its timing preferences, including, for example, the Philippines' requests to delay the issuance of two compliance panel reports², which also affected the course of the dispute. Neither Thailand nor, indeed, the DSB is responsible for the Philippines' own choices.

8. As Thailand will explain, the present situation is very straightforward. Contrary to what the Philippines has suggested, it is not a complex legal matter.

9. In order to put the Philippines' request in context, it is important to recall the history of this dispute.

10. The reasonable period of time for complying with the DSB's recommendations expired on 15 May 2012.³ The Parties concluded a sequencing agreement on 1 June 2012, following one of the standard models and contains two essential rules⁴:

1) The Philippines agreed to request retaliation under Article 22.2 of the DSU only after completion of proceedings under Article 21.5 of the DSU, which includes a ruling by the Appellate Body in case of an appeal.

2) The sequencing agreement further states that upon completion of the appeals Thailand would not object to the Philippines' retaliation request as being outside the 30-day deadline stipulated in Article 22.6 of the DSU. As we know, absent a sequencing agreement, a retaliation request that is filed after completing compliance proceedings would normally be outside the 30-day period for doing so under Article 22.6.

11. There is nothing unusual about this type of sequencing agreement. It simply clarifies the parties' agreement on the sequence of procedures to be followed, and confirms that a retaliation request submitted after the completion of the compliance proceedings will not be considered untimely.

12. Based on the parties' understanding, the Philippines initiated two compliance proceedings under Article 21.5. The compliance panel issued its reports on 12 November 2018 and 12 July 2019, respectively. Thailand appealed both compliance reports on 9 January 2019 and 9 September 2019, respectively. The appellate review in these compliance proceedings is, therefore, still pending.

¹ Appellate Body Appointments' proposal, WT/DSB/W/69/Rev.14, 18 February 2020; Communication from Thailand, WT/GC/W/769, 26 April 2019.

² Communications from the Panel, WT/DS371/25 and WT/DS371/29, dated 9 November 2018 and 12 July 2019 respectively.

³ The Parties' also agreed on a second reasonable period of time expiring on 15 October 2012 which applied to certain DSB recommendations and rulings (Agreement under Article 21.3(b) of the DSU, WT/DS371/14, 27 September 2011).

⁴ Understanding between the Philippines and Thailand regarding procedures under articles 21 and 22 of the DSU, WT/DS371/16, 7 June 2012.

B. The Philippines' request is without legal basis

13. During the past two years, at no point did the Philippines question the validity of the agreed sequence of steps. In its panel requests under Article 21.5, the Philippines expressly stated that it was doing so, and I quote, "pursuant to paragraph 1 of the Sequencing Agreement".⁵

14. Thus, at no point during the proceedings under Article 21.5 has the Philippines questioned the validity of the agreed sequencing rules.

15. This changed on 12 February 2020, when the Philippines submitted a request to suspend concessions against Thailand. As noted, the Philippines' request was submitted while the appeals under Article 21.5 are still ongoing.

16. By filing this request, the Philippines appears to believe that it is no longer bound by the sequencing agreement and, therefore, it can proceed to request the suspension of concessions even before the completion of the appeals in the Article 21.5 proceedings

17. Thailand is disappointed that the Philippines has chosen to unilaterally disregard the previously accepted rules for the post-implementation stage of this dispute. Thailand is disappointed that the Philippines has chosen to depart from its own position in *EC – Bananas* that, when there is a disagreement as to whether the measure taken to comply is in compliance, "Article 21.5 proceedings should be available to [the respondent] to resolve that disagreement".⁶ To reiterate, the Article 21.5 proceedings are still pending in this dispute and there have been no adopted reports finding that Thailand has failed to comply.

18. That being said, the important question is: what happens if, as the Philippines appears to suggest, the sequencing agreement is no longer valid? What are the rights and obligations of Thailand and the Philippines? The answer is simple - it means that we must apply the DSU to the letter.

19. Specifically, if one accepts that the sequencing agreement is no longer valid, the DSB must enforce the deadline under Article 22.6 for granting a request for suspension of concessions. To recall, pursuant to Article 22.6, any retaliation request must be authorized by the DSB within 30 days of the expiry of the reasonable period of time. As Thailand stated earlier, the reasonable period of time in this dispute expired on 15 May 2012, which means that the deadline for authorizing the suspension of concessions expired on 15 June 2012, more than 7 years ago.

20. In these circumstances, there are only two possible ways of viewing the Philippines' request:

- 1) Either the sequencing agreement applies, in which case the Philippines cannot request authorization to suspend before the appeals are completed; or
- 2) The sequencing agreement does not apply, in which case the Philippines' request is untimely under Article 22.6 as the 30-day deadline for requesting retaliation expired on 15 June 2012.

21. Either way, the Philippines' request is without any legal basis. This is not the usual debate about relationship between Articles 21 and 22. This is not an abstract legal discussion. It is a straightforward issue – does the sequencing agreement apply? yes or no? The Philippines must be able to answer this simple and direct question.

22. What the DSB cannot and should not accept is the Philippines' insistence that *some parts* of the sequencing agreement are still valid, but *some other parts* are no longer valid.

23. The Philippines cannot have it both ways. It cannot *breach* the sequencing agreement by requesting the suspension of concessions before the completion of the appeals contemplated in the sequencing agreement, while simultaneously asking Thailand to *respect* the provisions of the sequencing agreement that allows the Philippines to request the suspension of concessions outside

⁵ WT/DS371/18 of 6 July 2016 (first 21.5), para. 4; and WT/DS371/22 of 16 March 2018 (second 21.5), third preamble paragraph.

⁶ Minutes of the DSB meeting dated 19 April 1999, WT/DSB/M/59, p. 9.

the deadline under Article 22.6 of the DSU. The Philippines cannot pick and choose which rules to respect and which rules to disregard.

24. Thailand also finds extraordinary the Philippines' argument that once appeals have been pending for more than 90 days, Thailand and other affected Members should lose their rights under the DSU to appellate review of the panel reports. This argument has no basis in the DSU. It does, however, once again emphasize the need for Members to seek a prompt solution that will enable the dispute settlement system to move forward in a manner that respects the rights and obligations of all Members and all parties to disputes.

25. Absent any adopted compliance report by the Panel or the Appellate Body, the Philippines' retaliation request would amount to a unilateral determination regarding Thailand's alleged failure to comply with the DSB's rulings and recommendations in the original dispute. Thailand recalls that these types of unilateral determinations are expressly prohibited by Article 23.2(a) of the DSU. As noted in a previous WTO dispute, Article 23 prevents a WTO Member from "tak[ing] the law into its own hands".⁷

26. Before concluding, Thailand is also concerned that the Philippines has provided some Members with an inaccurate picture of Thailand's approach to the resolution of this situation. In Thailand's view, bilateral discussions should remain bilateral. Nevertheless, as Thailand has repeatedly stated, the real problem is the Appellate Body crisis. For the means of resolution of disputes in the WTO to have credibility among Members and in capitals, it must have multilateral support or, at a minimum, broad-based support for any temporary mechanism. Again, we encourage all Members, including the Philippines, to do their best to find ways to enable the system as a whole to move forward as soon as possible.

27. For these reasons, Thailand reiterates its strong views that the DSB is not in a position to consider and grant the Philippines' request for suspension of concessions at this meeting.

⁷ Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 398.