16 October 1991

CANADA - IMPORT, DISTRIBUTION AND SALE OF CERTAIN ALCOHOLIC DRINKS BY PROVINCIAL MARKETING AGENCIES

Report by the Panel adopted on 18 February 1992
(DS17/R - 39S/27)

1. Introduction

1.1 In July 1990, the United States held consultations with Canada under Article XXIII:1 concerning practices relating to imports of beer. The consultations did not lead to a solution and the United States requested the establishment of a GATT panel under Article XXIII:2 to examine the matter (DS17/2 of 6 December 1990).

1.2 On 6 February 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/247, page 14).

1.3 The terms of reference are as follows:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in documents DS17/2 and DS17/3 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." (DS17/4)

1.4 Pursuant to the authorization by the Council and after securing the agreement of the parties concerned, the Chairman of the Council decided on the following composition of the Panel (DS17/4):

Chairman: Mr. Ephraim F. Haran

Members: Mr. Alveus Contestable
Mr. Jorge A. Viganó

The composition of the Panel is the same as that of a GATT Panel which, in 1988, examined a complaint by the EEC relating to some of the practices of Canadian provincial marketing agencies of alcoholic beverages ("liquor boards").

1.5 The Panel met with the Parties on 23 April, 23-24 May and 29 July 1991. The delegations of Australia and EEC were heard by the Panel on 23 April 1991. The Panel submitted its report to the Parties to the dispute on 18 September 1991.

2. Factual aspects

2.1 The liquor boards are created by provincial statutes and their monopoly with respect to the supply and distribution of alcoholic beverages within their provincial borders is based on provincial legislation. The provinces are constitutionally empowered to enact such legislation under Section 92 of the Constitution Act, 1867, in particular the heads referring to 'Property and Civil Rights' and 'Local Matte

he importation of alcoholic beverages into Canada is, on the other hand, regulated by federal legislation. By means of the 1928 Importation of Intoxicating Liquors Act (now R.S.C, 1985), the Canadian Parliament restricted the importation of alcoholic beverages into a province except under the provisions established by a provincial agency vested with the right to sell alcoholic beverages.

This has resulted in a monopoly on the importation of alcoholic beverages by provincial liquor boards, whether the importation is from a foreign country or from another province. By virtue of the Act, importers and consumers in Canada cannot bypass the intermediary of the provincial liquor boards by making direct imports.

2.2 Each Canadian province requires a licence to be obtained from the designated provincial authority to manufacture and/or keep and sell beer in the province. Except in the case of Prince Edward Island where no beer is produced, most domestic beer must, as a matter of practice, be brewed in the province in which it is sold. No foreign brewer is permitted to sell beer in a province except through the liquor board. On the basis of the provincial legislation governing the right to sell beer, each province has developed its own system for the delivery and sale at retail outlets.

2.3 All provinces have government liquor stores situated throughout their territory. In addition, most provinces also allow beer sales at a variety of privately-owned and -operated retail outlets, as well as at on-site (brewery)

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Table 1: Points of sale for beer in Canadian provinces

Province	Points of sale[1]	Beer sold
Alberta	209 liquor-board stores 516	Listed beer, imported and domestic

2.4 The delivery of beer in Canada is controlled or conducted by the provincial liquor boards. In all 10 provinces, Canadian brewers, as a matter of administrative practice, are either required or permitted to deliver their products to all authorized or licensed points of sale. With the exception of Prince Edward Island and Saskatchewan, imported beer must be sold to the provincial liquor boards which, as a commercial and administrative matter, either require or arrange delivery of such product to their own central distribution centres in the provinces. Table 2 summarizes the situation.

Table 2: Delivery systems for beer in Canadian provinces.

Provinces	Imported beer	Domestic beer
Alberta	Public system: the liquor board warehouses imported beer and distributes it to all points of sale (except to outlets of Alberta brewers), and is	Private system: the liquor board purchases beer from provincial brewers and requires them to warehouse it themselves, deliver it to all outlets

Provinces	Imported beer	Domestic beer
New Brunswick	Public system: the liquor board warehouses imported beer and distributes it to all retail outlets (except the manufacturer's on-site store). Licensed establishments purchase and convey imported beer directly from the liquor board.	Private system: the liquor board purchases beer from provincial brewers, who warehouse and deliver it to all retail outlets (except the manufacturer's on-site store). Licensed establishments purchase and convey domestic beer directly from the liquor board, except provincial draught beer which is delivered by the brewers. Public system: the liquor board warehouses out-of-province domestic beer and distributes it to all retail outlets (except the manufacturer's on-site store).
Newfoundland	Public system: the liquor board warehouses imported beer and distributes it to its retail outlets and to its agency stores. Licensed establishments purchase and convey imported beer directly from the liquor board's own stores and from agency stores.	Private system: provincial beer is delivered by producers directly to all outlets.
Nova Scotia	Public system: the liquor board warehouses imported beer and distributes it to its retail outlets.	Private system: provincial brewers deliver their own beer to all liquor board retail outlets and draught beer to licensed

Provinces	Imported beer	Domestic beer
Ontario (cont'd)		Public system: the liquor board warehouses out-of-province domestic beer and distributes it to its retail outlets and licensees. One domestic brand is permitted per store, except in Combination stores.
Prince Edward Island	If the brewer, foreign or domestic, so wishes, the liquor board warehouses its beer and distributes it to its retail outlets. All brewers have the option of delivering direct to the liquor board stores. Licensed establishments arrange to have their beer delivered from the liquor board.	
Quebec	Public system: the liquor board board	

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2.5 While the situation varies somewhat from province to province, generally any supplier of alcoholic beverages, domestic or imported, wishing to sell a product in a province must first obtain a "listing" from the provincial marketing agency. In Alberta, unlisted products, both imported and domestic, may be sold in licensee outlets. In Ontario, except under the "Vintages programme" or a test-market programme (where in both cases imported beer may be sold without a listing on a one-time basis), all beer for sale in the province requires a listing. In Quebec, where the liquor board does not handle provincial beer, all provincial brewers are required to hold permits from the provincial authority for brewing, warehousing and distribution of beer. In all other provinces, all beer for sale in the province must be listed. If a listing is granted, it can be subject to conditions under which the product in question may be sold in the province (e.g. minimum sales quotas, bottle or package sizes). The listing of an alcoholic beverage by a provincial liquor board ensures the availability of that product in outlets operated by that board. In certain provinces (Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec), the listing and delisting practices, conditions and formalities for imported and domestic products differ from one another.

2.6 The retail price of beer sold in a Canadian province is established by adding applicable federal customs duties and taxes, provincial mark-ups and taxes to the base price. British Columbia applies both a volume and a percentage mark-up. Ontario also applies a volume levy. Most provincial liquor boards apply a cost-of-service charge, which can be higher for imported beer depending, inter alia, on on

cost-of-service

Table 3:

Province (1)	Mark-up (2)	COS charges (3)	Minimum pricing (4)
Nova Scotia	Equal mark-up (ad valorem) on imported and provincial canned beer; equal or different mark-up (ad valorem) on provincial and imported bottled beer, depending on package size; applied after the COS charge.	Flat-rate out-of-store COS differential on imports; applied before the mark-up.	
Ontario	Domestic beer: profit (ad valorem with minimum) applied after in-store COS charge to a base which includes warehousing, delivery and retail charges. Imported beer: the greater of mark-up (ad valorem), or sum of (1) COS charge (same flat-rate in-store charge as for domestic beer, + flat-rate out-of-store charge) and (2) flat-rate profit (same as minimum profit for domestic beer), applied to a base which includes the landed cost only and excludes warehousing and delivery charges.	Flat-rate charges applied or COS recouped as part of imported mark-up (see column 2).	Non-discriminatory Reference Price for imported and domestic beer.
Prince Edward Island	Same mark-up (ad valorem) on imported and domestic beer.		
Quebec	Mark-up on imported beer. (The	Flat-rate COS	

Province (1)	Mark-up (2)	COS charges (3)	Minimum pricing (4)
Saskatchewan	Same mark-up (ad valorem) on imported and domestic beer. Applied to imported beer after the out-of-store COS differential and before the in-store COS differential.	Flat-rate out-of-store COS differential on imports, applied before the mark-up; + flat-rate in-store COS differential on imports applied after the mark-up.	

2.7 In support of their case, both parties supplied the present Panel with extensive data relating to imports and domestic sales of beer, mark-ups, cost-of-service charges and other policies and practices affecting sales of beer in Canada.

2.8 The 1988 GATT Panel had examined a complaint by the EEC relating to some of the practices of Canadian provincial liquor boards, namely discriminatory practices relating to listing requirements, to price mark-ups and to the availability of points of sale. In its report[1], the 1988 Panel concluded that (i) th 0 0 1 121.68 693.84 Tm1leport

of Chapter 5 non-conforming provisions of existing measures relating to the internal sale and distribution of beer and malt beverages, as long as such provisions are not made more discriminatory than they were on 4 October 1987 (Article 1204). The Free-Trade Agreement was implemented in Canada in large measure by an Act of Parliament which, inter alia, ensures compliance by the provinces with Canada's obligations under that Agreement.

3.

Canadian provincial marketing

(b) the following elements of the methodology of price calculation were inconsistent with the provisions of Article III:2 of the General Agreement:

(i) the application on an ad valorem basis of cost-of-service differentials;

(ii) the application, in Alberta, British Columbia, Nova Scotia and Quebec, of the cost-of-service differential before the mark-up;

(iii) the application, in

4. with respect to import mark-ups:

   (a) the provincial practices of New Brunswick, Newfoundland, Nova Scotia, Ontario and Quebec with respect to mark-ups were in conformity with the provisions of Article II:4 of the General Agreement;

   (b) Canada had demonstrated through independent audits that the cost-of-ser

Agreement. In British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan, regardless of where sold, beer had to be listed according to the same criteria. In some cases, the treatment of imported beer with respect to listing and delisting was now better than that afforded to domestic beer from other provinces: in a number of provinces, for example Manitoba, the minimum sales requirements were significantly lower for imported than for domestic products; in Ontario, domestic brewers were entitled to only one brand listing per liquor-board retail store, while no such restriction limited the listings of foreign suppliers. Canada also stated that in the past year, nine domestic beers had been delisted in Manitoba for failure to meet the minimum

New Brunswick:

The United States claimed that, despite listing/delisting procedures which were state
non-discriminatory, imported United States beer appeared to be limited to three listings. C
stated that United States listings were not limited to three; the current listings were all tha
been applied for by United States suppliers. Furthermore, locally-brewed products were lim
to their current

Quebec:

The United States claimed that beer produced locally was not subject to the regulations that governed the marketing of imported and out-of-province domestic beer, for example minimum sales requirements. Canada stated that there was no discrimination with respect to the beers handled by the liquor board. The liquor board did not handle provincial or out-of-province domestic beer. The principle of minimum sales was a common and widespread commercial practice applied by every wholesaler, whether private or public; it

ability of the local authority to regulate the local industry and at the same time provide a service to its population. In Alberta, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan, imported and domestic beer could be sold at the same government retail stores, agencies, franchises or private outlets (in Alberta, all privately-owned vendors could stock and sell any imported or domestic beer, whether listed or not). In the remaining provinces (British Columbia, Manitoba, Newfoundland, Ontario and Quebec), various forms of private distribution systems had been established; they were limited to provincial breweries which were under the regulatory control of the provincial authority. In these provinces, imported beer was sold at the liquor-board stores or at agency or vendor stores operated under the authority of the liquor board. It was not possible to generalise, however, with respect to the private distribution systems; locally-produced beer could be sold through a variety of combinations of liquor-board stores or agencies and private licensed outlets - in Quebec exclusively in private licensed outlets. The private distribution systems, although regulated by the provincial authorities, were without any state involvement in their ownership or management structure. They were commercially separate and distinct from the provincial control boards. They were not an emanation of government, nor agents of the provincial control boards and had no power over imports. The Ontario and Quebec systems, while different, had both been in place since the 1920s, were the reflection of the ability of the local authority to regulate the local industry, and had developed to reflect social objectives unique to each province. Ontario breweries established Brewers' Retail Inc. (BRI) in 1927 pursuant to provincial legislation. Under that legislation, the liquor boards could authorize only Canadian brewers to sell beer in the province. Although regulated by the liquor board, BRI remained a purely private-sector corporation. It provided beer throughout the province at uniform prices in a manner consistent with the various control practices maintained by the province, and operated a comprehensive container return handling system. There was no law, regulation or government-imposed restriction preventing BRI from selling imported beer; however, it would have to purchase it from the liquor board and whether it did so was a matter within its own discretion. In Quebec, the one exception to the liquor board's monopoly was that beer brewed in Quebec was sold through grocery stores and not through the liquor board. This separate system was established by law in 1921, when the liquor board was created. To sell beer, local brewers had to obtain a permit from the provincial authority. In Manitoba, the system of having locally-produced beer available for sale at privately-authorized outlets

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Protocol of Provisional Application

4.14 Canada argued that the private system of delivery and sale of domestic beer in Ontario was covered by paragraph 1(b) of the Protocol of Provisional Application (PPA), according to which Canada applied Part II of the General Agreement to the fullest extent not inconsistent with existing legislation. Canada stated that the complaint before the Panel had been brought as the result of an action taken by a United States firm under Section 301 of the United States Trade Act. This Act provided for trade

4.16 Canada stated that the legislation was mandatory both in its terms and in its expressed intent. It could not have been altered by the discretionary action of either the federal or the provincial executive. Moreover, the later amendments to the

4.19 The United States claimed that the discriminatory delivery practices, in addition to being inconsistent with the provisions of Article III:4 of the General Agreement, were inconsistent with the provisions of Article XVII.

4.20 Canada stated that the liquor boards were state-trading enterprises operating within the provisions of Article XVII of the General Agreement. Article 31.6 of the Havana Charter recognized that monopolies could be established for a variety of reasons - social, cultural, humanitarian or revenue-raising - and Article 31.4 made it clear that import monopolies were permitted to control the transportation and distribution of imported products by allowing them to charge for these activities as part of their control over importation. The liquor boards exercised the right to deliver imported products to retail outlets as an extension of their control over the importation and sale of beer. The right to first receivership was fully in accordance with the provisions of Article XVII. These provisions contained an m.f.n. obligation to act on the basis of commercial considerations with respect to purchases or sales involving imports or exports; the 10 liquor boards fully met these obligations.

4.21 The United States argued that Canada had not met the standards laid down in the Havana Charter. For example, Canada had not adopted arrangements "designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic producers of the monopolized product" (Article 31.1(b)); also, the inherent limitations of the liquor boards, conceded by Canada, indicated that they could not "import and offer for sale such quantities of the products as will be sufficient to satisfy the full domestic demand" for imported beer (Article 31.5).

4.22 Canada said that it had not conceded that the liquor boards had operational limitations, "inherent" or other, which other retailers did not face. Like other commercial operators, the liquor boards faced limits on type and quantity of product that they stocked. Because they were profit-making operations, they could not be expected to handle products without regard to customer preference and other commercial considerations. Canada also rejected the United States' claim that Canada had not complied with the standards laid down in Article 31 of the Havana Charter. Article 31.1 of the Havana Charter

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4.23 In response to a question from the Panel, Canada recalled that Article II:4 of the General Agreement, together with Article 31.4 of the Havana Chartaana

some liquor boards had moved from discriminatory mark-ups to the imposition of discriminatory cost-of-service (COS) charges. However, some liquor boards continued to apply discriminatory mark-ups in establishing the retail price of beer.

4.27 Canada stated that its 1988 agreement with the EEC contained a provision for a standstill, applied on an m.f.n. basis, on any mark-up differential as of 1 December 1988 - mark-up differential having been defined, in this context, as the difference between the mark-up on a product of the Community and the mark-up on the like product of Canada other than the additional costs of service associated with imported products of the Community. Canada stated that, going beyond the requirements of that agreement, Canada had, with minor exceptions, moved to a mark-up system that was fully justified under GATT, reflecting both cost of service and profit. Such a system was applied to both domestic and imported beer, consistently with the principle of national treatment. In the context of the agreement, Canada had committed itself to bringing pricing into GATT conformity once the interprovincial negotiations had been successfully concluded. In fact, pricing changes made since 1988 had mainly brought provincial pricing systems into conformity with GATT obligations.

New Brunswick:

4.28 The United States argued that the discriminatory mark-ups applied by New Brunswick constituted import charges inconsistent with the provisions of Article II:4 of the General Agreement.

4.29 Canada stated that New Brunswick imposed only differential mark-ups and no COS charge as such; costs of service had been audited and the mark-up differential was well within the audited COS differential. However, the New Brunswick policy to retail imported beer at a price no less than a Canadian, out-of-province beer of equivalent size and package type superseded, where necessary, the normal mark-ups.

Newfoundland:

4.30 The United States stated that Newfoundland also applied differential mark-ups on beer.

4.31 Canada stated that, in Newfoundland, the rate of mark-up depended on delivery point and not on origin of beer. Thus the mark-up on beer, domestic or imported, delivered to stores was lower than the mark-up on beer, domestic or imported, delivered to port.

Nova Scotia:

4.32 The United States argued that the discriminatory mark-ups applied by Nova Scotia, which had actually been increased on 1 January 1988, constituted import charges

Ontario:

4.34 The United States argued that the discriminatory mark-ups applied by Ontario constituted import charges inconsistent with the provisions of Article II:4 of the General Agreement.

4.35 Canada stated that, in Ontario, for historical reasons, separate systems had evolved for the pricing of imported and domestic beer. However, the charges applied under each system were intended to generate equivalent revenue, namely to recover costs of service and provide a reasonable element of profit. The liquor board provided only in-store services to domestic beer, whose landed price, however, included out-of-store costs such as the delivery and warehousing costs (upon which the domestic licensing fee was calculated). Thus, the mark-up on imports needed to be higher not only to reflect the higher costs incurred by the liquor board, but also because it was applied to a lower base. The net effect was equivalent for imported and domestic beer. In fact, the difference in effective mark-up rates between imported and domestic beer was in all cases less than the audited COS differential. Canada stated that this demonstrated that there was no discrimination in mark-up between imported and domestic products. In July 1989, Ontario had introduced minimum COS and profit charges to ensure that the liquor board was recovering operating expenses and generating a minimum profit on all beers. For imported beer, the minimum per unit charges applied only if the mark-up failed to generate an amount greater than the sum of these minimum charges. In practice, the mark-up applied to the vast majority of imported beer. For domestic beer, the in-store COS charge was applied in all cases, the minimum net profit only if it generated more than the ad valorem licensing fee levied on provincial brewers; in practice, the minimum net profit did not apply because Ontario historically maintained a floor price for domestic beer which generated more revenue through the licensing fee. The net effect of the 1989 changes had been to increase charges on all domestic beers and on a dozen lower-priced imported beers. The independent audit of the COS charges carried out following the report of the 1988 Panel had found that applied charges underestimated the actual costs; the liquor board had not, however, increased them.

Quebec:

4.36 The United States argued that the discriminatory mark-ups applied by Quebec constituted import charges inconsistent with the provisions of Article II:4 of the General Agreement.

4.37 Canada stated that the Quebec mark-up on imported beer was calculated on the basis of a formula which applied equally and on a non-discriminatory basis to all imported beer.

British Columbia:

4.38 The United States stated that British Columbia had, in April 1988, replaced a prohibition on the sale of imported draught beer by a mark-up differential, although the liquor board did not distribute either domestic or imported draught beer. The United States argued that, in the light

interprovincial agreement. British Columbia had committed itself to that agreement and expected that the process underway to liberalize trade within Canada would enable its industry to achieve the competitiveness that would make possible the removal of the mark-up differentials on draught

the Provincial Auditor General who operated at arm

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4.47 Canada considered that the concept of "necessarily associated with" could only mean all costs associated with

This constituted an application of internal taxes in a manner less favourable to imported products than to domestic products and, as found in the case of the United States taxes on petroleum and certain imported substances (BISD 34S/136), was inconsistent with the provisions of Article III:2 of the General Agreement.

4.53 Canada stated that the provincial taxes and the federal Goods and Services Tax were taxes of general application and in no way singled out imported products. Both provincial taxes and the federal GST were internal taxes: the provincial sales taxes were applied on the sale in the province at the retail level and calculated on the selling price of the goods; the GST was a uniform-rate tax applicable to domestic and imported goods and services, collected by the liquor boards and remitted to the federal government. Canadian legislation effectively provided that the GST be imposed on the excise and duty-paid value of imported goods. The "value added" to both imported and domestic beer by the liquor boards went into the respective retail price calculations and, thereafter, the GST and provincial sales taxes were levied at a rate to the consumer which was the same for imported and domestic products. Canada argued that the Panel on United States taxes on petroleum and certain imported substances had not addressed the computations of the base value for the purposes of application of the tax, but had found that, to be in conformity with the provisions of Article III:2 of the General Agreement, the tax had to be applied at a common tax rate for domestic and imported products. This was the case with respect to provincial sales taxes and the federal GST, whose application was, therefore, consistent with Canada's obligations under Articles II and III of the General Agreement. Canada argued that its position was supported by the findings of the 1988 Panel, which had stated, at paragraph 4.10 of its report, that Article II:4, applied in the light of Article 31.4 of the Havana Charter, "prohibited the charging of prices by the provincial liquor boards for imported alcoholic beverages which (regard being had to average landed costs and selling prices over recent periods) exceeded the landed costs; plus customs duties collected at the rates bound under Article II; plus transportation, distribution and other expenses incident to the purchase, sale or further processing; plus a reasonable margin of profit; plus internal taxes conforming to the provisions of Article III".

4.54 The United States further argued that Canada's approach to price determination by the liquor boards of Alberta, British Columbia, Nova Scotia, Ontario, [illegible]

4.57 Canada rejected the United States' claim that Ontario's NDRP operated as a minimum import price and was, as such, inconsistent with the provisions of Articles XI and XVII of the General Agreement. Since 1927, the setting of a minimum price for domestic beer had been a social-policy objective of the liquor board to ensure responsible use of beverage alcohol through an across-the-board pricing mechanism; the NDRP had extended this objective to imported beer and its introduction had had no effect on retail prices. The NDRP was not an import restriction as no products were refused entry into the province. It did not apply at Canada's border, but was a strictly internal requirement which applied to the minimum price at which the liquor board would purchase all beer, imported and domestic, for sale within the province. This distinguished it from the EEC fruits and vegetables case, where the EEC legislation had been specifically designed to apply a minimum price to imports at the border. The consistency of the NDRP with the provisions of the General Agreement had, therefore, to be looked at in the light of Article III obligations only. The latter were specific to internal taxes, charges, laws, regulations and requirements as they affected domestic and imported products, while Article XI obligations were specific to measures affecting importation. Canada further argued that, as the difference between the NDRP and a lower supplier quote would accrue to the supplier and not to the government, the NDRP was not a charge within the meaning of Article III:2 of the General Agreement, but an internal requirement affecting the internal sale of beer within the meaning of Article III:4. However, in either case Article III permitted governments to regulate the treatment of both domestic and imported goods in the internal market, provided that the measure met the national treatment standard and did not afford protection to domestic production.

4.58 The United States rejected Canada's contention that the NDRP should be examined in the light of the provisions of Article III of the General Agreement. This was a border issue as it related to the purchase, by the liquor board, of beer from abroad. The NDRP affected the price of imported beer at the border in a manner that restricted the ability of foreign producers to compete on a commercially reasonable basis. Accordingly, it acted as a quantitative restriction inconsistent with the provisions of Article XI of the General Agreement, as had been found in the EEC fruits and vegetables case.

4.59 Canada argued that, subject to limited exceptions, Article XI of the General Agreement prohibited restrictive border measures on goods other than duties, taxes or other charges. Article XI was not relevant to the minimum reference price because this was not a border measure applied to prohibit or restrict the importation of beer. Article III, on the other hand, applied to "internal measures" that regulate, inter alia, the purchase, sale and distribution of a product. When the same measure was applied to both domestic and imported products, it was an internal measure within the meaning of Article III. Article III was not intended to prevent contracting parties from exercising their sovereignty to promote domestic policy goals (in place for social and cultural reasons) through internal regulations, provided these did not treat imported products less favourably than the domestic product.

4.60 Canada stated that the purpose of the NDRP was to ensure that suppliers would not offer deep price discounting, thereby encouraging excessive consumption. When the NDRP was introduced in 1989, it was set at a level which was just below the existing purchase price for domestic and imported beer. No supplier had been affected. Canada explained that the NDRP, the wholesale floor price below which both imported and domestic beer would not be purchased by the liquor board, included the supplier quote, plus federal excise tax and duty and the

4.61 Canada further argued that the existence of a tariff binding on a product did not prevent a government from introducing an internal regulation consistent with Article III. Were the application of such a measure to affect trade in a

4.70 The Panel noted that, for Ontario, Canada had provided an explanation as to the stage at which the minimum price was applied, but that for neither British Columbia nor Ontario was any indication given as to the criteria for setting the current level of the minimum price.

G. Taxes on beer containers

4.71 The United States stated that in Manitoba, Nova Scotia and Ontario, beer containers were assessed a tax per unit, which was refundable on domestic beer containers because domestic producers were able to collect used cans and bottles through the private delivery systems they were entitled to operate. As imported beer could not be distributed privately, a separate collection system would need to be set up, which would be prohibitively expensive. The United States recalled that the Panel on United States taxes on petroleum and certain imported substances had found that the discriminatory imposition of taxes on imported products could not be justified under Article III:4 of the General Agreement. The United States argued that the imposition of an internal tax that was refundable for domestic but not for imported products was inconsistent with the provisions of Articles III:4 and XVII of the General Agreement.

4.72 Canada rejected the United States' claim that the tax was inconsistent with the provisions of Articles III:4 and XVII of the General Agreement. Canada stated that this issue had not been raised by the United States in the consultations held under Article XXIII of the General Agreement in July 1990, and did not feature directly among the practices specifically mentioned in the Panel's terms of reference. However, given the importance of the environmental issue, Canada would welcome the Panel's views. Canada stated that, in Manitoba and Ontario, a container charge was levied on all beverage alcohol containers, domestic and imported, which were not part of a deposit/return system; in Nova Scotia, the charge was levied per unit of non-refillable containers, imported and domestic, that were shipped to the liquor board. The charges were designed to encourage the establishment of systems in which consumers returned bottles for refilling and cans for

but

4.73 Canada stated, in response to the statement by Australia, that it had not invoked Article XX(d) of the General Agreement because it was of the firm belief that the environmental tax was applied in a manner consistent with Article III. In the event that the Panel should find otherwise, Canada requested that consideration be given to the exception in Article XX(b). The environmental tax was a measure intended and implemented solely to protect the environment. Environmental measures protected human and animal health and therefore

I. Obligations under Article XXIV:12

4.79 The United States stated that the Government of Canada had had since 1988 to ensure that the liquor boards brought their practices into conformity with the provisions of the General Agreement. However, it had failed to meet its obligations under Article XXIV:12 of the General Agreement, namely to take "such reasonable measures as may be available to it to ensure observance of the provisions of the Agreement by the regional and local governments and authorities within its territory". The operation of import monopolies with

was treated from one province to another with respect to listing, pricing and distribution and was thus a critical component in building the international competitiveness of the Canadian brewing industry. While not all the provinces had signed the agreement, all were committed to the work of the Technical Committee, which was preparing a plan, including specific time-frames, for the elimination of all remaining discriminatory practices. All the provinces, as well as the federal government, had recognized that it was essential to resolve this matter satisfactorily and had endorsed the process of change at the highest political level. The creation of a truly national market would provide the basis for bringing all remaining practices into compliance with Canada's international trade obligations. Without the necessity for Canada to respond to the findings of the 1988 Panel, the Canadian brewing industry would not be under threat and the need to deal with interprovincial barriers would not have the same political urgency. The interprovincial agreement had specifically recognized the

J. Statement by Australia

4.84 Australia considered that its rights under the General Agreement continued to be nullified and impaired in respect of Articles II and XI of the General Agreement as a result of Canada's failure to implement, with regard to beer, the findings of the 1988 Panel. A number of practices, already examined by the 1988 Panel, imposed more onerous conditions on imported than on domestic beer. Some listing/delisting requirements effectively applied only to foreign beer. For example, the quota conditions attached to listing gave an edge to domestic suppliers given their capacity to meet such conditions within a short time-frame. The barring, in some provinces, of a delisted supplier for a two-year period amounted to a selective quantitative restriction on imports. Figures for retail outlets for domestic and imported beer demonstrated continuing discrimination.

4.85 The 1988 Canada/EEC agreement only partially implemented the 1988 Panel's findings. It had not removed mark-up differentials; moreover, the provisions of Article V of the agreement relating to non-discrimination did not extend to mark-ups, giving rise to an inconsistency with Article I of the General Agreement, in addition to the inconsistencies with Articles II and III. Certain other aspects of the agreement required clarification, namely: what interpretation was being given to non-discrimination; whether Canada was ensuring m.f.n. treatment for products from other countries in terms of Article XXIV:12 of the General Agreement or by concrete undertakings from the provinces to the federal government; whether the agreement defined beer that was the product of the EEC; whether "national treatment" was defined in terms of Article III of the

that only the EEC enjoyed any rights as a result of the 1988 Panel's findings denied any precedence status to panel findings in the GATT dispute settlement process and was inconsistent both with Canada's obligations under Article I of the General Agreement and with the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, which included provisions on the nullification and impairment of benefits accruing to any contracting party.

4.88 Australia also pointed to other practices which imposed more onerous conditions on imported than on domestic beer. In Australia's view, non-identical treatment of imported and domestic beer would be less favourable unless identical treatment proved impossible. Canada had not demonstrated why it could not provide identical treatment with respect to distribution of beer. While the liquor boards retained exclusive rights of first receivership of imported beer, they applied a de facto barrier to participation in private distribution systems. With respect to pricing, Australia stated that domestic suppliers faced lower costs because they did not have to sell through the monopoly. In addition, new discriminatory measures had been introduced since the adoption, by the CONTRACTING PARTIES, of the 1988 Panel report, including minimum reference prices and environmental taxes. It was not clear whether Ontario's Non-discriminatory Reference Price applied to sales at all retail outlets; if not, Article XI:1 of the General Agreement was relevant. Nor was it clear why delivery practices entered into the calculation of minimum prices, given that the stated object of the measure was social. The environmental tax was, in effect, only levied on imported beer, as importers were precluded by law from establishing their own distribution systems and by cost factors from setting up individual collection systems. Australia therefore believed that the environmental tax might be contrary to Article III:2 of the General Agreement. If this were found to be the case, Australia further considered that Canada could not justify such a tax under Article XX(d) unless it could demonstrate, as found by the Thai cigarette Panel (DS10/R), that there were no reasonable GATT-consistent measures available to it. If the objective of the environmental tax was as indicated by its name, then the provinces should be equally concerned with devising a means for recycling containers of foreign beer, e.g. by means of a collection system operated by the liquor boards.

4.89 Australia considered that Canada's actions in proceeding to implementation of the CONTRACTING PARTIES' decision with respect to wine, while maintaining or introducing discrimination on beer, had given rise to further breaches of the General Agreement in respect of Articles I and III and were inconsistent with the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures. These actions could not be justified under Article XXIV:12 of the General Agreement. Beer and wine were like products as alcoholic beverages and had been traditionally regarded as such in relation to the controls exercised by the respective provincial liquor boards. The Panel on imported wines and alcoholic beverages in Japan (BISD 34S/83), basing itself on the report of the Panel on Spanish tariff treatment of unroasted coffee (BISD 28S/102), had accepted that wines and spirits were like products for the purposes of Article III. Australia contended that beer enjoyed an even closer tariff and statistical correlation with wine than did wine with spirits.

4.90 In reply to the arguments by Australia (also see paragraph 4.73 above), Canada indicated that Ontario's NDRP was an internal requirement and that it operated in the same way for all beer regardless of where it was sold. Importers were not precluded from establishing a container retrieval/collection system. Canada did not accept Australia's arguments to the effect that, because the collection and retrieval of used containers required additional investments, it was not justified under the General Agreement. The levy was a means of securing public revenues to finance waste management systems. Domestic producers were subject to equivalent measures, where they failed to establish their own systems for container retrieval. Australia had raised Article XX(d) of the General Agreement. Canada had not relied on the exception in Article XX to justify the environmental tax because it was applied in a manner consistent with Article III of the General Agreement. In the event that the Panel should find

4.91 Canada rejected Australia's observations about the non-discriminatory application of the Canada-EEC Agreement. Canada confirmed that the agreement was being applied on an m.f.n. basis and that the terms "non discrimination" and "national treatment" were being used

4.95 The EEC concluded that, if imported beer enjoyed the same two facilities afforded to domestic beers, namely the right to warehouse and deliver products directly to points of sale, and the right to have the same access to non-liquor board outlets, there could be no basis for any cost-of-service differentials, as the liquor boards would provide the same services to imported and domestic beer.

4.96 In reply to the EEC, Canada argued that it had the right to operate import monopolies consistent with Article XVII of the General Agreement and to have those monopolies include in their price for imported products any charges incident to the purchase and sale of these products, consistent with Article 31.4 of the Havana Charter, as well as internal taxes consistent with Article III of the General Agreement.

4.97 Canada stated that, on the question of [illegible] reports, it was not clear whi744BT1 0 0 1 413.28 603.12 TmjET

5.3 The Panel noted that,

to imported beer, Canada accorded domestic beer competitive opportunities denied to imported beer. For these reasons the present Panel saw great force in the argument that the restrictions on access to points of sale were covered by Article III:4. However, the Panel considered that it was not necessary to decide whether the restrictions fell under Article XI:1 or Article III:4 because Canada was not invoking an exception to the General Agreement applicable only to measures taken under Article XI:1 (such as the exceptions in Articles XI:2 and XII) and the question of whether the restrictions violated Article III:4 or Article XI:1 of the General Agreement was therefore of no practical consequence in the present case.

5.7 The Panel found that the restrictions on access by imported beer to points of sale were contrary to the provisions of the General Agreement.

5.8 The Panel noted that Canada had argued that the authorization of the private sale of domestic beer

to accord domestic beer treatment more favourable than that accorded to imported beer and that the discriminatory restrictions on access to points of sale imposed by Canada in Ontario were consequently not covered by paragraph 1(b) of the Protocol of Provisional Application.

Restrictions on private delivery

5.10 The Panel noted that the Canadian provincial liquor boards applied two different systems for the delivery of beer to retail stores and other points of sale. The liquor boards of Prince Edward Island and Saskatchewan authorized the private delivery of both domestic (provincial and out-of-provinc/F8 1(sale.) TjET

The Panel consequently considered that the mere fact that imported and domestic beer were subject to different delivery systems was not, in itself, conclusive in establishing inconsistency

domestic beer would be greater if the import monopoly for beer were combined with a complete monopoly for the sale of both imported and domestic beer because, in that case, the monopoly would have

5.18 The Panel considered that, in determining which costs were "additional costs necessarily associated with the marketing of imported products", four situations had to be distinguished. The costs could be "additional" because they were incurred as a result of activities of the liquor boards that were specific to imported products; such costs were, for instance, the expenses arising from customs clearance or warehouse handling (e.g. palletization). The costs could also be "additional" because, although they arose both for imported and domestic products, they

as computed on the basis of cost-of-service charges did not conform to the principles set out above and included additional costs incurred by the liquor boards not necessarily associated with the marketing of imported beer. Two provinces, New Brunswick and Newfoundland, did not introduce separate cost-of-service charges but maintained differential mark-ups. In New Brunswick, this differential again included costs that were not necessarily associated with the marketing of imported beer. In the case of Newfoundland, no audit of the mark-ups had been provided. Only in Prince Edward Island, where no beer was brewed, no differential mark-up was maintained. The Panel therefore concluded that the differential mark-ups currently levied by the liquor boards (with the exception of Prince Edward Island), including differential mark-ups based on cost-of-service charges, were inconsistent with Article II:4 of the General Agreement.

5.22 The Panel then considered how Canada could best meet its burden of proving that the differential mark-ups consisted only of additional costs necessarily associated with the marketing of imported beer. The Panel considered that one possibility was for Canada to submit audited cost-of-service accounts prepared by independent reputable auditors who were made aware of Canada's obligations under the General Agreement in respect of mark- ups, in particular the obligation under Article II:4 not to afford protection on the average in excess of the amount of protection provided for in Canada's Schedule of Concessions. The Panel noted in this context that, in respect of wine and distilled spirits, the United States and Canada had agreed to rely on audited cost-of-service accounts. The Parties might, therefore, wish to agree on the instructions to be given to the auditors or, alternatively, to entrust an independent expert with the task of drawing up such instructions.

Methods of assessing mark-ups and taxes on imported beer

5.23 The Panel noted that Canada taxed both imported and domestic beer by assessing mark-ups through the liquor boards and by levying provincial sales taxes

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5.25 The Panel further noted that Article III:2 applied to internal taxes levied on imported products, that is products on which duties levied in

did affect the competitive opportunities of imported beer which could otherwise be supplied below the minimum price. The Panel noted, moreover, that one of the basic purposes of Article III was to ensure that the contracting parties' internal charges and regulations were not such as to frustrate the effect of tariff concessions granted under Article II and that a previous Panel had found that

> "the main value of the tariff concession is that it provides an assurance of better market access through improved price competition".[1]

Under Article II:4 (applied in accordance with the Note Ad Article II in the light of the provisions of Article 31 of the Havana Charter), contracting parties that maintained a monopoly on the importation of a product included in their Schedule of Concessions were under an obligation not to charge a price for

Notification procedures for new practices

5.34 The Panel noted that the United States had claimed that the liquor board of British Colombia had shared with domestic brewers information relating to pricing policy before that information was available to the United States' authorities, that in the province of Ontario, an announcement of a new

on access to points of sale for beer, which the Panel had found to be inconsistent with the General Agreement. It recalled that the 1988 Panel had already concluded that "the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1". As a result of that finding the CONTRACTING PARTIES had requested Canada to take "such reasonable measures as may be available to ensure observance of the provisions of Article XI of the provincial liquor boards". After reviewing all the information and documentation before it, including the statement made by Canada (see paragraph 4.80 above), the Panel came to the conclusion that, in spite of that request made by the CONTRACTING PARTIES in 1988, Canada had not demonstrated that it had made serious,

the end of 1994 of a practice which the CONTRACTING PARTIES had found in 1988 to be inconsistent with the General Agreement, the Government of Canada could hardly claim that it had taken a reasonable measure in compliance with the CONTRACTING PARTIES' request. The Panel therefore concluded that Canada had not made serious, persistent and convincing efforts to secure elimination of discriminatory mark-up practices and that it had not taken all the reasonable measures as might be available to it to ensure observance by the provincial liquor boards of the provisions of Article II:4 of the General Agreement. The Panel therefore found that with respect to provincial liquor board mark-up practices Canada had failed to comply with its obligations under Article XXIV:12.

5.40 Finally, with respect to minimum prices imposed by a number of provincial liquor boards, which this Panel had found to be inconsistent with Article III:4 of the General Agreement, but which had not been before the 1988 Panel, the Panel found it appropriate to follow the procedure adopted by the 1988 Panel as outlined in paragraph 5.38 above and to propose that the Government of Canada should be given a reasonable period of time to take measures which would lead to an elimination of this practice.

6. CONCLUSIONS

6.1 On the basis of the findings set out above, the Panel concluded that:

(a) the United States had not substantiated its claim that Canada maintained listing and delisting practices in its provinces, other than the province of Ontario, inconsistently with Article XI:1 of the General Agreement;

(b) the requirement imposed by Canada in the province of Ontario that imported beer be sold in the six-pack size, while in certain stores no such requirement was imposed on domestic beer, was inconsistent with Article III:4 of the General Agreement;

(c) the restrictions maintained by Canada in all provinces except Prince Edward Island and Saskatchewan on access of imported beer to points of sale available to domestic beer were inconsistent with Article III:4 or XI:1 of the General Agreement;

(d) the restrictions on the private delivery of imported beer maintained by Canada in the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario and Quebec were inconsistent with Article III:4 of the General Agreement;

(e) the differential mark-ups, including differential mark-ups based on cost-of-service charges, levied by Canada in all provinces with the exception of the province of Prince Edward Island, were inconsistent with Article II:4 of the General Agreement;

(f) the methods of assessing mark-ups and taxes on imported beer applied by Canada were not inconsistent with Article III:2 of the General Agreement;

(g) the minimum prices for beer maintained by Canada in the provinces of British Colombia, New Brunswick, Newfoundland and Ontario were inconsistent with Article III:4 of the General Agreement to the extent that they were fixed in relation to the prices at which domestic beer was supplied;

(h) the taxes on beer containers maintained by Canada in the provinces of Manitoba, Nova Scotia and Ontario were not inconsistent with Article III:2 of the General Agreement;

(i) the notification procedures for new practices followed by Canada in the provinces of British Columbia and Ontario were not inconsistent with Article X of the General Agreement.

6.2 The Panel further concluded that Canada's failure to make serious, persistent and convincing efforts to ensure observance of the provisions of the General Agreement by the liquor boards in respect of the restrictions on access of imported beer to points of sale and in respect of the