16 March 1992

UNITED STATES - MEASURES AFFECTING ALCOHOLIC AND MALT BEVERAGES

Report of the Panel adopted on 19 June 1992
(DS23/R - 39S/206)

1. INTRODUCTION

1.1 On 7 March and on 16 April 1991, Canada held consultations with the United States under Article XXIII:1 concerning measures relating to imported beer, wine and cider. The consultations did not result in a mutually satisfactory solution of these matters, and Canada requested the establishment of a GATT panel under Article XXIII:2 to examine the matter (DS23/2 of 12 April 1991).

1.2 At its meeting of 29-30 May 1991, the Council agreed to establish a panel and authorized the Council Chairman to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/250, page 35).

1.3 The terms of reference of the Panel are as follows:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Canada in document DS23/2 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

The parties subsequently agreed that the above terms of reference should include reference to documents DS23/1,

of the Council notified the following composition of the Panel on 8 July 1991 (DS23/4):

Chairman: Mr. Julio Lacarte-Muro

Members: Ms. Yvonne Choi
Mr. Ernst-Ulrich Petersmann

1.5 The Panel met with the Parties on 1-2 October and 2 December 1991. The delegations of Australia, EEC and New Zealand were heard by the Panel on 2 October 1991. The Panel submitted its report to the Parties to the dispute on 7 February 1992.

2. FACTUAL ASPECTS

2.1 The current regulatory structure in the United States alcoholic beverages market arose from the repeal of the Eighteenth Amendment to the United States Constitution, which had established Prohibition. The Twenty-first Amendment to the United States Constitution, adopted in 1933, repeals the Eighteenth Amendment and furthermore provides that:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

2.9 The Act increased the excise tax on wine held in stock for sale by $9 per wine gallon. The Act provides, however, for wine produced by small United States producers that the tax increase shall be reduced by the credit provided for small United States producers as described above. No reduction is available for imported wine.

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New York and **Rhode Island**, and the Commonwealth of **Puerto Rico**, provide an excise tax exemption or lower rate of tax for a specified quantity of beer brewed by in-state breweries. In the state of **Oregon**, an excise tax exemption is applied for a limited quantity of wine sold by United States producers manufacturing less than 100,000 gallons per year of alcoholic beverages.

2.11 In the states of **Kentucky**, **Minnesota**, **Ohio** and **Wisconsin**, an excise tax credit based on annual production is available for specified quantities of beer sold by brewers whose annual production does not exceed an indicated level. In **Kentucky** and **Ohio**, the credit is available only to in-state breweries.

2.12 In **Alabama**, **Georgia**, **Nebraska** and **New Mexico**, the excise tax rate is based on the origin of the product. These states provide for a lower rate of taxation, or a tax exemption, for wine produced by in-state or domestic wineries. **Iowa** applies an excise tax at the wholesale level; only "native wines" may be sold directly at retail, where no excise tax is applied.

2.13 **Michigan**, **Ohio** and **Rhode Island** determine the excise tax treatment based on the use of local ingredients. A lower tax rate is applied in the state of **Mississippi** to wines in which a certain variety of grape has been used.

2.14 The state of **Pennsylvania** provides a tax credit on the purchase of equipment for the production of beer to domestic breweries not exceeding a specified size.

2.15 Table 1 summarizes the differential excise tax measures applied by various states.

State Distribution Requirements

2.16 Many states regulate the distribution of alcoholic beverages, including beer and wine, to points of sale. Such regulations may limit the right to import beer and wine to alcoholic beverage boards, manufacturers, licensed importers, or to wholesalers. Further restrictions are usually applied with respect to which entities can qualify to receive importer, wholesaler or retailer licenses. In-state manufacturers of beer and wine may, in some states, sell directly to retailers. Table 2 presents the distribution requirements of thirty states.

Use of Common Carrier Requirements

2.17 Several states impose restrictions on the transportation system that can be used for the delivery of beer and wine. In particular, certain states require that alcoholic beverages be shipped into the state by common carriers. A common carrier is defined as one that undertakes to carry the goods of all persons indifferently or of all who choose to employ it.

2.18 The state of **Arizona** requires that out-of-state or foreign-produced alcoholic beverages be shipped to their destination by common carriers. In-state produced alcoholic beverages may be shipped in the in-state wholesaler's own vehicle.

TABLE 1. EXCISE TAX RATES AND CREDITS

STATE	PRODUCT	OUT-OF-STATE/ FOREIGN RATE ($/unit)	IN-STATE RATE ($/unit)	CONDITIONS FOR IN-STATE RATE
		Tax Differential Based on Annual Production		
New York	beer	0.21/gallon	0.0	First 100,000 barrels brewed and sold or used in-state per year per distributor-brewer whose principal executive office is in New York state.
Oregon	wine	0.65/gallon	0.0	First 40,000 gallons of alcoholic beverage sold annually in Oregon by US producer of less than 100,000 gallons/year of alcoholic beverages (wine).
Puerto Rico	beer with 1 1/2% or more alcohol	1.80/wine gallon 1.85/wine gallon if containers > 5 gallon	1.25	Total beer production including affiliated producers less than 31,000,000 wine gallons in previous year. All Puerto Rican producers not exceeding 31,000,000 wine gallons in previous year qualify for lower rate regardless of total production of affiliated producers.
Rhode Island	beer	3.00/barrel	0.0	First 100,000 barrels brewed and distributed in Rhode Island.

TABLE 1. EXCISE TAX RATES AND CREDITS (Cont'd)

STATE	PRODUCT	OUT-OF-STATE/ FOREIGN RATE ($/unit)	IN-STATE RATE ($/unit)	CONDITIONS FOR IN-STATE RATE
		Tax Credit Based on Annual Production		
Kentucky	beer	2.50/barrel	50% credit	On up to 300,000 barrels sold or distributed by in-state brewer per year.
Minnesota	beer with 3.2% alcohol or less beer with more than 3.2% alcohol by weight	2.40/barrel 4.60/barrel	credit up to 4.60/barrel	First 25,000 gallons for all qualifying brewers of less than 100,000 barrels/year, regardless of location.
Ohio	beer bottles/cans 12 oz. > 12 oz.	3.50/barrel 0.00125/oz. liquid 0.0075/6 oz. liquid	credit	On up to 9,300,000 gallons/year sold within state by in-state brewer of less than 31,000,000 gallons/year.
Wisconsin	beer	2.00/barrel	50% credit	First 50,000 barrels of domestic beer from producer of less than 300,000 barrels.

TABLE 1. EXCISE TAX RATES AND CREDITS (Cont'd)

STATE	PRODUCT	OUT-OF-STATE/ FOREIGN RATE ($/unit)	IN-STATE RATE ($/unit)	CONDITIONS FOR IN-STATE RATE
		Tax Rate Based on Origin of Product		
Alabama	wine	0.45/litre	0.05/gallon	First 100,000 gallons annually of in-state "native farm" wine.
Georgia	table wine	0.40/litre	0.11	In-state production.
	dessert wine	0.67/litre	0.27	
Iowa	wine	1.75/gallon	1.75/gallon (wholesale) 0.0 (retail)	Tax applied at wholesale level to all product regardless of origin; "native wine" may be sold directly at retail.
Nebraska	wine with less than 14% alcohol	0.75/gallon	0.05/gallon	Wine produced by in-state "farm" wineries.
	wine with 14% or more alcohol	1.35/gallon		
New Mexico	wine	0.25/litre	0.05/litre	First 80,000 litres wine (until 30/6/92, after $0.10/litre to 30/6/94).
			0.10/litre	> 80,000 litres wine (until 30/6/92, after $0.20/litre to 30/6/94). Tax applicable to winery or wine grower that produces less than 200,000 litres of wine per year and, for period 1/1/91 through 30/6/94, is a small domestic producer for purposes on Internal Revenue Code Section 5041

TABLE 1. EXCISE TAX RATES AND CREDITS (Cont'd)

STATE	PRODUCT	OUT-OF-STATE/ FOREIGN RATE ($/unit)	IN-STATE RATE ($/unit)	CONDITIONS FOR IN-STATE RATE
		Tax Credit for Equipment Purchase		
Pennsylvania	beer	2.48/barrel	tax credit up to 0.67/barrel	Domestic breweries of no more than 300,000 barrels/year, for amounts paid between 1/1/74 and 31/12/93 for plant, machinery or equipment for beer production and sale in Pennsylvania, provided that total expenditures by the taxpayer in single year did not exceed $200,000.

TABLE 2. STATE DISTRIBUTION REQUIREMENTS

STATE	OUT-OF-STATE/IMPORTED BEER AND

TABLE 2. STATE DISTRIBUTION REQUIREMENTS (Cont'd)

STATE	OUT-OF-STATE/IMPORTED BEER AND WINE	IN-STATE BEER AND WINE
Idaho	Only dealers and wholesalers may import; corporations not authorized to do business in the state may not obtain dealers or wholesalers' licenses. A "dealer" is defined as any person who imports, or	Idaho brewers may obtain wholesaler's licenses for the sale of beer at wholesale. Brewers producing less than 30,000 barrels/year

TABLE 2. STATE DISTRIBUTION REQUIREMENTS (Cont' d)

STATE	OUT-OF-STATE/IMPORTED BEER AND WINE	IN-STATE BEER AND WINE
Iowa	Only holders of a class "A" permit may import beer into Iowa.	An

TABLE 2. STATE DISTRIBUTION REQUIREMENTS (Cont' d)

STATE	OUT-OF-STATE/IMPORTED BEER AND WINE	IN-STATE BEER AND WINE
Louisiana	Only wholesalers are permitted to import alcoholic	Manufacturers of alcoholic beverages

TABLE 2. STATE DISTRIBUTION REQUIREMENTS (Cont' d)

STATE	OUT-OF-STATE/IMPORTED BEER AND WINE	IN-STATE BEER AND WINE

TABLE 2. STATE DISTRIBUTION REQUIREMENTS (Cont'd)

STATE	OUT-OF-STATE/IMPORTED BEER AND WINE	IN-STATE BEER AND WINE
Ohio	Wholesale distributors may import beer and wine. The retailer's license does not include the right to import beer or wine. Wholesalers are prohibited from holding any interest in a retail license. An out-of-state brewer or winery may establish its own wholesaler in the state. Foreign producers may not hold a wholesale license.	In-state breweries and wineries may sell to retailers and at retail.
Oregon		

TABLE 2. STATE DISTRIBUTION REQUIREMENTS (Cont'd)

STATE	OUT-OF-STATE/IMPORTED BEER AND WINE	IN-STATE BEER AND WINE
Tennessee	Retailers may not purchase beer from foreign producers; only wholesale distributors and Tennessee brewers may purchase from foreign producers. Foreign producers are prohibited from being licensed to act as wholesale distributors. [NOTE: The United States provided a statement from the Tennessee Department of Revenue which indicates that the provision prohibiting non-US citizens from being licensed is not enforced.]	Tennessee retailers may purchase beer from in-state manufacturers.
Texas	Imported wine must be sold to wine bottlers or wholesalers for resale to retailers. Retailers are prohibited from purchasing wine directly from foreign producers. Imported beer (no less that 1/2 per cent alcohol by volume and no more than 4 per cent alcohol by weight) must be sold to resident importers for resale to retailers. Retailers and foreign producers are prohibited from holding importer licenses. Manufacturers and distributors are prohibited from holding any interest in the business or premises of a retailer.	In-state wineries may sell wine directly to retailers. In-state wineries, wholesalers and wine bottlers are prohibited from holding any interest in the premises of a package store permitee. In-state manufacturers of beer producing less than 75,000 gallons per annum may sell direct to retailers. Manufacturers and distributors are prohibited from holding any interest in the business or premises of a retailer.
Utah	Only beer wholesalers may import "light" beer (containBT-0 1 -1 -0 379.44 386. -0 328.;0 39l 1 -1 -0 341.04 182.16 Tm/F8/F8 11 Tf(a) TjE6;0 3	

TABLE 2. STATE DISTRIBUTION REQUIREMENTS (Cont'd)

STATE	OUT-OF-STATE/IMPORTED BEER AND WINE	IN-STATE BEER AND WINE
Virginia	Imported beer may be sold only to beer importers, who in turn may sell it only to wholesalers. Foreign beer producers are not permitted to hold wholesale licenses. Manufacturers and wholesalers are prohibited from holding retail licenses.	In-state breweries may sell to retailers.
Washington	A foreign brewer or winery must sell to the holder of an importer's license; this license authorizes sales only to wholesalers and/or for re-export. An importer must be a state resident and maintain an office in the state. An out-of-state brewer or winery must establish a principal office in the state to be eligible for an importers license.	In-state wine and beer manufacturers' licenses include the right to act as wholesalers and to sell to retailers, and to act as retailers.
West Virginia	Foreign wineries must sell to licensed wholesalers or the alcohol beverage control commissioner.	An in-state manufacturer of alcoholic liquors (i.e. wine but not beer) may sell to licensed wholesalers, the alcohol beverage control commissioner, and retailers.
Wisconsin	Foreign brewers must obtain an out-of-state shippers' permit which permits them to sell only to licensed wholesalers. All shipments of fermented malt beverages from outside Wisconsin to a Wisconsin wholesaler must be unloaded at and distributed from the wholesaler's warehouse in Wisconsin. An out-of-state brewer may establish its own wholesaler in the state. Foreign wineries may only ship to manufacturers and wholesalers. Wholesalers are prohibited from holding any interest in licenses which permit retail sales of beer for consumption on or off the premises where sold.	In-state brewers may sell fermented malt beverages to retailers, if the brewer obtains a wholesaler's license, and at retail. In-state wineries may sell at wholesale to retailers.

2.19 In **California**, alcoholic beverages imported into the state are

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designated as an agent…that the bottle and case price of alcoholic beverages to wholesalers…is not higher than the lowest price at which such item of alcoholic beverage will be sold by such brand owner or such wholesaler designated as agent or any related person to any wholesaler anywhere in any other state in the United States or in the District of Columbia, or to any state or state agency which owns and operates retail alcoholic beverage stores." In-state producers can sell directly to retailers.

2.30 The **Rhode Island** price affirmation requirements apply to wine: "no holder of a certificate of compliance for … vinous beverages shall ship, transport or deliver this state, or sell or offer for sale to a wholesaler any brand of … vinous beverages at a bottle or case price higher than the lowest price at such item is then being sold or offered sale shipped, transported, or delivered… to any wholesaler in any state of the United States or in the District of Columbia or to any state, including an agency or [sic] such state, which owns and operates retail liquor outlets". Certificates of compliance are required in order to transport malt beverages and vinous beverages into the state. The price affirmation requirement applies to sales to any wholesaler and only wholesalers may import alcoholic beverages; in-state wineries may sell their products directly to retailers. (General Laws of Rhode Island 1956, 1987 Re-Enactment)

Listing and De-listing Policies

2.31 Eighteen states in the United States maintain Alcoholic Boards or Commissions which import, distribute and sell alcoholic beverages at retail level. In a number of these "control" states, wine must be "listed" with these state marketing agencies in order to access either to the state market or to state stores. criteria for accepting a new listing for wines varies substantially among control jurisdictions. The listing and delisting of the nine states which Canada has as GATT inconsistent are detailed in Table 3.

Beer Alcohol Content Restrictions

2.32 Certain states distinguish between beers with an alcohol content of 3.2 per cent by weight (4 per cent by volume) or lower those with a higher content. A number of states restrict the location at which beer with over 3.2 per cent alcohol content may sold, while not imposing the same restrictions on sales beer at 3.2 per cent alcohol content or lower. In some states, labelling requirements imposed on beer containing more than 3.2 per cent which differentiate it from the alcohol content beer. Table 4 indicates the treatment of beer on the basis of its alcohol content in states.

TABLE 3. LISTING AND DE-LISTING POLICIES

Alabama

Native farm wineries are authorized to sell directly to consumers, to wholesalers and to the Board. Table wines (14% alcohol or less) may be sold by the Alabama Alcoholic Beverage Control Board, and would have to be listed. Table wines may also be imported and sold by wholesalers, and such wines are not listed by the The Board has the monopoly on the importation, and retail of dessert (fortified, over 14% alcohol) wine.

The criteria for listing includes:

(a) sales in other states
(b) demand
(c) special order
(d) vendor support

which for or

No written policy is available. Written notifications are provided. No rationale is pr
decisions. Vendors may request an appeal before the Board.

Idaho

The Idaho Alcoholic Beverage Control Division has the monopoly on importation of table wines which may be sold by private wholesalers or through Control Division stores. Th
has the monopoly on the importation and retail sale of dessert wine.

Listing criteria include:

(a) need for additional listings in class
(b) need for additional listings in price range
(c) exceptional sales in border states (control states)

Rationale is provided for negative determinations. No appeal procedure is provi

Fifty-five per cent of the 49 state stores receive new listings.

Mississippi

Importation and wholesaling of wine is by the Mississippi State Tax C
wines may be sold directly to retailers and through the Commission. The listing policy, amended in April 1991, includes the following:

> New listings will be considered on May 1 of each year and at such other times as the Commission deems appropriate. All requests for listings must be submitted in writing at least three months prior to the date chosen for the listing. Requests for the listing of new items must be substantiated by facts and figures regarding prices, specifications, alcohol content (appeal) relevant information requested.

All inventory brought into Mississippi is placed in bailment.

The maximum number of items the Commission will authorize for any one company is pre-determined, based on a formula utilizing the

TABLE 3. LISTING AND DE-LISTING POLICIES (Cont'd)

The Nine Month Case Order quota for wine is:

Wine	10L	5L	4L 3L	2L 1.5L	1L 75ML	355ML 375ML	187ML
Imported							
$0.00 to $3.00		90	90	90	90	45	
$3.00 up	45	45	45	45	45	45	45
Domestic							
$0.00 to $3.00	45	45	90	90	90	90	45
$3.00 up	45	45	45	45	45	45	45
Champagne and Sparkling Wines							
$0.00 to $5.00				90	90	90	45
$5.01 up				45	45	45	45

No rationale is given for negative decisions and no appeal process is provided.

New Hampshire

The New Hampshire State Liquor Commission has the monopoly on the importation and wholesale of wine which may be sold at retail by Commission stores and private retailers.

Listing criteria for premium wines in State stores include, but are not limited to: vintage; consumer demand; sales performance in the national markets; and potential profitability. De-listing criteria include annual gross profits of less $6,500; unavailability of the product; delisting request from the vendor or manufacturer; non-payment of the wine listing fees; excessive cost increases passed on to the consumer.

Table wines not listed in any other listing may be sold by a manufacturer through the Commission or its licensees. Placement of available wines is automatic upon submission of a request for listing and payment of the registration fee. Renewals are also automatic with the payment of the annual maintenance fee.

New Hampshire law includes statutory requirements that in-state wine be granted preferred treatment in listing procedures where feasible. The delisting review procedure includes preferred treatment for in-state wine.

North Carolina

The state Alcoholic Beverage Control Commission does not import or sell any wines. Local Alcoholic Beverage Control Boards, which are not agencies of the State Board, may sell fortified wines at retail. Local boards have no authority to import fortified wines but must purchase such wines from private, licensed importers. There are no listing or delisting criteria applicable to the sale of fortified wines by the local boards. "Fortified wine" is defined as any wine made by fermentation from grapes,

fruits, berries, rice or honey, to which nothing has been added other than pure brandy made from the same type of grape, fruit, berry, rice or honey that is contained in the base wine, and which has an alcoholic content of not more than twenty-four per cent (24%) alcohol by volume.

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TABLE 3. LISTING AND DE-LISTING POLICIES (Cont'd)

(e) representation in the state
(f) sales trends within the category and in other states
(g) suppliers past performance relative to support and availability of product

No rationale is given for negative responses on

that only those matters on which parties to a dispute had consulted, and on which consultations had not proven successful, were properly subject to examination by a GATT panel. This concept was also implicit in the 1989 Improvements to the GATT Dispute Settlement Rules and Procedures.

3.2 In the United States view, consultations provide the parties an opportunity to reach a satisfactory

3. The Panel decided to examine all United States measures specified in document DS23/3 and in the submission, dated 23 July 1991, presented by Canada to the GATT Panel.

4. Document DS23/3, page 2, declares that Canada "reserves the right to raise any new measure which may come into effect during the Panel's deliberations". The Panel considers that its terms of reference do not permit it to examine "any new measure which may come into effect during the Panel's deliberations".

5. The Panel noted that Canada no longer requests the Panel to make a finding on the labelling practices of certain states.

General Arguments

3.6 Canada indicated that its request for a GATT Panel arose from complaints received from the Canadian beer and wine industries that resulted from United States federal excise tax measures introduced in 1991 in section section

(f) the requirements imposed in the United States by the states of Arizona, California, Maine, Mississippi, and South Carolina that imported beer and wine be transported into and within a state only by a common carrier while no such requirement was imposed on the like domestic (in-state) product were inconsistent with Articles III:1 and III:4 of the General Agreement;

(g) the application in the United States by the states of Alaska (beer and wine) and Vermont (beer only) of a higher licensing fee for imported product than applied to the like domestic product was inconsistent with Articles III:1 and III:4 of the General Agreement;

(h) the exemption of domestic in-state wine, but not the like imported product, from decisions to prohibit the sale of alcohol in certain regions in the United States by the state of Mississippi, was inconsistent with Articles III:1 and III:4 of the General Agreement;

(i) the fixing of price levels (price affirmation requirements) in the United States by the states of Massachusetts and Rhode Island for imported beer and wine on the basis of the price of those products in other neighbouring states, but exempting the like domestic product from this requirement was inconsistent with Articles III:1 and III:4 of the General Agreement;

(j) the listing and delisting practices maintained in the United States by the states of Alabama, Idaho, Mississippi, New Hampshire, North Carolina, Oregon, Pennsylvania, Vermont and Virginia which provided more favourable treatment to domestic products than the like imported product were inconsistent with Articles III:4, III:1 or XI:1 of the General Agreement;

(k) restrictions on points of sale, distribution and labelling based on the alcohol content of beer above 3.2 per cent alcohol by volume maintained in the United States by the states of Alabama, Colorado, Florida, Kansas, Minnesota, Missouri, Oklahoma, Oregon, and Utah were inconsistent with Articles III:1 and III:4 of the General Agreement;

(l) the above inconsistent measures nullified or impaired benefits Canada reasonably expected would accrue to it;

(m) In the alternative, if the Panel found that the tax measures referred to in paragraphs (a) through (d) above were not inconsistent with the General Agreement, Canada asked that the Panel find that those measures nullified or impaired benefits Canada reasonably expected would accrue to it.

3.9 Canada noted that the United States market for beer, wine and cider was an important one for its products and that the less favourable treatment offered to imported products as compared to United States domestic products had a significant effect on Canada's export performance and prospects. In spite of various barriers to trade, Canadian beer sales into the United States totalled approximately $200,000,000 annually which accounted for 90 per cent of Canadian exports of beer. Canada also noted that the United States market for imported wine had declined by 50 per cent since 1984, but the Canadian industry considered the United States to be an important growth market for its products. However, Canada had received strong expressions of concern from the Canadian beer industry that the competitive position of their products had been placed at a disadvantage. Canada cited the Panel on Uni[redacted]m and Certain Imported Substances (BISD 34S/136) (the "Superfu

3.10 The United States stated that with respect to the Panel's examination of state practices, it was important to bear in mind that each state had independent legislative and

products."

accept the United States' estimate that the tax exemption applied to only 1 per cent of United States production, Canada noted that this figure equalled total Canadian exports of beer to the United States.

3.20 The United States indicated that it was not arguing de minimis trade effect but rather the meaning of discriminatory and protective in the context of Article III:2.

3.21 The United States further maintained that the lower excise tax rate was allowable as a subsidy under Article III:8(b). Article III:8(b) states:

> "The provisions of this Article shall not prevent the payment of subsidies exclusively

It was agreed at Havana that the terms of Article [XVI] were

on both the imported and domestic product. Canada noted that Article III:2 referred to internal taxes of any kind and that the Japan Alcoholic Beverages Panel considered this language to have wide meaning to include the rules for tax collection (paragraph 5.8).

3.27 Canada further argued that the credit on wine was designed to provide domestic products with a lower rate of tax. It was described in the legislation as allowable at the time the tax was payable as if the credit constituted a reduction in the rate of such tax. As a practical matter, this meant that eligible United States producers simply continued to pay the pre-existing lower rate of tax on up to 150,000 wine gallons. This discriminated against imported products as Canadian exports of wine and cider competed directly in the United States market with like products of United States origin, regardless of the annual volume of production by the

of the tax that would otherwise be due, not a payment as such to the domestic producer. Canada indicated that the same arguments it made with respect to the reduced federal excise tax for beer were fully applicable with respect to these state measures.

3.33 The United States argued that the intent of the state tax exemptions or reductions in **New York**, **Rhode Island**, **Puerto Rico** and **Oregon** was to provide a subsidy to small producers, consistent with Article III:8(b) of the General Agreement.

State Tax Credit Based on Annual Production

3.34 Canada observed that the states of **Kentucky** and **Ohio** provided tax credits for in-state breweries whose production did not exceed a specified level. **Minnesota** and **Wisconsin** provided similar tax credits to small United States breweries, whether or not located in the state. Canada argued that, as in the case of the federal

3.40 The United States maintained that the tax provisions of **Alabama**, **Georgia**, **Nebraska** and **New Mexico** were subsidies for the benefit of small vintners in terms of Article III:8(b), and recalled its arguments with respect to such subsidies in paragraphs 3.21 and 3.23 above.

3.41 Canada indicated that its arguments with respect to subsidies under Article III:8(b) in paragraphs 3.22 and 3.24 above were equally

for the

3.50 Canada argued that the measures in question could not have been reasonably anticipated at the time the tariff concessions were negotiated. The federal tax measures of which Canada complained were made effective in 1991. With respect to beer, a tax reduction for small brewers was introduced in 1976, lowering the rate from 9 dollars to 7 dollars. The Oilseeds Panel had rejected the EC contention that it was not legitimate to expect the absence of production subsidies even after the grant of a tariff concession because Articles III:8(b) and XVI:1 explicitly recognized the right of contracting parties to grant production subsidies. The Panel found at paragraph 148:

> "… that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff

State Distribution Requirements

3.54 Canada claimed that many states maintained beer and wine distribution provisions which treated imported products less favourably. These distribution systems limited in-state retailers' access to imported beer and wine. Many states permitted retailers to purchase beer and wine directly from some in-state brewers and wineries. However, retailers were required to purchase all imported beer and wine from in-state wholesalers, or, in some states, from manufacturers or the state liquor monopoly. This established an additional distribution level for imported beer and wine and resulted in in-state retailers facing more restricted access to imported beer and wine.

3.55 In addition, Canada indicated that many states maintained measures which prohibited retailers from acting as wholesalers. Retailers could not acquire imported beer and wine directly from the foreign producers. Some states also prohibited non-residents from acquiring wholesalers licenses. In that foreign producers could not act as wholesalers, retailers were further denied the opportunity of purchasing directly from the foreign producer. Canada argued that these distribution systems constituted less favourable treatment of the imported product with respect to purchase, sale and distribution than was afforded to the like domestic product, within the meaning of Article III:4 of the General Agreement. In addition, these measures afforded protection to domestic production contrary to Article III:1, and nullified or impaired benefits to Canada under the General Agreement.

3.56 Canada recalled that in the report of the Panel on Italian Discrimination Against Imported Agricultural Machinery (BISD 7S/60), the panel, in considering the meaning of Article III:4, noted in paragraph 11 that "…the intention of the drafters of the Agreement was clearly to treat the imported product in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given." Similarly, in paragraph 12, in interpreting the word "affecting" in Article III:4, the panel was of the view that "… the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any 2ps/F8 11 Tf(through) TjET TjETBT1 0 0 1 2480 0 1 172.56 421.68 Tm/68 Tm/TjET Tj

sale chase

3.59 The United States further argued that the three tier production and distribution system was important for public policy reasons. The United States Supreme Court had stated that these laws "are components of an extensive system of statewide regulation that furthers legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue."

3.60 The United States observed that despite these extensive regulatory controls, the market at all levels of beer distribution was intensely competitive: profit rates were below average; selling prices reflected the cost of goods; and vigorous interbrand rivalry existed for both price and service. Furthermore, they insisted that in-state brewers had no advantage over out-of-state or foreign brewers. The burdens borne by in-state and out-of-state or foreign producers were identical. All ultimately had the same costs of record keeping, audit, inspection, and tax collection, whether directly or through wholesalers. Although some states provided an exception to the three-tier system for in-state breweries and wineries, this merely shifted the burden of compliance from the wholesaler to the producer. It was possible to do this because in-state producers were within the jurisdiction of the state authorities, whereas out-of-state producers were not.

3.61 The United States stated that virtually all United States producers voluntarily chose to use wholesalers to distribute their products, even in those cases in which they could market their products directly to retailers. They made this choice because wholesalers presented a more economically efficient me0 152icient

distribution system where such responsibilities were imposed and where such costs had to be paid. Furthermore, in contrast to the FIRA situation cited by Canada, the required use of wholesalers in this case was not less favourable treatment, but rather the most favoured method of distribution of wine and beer products. As the Section 337 Panel stated:

> "… [T]he mere fact that imported products are subject … to legal provisions that are different fr7e

"It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions

was no statutory impediment to a foreign brewer obtaining a wholesale license. The United States also stated that an out-of-state brewer, including a Canadian brewer, could establish its own wholesaler to sell beer above 3.2 per cent by weight in **Missouri**. An out-of-state brewer, including a Canadian brewer, could act as its own wholesaler to sell light beer (less than 3.2 per cent alcohol by volume) in **Utah**. In **Virginia**, an out-of-state brewer, including a Canadian brewer, could establish its own importer/wholesaler to sell beer in Virginia. Consequently, in all of these states, a Canadian brewer, or vintner, could sell their product on the same terms as an in-state brewer or vintner.

3.74 Canada argued that even if Canadian producers could establish their own wholesalers in these states, the fact remained that Canadian products could not be obtained by in-state retailers directly from out-of-state distribution points. In order to obtain such access the Canadian producer had to establish an in-state presence in the states of **California**, **Connecticut**, **Idaho**, **Oregon** and **Utah**. Canadian producers were not eligible to obtain a wholesale license in all states because of residency requirements in **Idaho**, **Iowa**, **Maryland**, **Massachusetts**, **Minnesota**, **Missouri**, **Ohio**, **Virginia** and **Washington**. Even if the in-state wholesaler were wholly owned and operated by the Canadian producer, that wholesaler still represented an additional layer of distribution and costs through which Canadian products had to pass before reaching the in-state retailer.

3.75 With respect to **Alaska**, **Hawaii**, **Indiana**, **Kansas**, **Louisiana**, **Maine**, **Maryland**, **Pennsylvania**, **Rhode Island**, **Tennessee**, **Texas**, and **West Virginia**, the United States argued that Canadian producers had access to the commercially preferable method for distributing their products in each of these states. It recalled its arguments in paragraph 3.61 above with respect to distribution systems.

3.76 Canada argued that it was for individual breweries to determine the "commercially preferred method." Whether or not United States producers chose to employ wholesalers to distribute their product as the "commercially preferred method" was irrelevant. It was not the purpose of the General Agreement to permit any Contracting Party to determine, unilaterally and without consultation, to limit through

with Article III:2 (as in Thailand Cigarettes), rather it contained mandatory requirements that were inconsistent with the GATT. According to the principle enunciated in the Thailand Cigarettes case, this made the mandatory state measure inconsistent with the GATT.

3.79 The United States observed that Article III:2 concerned "internal taxes or other internal charges in excess of those applied to like domestic products," and stated that no contracting party "shall otherwise apply internal taxes or other internal charges" to products contrary to the principles of Article III:1 (emphasis added). Similarly, Article III:4 stated that imported products "shall be accorded treatment no less favourable than like products of national origin" (emphasis added). The Illinois state authorities were not enforcing the measure as a result of a specific judicial or administrative decision. The state had ensured that these measures were not being "applied" within the meaning of Articles III:2 and III:4. The fact that the measures had not been repealed was irrelevant, and did not cause them to be in violation of the General Agreement. The Thailand Cigarettes Panel, in paragraph 84, stated that "legislation merely giving the executive the possibility to act inconsistently with Article III:2 could not, by itself, constitute a violation of that provision." Furthermore, the Thailand Cigarettes Panel was even more explicit with respect to the Thai government's issuance of a regulation that would remove business and municipal taxes from all cigarettes, despite the continuing authority under the Tobacco Act for the Thai executive authorities to continue to levy discriminatory taxes:

> "The Panel noted that, as in the case of the excise tax, the Tobacco Act continued to enable the executive authorities to levy the discriminatory taxes. However, the Panel, recalling its findings on the issue of excise taxes, found that the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement."

The United States argued that this reasoning applied even more forcefully in the present case. The relevant executive authorities had explicitly stated that they were not enforcing the challenged measures, and that they would not do so in the future. The possibility of application was not sufficient to result in violation of the GATT.

3.80 Canada replied with respect to the Thailand Cigarettes case that the test was not whether the measure was being applied at a particular point in time but whether the

"executive action," without recourse to the legislature, it was not "mandatory" for the purposes of the PPA. Under the United St

3.87 With respect to specific state statutes, the United States provided the legislation of various states to demonstrate the pre-1947 existence

Licensing Fees

3.97 Canada brought to the Panel's attention the licensing fees for the sale of beer and wine in **Alaska**, and for beer in **Vermont**, which were higher for imported product. The state of Alaska required local brewers and wine

considerations. It protected in-state product from price competition, affording protection

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3.116 With respect to **Vermont** and **Virginia**, the United States stated that both had an extensive system of

3.122 The United States further observed that the fact that United States manufacturers provided the significant portion of the 3.2 per cent beer market by itself had no bearing on whether these

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Article XXIV:12

3.132 The United States presented its view that Article XXIV:12 applied as a matter of course in a di

4.3 Subsequent GATT practice in the application of Article III further showed that past GATT Panels had examined Article III:2 (and 4) by determining, firstly, whether the imported and domestic products concerned were "like" and, secondly, whether the internal taxation or other regulation discriminated against the imported products. The term "like product" was not defined in the GATT and Panels had been consistent in not defining it except on a case-by-case basis. The criteria for measuring "likeness" in previous panel cases had included: practices of other contracting parties, the physical origin and properties of the product, traditional tariff treatment, treatment of the products in internal regulations by the importing country, and the end use of the product. On the basis of each of these criteria, no distinction could be drawn between beer imported from third countries and beer produced domestically. The same was true of domestically-produced and imported wine. The amount of production output was not a valid criteria upon which to differentiate between products. Any differentiation in tax levels for like products based on annual production levels therefore constituted discrimination against like imported products and was in violation of Article III:2. The Panel on United States - Taxes on Petroleum and Certain Imported Substances (BISD 34S/136), found that a rate of tax for domestic products which was less than that for imported products was contrary to Article III:2.

4.4 Australia further argued that the tax credit granted to domestic producers also violated Article III:4 in that it constituted less favourable treatment for imported products. The Panel on Italian Discrimination against Imported Agricultural Machinery (BISD 7S/60) noted that "any favourable treatment granted to domestic products would have to be granted to like imported products". The Panel on European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (BISD 37S/86) noted that violations of Article III occurred when regulations were capable of giving rise to discrimination against imported products although they might not necessarily do so in all individual cases. The Panel found that exposure of a

quality "boutique" wineries and vineyards. The conditions of competition for New Zealand exports were therefore particularly affected by the federal tax credits because they benefited small domestic United States producers. It was against the products of these small facilities that New Zealand wines primarily competed. In this market, the tax credit afforded protection to domestic production against the similar small volume/high quality imported New Zealand wines.

4.15 Furthermore New Zealand argued that because the tax credit was not available to imported wines on similar terms to wines produced at qualified domestic facilities,

measures nullified tariff concessions granted by the United States pursuant to Article II of the General Agreement. The Panel decided to examine successively each of these claims.

Federal Excise Tax Differential on Beer

5.2 The Panel began its examination with Canada's claim that the application of a lower rate of federal excise tax on domestic beer from qualifying (small) United States producers, which lower rate was not available to imported beer, was inconsistent with Articles III:1 and III:2 of the General Agreement. The Panel noted that because Article III:1 is a more general provision than either Article III:2 or III:4, it would not be appropriate for the Panel to consider Canada's Article III:1 allegations to the extent that the Panel were to find United States measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.

5.3 The Panel considered that excise taxes levied on imported and domestic products are internal taxes subject to the national treatment provision of Article III:2, first sentence, which reads:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products".

5.4 In the present case, at least with respect to the federal excise tax issues, the Panel noted the parties' agreement that the excise taxes in question are internal taxes and that imported beer is subject to a higher rate of federal excise tax than domestic beer from qualifying producers. In addition, the record reflected that approximately 1.5 per cent of United States beer production is eligible for the reduced federal tax rate.

5.5 The Panel considered that the application of a lower rate of federal excise tax on domestic beer from qualifying United States producers, which lower rate is not available in the case of imported beer, constitutes less favourable treatment to the imported product in respect of internal taxes and is therefore inconsistent with the national treatment provision of Article III:2, first sentence.

5.6 The Panel noted the United States argument that the total number of barrels currently subject to the lower federal excise tax rate represented less than one per cent of total domestic beer production, that over 99 per cent of United States beer was subject to the same federal excise tax as that imposed on imported beer, and that therefore the federal excise tax neither discriminated against imported beer nor provided protection to domestic production. The Panel further noted that although Canada did not accept the United States estimate that the tax exemption applied to only one per cent of United States production, it pointed out that this figure nonetheless equalled total Canadian exports of beer to the United States. In accordance with previous panel reports adopted by the CONTRACTING PARTIES, the Panel considered that Article III:2 protects competitive conditions between imported and domestic products but does not protect expectations on export volume.[2] In the view of the Panel, the fact that only approximately 1.5 per cent of domestic beer in the United States is eligible for the lower tax rate cannot justify the imposition of higher internal taxes on imported Canadian beer than on competing domestic beer. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a "trade effects test" nor is it qualified by a de minimis standard. As a previous panel found,

[2]See, for example, the Report of the Panel on "United States - Taxes on Petroleum and Certain Imported Substances", adopted on 17 June 1987, BISD 34S/136, 158; see also

"A change in the competitive relationship contrary to [Article III:2] must consequently be regarded 'ipso facto' as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a

5.10 Article III:8(b) limits, therefore, the permissible producer subsidies to "payments" after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, e.g. on tax exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due. The separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.

5.11 The Panel considered that the drafting history of Article III confirms the above interpretation. The Havana Reports recall in respect of the provision corresponding to Article III:8(b):

> "This sub-paragraph was redrafted in order to make clear that nothing in Article [III] could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub- Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article [III] would override the provisions [of Article XVI]".[4]

The drafters of Article III explicitly rejected a proposal by Cuba at the Havana Conference to amend the Article to read:

> "The provis

consistent

5.15 The Panel noted the United States contention that the number of United States wineries qualifying for the tax credit represented less than four per cent of domestic wine production, and thus the law did not have a discriminatory or protective effect. The United States also argued that the tax credit was allowable as a subsidy under Article III:8(b). The Panel found that its considerations with respect to similar arguments in the context of the lower federal excise tax on domestic beer apply equally here. Accordingly, the Panel found that the provision of a federal excise tax credit on domestic wine and cider, which credit is not available to imported wine and cider, is inconsistent with United States obligations under Article III:2, first sentence, and is not covered by Article III:8(b).

State Excise Tax Differentials Based on Annual Production

5.16 The Panel then examined Canada's claim that the tax laws in the states of **New York**, **Oregon**, **Rhode Island** and the Commonwealth of **Puerto Rico** provided exemptions or reductions of excise taxes to in-state producers of beer and wine based on annual production by these breweries and vintners, below certain limits, and that this treatment resulted

to grant the tax credits on a non-discriminatory basis to small breweries inside and outside the United States, imported beer from large breweries would be "subject … to internal taxes … in excess

a general definition of the term "like products", either within the context of Article III or in respect of other Articles of the General Agreement. Past decisions on this question have been made on a case-by-case basis after examining a number of

regarded as "directly competitive" products in terms of the Interpretive Note to Article III:2, second sentence, and the imposition of a higher tax on directly competing imported wine so as to afford protection to domestic production would be inconsistent w81 Tf(afford) TjETBT1 0 0 1 73.68 71iicle

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

The Panel recalled that the CONTRACTING PARTIES have consistently interpreted the requirement of Article III:4 to accord imported products treatment no less favourable than that accorded to domestic products as a requirement to accord imported products competitive opportunities no less favourable than those accorded to domestic products.[8]

5.31 The Panel considered as irrelevant to the examination under Article III:4 the fact that many -- or even most -- in-state beer and wine producers "preferred" to use wholesalers rather than to market their products directly to retailers. The Article III:4 requirement is one addressed to relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in that market. Producers located in the states in question have the opportunity to choose their preferred method of marketing. The Panel considered that it is the very denial of this opportunity in the case of imported products which constitutes less favourable treatment. The Panel then recalled the finding of a previous panel[9] that a requirement to buy from domestic suppliers rather than from the foreign producer was inconsistent with Article III:4:

> "The Panel recognized that these requirements might in a number of cases have little or no effect on the choice between imported and domestic products. However, the possibility of purchasing imported products directly from the foreign producer would be excluded and as the conditions of purchasing imported products through a Canadian agent or importer would normally be less advantageous, the imported product would therefore have more difficulty in competing with Canadian products (which are not subject to similar requirements affecting their sale) and be treated less favourably".[10] (emphasis in the original)

Similarly, in the present case the Panel considered that the choice available to some United States producers to ship their beer and wine directly to in-state retailers may provide such domestic beer and wine with competitive opportunities denied to the like imported products. Even if in some cases the in-state exemption from the wholesaler requirement is available only to small wineries and small breweries, this fact does not in any way negate the denial of competitive opportunities to the like imported products. In so finding, the Panel recalled its earlier finding, in paragraph 5.19, that beer from large breweries is not unlike beer from small breweries.

5.32 In the view of the Panel, therefore, the requirement that imported beer and wine be distributed through in-state wholesalers or other middlemen, when no such obligation to distribute through wholesalers exists with respect to in-state like domestic products, results in "treatment … less favourable than that accorded to like products" from domestic producers, inconsistent with Article III:4. The Panel considered that even where Canadian producers have the right to establish in-state wholesalers,

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[8]See, for example, the Report of the Panel on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, 386; and the Report of the Panel on "Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies", [not yet considered by the Council,] DS17/R, page 55.

[9]Report of the Panel on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, 160-61.

[10]Report of the Panel on "Canada - Administration of the Foreign Investment Review Act", adopted on 7 February 1984, BISD 30S/140, 160-61.

as is the case in some states, subject to varying conditions, the fact remains that the

5.38 Accordingly, the Panel found that the requirement in the states of **Alaska** (for beer and wine), **California** (beer and wine), **Connecticut** (beer and wine), **Florida** (beer and wine), **Hawaii** (beer and wine), **Idaho** (beer), **Illinois** (beer), **Indiana** (beer and wine), **Iowa** (beer and wine), **Kansas** (beer and wine), **Louisiana** (beer and wine), **Maine** (beer and wine), **Maryland** (beer and wine), **Massachusetts** (beer and wine), **Minnesota** (beer and wine), **Montana** (beer), **New Hampshire** (beer and wine), **Ohio** (beer and wine), **Oregon** (beer and wine), **Pennsylvania** (beer and wine), Maryland

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The Panel noted that in addition to the requirements of the introductory section of Article XX, sub-paragraph (d) of the Article requires a showing (i) that the laws or regulations with which compliance is being secured are not inconsistent with the General Agreement, and (ii) that the measures in question -- not measures generally -- are necessary to secure compliance with those laws or regulations. The Panel also noted the practice of the CONTRACTING PARTIES of interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use.

5.42 The Panel recalled the position of the United States that there was no reasonable alternative to the existing regulatory scheme in the various states which required out-of-state and imported beer to be distributed to retailers via in-state wholesalers while allowing in-state beer to be shipped directly from producers to retailers. The United States considered that the wholesaler was the only reasonable place for beer excise taxes to be collected for out-of-state and foreign products, but that there was no such necessity with respect to products from in-state producers that were, by definition, under the jurisdiction of the state. The Panel further recalled the position of Canada that the burden was on the United States to specify and demonstrate

"The Governments of … undertake … to apply provisionally on and after 1 January 1948:

(a) Parts I and III of the General Agreement on Tariffs and Trade, and

(b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation".

It then noted that the Chairman of the CONTRACTING PARTIES ruled in 1949 that the reference date for the phrase "existing legislation" was 30 October 1947, the date of the PPA.[13] It also noted the report of the Working Party on "Modifications to the General Agreement", adopted on 1 September 1948, which recorded agreement of the Working Party that a measure could be permitted during the period of provisional application "provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character -- that is, it imposes on the executive authority requirements which cannot be modified by executive action".[14] The Panel further noted

(2) The GATT prevails over state law, but is inferior to federal law".[17]

Professor Hudec also notes the teachings of the United States

> "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry.' … Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State's … claim based on the Amendment".[22]

The Supreme Court then ruled in Brown-Forman Distillers Corp. v. New York State Liquor Authority that the Twenty-first Amendment does not immunize state laws from Commerce Clause attack where their practical effect is to regulate liquor sales in other states.[23] And it made a similar ruling in Healy v. Beer Institute, Inc.[24]

5.48 Judging from the evidence submitted to this Panel, and in particular that of the various cases before the United States Supreme Court, the Panel considered that the United States has not demonstrated

independent verification was necessa

domestic product. The Panel, therefore, concluded that

5.60 In respect of the United States contention that the

The latter panel considered that the practice in Ontario liquor boards of limiting the listing of imported beer to the six-pack size while according listings in different package sizes to domestic beer was a practice falling under Article III:4 in that it was a requirement that did not affect the importation of beer as such but rather its offering for sale. That panel then ruled that the measure was inconsistent with Article III:4.[27] The same panel "saw great force in the argument that the restrictions on access to points of sale were covered by Article III:4", but went on to find that these point of sale restrictions were contrary to the provisions of the General Agreement, without deciding whether they fell under Article XI:1 or Article III:4.[28]

5.63 Having regard to the past panel decisions and the record in the instant case, the present Panel was of the view that the listing and delisting practices here at issue do not affect importation as such into the United States and should be examined under Article III:4. The Panel further noted that the issue is not whether the practices in the various states affect the right of importation as such, in that they clearly apply to both domestic (out-of-state) and imported wines; rather, the issue is whether the listing and delisting practices accord less favourable treatment -- in terms of competitive opportunities -- to imported wine than that accordT1 0 0 1 275.76 706.8o

points

5.67 With respect to the listing/delisting policies of **Alabama** and **Oregon**, the Panel considered that

for standardization or environmental purposes, becomes inconsistent with Article III even if the regulation is not "applied … so as afford protection to domestic production". In the

5.76 The Panel then proceeded to examine whether the laws and regulations in the above-mentioned states affecting the alcohol content of beer are applied to imported or domestic beer so as to afford protection to domestic production in terms of Article III:1. In this context, the Panel recalled its finding in paragraph 5.74 regarding the alcohol content of beer and concluded that the evidence submitted to it does not indicate that the distinctions made in the various states with respect to the alcohol content of beer are applied so as to favour domestic producers over foreign producers. Accordingly, the Panel found that the restrictions on points of sale, distribution and labelling based on the alcohol content of beer maintained by

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(i) the provision by the state of Pennsylvania of an excise tax credit on beer for the purchase of manufacturing equipment, which credit is not available to imported beer, is inconsistent with Article III:2, first sentence, and is not covered by Article III:8(b);

(j) the exemption by the states of Alaska (beer and wine), California (beer and wine), Connecticut (beer and wine), Florida (beer and wine), Hawaii (beer and wine), Idaho (beer), Illinois (beer, whether or not the exemption is currently being given effect), Indiana (beer and wine), Iowa (beer and wine), Kansas (beer and wine), Louisiana (beer

(s) the record does not support a finding that the state wholesaler distribution requirements in Connecticut, Florida, Maryland, Massachusetts, Missouri, Oregon, Texas and Utah are "mandatory existing legislation" in terms of the Protocol of Provisional Application;

(t) the United States has not demonstrated to the Panel that the conditions for the application of Article XXIV:12 have been met; and

(u) in view of the Panel's conclusions in respect of federal and state tax measures, it is not necessary to address Canada's subsidiary argument that these federal and state tax measures nullify or impair tariff concessions on beer, wine and cider granted by the United States pursuant to Article II.

6.2 The Panel recommends that the CONTRACTING PARTIES request the United States to bring its inconsistent federal and state measures into conformity with its obligations under the General Agreement.