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THAILAND – CUSTOMS AND FISCAL MEASURES ON CIGARETTES FROM THE PHILIPPINES

REPORT OF THE FACILITATOR PURSUANT TO PARAGRAPH 5 OF THE "UNDERSTANDING BETWEEN THE PHILIPPINES AND THAILAND TO PURSUE FACILITATOR-ASSISTED DISCUSSIONS AIMED AT PROGRESSING AND RESOLVING OUTSTANDING ISSUES IN REGARD TO DS371"

The following communication, dated 30 June 2022, from the Facilitator to the Chairperson of the Dispute Settlement Body (DSB), is circulated at the request of the Facilitator.

Further to para 5 of the 18 December 2020 Understanding between the Philippines and Thailand on the DS 371 Facilitator-Assisted discussions (WT/DS371/44) as well as to the written report I provided to the DSB on 31 March 2021 (WT/DS371/45) and my oral reports to the DSB meetings held on 26 July and 20 December 2021 as well as at the DSB meeting held earlier today, I am now writing to provide a further update to the DSB, through you, in this communication:

I am pleased to report that following on from my earlier reports to the DSB, I have continued to meet on a regular basis with the Philippines and Thailand (the DS 371 parties) in my capacity as Facilitator. While it is not my intention to report on the detail of the consultations, which remain confidential, I can confirm that these further consultations have proven extremely valuable in identifying a practical path forward that should, hopefully, eventually lead the parties to arrive at a mutually agreed solution to their dispute in accordance with Article 3.6 of the DSU.

The productive consultations between the DS 371 parties have recently culminated with the signature on 7 June 2022 of a bilateral "Understanding on Agreed Procedures Towards a Comprehensive Settlement of the Dispute in Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines" ("the Understanding").

Pursuant to this Understanding, the DS 371 Parties have agreed to establish a bilateral consultative mechanism (BCM) which will serve as a channel for their respective relevant authorities to cooperate and dialogue on a regular basis, with the objective to build further confidence that will support efforts to reach a comprehensive settlement of their dispute in DS 371, consistent with their rights and obligations under the WTO Agreement, as well as the recommendations and rulings of the Dispute Settlement Body (DSB). The joint statement of the DS 371 parties further backgrounding the 7 June 2022 Understanding is attached.

In my capacity as Facilitator, I am delighted to have been able to assist the parties over the last eighteen months in their negotiations on the Understanding. In this context, I also wish to express, on behalf of both myself and the DS 371 parties, our shared appreciation for the strong support offered by the WTO Secretariat, in particular Mr John Adank and Ms Bozena Mueller-Holyst. We also wish to record our appreciation for the technical assistance that Dr Leonardo Macedo, of Brazil, was able to offer the parties to assist them in achieving a better understanding of their respective positions.

I believe the active and constructive engagement by the DS 371 parties both in Geneva and through their respective capitals to arrive at the Agreed Procedures Understanding signed earlier this month serves to further highlight their commitment to the WTO dispute settlement system.

In concluding this report, I also wanted to take the opportunity, as I did in my oral report to the DSB earlier today, to make some observations about this DS 371 Facilitation process in the broader context of the unresolved functioning issues that continue to stand in the way of our goal of restoring a fully and well-functioning WTO Dispute Settlement System. In my view, it is very clear that there is a huge appetite across the membership to restore a greater sense of normality to the WTO Dispute Settlement System, including its appeal architecture. My country, Australia, shares that desire.

In my capacity as Facilitator of the DS 371 Facilitation process, I have of course been made very aware as a result of the commitment the DS 371 parties have brought to this process that there are creative alternative means of dispute settlement available to the Membership. At the same time, we need to recognize that the DS 371 Facilitation process represents something of a rare or even unprecedented example in the WTO's dispute settlement lexicon of experience. These forms of alternative means of dispute settlement are available to all of us but they do require a substantial investment of energy, of political commitment, and of time. Such processes require an engineering of process that in most cases will be unnecessary if we are able to return to a fully and well-functioning dispute settlement system in line with the commitment Ministers have recently made at MC12. Therein lies the challenge for all of us in the period ahead.

***Joint Statement issued by
the Philippines and Thailand following signature of Understanding
Aimed at Resolving Customs Valuation Dispute***

On Tuesday 7 June 2022 the Philippines and Thailand, meeting at the World Trade Organization in Geneva, signed a bilateral *Understanding on Agreed Procedures Towards a Comprehensive Settlement of the Dispute in Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines (DS 371)*.

The *Understanding on Agreed Procedures* was negotiated between the two ASEAN members to be consistent with relevant bilateral treaties, ASEAN treaties and values, WTO law and agreements including the Customs Valuation Agreement, WTO Dispute Settlement Body Rulings and Recommendations, as well as their domestic laws and regulations.

Reflecting the shared determination and effort of the two countries to resolve their longstanding differences, the formal signature of the *Understanding on Agreed Procedures* on 7 June represents a successful outcome of the facilitator-assisted process commenced in 2021 following the "Understanding between the Philippines and Thailand to pursue Facilitator-Assisted discussions aimed at progressing and resolving outstanding issues in regard to DS 371" (WT/DS371/44, 21 December 2020).

Throughout the process and assisted by the leadership of H.E. Ambassador George Mina, Permanent Representative of Australia to the WTO, acting as Facilitator, the Philippines and Thailand have actively and constructively engaged in discussions, both in Geneva and through their respective capitals, with a view to considering possible ways forward for the two countries to reach a mutually agreeable resolution to their customs valuation related dispute, without prejudice to their respective rights and obligations under the DSU.

In accordance with the *Understanding on Agreed Procedures*, the two countries have agreed to establish a bilateral consultative mechanism (BCM) which will serve as a channel for their respective relevant authorities to cooperate and dialogue on a regular basis, with the objective to build further confidence that will support them to reach a comprehensive settlement of their dispute in DS 371, consistent with their rights and obligations under the WTO Agreement, as well as the recommendations and rulings of the DSB.

The *Understanding* entered into force on signature by the two parties and may be terminated by either party on 60-days written notice, and, taking into account the progress made in the implementation of their cooperation, it should ideally lead to the notification by the parties of a mutually agreed solution under Article 3.6 of the DSU.

The signature of the *Understanding on Agreed Procedures* underlines the commitment of Thailand and the Philippines to continue their close cooperation, particularly through the frank and open dialogue process that will be facilitated under the BCM, consistent with the strong spirit of ASEAN solidarity and friendship which unites them and their commitment to the WTO's rules-based dispute settlement system.
