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

**RECOURSE TO ARTICLE 22.2 OF THE DSU BY THE PHILIPPINES**

The following communication, dated 12 February 2020, from the delegation of the Philippines to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 22.2 of the DSU.

1. Pursuant to Article 22.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and the expiry of the agreed reasonable period of time (RPT) on 15 May 2012, the Philippines hereby requests authorization from the Dispute Settlement Body ("DSB") to suspend the application to Thailand of concessions or other obligations under the covered agreements, covering trade in an amount of approximately *USD 594 million annually*.

2. In addition, in respect of certain notification requirements regarding the tax base for value-added tax ("VAT"), the Philippines seeks authorization to suspend concessions or other obligations in an annual amount based on a formula commensurate with the trade effects to be caused.

3. The requested level of suspension is equivalent to the level of nullification or impairment of the Philippines' benefits as a result of Thailand's failure to comply with the DSB's recommendations and rulings in this dispute. The Philippines seeks authorization to update the relevant amounts to account for changes in the circumstances.

4. In preparing this request, the Philippines has followed the principles and procedures set forth in Article 22.3 of the DSU. The Philippines intends to take measures in the goods sector under agreements described in Article 22.3(g)(i) of the DSU.

5. The Philippines intends to hold public consultations to determine the imported Thai goods to be subject to suspension measures. The Philippines will provide the DSB with a list of the chosen goods, and the levels of tariffs to be applied, in due course.

**Thailand's Failure to Implement the DSB's Recommendations and Rulings**

6. On 17 November 2008, the DSB established the original panel in this dispute to examine a number of Thailand's customs valuation and tax measures. The original panel and the Appellate Body found that Thailand's measures violated the *Customs Valuation Agreement* ("CVA") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").<sup>1</sup> On 15 July 2011, the DSB adopted the original panel and Appellate Body reports.<sup>2</sup> The DSB recommended that Thailand bring its measures into conformity with its WTO obligations.

<sup>1</sup> Panel Report, *Thailand – Cigarettes*; Appellate Body Report, *Thailand – Cigarettes*.

<sup>2</sup> WT/DS/371/11, 18 July 2011, *Thailand – Cigarettes*, Appellate Body Report and Panel Report, Action by the Dispute Settlement Body.

7. The Philippines and Thailand agreed "that the reasonable period of time to implement the DSB's recommendations and rulings regarding paragraphs 8.1, 8.2, 8.3(a) and 8.4 of the panel report would be 10 months, expiring on 15 May 2012."<sup>3</sup>

8. Thailand has failed to comply with the DSB's recommendations and rulings, within the agreed upon reasonable period of time, including through the following four WTO-inconsistent measures taken to comply ("four MTTCs"):

- (1) criminal charges brought against the Thai branch office of Philip Morris (Thailand) Limited ("PMTL") regarding the alleged under-declaration of the customs values of 272 entries of cigarettes imported into Thailand from 28 July 2003 to 24 June 2006; the charges resulted in conviction of PMTL on 29 November 2019 and the imposition of a fine of approximately USD 40.5 million, which was paid on 27 December 2019;
- (2) criminal charges brought against PMTL regarding the alleged under-declaration of the customs value of 780 entries of cigarettes imported from 22 January 2002 to 28 July 2003;
- (3) a ruling by Thailand's Board of Appeals, issued on 16 November 2012 regarding 210 entries of cigarettes between 2002 to 2003; and,
- (4) the notification requirements imposed under Thailand's amended VAT regime.

9. As a result of Thailand's failure to comply with the DSB's recommendations and rulings, the Philippines is entitled to redress under Article 22 of the DSU.

#### **Request for DSU Article 22.2 Authorization to Suspend Concessions**

10. On 7 June 2012, the Philippines and Thailand informed the DSB of their "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding" ("sequencing understanding").<sup>4</sup> Therein, Thailand fully committed that it would not object to any such request under Article 22.2 of the DSU, by the Philippines, made after the expiry of the time period specified in the first sentence of Article 22.6 of the DSU.

11. In good faith compliance with the sequencing understanding, which provided that both parties would cooperate so that the appeal would be resolved within 90 days from its initiation, and in reliance on Thailand's commitment not to object to a request under Article 22.2 made after the expiry of the time period in Article 22.6, the Philippines initiated two compliance proceedings.

12. On 12 March 2018 and 12 July 2019, respectively, the compliance panel issued its reports. The panel found that Thailand had failed to comply with the DSB's recommendations and rulings. On 9 January 2019 and 9 September 2019, respectively, Thailand appealed the compliance panel reports to the Appellate Body. On 10 December 2019, the Division in each appeal informed the parties that it had indefinitely suspended its work.

13. The sequencing understanding provides that the parties shall endeavor to find a prompt solution to any procedural issues that arise and that are not properly addressed in the understanding, and that appeals would be resolved within "no more than 90 days from the date of notification of the appeal to the DSB." It may be noted that Thailand had filed their notifications of appeal respectively on 09 January 2019 and on 09 September 2019.

14. The sequencing understanding does not expressly address the current institutional and budgetary constraints that have led the Appellate Body to suspend its work indefinitely. However, Article 22.1 does require Thailand to fully comply within the agreed reasonable period of time and does grant to the Philippines the right to request authorization for the suspension of concessions or other obligations under the covered agreements should no mutually acceptable compensation be reached within 20 days from the expiry of the agreed reasonable period of time.

15. The Philippines has repeatedly, most recently last 13 December 2019, requested Thailand to engage in good faith efforts to bring its measures into compliance or to find mutually acceptable and

<sup>3</sup> WT/DS371/16, 7 June 2012, *Thailand – Cigarettes*, Understanding between the Philippines and Thailand Regarding Procedures under Articles 21 and 22 of the DSU, concluded on 1 June 2012, preamble, p. 2.

<sup>4</sup> WT/DS371/16, 7 June 2012, *Thailand – Cigarettes*, Understanding between the Philippines and Thailand Regarding Procedures under Articles 21 and 22 of the DSU, concluded on 1 June 2012.

prompt solutions, as well as to cooperate in good faith on the current procedural impasse. Regrettably, Thailand has failed to resolve this matter.

16. The Philippines, therefore, has no choice but to proceed to request authorization to suspend concessions or other obligations, as set out in paragraphs 1, 2 and 3 above.

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