

PHILIPPINES – TAXES ON DISTILLED SPIRITS

Reports of the Panel

The present document contains the two reports of the Panel in the disputes WT/DS396 and WT/DS403. The document comprises a common cover page, a common Descriptive Part and a common set of Findings in relation to the complainants' claims. This document also contains Conclusions and Recommendations that, unlike the Descriptive Part and the Findings, are separate for each of the complainants. Specifically, in the Conclusions and Recommendations, separate document numbers/symbols have been used for each of the complainants (WT/DS396 for the complaint brought by the European Union and WT/DS403 for the complaint brought by the United States).

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. REQUEST FOR CONSULTATIONS	1
B. ESTABLISHMENT AND COMPOSITION OF THE PANEL	1
C. PANEL PROCEEDINGS	2
II. FACTUAL ASPECTS	4
A. THE EXCISE TAX	4
B. PRODUCTS AT ISSUE	11
1. Products at issue.....	11
2. Characteristics of distilled spirits	12
3. Distilled spirits market in the Philippines.....	14
4. Tariff classification	21
5. Gin	24
6. Brandy.....	27
7. Rum	30
8. Vodka	32
9. Whisky	35
10. Tequila	37
III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....	39
IV. ARGUMENTS OF THE PARTIES	41
V. ARGUMENTS OF THE THIRD PARTIES	41
VI. INTERIM REVIEW	41
A. INTERIM REVIEW CHANGES TO THE DESCRIPTIVE SECTIONS.....	41
B. INTERIM REVIEW CHANGES TO THE FINDINGS SECTION	42
C. INTERIM REVIEW CHANGES TO THE CONCLUSIONS AND RECOMMENDATIONS SECTION	49
D. MINOR CORRECTIONS AND ADDITION OF REFERENCES	49
VII. FINDINGS	49
A. CLAIMS AND ORDER OF ANALYSIS	49
1. The complainants' claims	49
2. Applicable provisions.....	51
3. Order of analysis.....	52
B. BURDEN OF PROOF	53
C. CLAIMS UNDER THE FIRST SENTENCE OF ARTICLE III:2 OF GATT 1994.....	54

1.	The complainants' claims	54
2.	The Philippines' response.....	55
3.	Panel's analysis.....	56
(i)	<i>Products' properties, nature and quality</i>	<i>57</i>
(ii)	<i>End uses</i>	<i>61</i>
(iii)	<i>Consumers' tastes and habits.....</i>	<i>61</i>
(iv)	<i>Tariff classification</i>	<i>65</i>
(v)	<i>Internal regulations</i>	<i>67</i>
(vi)	<i>Conclusions on "likeness".....</i>	<i>67</i>
(vii)	<i>Excess taxation</i>	<i>70</i>
(viii)	<i>Conclusions regarding the claims under the first sentence of Article III:2 of GATT 1994.....</i>	<i>70</i>
D.	CLAIMS UNDER THE SECOND SENTENCE OF ARTICLE III:2 OF THE GATT 1994.....	71
1.	Complainants' claims.....	71
2.	The Philippines' response.....	71
3.	Panel's analysis.....	71
(a)	"Directly competitive or substitutable products"	72
(i)	<i>Introduction</i>	<i>72</i>
(ii)	<i>The competitive relationship between the products at issue.....</i>	<i>74</i>
(iii)	<i>Products' channels of distribution</i>	<i>80</i>
(iv)	<i>Products' properties, nature and quality</i>	<i>80</i>
(v)	<i>End uses and marketing.....</i>	<i>81</i>
(vi)	<i>Tariff classification</i>	<i>82</i>
(vii)	<i>Internal regulations</i>	<i>83</i>
(viii)	<i>Conclusions on "directly competitive or substitutable"</i>	<i>83</i>
(b)	"Not similarly taxed"	83
(i)	<i>Introduction</i>	<i>83</i>
(ii)	<i>Arguments of the parties</i>	<i>84</i>
(iii)	<i>Consideration by the Panel.....</i>	<i>86</i>
(c)	"So as to afford protection to domestic production"	90
(i)	<i>Introduction</i>	<i>90</i>
(ii)	<i>Arguments of the parties</i>	<i>90</i>
(iii)	<i>Consideration by the Panel.....</i>	<i>93</i>
(d)	Conclusions regarding the claim under the second sentence of Article III:2 of GATT 1994.....	96
E.	SPECIAL AND DIFFERENTIAL TREATMENT	96

VIII. CONCLUSIONS AND RECOMMENDATIONS.....	97
COMPLAINT BY THE EUROPEAN UNION (DS396): CONCLUSIONS OF THE PANEL	98A
COMPLAINT BY THE UNITED STATES (DS403): CONCLUSIONS OF THE PANEL	98B

LIST OF ANNEXES**ANNEX A****FIRST WRITTEN SUBMISSIONS OF THE PARTIES**

Contents		Page
Annex A-1	Executive summary of the first written submission of the European Union	A-2
Annex A-2	Executive summary of the first written submission of the United States	A-10
Annex A-3	Executive summary of the first written submission of the Philippines	A-18

ANNEX B**SUBMISSIONS OF THE THIRD PARTIES**

Contents		Page
Annex B-1	Executive summary of the written submission of Australia	B-2
Annex B-2	Written submission of Mexico	B-5

ANNEX C**ORAL STATEMENTS OF THE PARTIES
AT THE FIRST SUBSTANTIVE MEETING**

Contents		Page
Annex C-1	Executive summary of the opening oral statement of the European Union at the first substantive meeting	C-2
Annex C-2	Closing oral statement of the European Union at the first substantive meeting	C-7
Annex C-3	Executive summary of the opening oral statement of the United States at the first substantive meeting	C-8
Annex C-4	Closing oral statement of the United States at the first substantive meeting	C-16
Annex C-5	Executive summary of the opening oral statement of the Philippines at the first substantive meeting	C-17
Annex C-6	Closing oral statement of the Philippines at the first substantive meeting	C-21

ANNEX D**ORAL STATEMENTS OF THE THIRD PARTIES**

Contents		Page
Annex D-1	Oral statement of Australia at the first substantive meeting	D-2
Annex D-2	Oral statement of India at the first substantive meeting	D-4
Annex D-3	Oral statement of Chinese Taipei at the first substantive meeting	D-6

ANNEX E**SECOND WRITTEN SUBMISSIONS OF THE PARTIES**

Contents		Page
Annex E-1	Executive summary of the second written submission of the European Union	E-2
Annex E-2	Executive summary of the second written submission of the United States	E-10
Annex E-3	Executive summary of the second written submission of the Philippines	E-19

ANNEX F**ORAL STATEMENTS OF THE PARTIES
AT THE SECOND SUBSTANTIVE MEETING**

Contents		Page
Annex F-1	Executive summary of the opening oral statements of the Philippines at the second substantive meeting	F-2
Annex F-2	Closing oral statement of the Philippines at the second substantive meeting	F-7
Annex F-3	Executive summary of the opening oral statement of the European Union at the second substantive meeting	F-9
Annex F-4	Executive summary of the closing oral statement of the European Union at the second substantive meeting	F-14
Annex F-5	Executive summary of the opening oral statement of the United States at the second substantive meeting	F-15

ANNEX G**VARIOUS RELEVANT DOCUMENTS**

Contents		Page
Annex G-1	Request for the Establishment of a Panel by the European Union	G-2
Annex G-2	Request for the Establishment of a Panel by the United States	G-5
Annex G-3	Working Procedures for the Panel (28 July 2010)	G-7
Annex G-4	Additional Working Procedures Concerning Business Confidential Information (31 August 2010)	G-10

TABLE OF WTO CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, 481
<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
<i>Chile – Alcoholic Beverages</i>	Panel Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, as upheld (WT/DS339/R) and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, 3305
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Chicken Cuts (Brazil)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil</i> , WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295
<i>EC – Chicken Cuts (Thailand)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand</i> , WT/DS286/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XX, 9721
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – IT Products</i>	Panel Report, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010

Short Title	Full Case Title and Citation
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Alcoholic Beverages</i>	Panel Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, 3
<i>Mexico – Taxes on Soft Drinks</i>	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, 43
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
<i>US – Cotton Yarn</i>	Panel Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/R, adopted 5 November 2001, as modified by Appellate Body Report WT/DS192/AB/R, DSR 2001:XII, 6067
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Shrimp</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, 2821
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

WT/DS396/R

WT/DS403/R

Page viii

Short Title	Full Case Title and Citation
<i>US – Wool Shirts and Blouses</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, as upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343

LIST OF ABBREVIATIONS USED IN THESE REPORTS

BIR	Philippines' Bureau of Internal Revenue
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATT	General Agreement on Tariffs and Trade
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized Commodity Description and Coding System
HSEN	HS Explanatory Notes
ml	millilitres
NIRC	Philippines' National Internal Revenue Code of 1997
NRP	Net retail price
PHP	Philippine Pesos
ppl	per proof litre
SAO	Philippines' Standards Administrative Orders
WTO	World Trade Organization

I. INTRODUCTION

A. REQUEST FOR CONSULTATIONS

1.1 On 29 July 2009, the European Union (then the European Communities¹), and on 14 January 2010, the United States, separately requested consultations with the Philippines pursuant to Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") with respect to the taxation of imported distilled spirits by the Philippines.² The United States and the European Union each requested to be joined in the consultations requested by the other Member. The Philippines accepted the requests of both the United States and the European Union to join the consultations.³

1.2 Consultations were held between each complaining party and the Philippines. The European Union and the Philippines held their consultations on 8 October 2009 in Manila. The United States and the Philippines held their consultations on 23 February 2010 in Geneva. The United States and the European Union each attended the consultations requested by the other Member. These consultations did not lead to a mutually satisfactory resolution of the dispute.⁴

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 On 10 December 2009, the European Union, and on 26 March 2010, the United States, requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Articles 4 and 6 of the DSU, with standard terms of reference as set out in Article 7.1 of the DSU.⁵ At its meetings on

¹ The European Union's request for consultations was filed before the entry into force of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007). On 30 November 2009, the World Trade Organization received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the World Trade Organization received a Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party. We understand the reference in the Verbal Notes to the "European Community" to be a reference to the "European Communities". Thus, we will refer to the European Union in these reports.

² *Philippines – Distilled Spirits*, Request for Consultations by the European Communities (WT/DS396/1), 30 July 2009; and Request for Consultations by the United States (WT/DS403/1), 18 January 2010. In addition to Article 4 of the DSU, the European Union also cited Article 1 of the DSU as a basis for its request for consultations.

³ See *Philippines – Distilled Spirits*, Request to Join Consultations: Communication from the United States (WT/DS396/2), 12 August 2009; Acceptance by the Philippines of the Request to Join Consultations (WT/DS396/3), 27 August 2009; Request to Join Consultations: Communication from the European Union (WT/DS403/2), 29 January 2010; and, Acceptance by the Philippines of the Request to Join Consultations (WT/DS403/3), 3 February 2010.

⁴ *Philippines – Distilled Spirits*, Request for the Establishment of a Panel by the European Union (WT/DS396/4), 11 December 2009, attached as Annex G-1 of the reports; and Request for the Establishment of a Panel by the United States (WT/DS403/4), 29 March 2010, attached as Annex G-2 of the reports. See also European Union's first written submission, paras. 4-5 and 7; United States' first written submission, para. 4; United States' comments on the draft descriptive sections of the Panel Reports (6 April 2011).

⁵ *Philippines – Distilled Spirits*, Request for the Establishment of a Panel by the European Union (WT/DS396/4), 11 December 2009; and Request for the Establishment of a Panel by the United States (WT/DS403/4), 29 March 2010.

19 January and 20 April 2010, the DSB established a single Panel for both complaints in accordance with Articles 6 and 9 of the DSU.⁶

1.4 The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union and the United States in documents WT/DS396/4 and WT/DS403/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."⁷

1.5 On 25 June 2010, pursuant to Article 8.7 of the DSU, the European Union and the United States requested the Director-General to determine the composition of the panel. On 5 July, the Director-General composed the Panel as follows:

Chairman: Mr Eirik Glenne

Members: Mr Minn Naing Oo
Ms Claudia Orozco

1.6 Australia, China, Colombia, the European Union, India, Mexico, Chinese Taipei, Thailand, and the United States, reserved their rights to participate in the Panel proceedings as third parties.⁸

C. PANEL PROCEEDINGS

1.7 On 14 July 2010, the Panel held its organizational meeting with the parties to seek their views on the proposed timetable and working procedures. At this meeting, the Philippines proposed language to be added to the draft working procedures with respect to the protection of business confidential information ("BCI"). The complainants made a number of comments on this proposal.

1.8 On 28 July 2010, taking into consideration the comments made by the parties both during and after the organizational meeting, the Panel adopted its timetable and working procedures. On 31 August, the Panel also adopted additional working procedures concerning BCI.⁹

1.9 The Panel received written submissions from the complainants and the Philippines on 2 September and 14 October 2010, respectively. In accordance with the Panel's working procedures, each party submitted an executive summary of its written submission. Australia and Mexico filed third-party written submissions on 25 October. Australia submitted an executive summary of its third-party written submission.

⁶ See minutes of DSB meetings held on 19 January 2010 and on 20 April 2010 (documents WT/DSB/M/278 and WT/DSB/M/282, respectively).

⁷ *Philippines – Distilled Spirits*, Constitution of the Panel Established at the Requests of the European Union and the United States: Note by the Secretariat (WT/DS396/5 and WT/DS403/5).

⁸ The European Union and the United States reserved their rights to participate as third parties with respect to each other's complaints; Colombia is a third party with respect to the dispute brought by the United States (WT/DS403). See *Philippines – Distilled Spirits*, Constitution of the Panel Established at the Requests of the European Union and the United States: Note by the Secretariat (WT/DS396/5 and WT/DS403/5).

⁹ The Panel's working procedures and the Panel's additional working procedures concerning business confidential information are attached as Annexes G-3 and G-4, respectively, of the reports.

1.10 The Panel held its first substantive meeting with the parties on 17 and 18 November 2010. It met with the third parties on 18 November; in this meeting, Australia, India, and Chinese Taipei delivered oral statements. On 23 November, the Panel sent written questions to the parties and the third parties. On 8 December, the Panel received responses to the questions from the European Union, the United States, the Philippines, Australia, India, and Mexico.

1.11 Parties filed their written rebuttals on 22 December 2010. In accordance with the Panel's working procedures, each party submitted an executive summary of its written rebuttal.

1.12 The Panel held its second substantive meeting with the parties on 9 February 2011.¹⁰ On 15 February, the Panel sent written questions to the parties. On the same date, the Philippines sent a written question to the European Union. On 24 February, the Panel received responses to the questions from the European Union, the United States and the Philippines. On 3 March, the European Union and the United States submitted comments on the Philippines' replies, and the Philippines submitted comments on the European Union's and the United States' replies.¹¹

1.13 On 23 March 2011, the Panel issued the draft descriptive (factual and arguments) sections of its reports. On the same date, Australia, India, Mexico and Chinese Taipei were sent excerpts from the descriptive sections containing the summary of their respective arguments. On 6 April, the Panel received comments from the European Union, the United States and the Philippines on the draft descriptive sections of the reports. It also received comments from Australia on the summary of its own arguments.

1.14 The Panel issued its interim reports to the parties on 4 May 2011. On 25 May, the European Union, the United States and the Philippines requested the Panel to review precise aspects of the interim reports. On 8 June, the parties submitted written comments on each other's comments and requests for interim review. Neither party requested an interim review meeting with the Panel.

1.15 The Panel issued its final reports to the parties on 27 June 2011.

¹⁰ At the second substantive meeting, the European Union and the United States requested the Panel to issue separate reports for each of the disputes in a single document. They further suggested that this document should contain the conclusions and recommendations for each of the disputes on separate pages, with each page bearing only the report symbol relating to that dispute. The Philippines did not object to such request. The Panel's findings are therefore issued in the form of a single document, containing two separate reports. The Panel's conclusions and recommendations for each of the disputes are set out on separate pages, with each page bearing only the report symbol relating to that dispute.

¹¹ In its comments on the Philippines' responses to Panel questions, the European Union submitted exhibit EU-118, and asserted the existence of "good cause", pursuant to paragraph 12 of the Panel's working procedures, for submitting this document at that stage. On 4 March 2011, the Panel invited the Philippines and the United States to comment on the submission of exhibit EU-118 by the European Union. In response to the Panel's invitation, on 9 March the Philippines and the United States provided comments on exhibit EU-118. In their respective comments, the Philippines and the United States did not object to the filing of the document in exhibit EU-118.

II. FACTUAL ASPECTS¹²

A. THE EXCISE TAX

2.1 The measure at issue in the present case is defined by the European Union as "the excise tax regime in force in the Philippines with respect to distilled spirits", or simply the "excise tax regime".¹³ Similarly, the United States refers to the measure at issue as the "Philippines tax system for distilled spirits."¹⁴ For ease of reference, we will refer to the measure at issue as the "excise tax". As described by the complainants in their respective panel requests, the "excise tax" is regulated through the following instruments:

- (a) Section 141 of the *National Internal Revenue Code of 1997*, Republic Act No. 8424¹⁵, as subsequently amended, particularly by Section 1 of Republic Act No. 9334¹⁶;
- (b) Republic Act No. 8240, *an Act amending Sections 138, 139, 140 and 142 of the National Internal Revenue Code, as amended, and for other Purposes*¹⁷;
- (c) *Revenue Regulations No. 02-97 Governing Excise Taxation on Distilled Spirits, Wines and Fermented Liquors*, implementing the relevant provisions of Republic Act No. 8240¹⁸;
- (d) *Revenue Regulations No. 17-99, Implementing Sections 141, 142, 143 and 145(A) and (C) (1), (2), (3) and (4) of the National Internal Revenue Code of 1997 relative to the Increase of the Excise Tax on Distilled Spirits, Wines, Fermented Liquors and Cigars and Cigarettes Packed by Machine by Twelve Per Cent (12%) on 1 January 2000*¹⁹;
- (e) *Revenue Regulations No. 9-2003 Amending Certain Provisions of Revenue Regulations No. 1-97 and Revenue Regulations No. 2-97 Relative to the Excise Taxation of Alcohol Products, Cigars and Cigarettes for the Purpose of Prescribing the Rules and Procedures To Be Observed in the Establishment of the Current Net Retail Price of New Brands and Variants of New Brands of Alcohol and Tobacco Products*²⁰;
- (f) *Revenue Regulations No. 23-2003 Implementing the Revised Tax Classification of New Brands of Alcohol Products and Variants Thereof Based on the Current Net*

¹² This section describes the evidence before the Panel. It includes uncontested facts, as well as factual arguments presented by one or more of the parties that are contested, with the Panel's assessment of those arguments. The Panel used these facts and its factual findings to draw legal conclusions on the claims before it. Those legal conclusions are set forth in Section VII of these reports.

¹³ *Philippines – Distilled Spirits*, Request for the Establishment of a Panel by the European Union (WT/DS396/4), 11 December 2009, p. 1. See also European Union's first written submission, para. 11.

¹⁴ See e.g. United States' first written submission, para. 8.

¹⁵ Exhibits EU-1 and US-1.

¹⁶ Exhibits EU-2, US-2 and PH-4.

¹⁷ Exhibits EU-3, US-3 and PH-31.

¹⁸ Exhibits EU-4 and US-4.

¹⁹ Exhibits EU-5 and US-5.

²⁰ Exhibits EU-6 and US-6.

*Retail Prices Thereof as Determined in the Survey Conducted Pursuant to Revenue Regulations No. 9-2003*²¹;

- (g) *Revenue Regulations No. 12-2004 Providing for the Revised Tax Rates on Alcohol and Tobacco Products introduced on or before 31 December 1996, and for those Alcohol and Tobacco Products Covered by Revenue Regulations No. 22-2003 and 23-2003, Implementing Republic Act No. 9334*²²; and,
- (h) *Revenue Regulations No. 3-2006 Prescribing the Implementing Guidelines on the Revised Tax Rates on Alcohol and Tobacco Products Pursuant to the Provisions of Republic Act No. 9334, and Clarifying Certain Provisions of Existing Revenue Regulations Relative Thereto.*²³

2.2 Under the excise tax, taxes are collected on distilled spirits in accordance with the criteria set out in *Section 141* of the Philippines' National Internal Revenue Code of 1997 (the "NIRC"), as amended.²⁴ In essence, the excise tax creates a system that combines specific and *ad valorem* taxes.²⁵

2.3 Distilled spirits produced from the sap of the *nipa*, coconut, cassava, *camote*, or *buri* palm, or from juice, syrup or sugar of the cane (the designated raw materials) fall under *Section 141(a)* of the NIRC, and are subject to a flat tax rate.²⁶ *Section 141(a)* also requires that the "designated raw materials" be "produced commercially in the country where they are processed into distilled spirits".²⁷ The excise tax rates under *Section 141* have been periodically increased since this provision was

²¹ Exhibits EU-7 and US-7.

²² Exhibits EU-8 and US-8.

²³ Exhibits EU-9 and US-9.

²⁴ *Section 141* of the NIRC was enacted by Republic Act 8424 of 1997, as amended by Republic Act 9334 of 2004, which gives this provision its current text. See exhibits EU-1, US-1 and EU-3, US-3, PH-4, respectively.

²⁵ Until 1996, and with the exception of a brief period between 1985 and 1987 (when an *ad valorem* tax applied to "compounded liquor"), the Philippines always had a pure specific tax system for distilled spirits. In 1996, when Republic Act 8240 introduced for the first time the three-tiered tax rates based on the net retail price of spirits made from "other raw materials", the current system combining a specific and *ad valorem* tax was created. European Union's first written submission, paras. 18–19; Philippines' first written submission, paras. 30–33. But see Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011).

²⁶ European Union's first written submission, para. 15; United States' first written submission, para. 11; Philippines' first written submission, para. 22. The Philippines has generally referred in its submissions to these spirits as "sugar-based spirits". It has referred to distilled spirits produced from other raw materials as "non-sugar-based spirits". We note, however, that all distilled spirits, irrespective of the raw material on which they are based, are made from the fermentation of sugars. See 2.23 below. See also European Union's response to Panel question No. 11, paras. 1–2; United States' opening statement at second substantive meeting, paras. 7–8; United States' response to Panel question No. 11, paras. 1–2; Philippines' first written submission, footnote 8 to para. 10; Philippines' response to Panel question No. 11. Accordingly, we will refer to distilled spirits made from the "designated raw materials" and to distilled spirits made from "other raw materials". Parties have also referred to sugar cane molasses, which is a juice or syrup of the cane and would therefore be a designated raw material.

²⁷ European Union's first written submission, para. 12; United States' first written submission, para. 11; United States' second written submission, para. 47; Philippines' response to Panel question Nos. 60 and 68. Unlike the "raw material" requirement, which has existed under Philippine law as far back as 1914 (with the enactment of Act 2339 – exhibit PH-9), the "commercially produced" requirement was introduced for the first time in 1983 (with the enactment of Executive Order 923 – Exhibit PH-3). European Union's first written submission, para. 17; Philippines' first written submission, footnote 13 to para. 19 and paras. 26–29.

enacted in 1997.²⁸ As from 1 January 2011, spirits falling under *Section 141(a)* are subject to a flat tax rate of Philippine Pesos (PHP) 14.68 per proof litre ("ppl").

2.4 Distilled spirits produced from raw materials other than those indicated above (other raw materials) fall under *Section 141(b)* of the NIRC, which provides for three tax rates that apply depending on the "net retail price" ("NRP")²⁹ of a 750 millilitres (ml) bottle of the spirit.³⁰ As from 1 January 2011³¹, spirits falling under *Section 141(b)* are subject to a tax of:

- (a) PHP 158.73 ppl, if their NRP is less than PHP 250.00;
- (b) PHP 317.44 ppl, if their NRP is PHP 250.00 up to PHP 675.00; or,
- (c) PHP 634.90 ppl, if their NRP is more than PHP 675.00.

2.5 All the rates under *Section 141* are set in "proof litres".³² Because distilled spirits have different alcohol contents (proof) and bottle volumes, the appropriate excise tax applicable to a particular spirit will vary depending on these factors.³³

²⁸ Republic Act 8424 of 1997 determined that the tax rates under *Section 141* were to be increased 12 per cent as from January 2000. Subsequently, Republic Act 9334 of 2004 increased the tax rates by between 30 per cent (for spirits from "designated raw materials") and 50 per cent (for spirits from "other raw materials") compared to the previous year. Republic Act 9334 also determined that the tax rates were to be increased 8 per cent "every two years starting on January 1, 2007 until January 1, 2011." See also Revenue Regulations 3-2006, pp. 7-8 (exhibits EU-9 and US-9), which contains a table indicating all the *Section 141* tax rate increases for 2005, 2007, 2009, as well as the current rates for 2011. European Union's first written submission, paras. 13, 14 and 19; United States' first written submission, para. 12.

²⁹ The NRP is determined by the Philippines' Bureau of Internal Revenue ("BIR") through a price survey conducted by itself or by the National Statistics Office. For brands marketed within Metro Manila, the NRP is the price at which the distilled spirit is sold on retail in at least 10 major supermarkets in Metro Manila, excluding any applicable excise and value-added taxes. For brands marketed outside Metro Manila, the NRP is that at which the distilled spirit is sold in at least 5 major supermarkets in the region, excluding any applicable excise and value-added taxes. See Republic Act 9334 of 2004, Sec. 1, page 3, in exhibits EU-2, US-2 and PH-4. See European Union's first written submission, para. 20; United States' first written submission, para. 17. See also para. 2.9 below.

³⁰ European Union's first written submission, para. 15; United States' first written submission, para. 11; Philippines' first written submission, para. 22.

³¹ The excise tax rates under *Section 141* have been periodically increased since this provision was enacted in 1997. See footnote 28, above.

³² Under Philippine law, a "proof litre" is defined as a "liquor containing one-half (½) of its volume of alcohol of a specific gravity of seven thousand nine hundred and thirty-nine ten thousandths (0.7939) at fifteen degrees centigrade (15°C)." Republic Act 9334, Sec. 1, page 3, in exhibits EU-2, US-2 and PH-4. See also European Union's first written submission, footnote 18 to para. 15.

³³ This means that the more alcohol content and volume a bottle of a given distilled spirit has, the higher the applicable tax will be. The applicable tax of a particular bottle can be determined by using the following formula:

$$\text{Tax Rate} \times \% \text{ of alcohol} \times 2 \times \text{Bottle Volume} = \text{Tax}$$

So, for example, under the current *Section 141(a)* rate of PHP 14.68 per proof litre, the excise tax on a 750 ml bottle of local *White Castle Whisky*, made from designated raw materials (in this case, cane sugar), 80 per cent proof (or 40 per cent alcohol), would be calculated as follows:

$$14.68 \times (40/100) \times 2 \times (750/1000) = \text{PHP } 8.81$$

2.6 With respect to the requirement in *Section 141(a)* that the "designated raw materials" be "produced commercially in the country where they are processed into distilled spirits", the Philippines explained that "there should be no restriction as to the origin of the raw materials used in production, so long as they are also produced commercially in the country where the distilled spirit is manufactured."³⁴ This means that under the measure, imported distilled spirits made from "designated raw materials" may fall under *Section 141(a)* or *Section 141(b)* depending on the country where the distilled spirit (the ethyl alcohol or the finished product, as the case may be) is manufactured.³⁵

2.7 More specifically, distilled spirits (including ethyl alcohol) made from "designated raw materials" and imported from countries where these raw materials are "produced commercially" would be subject to the flat tax rate under *Section 141(a)*. This is the case even if the "designated raw material" used to produce the spirit came from a third country.³⁶ Likewise, a distilled spirit made from "designated raw materials" and imported into the Philippines from a country which does *not* produce the designated raw materials commercially would still be subject to the flat tax rate under *Section 141(a)* if the ethyl alcohol on which the spirit is based was distilled in a third country where the designated raw materials are produced commercially.³⁷

2.8 The transformation of the designated raw materials into distilled spirits (including ethyl alcohol) in countries where these raw materials are *not* "produced commercially" would not allow the resulting spirits to enjoy the flat tax rate under *Section 141(a)*; these spirits are instead subject to one of the three tax rates under *Section 141(b)*.³⁸ This will be the case even if the "designated raw material" used to produce the spirit came from a third country where the material is indeed "produced commercially".³⁹

2.9 Based on the above criteria, each brand of distilled spirit sold in the Philippines is classified as falling under *Section 141(a)* or *(b)* by the Philippine Bureau of Internal Revenue ("BIR") according to its constituent raw material and, if applicable, its NRP. Spirits that are not made from "designated raw materials", or that are made in countries where these materials are *not* "produced commercially",

The excise tax on a 750 ml bottle of imported *Jim Beam Black Whiskey*, made from other raw materials, 86 per cent proof (or 43 per cent alcohol), would be calculated as follows:

$$317.44 \times (43/100) \times 2 \times (750/1000) = \text{PHP } 204.75$$

See United States' first written submission, para. 14 (submitting identical examples, but based on the 2009 applicable tax rates).

³⁴ Philippines' response to Panel question No. 60. See also European Union's first written submission, para. 20; European Union's second written submission, paras. 15-17.

³⁵ See Philippines' response to Panel question Nos. 60 and 68.

³⁶ See e.g. United States' second written submission, para. 46. See Philippines' response to Panel question No. 60 (submitting two BIR rulings: a 1997 BIR ruling with respect to rum imported from Trinidad and Tobago, in which this country was considered to be a sugar cane producer, and a 2007 BIR ruling with respect to rum imported from France, which was also considered to be a sugar cane producer country because the rum came from Martinique, a French territory in the West Indies). See exhibits PH-62 and PH-71. See also European Union's second written submission, footnote 14 to para. 16.

³⁷ See Philippines' response to Panel question No. 68. See also the European Union's comments on the Philippines' response to Panel question No. 68, para. 5.

³⁸ See European Union's second written submission, para. 16; European Union's comments on Philippines' response to Panel question No. 68, paras. 4-9; Philippines' response to Panel question No. 60.

³⁹ Philippines' response to Panel question Nos. 60 and 68. See also European Union's comments on Philippines' response to Panel question No. 68, paras. 4-9.

need to have their NRP established so as to be classified under one of the three rates indicated in *Section 141(b)*.⁴⁰

2.10 With respect to the payment of *Section 141* excise taxes, the following situations may arise. If a domestic producer buys ethyl alcohol made from "designated raw materials" from a domestic supplier in order to manufacture spirits, the latter is liable to pay the *Section 141(a)* tax on the ethyl alcohol. Alternatively, if a domestic producer imports such ethyl alcohol (made from the designated raw materials in a country where these materials are produced commercially), the *Section 141(a)* tax on this product has to be paid to Customs by the "owner or importer" before the good can be released.⁴¹ Finally, with respect to certain spirits that contain more than one material, *Section 141* provides that the excise tax is paid on the component of the mixture, and not on the mixture itself.⁴² The Philippines explains that:

"If the beverage producer imports non-sugar based ethyl alcohol or distilled spirits for blending to make into a whisky or brandy for instance, whether straight, blended or compound spirits, the excise tax under 141 (b) is paid before the goods can be released from the Philippine customhouse.

Hence, the amount of excise tax on a particular product depends on the ratio of sugar-based to non-sugar based spirit (whether 99:1, 90:10; 60:40, 10:90, etc.) contained in the blend or the compound of a distilled spirits product."⁴³

2.11 The classification and applicable tax of "existing brands" and "new brands" of distilled spirits is generally indicated in the annexes to relevant acts and regulations. These annexes are presented in the form of separate tables for spirits made from "designated raw materials" and for spirits made from other raw materials. These tables contain *inter alia* the following information: the brand name of the spirit, its bottle size (in ml), its proof litre, its NRP.⁴⁴

2.12 "Existing brands" include those brands that were registered *before* 1 January 1997, the classification of which, if applicable, was based on the NRP of these products as of 1 October 1996.⁴⁵ Many, but not all, of the "existing brands" are listed in Annex A to Republic Act No. 8240⁴⁶ and

⁴⁰ United States' first written submission, para. 15; Philippines' response to Panel question No. 47.

⁴¹ Philippines' response to Panel question Nos. 59 and 69(a)-(c). See Sections 130 and 131 of the NIRC, in exhibit PH-79.

⁴² *Section 141* states that "... the tax should attach to [the] substance as soon as is in existence as such, whether it be subsequently separated as pure or impure spirits, or transformed into any other substance either in the process of original production or by any subsequent process." So, for example, a whisky from 90 per cent straight whisky and 10 per cent sugar cane neutral spirit would be taxed as follows: the 90 per cent straight whisky component would be subject to one of the three *Section 141(b)* taxes, while the 10 per cent sugar cane neutral spirit component would fall under the *Section 141(a)* flat tax. See Philippines' response to Panel question Nos. 24 and 25.

⁴³ Philippines' response to Panel question No. 69(a).

⁴⁴ The Annexes that contain the classification of spirits falling under *Section 141(b)* are further divided into three sub-categories of spirits: "Premium" (high-priced); "De Luxe" (medium priced); and, "Standard" (Low-priced). See European Union's first written submission, para. 20; Philippines' response to Panel question No. 65.

⁴⁵ Philippines' response to Panel question No. 65. See also Republic Act 8240 in exhibits EU-1 and US-1.

⁴⁶ Republic Act 8240 in exhibits EU-1 and US-1, in which the taxation of distilled spirits was based on Section 138 (later replaced by *Section 141*).

Revenue Regulations 2-97.⁴⁷ "New brands" refer to those brands that were registered and classified after 1 January 1997.⁴⁸

2.13 Revenue Regulations 23-2003⁴⁹ and Revenue Regulations 12-2004⁵⁰ are the two most recent public listings of "existing brands" and "new brands". Revenue Regulations 23-2003 implemented the revised tax classifications of certain "new brands", including variants thereof.⁵¹ Revenue Regulations 12-2004 set out the new revised tax rates (based on Republic Act 9334) of all "existing brands" that were classified under *Section 141(a)*⁵² and also include the rates for a number of additional "existing brands" that were not published before.⁵³ There is no updated, comprehensive list of brands which were introduced after 31 December 2003.⁵⁴

2.14 In the case of "new brands" of imported distilled spirits, the "suggested" NRP of spirits falling under *Section 141(b)* is ascertained based on a "sworn statement" by the importer. Such "suggested" NRP is later analysed and validated by the BIR.⁵⁵

⁴⁷ Revenue Regulations 2-97 in exhibits EU-1 and US-1. According to Republic Act 9334, "existing brands" are not only those set forth in "Annex A" of that Act, but also those that "were registered and were being commercially produced and marketed on or after October 1, 1996, and which continue to be commercially produced and marketed after the effectivity of this Act ..." See Republic Act 9334, in exhibits EU-2, US-2 and PH-4.

⁴⁸ The effective date of Republic Act 8240 is 1 January 1997. "New brands" are defined in Republic Act 9334 (exhibits EU-2, US-2 and PH-4) and Revenue Regulations 3-2006 (exhibits EU-9 and US-9).

⁴⁹ Revenue Regulations 23-2003 in exhibits EU-7 and US-7.

⁵⁰ Revenue Regulations 12-2004 in exhibits EU-8 and US-8. See also United States' first written submission, paras. 68-69.

⁵¹ Such revision was based on a nationwide survey of current NRP conducted by the BIR pursuant to Revenue Regulations No. 9-2003. See Philippines' first written submission, para. 173; Philippines' response to Panel question No. 65.

⁵² These 24 brands were originally listed in "Annex A" of Republic Act No. 8240.

⁵³ See Philippines' response to Panel question No. 65.

⁵⁴ *Ibid.*

⁵⁵ Philippines' response to Panel question Nos. 47 and 66. Revenue Regulations 3-2006, in exhibits EU-9 and US-9, set out the procedure for the submission of the importer's sworn statement and the determination of the NRP. More specifically, as explained by the Philippines, Section 23 of said regulations:

" ... provides that prior to the importation of a new brand or a variant of an existing brand, an application for registration thereof must be filed with the office of the BIR where the importer is registered or required to be registered as an excise taxpayer. The application must be accompanied by, inter alia, a duly notarized importer's sworn statement for each brand and variant of the brand showing, among others, the following information: Name, address, tax identification number and assessment number of the importer; Complete root name of the brand as well as the complete brand name with modifiers, if any; Complete specifications of the brand detailing the specific measurements, weights, manner of packaging, etc.; Name(s) of the region(s) where the brand is/are to be marketed; Wholesale price per case, gross and net of value added tax (VAT) and excise tax; Suggested retail price, gross and net of VAT and excise tax, per bottle; Detailed importation costs and all other expenses incurred or to be incurred until the product is finally sold (e.g. materials, labor, overhead, selling and administrative expenses) per case; Applicable rate of excise tax per unit of measure or value, as the case may be; and Corresponding excise and VAT per case. The importer must submit thereafter an updated sworn statement of the brand on or before the end of the months of June and December of the year. Within 45 days immediately after the end of 3 months from the product launch, the BIR or the National Statistics Office (NSO), when deputized by the BIR for the purpose, shall conduct a price survey to validate the suggested net retail price of the new brand as declared in the importer's sworn statement, against the surveyed net retail price. Based on the results of the price survey, the BIR shall determine the correct tax bracket to which such brand of alcohol shall be classified. A further review is conducted after the end of 18 months from the initial validation, in order to determine the proper tax bracket to which such brand shall be classified."

2.15 Once a specific brand is classified as falling under *Section 141(a)* or *(b)*, the reclassification of that brand is not foreseen and therefore may not occur, except through an Act of Congress.⁵⁶ With respect to spirits falling under *Section 141(b)*, reclassification in a different tax tier is not foreseen, even when the NRP of the spirit concerned changes after the original classification has been made.⁵⁷

2.16 In case an importer of a spirit falling under *Section 141* considers that the classification of such spirit has not been made correctly, the Philippines explains that:

"The affected taxpayer may request a ruling from the Commissioner of Internal Revenue (the head of the Bureau of Internal Revenue) for the proper tax treatment of the product. Section 4 of the NIRC provides that the 'power to interpret the provisions of this Code and other tax laws shall be under the exclusive and original jurisdiction of the Commissioner [of Internal Revenue], subject to review by the Secretary of Finance.' Rulings interpreting the provisions of the NIRC are issued by the Commissioner of Internal Revenue under the power granted to the Commissioner pursuant to this section. In case of an adverse ruling by the Commissioner, the taxpayer may seek the review of such ruling by the Secretary of Finance."⁵⁸

2.17 According to the evidence, all distilled spirits produced in the Philippines are made from designated raw materials and the base spirit has been processed from the designated raw materials either in the Philippines or in other countries where those raw materials are produced commercially. More specifically, and as it will be further described below⁵⁹, most of the distilled spirits produced in the Philippines are made from one particular designated raw material: sugar cane molasses.⁶⁰ Accordingly, all distilled spirits produced in the Philippines are subject to the current *Section 141(a)* flat tax rate of PHP 14.68 ppl. In contrast, the vast majority of distilled spirits imported into the Philippines are made from other raw materials and are thus subject to one of the three current tax rates

⁵⁶ See Sections 4 and 5 of Revenue Regulations 3-2006. See also European Union's first written submission, para. 20; United States' first written submission, para. 16; Philippines' first written submission, para. 306; Philippines' response to Panel question No. 66.

⁵⁷ Philippines' first written submission, para. 306; Philippines' response to Panel question No. 66.

⁵⁸ Philippines' response to Panel question No. 67 (also submitting exhibit PH-78, containing Department Order 7-02, which provides for implementing rules for the relevant part of Section 4 of the NIRC). See also European Union's comments on Philippines' response to Panel question No. 67, paras. 1-3; United States' comments on Philippines' response to Panel question No. 67, paras. 1-2.

⁵⁹ See paras. 2.61, 2.68, 2.74, 2.80, 2.86 and 2.92 below.

⁶⁰ There are however domestic distilled spirits that are made from designated raw materials other than sugar cane molasses (i.e. from the sap of the *nipa*, coconut, cassava, *camote*, or *buri* palm) One example of such a product is "*lambanog*", a local spirit made from coconut. European Union's first written submission, footnote 19 to para. 15; European Union's first written submission, para. 20; European Union's opening statement at first substantive meeting, para. 58; Philippines' first written submission, para. 51; exhibits EU-41, EU-81 and PH-8. According to an estimate provided by the United States, sales of *lambanog* represented approximately 0.011 per cent by volume, and 0.004 per cent by value, of total sales of distilled spirits in the Philippines in the year 2008. See tables 1 and 2 in exhibit US-40. Spirits made from the sap of the *nipa*, *camote*, or *buri* palm are not produced in the Philippines in commercial quantities and are only limited to artisanal producers. Philippines' response to Panel question No. 20; European Union's opening statement at second substantive meeting, para. 68; exhibit EU-81. Pointing to exhibits EU-45 and EU-105, the European Union suggests that there is evidence that other raw materials (such as *camote*) are currently used by Philippine manufacturers in the production of distilled spirits. See European Union's comments on the draft descriptive sections of the Panel Reports (6 April 2011). Exhibits EU-45 and EU-105 contain excerpts from the 2008 and 2009 annual reports of a local manufacturer. The excerpts suggest that the manufacturer is exploring options to produce alcohol from agricultural raw materials other than sugar cane molasses and is showcasing opportunities for local farmers. There is no evidence in any of these exhibits that raw materials other than sugar cane molasses are currently used by Philippine distilled spirits producers in commercial quantities.

under *Section 141(b)*: PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl, depending on their NRP.⁶¹

B. PRODUCTS AT ISSUE

1. Products at issue

2.18 In both the European Union's and the United States' panel requests the relevant products are defined as "distilled spirits".⁶²

2.19 The European Union provides further details on the products at issue:

"[D]istilled spirits falling within the heading 2208 of the Harmonised System (the 'HS'), including, among others, whisky, gin, brandy, rum, vodka, tequila, liqueurs. These products will be collectively referred to as 'distilled spirits' or as 'spirits'."⁶³

2.20 In turn, the United States describes the products at issue thus:

"Distilled spirits are alcoholic beverages made 'from wine or other fermented fruit or plant juice or from a starchy material (such as various grains) that has first been brewed.' By heating the fermented or brewed material, the alcohol is evaporated and captured. This alcohol is the 'distilled spirit.' Distilled spirits are distinguished from other alcoholic beverages, such as beer and wine, by the higher alcohol content. Exhibit US-12, Encyclopedia Britannica Article on Distilled Spirits. Distilled spirits fall under Heading 2208 of the Harmonized Tariff System, and they include many types of spirits, such as gin, vodka, brandy, whiskey, tequila, rum, and liqueurs. See, e.g., Exhibit US-13, Harmonized Tariff System."⁶⁴

2.21 For the purpose of this dispute, we will refer to "distilled spirits" generally, or to specific types of distilled spirits, such as gin, brandy, rum, vodka, whisky, and tequila or tequila-flavoured spirits. The Philippines has issued Standards Administrative Orders (SAOs) for brandy, rum, vodka,

⁶¹ European Union's first written submission, paras. 105 and 161; European Union's opening statement at first substantive meeting, para. 81; United States' first written submission, paras. 73 and 99; United States' opening statement at first substantive meeting, para. 43-46; United States' opening statement at second substantive meeting, para. 48; United States' response to Panel question No. 56, para. 56. According to the last list of brand classification, contained in Revenue Regulation 12-2004, Annexes A and B (based on the 2011 *Section 141* rates and adjusted ppl and bottle volume), the current amount of excise tax applicable to certain brands of "local distilled spirits" made from designated raw materials in 750 ml bottles can range from PHP 6.86 (for *Tanduay ESQ*) to PHP 9.98 (for domestically-produced *Gordon* gin and *Oxford* gin). Conversely, the current amount of excise tax applicable to certain brands of "imported distilled spirits" made from other raw materials in 750 ml bottles can range from PHP 85.71 (*Fundador* and *Veterano Osborne*, both brandies) to a maximum of PHP 409.51 (for *Johnny Walker Blue Label*, *Johnny Walker*, *Old Parr*, *Swing* and *Glenlivet*, all whiskies). See exhibits EU-8 and US-8. See also United States' first written submission, paras. 68-69 (and footnote 83 to para. 68).

⁶² *Philippines – Distilled Spirits*, Request for the Establishment of a Panel by the European Union (WT/DS396/4), 11 December 2009, p. 3. See also European Union's first written submission, para. 122. *Philippines – Distilled Spirits*, Request for the Establishment of a Panel by the United States (WT/DS403/4), 29 March 2010, p. 1.

⁶³ European Union's first written submission, para. 10. See also European Union's response to Panel question No. 64, paras. 1-3.

⁶⁴ United States' first written submission, footnote 1 to para. 1.

and whisky detailing the standards that these products must meet to be sold in the Philippines under each of these designations.⁶⁵

2. Characteristics of distilled spirits

2.22 In terms of physical characteristics, distilled spirits relevant in the present dispute are concentrated forms of potable alcohol (suitable for human consumption) obtained through the process of distillation.⁶⁶ Combined, ethyl alcohol and water account for more than 99 per cent of the content of all distilled spirits.⁶⁷ The average alcohol content for distilled spirits relevant in the present dispute ranges from around 25 per cent to 40 per cent by volume (or 50 to 80 US proof). Spirits of the same category tend to have similar alcohol content.⁶⁸

2.23 The production of distilled spirits starts with the fermentation of feedstock. Fermentation results in the breakdown of sugars and the production of ethyl alcohol (ethanol), carbon dioxide and small amounts of other by-products. Feedstock for the production of ethyl alcohol can consist of any raw material that contains natural sugar or other carbohydrates that can be converted into sugars (such as sugar-cane, molasses, sugar beet, roots, juice of grapes, or mash of grains or cereals).⁶⁹ After fermentation, the elaboration of spirits involves the distillation of ethyl alcohol by boiling the product and separating its components based on the differences in their respective volatilities. When the different components evaporate, they are captured in separate containers.⁷⁰ Depending on the raw material used, different congeners are naturally formed during the process of fermentation. Congeners are chemical compounds associated with the flavour and aroma characteristic of specific alcoholic beverages, such as acetal, acetaldehyde, ethyl acetate, isoamyl acetate, isoamyl alcohol, isobutanol, methanol and n-propanol.⁷¹ Levels and combinations of various congeners vary according to the type of spirit, and even according to the brand of the same spirit. As noted by the parties, congeners may make up less than one per cent of the volume of the final product.⁷²

2.24 In certain cases, the flavour and aroma of specific distilled spirits may depend on the raw materials used in their production. The flavour and aroma may also be affected by post-distillation processes such as ageing, blending, filtering, diluting with water and incorporating additional

⁶⁵ United States' first written submission, paras. 27-30.

⁶⁶ European Union's first written submission, paras. 79 and 121; Philippines' response to Panel question No. 11; exhibit EU-99.

⁶⁷ European Union's first written submission, para. 79.

⁶⁸ *Ibid.*, para. 84. See also exhibits EU-55 and EU-79. Referring to an argument in its first written submission, the Philippines contests our conclusion that spirits of the same category tend to have similar alcohol content. See Philippines' first written submission, para. 136; Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). The Philippines' argument, however, refers to differences in alcohol content between a particular domestic whisky and imported whiskies. In our view, it does not affect our general conclusion.

⁶⁹ European Union's response to Panel question No. 11, paras. 1-2; European Union's second written submission, para. 19; United States' response to Panel question Nos. 11 and 31, paras. 1-2 and 18; Philippines' first written submission, paras. 100-101; Philippines' response to Panel question No. 11. See also exhibits EU-84, US-12, PH-26 and PH-28.

⁷⁰ United States' response to Panel question No. 11, paras. 1-2; Philippines' first written submission, paras. 106-107; exhibit PH-28.

⁷¹ Philippines' first written submission, paras. 102-105, 138, 149 and 164; Philippines' response to Panel question No. 11. See exhibits PH-26, PH-40 and PH-80.

⁷² European Union's second written submission, paras. 60-65; European Union's comments on Philippines' response to Panel question No. 70, paras. 10-13; Philippines' opening statement at second substantive meeting, para. 13; Philippines' response to Panel question No. 70; exhibits EU-92, PH-40 and PH-80.

flavourings.⁷³ Indeed, the trace of the original raw materials in the taste of the final product may be altered by the addition of natural or artificial flavourings.⁷⁴

2.25 As explained below, the colour, odour and taste normally associated with certain types of spirits, such as brandy, rum, whisky or tequila, are natural results of the distillation of ethyl alcohol from certain raw materials, such as wine or fortified wine, sugar molasses, wheat, barley or malt, or agave, respectively, and their respective process of production. For other types of spirits, such as gin and vodka, the ethyl alcohol is normally stripped of its congeners, so as to obtain a neutral spirit. In the Philippines, most types of spirits (such as gin, brandy, rum, vodka, whisky and tequila or tequila-flavoured spirits) are distilled from sugar cane molasses (one of the designated raw materials).⁷⁵ In the case of Philippine brandy, vodka, whisky and tequila or tequila-flavoured spirits, the ethyl alcohol is stripped of its congeners to produce a neutral spirit. Special additives are then incorporated into the cane sugar-based spirit in order to ensure, as much as possible, that it has the colour, odour and taste traditionally associated with brandy, whisky or tequila.⁷⁶

2.26 Different brands of spirits of the same type may have differences in taste and aroma, and a consumer may prefer one product over another. However, there is no evidence to suggest that a non-expert consumer would be able to distinguish between imported and domestic spirits of the same type based only on the different raw materials used in their respective production.⁷⁷ Distilled spirits relevant in the present dispute have colours that range from clear (transparent) to golden or mahogany.

2.27 Many of the physiological effects on humans associated with the consumption of distilled spirits, such as intoxication, are due to the presence of ethyl alcohol. These effects may vary according to many factors, including the type and quantity of spirit consumed, the weight, gender and age of the consumer, body chemistry, food in the stomach and drinking experience. There is no

⁷³ European Union's first written submission, para. 82; Philippines' first written submission, paras. 108-110. But see Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011).

⁷⁴ Philippines' first written submission, paras. 108 and 112; exhibits PH-26 and PH-34.

⁷⁵ The ethyl alcohol distilled from one of the designated raw materials and used by Philippine spirits producers may be made in the Philippines or imported from another country. Philippines' first written submission, para. 301.

⁷⁶ European Union's second written submission, paras. 5-6; United States' response to Panel question Nos. 21 and 23, paras. 11 and 13; Philippines' first written submission, paras. 11, 98, 118-119, 134, 141, 143 and 169; Philippines' response to Panel question Nos. 17, 20, 31 and 32. According to the Philippines, these additives include "nature-identical flavourings", which are "chemically identical to natural flavourings but are prepared or extracted using chemical methods. They are identical to the molecules found in nature and the body cannot distinguish between them. Nature identical flavouring substances include: ethyl acetate (identical in nature to many fruits) and decanal (nature identical to orange)." Philippines' first written submission, footnote 129 to para. 108.

⁷⁷ European Union's response to Panel question Nos. 29 and 31, paras. 27-28 and 36-38; exhibits EU-86 and PH-43. The Philippines refers to a statement in the *Euromonitor International* survey ("Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 19), as evidence that non-expert consumers may be able to distinguish between imported and domestic spirits based on the different raw materials used in their respective production. See Philippines' first written submission, para. 130; Philippines' second written submission, paras. 34-38; Philippines' response to Panel question Nos. 29, 31 and 32; Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). In our view, however, the consumers responses cited in the *Euromonitor International* survey do not disprove our conclusion. Consumers consulted in this survey were not subject to a blind test, but were rather expressing personal preferences, based on perceptions, between more-expensive imported spirits and less-expensive domestic spirits.

evidence of any difference in this regard between imported and domestic spirits, nor between spirits made from the designated materials and those made from other materials.⁷⁸

2.28 Distilled spirits are normally bottled. Frequent bottle presentations are 750 ml and 700 ml, but also 375 ml, and 1,000 ml.⁷⁹ Bottles carry labels, which have designs that tend to be similar for specific types of distilled spirits.⁸⁰

2.29 The cost of the raw materials used in the production of the base spirit may bear little relation with the price of the final product. Depending on the specific product, bottling, packaging, aging, marketing and promotion can have a significant impact on the total cost.⁸¹

2.30 With respect to domestic regulations on distilled spirits in the Philippines, local ordinances against drunk driving do not distinguish between imported and domestic spirits, nor between spirits made from the designated materials and those made from other materials. Nor is any such distinction made in local ordinances with respect to "the sale, dispensation and/or distribution of alcoholic beverages".⁸²

3. Distilled spirits market in the Philippines

2.31 According to figures submitted by the European Union, the population in the Philippines was about 91,983,102 for the year 2009.⁸³ The Philippines has provided information on the income and expenditure of Philippine households. By 2006, 45 per cent of the population earned less than 2 United States dollars a day.⁸⁴ In the same year, the poorest 30 per cent of the Philippine population would have received 10 per cent of the total income, while the richest 10 per cent would have received 34 per cent of the income.⁸⁵ Food and non-alcoholic beverages would account for 42 per cent of household expenditures in the Philippines; alcoholic beverages would account for 1.2 per cent.⁸⁶

⁷⁸ European Union's first written submission, para. 88; Philippines' first written submission, para. 175. See also exhibit EU-50.

⁷⁹ European Union's first written submission, para. 83. International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15, and exhibits EU-80 and PH-19.

⁸⁰ European Union's first written submission, para. 83. See exhibits EU-55, EU-79 and US-38.

⁸¹ European Union's response to Panel question No. 77, paras. 19-20; European Union's comments on the Philippines' response to Panel question No. 77, paras. 39-40; United States' response to Panel question No. 77, paras. 9-13; Philippines' response to Panel question Nos. 76 and 77; Philippines' comments on the European Union's and on the United States' responses to Panel question No. 77, paras. 14-16. Referring to its response to questions 76 and 77 and to its comments on the European Union's and on the United States' responses to question 77, the Philippines contests our conclusion that the cost of raw materials may bear little relation with the price of the final product. See Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). The Philippines' arguments regarding alleged differences in cost between spirits made from the designated materials and those made from other materials, however, do not affect our general conclusion regarding the price of final products, which depends also on other factors.

⁸² European Union's first written submission, paras. 90-91; European Union's opening statement at second substantive meeting, para. 62; United States' first written submission, paras. 53-55. See also exhibits EU-51, EU-52, EU-53, US-28, US-29.

⁸³ European Union's first written submission, para. 4.

⁸⁴ Philippines' first written submission, para. 42; exhibits PH-8 and PH-21 (figures in 2005 international prices, adjusted at purchasing power parity).

⁸⁵ Philippines' first written submission, para. 42; exhibit PH-8.

⁸⁶ Philippines' first written submission, para. 44; exhibit PH-8.

2.32 The following table, provided by the Philippines, divides the population in five on monthly household expenditures. The bottom two classes, spending less than PHP 45 per week on alcoholic beverages, would make up 72.7 per cent of the total Philippine population:⁸⁷

Class by Household monthly income	% of population	Total monthly expenditure (PHP)	Weekly expenditure on alcoholic beverages (PHP)
AB (PHP 50,000 and more)	2.1	50,007 – 353,512	150 – 1,061
Upper C (PHP 30,001 – 50,000)	5.5	30,022 – 49,979	90 – 150
Lower C (PHP 15,001 – 30,000)	19.7	15,001 – 29,997	45 – 90
D (PHP 8,001 – 15,000)	29.9	8,001 – 14,995	24 – 45
E (less than 8,000)	42.8	343 – 8,000	1 – 24

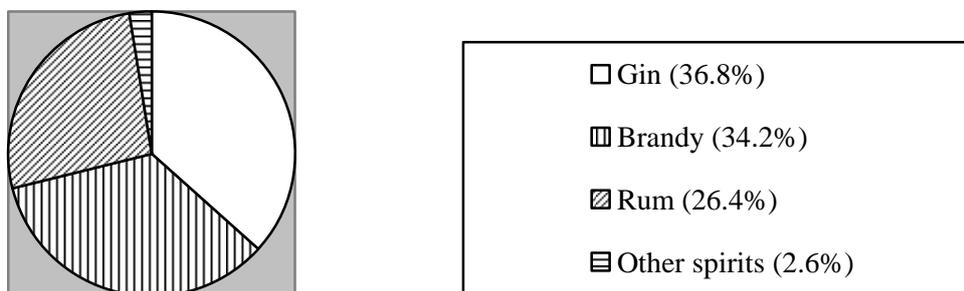
2.33 According to figures submitted by the United States, annual sales of distilled spirits in the Philippines have risen "from just over 400 million liters to just under 600 million liters over the past ten years [2000-2009], with the highest figures (in value as well as volume) in 2009".⁸⁸ As shown below, in 2009 three types of distilled spirits (gin, brandy and rum) constituted 97.4 per cent of these sales: gin represented some 36.8 per cent, brandy some 34.2 per cent and rum some 26.4 per cent. The remaining 2.6 per cent of the Philippines' sales were split between vodka, whisky, tequila or tequila-flavoured spirits, and assorted local spirits.⁸⁹

⁸⁷ Philippines' response to Panel question No. 72; exhibits PH-8, PH-18 and PH-22. See also Philippines' first written submission, paras. 44-46 and 181; Philippines' second written submission, paras. 50-54. But see European Union's comments on the Philippines' response to Panel question No. 72, paras. 19-20; United States' comments on the Philippines' response to Panel question No. 72, para. 12.

⁸⁸ United States' first written submission, para. 31. See *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 11. See also United States' first written submission, para. 32, as well as the estimates in International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15.

⁸⁹ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15. See also *Euromonitor International*, "Country Sector Briefing" (March 2009), in exhibit US-40; European Union's first written submission, para. 35; United States' first written submission, paras. 31-33; United States' second written submission, para. 49; United States' response to Panel question No. 85, paras. 29-32; Philippines' first written submission, para. 298. Referring to its comments on the European Union's and on the United States' responses to Panel question No. 83, paras. 19-23, the Philippines contests our estimations on the relative shares of the different spirits in its market. Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). The Philippines, however, has not submitted alternative estimations on the relative shares of the different spirits in its market. Furthermore, the Philippines comments on responses to Panel question 83, refer to the *Euromonitor International* study in exhibits EU-41 and US-41, and not to the International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15, on which our estimations are based. Indeed, in its comments on responses to Panel question 83, the Philippines stated that the IWSR figures are "closer to the Philippine industry figures than the Euromonitor's figures." Philippines' comments on the European Union's and on the United States' responses to Panel question No. 83, para. 22.

Percentage distribution of distilled spirits sales in the Philippines in the year 2009⁹⁰



2.34 According to estimates submitted by the European Union and the United States, domestic products accounted for 97.7 per cent of spirits consumption in the Philippines during the year 2009, while imported spirits accounted for the remaining 2.3 per cent of consumption.⁹¹

2.35 The European Union and the United States provided the following estimates to the Panel, regarding the domestic consumption of distilled spirits in the Philippines during the year 2009, as well as the percentage of imported spirits:⁹²

	Gin	Brandy	Rum	Vodka	Whisky	Tequila ⁹³
Domestic consumption in 2009 (in thousands of 9-litre cases)	18,075	16,802	12,972	132	85	24
Percentage of imports	0.01%	5.4%	0.02%	28.44%	100% ⁹⁴	100% ⁹⁵

⁹⁰ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15.

⁹¹ *Ibid.*, p. 7. See also European Union's first written submission, para. 24; and United States' first written submission, para. 33. But see Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, p. 14 (estimating that imported spirits would account for a 9.4 per cent market share in the Philippines in April 2010). The Philippines contests our estimations on the relative shares of domestic and imported distilled spirits in its market, referring to the impact that smuggling may have on the market share of imported spirits. Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). See e.g. Philippines' first written submission, para. 41. The Philippines, however, has not submitted alternative estimations on the relative shares of domestic and imported distilled spirits in its market, nor on the impact that smuggling may have on those shares.

⁹² See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15. See also European Union's first written submission, para. 36. Referring to its response to Panel question No. 86, as well as to its comments on the European Union's and on the United States' responses to Panel question Nos. 83, paras. 19-23, and 86, the Philippines contested our estimations on the domestic consumption of distilled spirits in the Philippines, as well as the percentage of imported spirits. Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). The Philippines, however, has not submitted alternative estimations. Furthermore, the Philippines comments on responses to Panel question No. 83, refer to the *Euromonitor International* study in exhibits EU-41 and US-41, and not to the International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15, on which our estimations are based. Indeed, in its comments on responses to Panel question 83, the Philippines stated that the IWSR figures are "closer to the Philippine industry figures than the Euromonitor's figures." Philippines' comments on the European Union's and on the United States' responses to Panel question No. 83, para. 22.

⁹³ Includes tequila and tequila-flavoured spirits.

⁹⁴ Imports represented almost 100 per cent of whisky consumption in the Philippines in the year 2009.

⁹⁵ Imports represented almost 100 per cent of the consumption of tequilas and tequila-flavoured spirits in the Philippines in the year 2009.

2.36 Generally speaking, imported brands tend to be more expensive in the Philippines (even before taxes) than the corresponding domestic brands of the same type of spirit.⁹⁶ However, as will be noted below with respect to specific types of spirits, there are a number of high-priced domestic spirits, as well as less expensive imports.⁹⁷

2.37 All gins, brandies, rums, vodkas, whiskies and tequilas or tequila-flavoured spirits made in the Philippines are subject to the lower excise tax rate as they are produced from sugar cane molasses, one of the designated raw materials.⁹⁸ In contrast, imported gins, brandies, vodkas, whiskies and tequilas sold in the Philippines are produced with raw materials other than those designated in the challenged measure and are subject to higher tax rates.⁹⁹ In the case of imported rums, some products such as *Bacardí Superior* (which represented 80 per cent of the imported rum consumed in the Philippines in the year 2009) and *Bardinet*, are subject to the lower excise tax rate applicable to spirits produced with designated raw materials¹⁰⁰, while some others, such as *Havana Club* and *Myers's*, are subject to the higher excise tax rates applicable to spirits produced with other than the designated raw materials.¹⁰¹

⁹⁶ See *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 9; exhibits PH-19 (original), PH-19 (amended) and PH-77. See also Philippines' first written submission, para. 227; and exhibits EU-103, PH-51 and PH-83.

⁹⁷ See exhibits PH-19 (original), PH-19 (amended) and PH-77. See also exhibits EU-80 and EU-118; European Union's first written submission, paras. 154-157; European Union's opening statement at first substantive meeting, paras. 34-54; European Union's second written submission, paras. 3-4, 35-52; European Union's opening statement at second substantive meeting, paras. 51-60; European Union's response to Panel question Nos. 30, paras. 29-30, 33, paras. 39-43, 49, para. 78, and 73, paras. 13-18; European Union's response to Philippines' question, paras. 54-60; European Union's comments on Philippines' response to Panel question No. 75, paras. 23-31; United States' second written submission, paras. 29-31; United States' opening statement at second substantive meeting, paras. 28-29; United States' response to Panel question Nos. 33, paras. 19-21, 57, para. 64, and 73, paras. 4-6; United States' comments on Philippines' response to Panel question Nos. 74-75, paras. 13-14; Philippines' first written submission, paras. 14, 36-39, 177, 226-251; Philippines' opening statement at first substantive meeting, paras. 9, 27-30 and 34-35; Philippines' second written submission, paras. 16-17 and 28; Philippines' opening statement at second substantive meeting, paras. 9, 27-30 and 34-35; Philippines' response to Panel question Nos. 17, 35, 53, 54, 74 and 75; Philippines' comments on the European Union's and on the United States' responses to Panel question No. 73, paras. 6-13; Philippines' comments on the European Union's response to Philippines' question, para. 29. In its first written submission, the Philippines provided information on the net retail prices (before excise tax and value-added tax) for September 2010 of a number of distilled spirits, both domestic and imported, in exhibit PH-19 (original). During the first meeting of the Panel with the parties, the Philippines amended the price information in exhibit PH-19 (amended). In its second written submission, the Philippines provided yet further new price information, in exhibit PH-77, to replace the one previously submitted.

⁹⁸ European Union's first written submission, paras. 36, 39, 40 and 42.

⁹⁹ *Ibid.*, paras. 37, 38 and 43.

¹⁰⁰ *Ibid.*, para. 41; United States' opening statement at second substantive meeting, para. 42; Philippines' first written submission, para. 39; Philippines' opening statement at second substantive meeting, paras. 36-37; Philippines' closing statement at second substantive meeting, para. 6(d); Philippines' response to Panel question Nos. 60 and 67. See also exhibits PH-62 and PH-71.

¹⁰¹ European Union's first written submission, paras. 41, 70 and 177; European Union's opening statement at first substantive meeting, paras. 52-54; European Union's second written submission, paras. 7 and 110-116; European Union's opening statement at second substantive meeting, para. 70; European Union's response to Panel question No. 34, para. 48; United States' first written submission, paras. 30 and 89; United States' second written submission, paras. 46-49; Philippines' first written submission, paras. 94, 171-174 and 303; Philippines' opening statement at second substantive meeting, para. 37; Philippines' response to Panel question No. 17. See also para. 2.74 below.

2.38 As noted by the European Union, "distilled spirits in general have the same end uses ... All of them are drunk with the same purpose: thirst quenching, socialization, relaxation, pleasant intoxication."¹⁰² Those end uses do not depend on the origin of the spirits (domestic or imported), nor on the raw materials used in their respective production.

2.39 Distilled spirits can be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails.¹⁰³ The promotional materials prepared by manufacturers and distributors of both domestic and imported spirits sold in the Philippines suggest almost identical uses for each category of spirit. In other words, for products such as gin, brandy, rum, vodka, whisky and tequila or tequila-flavoured spirits, whether the spirit is drunk straight, with ice, mixed or used in the preparation of specific cocktails does not depend on the origin of the spirit, nor on the raw materials used in its production.¹⁰⁴

2.40 Distilled spirits, regardless of their respective origin or the raw materials used in their production, are drunk at home, in the homes of family or friends or in public places, such as restaurants, bars, pubs, clubs and discotheques. The evidence suggests that premium distilled spirits are largely consumed on premise (in restaurants, bars, pubs, clubs and discotheques), while less-expensive spirits may be proportionally more consumed off premise (in private homes).¹⁰⁵ They can be consumed before, during or after meals. The occasions and the manner of consuming a specific spirit, for example, whether it is consumed as an aperitif or after a meal, depend on the particular tastes of the consumer and on the type of spirit and not on the spirit's origin or on the raw materials used in its production.¹⁰⁶ As noted in the promotional materials prepared by manufacturers and distributors of both domestic and imported spirits sold in the Philippines, these products can be consumed on a number of occasions, such as parties, reunions, celebrations and romantic encounters.¹⁰⁷ Consumers tend to drink more expensive spirits on special occasions.¹⁰⁸

¹⁰² European Union's first written submission, para. 64. See also *ibid.*, para. 125; European Union's second written submission, para. 82; Philippines' first written submission, para. 201.

¹⁰³ European Union's first written submission, paras. 64-70 and 125; European Union's second written submission, paras. 89 and 104-107; United States' first written submission, para. 61; *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 8; and exhibits EU-27 and US-46.

¹⁰⁴ European Union's first written submission, paras. 65-70; European Union's response to Panel question No. 49, para. 79. See exhibits EU-26, EU-27, EU-28, EU-29, EU-30, EU-31, EU-32, EU-33, EU-34, EU-35, EU-36, EU-37, videos in EU-38, US-40 and US-46. The Philippines suggests that there is evidence that less-expensive domestic distilled spirits are largely used as mixers, while more expensive (premium) spirits may be consumed by shots. See Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). The evidence indicated by the Philippines, however, refers only to vodka. Furthermore, the evidence suggests a difference in the mode of consumption of more-expensive (premium) spirits compared to less-expensive spirits. This does not imply a difference in the mode of consumption of imported and domestic spirits, nor between spirits made from the designated materials and those made from other materials.

¹⁰⁵ Philippines' first written submission, paras. 263-266; International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15.

¹⁰⁶ European Union's first written submission, paras. 73 and 125; European Union's response to Panel question No. 49, para. 79; United States' first written submission, para. 61, *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, pp. 8-9. See also exhibits US-26 and US-32.

¹⁰⁷ European Union's first written submission, paras. 74-75. See exhibits EU-39, EU-40, EU-62, as well as videos in EU-38 and *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41.

¹⁰⁸ See *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 8. See also European Union's response to Panel

2.41 Evidence submitted by the parties suggests that the same outlets where imported spirits are sold either for consumption on the premises (restaurants, bars, pubs, clubs, discotheques, hotels, etc.) or off the premises (stores or supermarkets) also offer domestic spirits.¹⁰⁹ The opposite is not always the case: many establishments (especially, small retail stores) that offer domestic spirits do not carry imported spirits.¹¹⁰

2.42 The evidence suggests that the marketing campaigns of all distilled spirits, whether imported or domestic, and irrespective of the specific type of spirit and the raw materials used in their respective production, are very similar. Advertising campaigns, including printed material and videos, tend to associate consumption of spirits with the enjoyment of friendship and romantic moments by young people, or the celebration of important events, in parties, in bars or clubs, or in houses or parks. In the case of premium spirits, namely those that are priced relatively higher, the campaigns also emphasize an image of class and glamour.¹¹¹

2.43 A survey of consumer perceptions produced by *Euromonitor International* and submitted by the European Union and the United States suggests that local consumers in the Philippines would be "more willing to purchase [imported spirits]" when the price of those spirits decreases and the price of domestic spirits increases, even if "import prices continued to be at least twice as expensive as domestics".¹¹² According to this survey, "[o]n average, at an import price decrease of 25% and domestic increase of 50%, consumers were 4.9% more willing to purchase imports and 4.0% less

question No. 35, para. 55; United States' opening statement at first substantive meeting, para. 34; and United States' response to Panel question No. 35, para. 27.

¹⁰⁹ European Union's first written submission, paras. 72, and 141-143; European Union's second written submission, para. 109; European Union's response to Panel question Nos. 51, paras. 82-84, and 71, para. 8; United States' first written submission, paras. 56-58, 62 and 96; United States' opening statement at first substantive meeting, para. 33; United States' response to Panel question Nos. 55, para. 53, and 71, para. 3; Philippines' first written submission, paras. 260-262; Philippines' response to Panel question No. 71. See exhibits EU-66, EU-67, EU-68, EU-69, EU-70, EU-71, EU-104, US-30, US-31, US-42 and US-43. But see Philippines' first written submission, paras. 260-270; exhibits PH-19, PH-57 and PH-60.

¹¹⁰ European Union's opening statement at first substantive meeting, paras. 70-72; European Union's second written submission, para. 98; European Union's opening statement at second substantive meeting, paras. 39-41; European Union's response to Panel question Nos. 49, para. 83, and 71, paras. 9-12; United States' response to Panel question No. 71, para. 3; Philippines' first written submission, paras. 253-255 and 257-259; Philippines' response to Panel question Nos. 71 and 76. See exhibits PH-19, PH-53, PH-54, PH-55, PH-56, PH-58 and PH-59.

¹¹¹ European Union's first written submission, paras. 64-70, 74-75, 77-78, 126-127 and 136; European Union's second written submission, paras. 90-94, United States' first written submission, para. 48; exhibits EU-27, EU-28, EU-29, EU-30, EU-31, EU-32, EU-33, EU-34, EU-36, EU-37, EU-38, EU-39, EU-40, EU-44, EU-45, EU-46, EU-56, EU-57, EU-58, EU-59, EU-60, EU-62, EU-63, EU-64, EU-65. But see Philippines' first written submission, paras. 184-187 and 283. The Philippines suggests that there is evidence of substantial differences in the marketing campaigns of imported and domestic spirits. See Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011); Philippines' response to Panel question No. 76. The evidence indicated by the Philippines, however, suggests that differences in marketing campaigns, if any, would be between more-expensive (premium) spirits and less-expensive spirits. This does not necessarily imply differences between imported and domestic spirits, nor between spirits made from the designated materials and those made from other materials.

¹¹² See *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 9. See also European Union's response to Panel question No. 83, paras. 35-35; United States' opening statement at first substantive meeting, paras. 21-26; United States' response to Panel question No. 83, paras. 21-25; Philippines' first written submission, paras. 180-182, 240-241 and 268; Philippines' comments on the European Union's and on the United States' responses to Panel question No. 83, paras. 19-23; exhibit US-52.

likely to purchase domestics."¹¹³ Moreover, "[o]n average, at an import price decrease of 40% to 60% and domestic increase of 100% to 200%, consumers were 10.1% more willing to purchase imports and 6.5% less likely to purchase domestics."¹¹⁴ The survey concludes that, "[i]f price were no issue, on average, consumers were 43% more likely [to] purchase local brands and 86.2% more likely to purchase imported ones."¹¹⁵

2.44 In turn, the Philippines has submitted a survey by Abrenica & Ducanes from the University of Philippines School of Economics that concludes that distilled spirits have low own- and cross-price elasticity in the Philippine market and that "local and imported brands [of spirits are] non-substitutable".¹¹⁶ According to this survey, a narrowing of price differentials between imported and domestic spirits would only result in a small change in their respective market shares.¹¹⁷ The same survey concludes that if excise taxes were completely removed thereby reducing prices for all distilled spirits, the market share of imported distilled spirits would increase from around 9.4 per cent to around 11.7 per cent.¹¹⁸

2.45 Both the survey of consumer perceptions submitted by the European Union and the United States and the Abrenica & Ducanes survey submitted by the Philippines suggest that certain constraints (such as price, information, distribution and brand recognition) affect consumer choices in the Philippines' distilled spirits market. The Abrenica & Ducanes survey notes that custom and tastes also create a brand loyalty that prevents many consumers from switching brands.¹¹⁹ As noted by this survey, the characteristics of specific spirits are known to consumers through product reputation or personal experience.¹²⁰ The *Euromonitor International* survey points out availability, in addition to price, as one of the most cited reasons why Philippine consumers select domestic, as opposed to imported spirits; domestic products are often the only option available.¹²¹ Despite their shortcomings¹²², both studies suggest that, within the Philippines' market, a simultaneous increase in the price of domestic spirits and decrease in the price of imported spirits, such as that which would

¹¹³ See *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 9.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ See Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, pp. 2 and 20. The survey used 23 distilled spirits brands, of which 14 domestic and 9 imported. The distilled spirits brands selected include: 6 Gins (4 domestic, 2 imported); 6 brandies (3 domestic, 3 imported); 2 rums (1 domestic, 1 imported); 5 vodkas (4 domestic, 1 imported); and, 4 whiskies (2 domestic, 2 imported). See also European Union's second written submission, paras. 85-89 and 97-102; United States' opening statement at first substantive meeting, paras. 27-29; United States' second written submission, para. 51, and KPMG for The Scotch Whisky Association, "The substitutability of imported and locally produced spirits in the Philippines" (December 2010), in exhibits EU-102 and US-48.

¹¹⁷ See Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, p. 14. See also Philippines' first written submission, para. 235.

¹¹⁸ See Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, p. 14. See also European Union's comments on Philippines' response to Panel question No. 89, paras. 44-46; Philippines' first written submission, para. 236; Philippines' response to Panel question No. 89.

¹¹⁹ Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, pp. 7, 10, 12 and 20.

¹²⁰ *Ibid.*, p. 2.

¹²¹ *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, pp. 8-9 and 17-18.

¹²² See paras. 7.62, 7.76 and 7.112 below.

result from an equalization in the respective level of the excise tax, could result in the substitution of the consumption of imported spirits in lieu of domestic spirits.¹²³

4. Tariff classification

2.46 The "Harmonized Commodity Description and Coding System" ("Harmonized System" or "HS") was established under the "International Convention on the Harmonized Commodity Description and Coding System" ("HS Convention") and entered into force on 1 January 1988. Since its entry into force, the HS has been partially amended every four to six years. These amendments entered into force on 1 January 1992 (HS1992), 1 January 1996 (HS1996), 1 January 2002 (HS2002) and 1 January 2007 (HS2007).¹²⁴ The HS2007 is the current version of the HS.¹²⁵

2.47 As explained by a previous panel:

"The preamble of the HS Convention sets out the objectives of the HS including 'to facilitate international trade', 'to facilitate the collection, comparison and analysis of statistics', 'to reduce the expense incurred by re-describing, reclassifying and recoding goods as they move from one classification system to another in the course of international trade', and 'to facilitate the standardisation of trade documentation and the transmission of data'. The HS Convention aims to achieve these objectives through the HS, which establishes an international standard for product nomenclature for more than 5,000 commodity groups, and includes approximately 1,200 headings that are grouped into 21 sections comprising 99 chapters. Product groups are organized systematically and each group is identified by a 'heading', represented as a four-digit code. The first two digits indicate the chapter to which they correspond, while the two subsequent digits indicate the position within the heading of a particular chapter. HS headings are sometimes further divided into subheadings, which are identified by a six-digit code, which is the maximum level of disaggregation permitted by the HS. The last two digits then indicate the relevant HS subheading.

The HS Convention requires contracting parties to the HS to ensure that their laws are in conformity with the HS. Article 3.1(a)(i) of the HS Convention provides in particular that HS contracting parties shall use, in respect of their customs tariff and

¹²³ See for example United States' opening statement at first substantive meeting, para. 28; United States' second written submission, para. 52; United States' comments on Philippines' response to Panel question No. 89, paras 26-28; Philippines' response to Panel question No. 89. See also exhibit PH-51. The Philippines contests our conclusions regarding the *Euromonitor International* and the Abrenica & Ducanes surveys. Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). While in our view the surveys have significant limitations, we believe our statement is a fair characterization of conclusions that can be inferred from both.

¹²⁴ For an explanation by the WCO Secretariat of the list of the amendments, see: TAR/W/91 (HS1996), G/MA/W/26 (HS2002), G/MA/W/76 (HS2007).

¹²⁵ In their respective responses to Panel question No. 41, the parties have confirmed that the text of the HS they have referred to in the present dispute corresponds to that of HS2007. The European Union, however, has qualified its response stating that the alleged inconsistencies of the measure at issue started before the 2007 version of the HS came into effect. Accordingly, unless otherwise noted, all references in these reports to any HS material (chapters, headings, subheadings, etc.) should be understood as references to the 2007 version of the HS (HS2007).

statistical nomenclatures, all the HS headings and subheadings 'without addition or modification, together with their related numerical codes'. ...¹²⁶

2.48 Article 6 of the HS Convention establishes an HS Committee composed of representatives from each of the Contracting Parties that meets at least twice annually. Under Article 7(1)(b) of the HS Convention, the HS Committee prepares HS Explanatory Notes (HSEN), classification opinions and other advice as *guidance* to secure uniformity in the interpretation of the HS. The HSEN provide guidance for interpreting the terms of a specific HS heading; pursuant to Article 3.1(a) of the HS Convention, the HSEN are not binding.¹²⁷

2.49 Distilled spirits at issue in this dispute fall within the HS heading 2208¹²⁸, which refers to "undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages".¹²⁹

2.50 Heading 2208 comes under Chapter 22 of the HS, which is entitled "Beverages, spirits and vinegar". Besides the product descriptions for headings 2207 and 2208, Chapter 22 also contains descriptions for the following products: various kinds of "waters" and certain "other non-alcoholic beverages" (headings 2201 and 2202); "beer made from malt" (heading 2203); various kinds of "wine", including "fortified wine" and "vermouth" (headings 2204 and 2205); "other fermented beverages", such as "cider" (2206); and "vinegar" (2209).¹³⁰

2.51 Under the HS, certain spirits can fall within heading 2207, which has the following structure:

Heading	HS 6-digit Code	Description
22.07		Undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol or higher; ethyl alcohol and other spirits, denatured, of any strength
	2207.10	- Undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol or higher
	2207.20	- Ethyl alcohol and other spirits, denatured, of any strength

¹²⁶ Panel Report, *EC – IT Products*, paras. 7.32-7.33 (original footnotes omitted).

¹²⁷ See e.g. Appellate Body Report, *EC – Chicken Cuts*, para. 224, and Panel Reports, *China – Auto Parts*, para. 7.410. See also European Union's response to Panel question Nos. 42, paras. 62-66, and 78, para. 25; United States' response to Panel question Nos. 42, paras. 31-33, and 78, para. 14; Philippines' response to Panel question No. 42.

¹²⁸ The text of HS heading 2208 has been provided in exhibit US-13.

¹²⁹ European Union's first written submission, para. 192; European Union's opening statement at first substantive meeting, para. 76; European Union's first written submission, para. 96; European Union's response to Panel question No. 64, para. 3; United States' first written submission, para. 65; United States' opening statement at first substantive meeting, para. 41; United States' second written submission, footnote 27 to para. 27; United States' response to Panel question No. 64, para. 1; Philippines' first written submission, paras. 194, 196-200; Philippines' opening statement at first substantive meeting, para. 19.

¹³⁰ The entire text of Chapter 22 of the HS, including its headings and subheadings, was provided in exhibit US-13.

2.52 At the 6-digit code level, HS heading 2208, which refers to the distilled spirits at issue in this dispute, divides spirits into different subheadings:

Heading	HS 6-digit Code	Description
22.08		Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages
	2208.20	- Spirits obtained by distilling grape wine or grape marc
	2208.30	- Whiskies
	2208.40	- Rum and other spirits obtained by distilling fermented sugarcane products
	2208.50	- Gin and Geneva
	2208.60	- Vodka
	2208.70	- Liqueurs and cordials
	2208.80	- Other

2.53 In relevant part, the HSEN to heading 2208¹³¹ reads as follows:

"The heading covers, **whatever their alcoholic strength:**

(A) **Spirits** produced by distilling wine, cider or other fermented beverages or fermented grain or other vegetable products, without adding flavouring; they retain, wholly or partly, the secondary constituents (esters, aldehydes, acids, higher alcohols, etc.) which give the spirits their peculiar individual flavours and aromas.

(B) **Liqueurs and cordials**, being spirituous beverages to which sugar, honey or other natural sweeteners and extracts or essences have been added (e.g., spirituous beverages produced by distilling, or by mixing, ethyl alcohol or distilled spirits, with one or more of the following : fruits, flowers or other parts of plants, extracts, essences, essential oils or juices, whether or not concentrated). ...

(C) **All other spirituous beverages not falling** in any preceding heading of this Chapter.

Provided that **their alcoholic strength by volume is less than 80% vol**, the heading also covers undenatured spirits (ethyl alcohol and neutral spirits) which, contrary to those at (A), (B) and (C) above, are characterised by the absence of secondary constituents giving a flavour or aroma. These spirits remain in the heading whether intended for human consumption or for industrial purposes.

In addition to undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 % vol, the heading includes, *inter alia*:

¹³¹ The HSEN to heading 2208 has been provided in exhibit PH-46. See also European Union's response to Panel question Nos. 42, paras. 62-66; and 78, paras. 21-26; United States' response to Panel question Nos. 42, paras. 31-33, and 78, paras. 14-17; Philippines' first written submission, para. 191; Philippines' response to Panel question No. 78. See para. 2.48 above.

- (1) Spirits obtained by distilling grape wine or grape marc (Cognac, Armagnac, brandy, grappa, pisco, singani, etc.).
- (2) Whiskies and other spirits obtained by distilling fermented mash of cereal grains (barley, oats, rye, wheat, corn, etc.).
- (3) Spirits obtained exclusively by distilling fermented products of the sugar cane (sugar-cane juice, sugar-cane syrup, sugar-cane molasses), e.g., rum, tafia, cachaça.
- (4) Spirituous beverages known as gin or Geneva, containing the aromatic principles of juniper berries.
- (5) Vodka obtained by distilling fermented mash of agricultural origin (e.g., cereals, potatoes) and sometimes further treated with activated charcoal or carbon."¹³²

2.54 As seen above, the HSEN describes certain types of distilled spirits falling within heading 2208 in various ways. With respect to the spirits at issue in this dispute, the HSEN makes the following clarifications:

- (a) "Gin and Geneva" are described as spirituous beverages "containing the aromatic principles of juniper berries"¹³³;
- (b) "Brandy" is cited as an example of a spirit "obtained by distilling grape wine or grape marc";
- (c) "Rum" is cited as an example of a spirit obtained "exclusively by distilling fermented products of the sugar cane"¹³⁴;
- (d) "Vodka" is described as a spirit that is obtained by distilling "fermented mash of agriculture origin (e.g., cereals, potatoes) and sometimes further treated with activated charcoal or carbon"¹³⁵; and,
- (e) "Whiskies" are described as types of spirits made from a "mash of cereal grains" (such as barley, oats, rye, wheat, corn, etc.).

5. Gin

2.55 Gin is traditionally produced by redistilling a high proof neutral spirit with juniper berries and other botanicals; indeed, the characteristic flavour of gin is associated with the presence of juniper

¹³² The HSEN's list goes on to include other spirits, such as liqueurs, 'crèmes', ratafias, aquavit, arrack, alcoholic aperitives alcoholic lemonade, and spirituous food supplements.

¹³³ See European Union's response to Panel question No. 78, paras. 22-24; United States' response to Panel question No. 78, para. 17; Philippines' response to Panel question No. 78.

¹³⁴ See European Union's response to Panel question No. 79, paras. 27-30; United States' response to Panel question No. 79, para. 18; Philippines' response to Panel question Nos. 78, 79 and 80.

¹³⁵ See European Union's response to Panel question Nos. 78, para. 25, and 80, para. 31; United States' response to Panel question Nos. 78, para. 17, and 80, para. 19; Philippines' response to Panel question Nos. 78 and 80.

berries.¹³⁶ Regardless of the raw materials used in their production, and whether they are domestic or imported, gins have a similar clear (transparent) colour.¹³⁷ When gin is made from a non-cane sugar based spirit, as is traditionally the case, the original spirit is stripped of its congeners so as to result in a more neutral taste; in contrast, when a cane sugar-based spirit is used, it is allowed to retain its congeners.¹³⁸ As explained by the Philippines, domestic gin is produced "using a 'cold compounding' method, which is essentially mixing sugar-based alcohol with water, flavours and essences. The product is not redistilled with ... juniper berries and other botanicals"¹³⁹, but has "the organoleptic characteristics of [traditional] gin".¹⁴⁰ Gin can be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails, such as "*gin and tonic*".¹⁴¹

2.56 There is no standards administrative order (SAO) or other internal regulation that defines what can be considered gin in the Philippines.¹⁴² HS subheading 2208.50 covers "Gin and Geneva", which are described in the HSEN to heading 2208 as spirituous beverages "containing the aromatic principles of juniper berries".¹⁴³

2.57 The domestic gin most sold in the Philippines is *Ginebra San Miguel*; its sales in 2009 were equivalent to almost a 100 per cent of domestic consumption of gin in the Philippines.¹⁴⁴ *Ginebra San Miguel* has a 40 per cent alcohol content and is sold in bottles of 250 ml, 350 ml, 700 ml and 1,500 ml.¹⁴⁵ Other domestic gins sold in the Philippines are *Britannia London Dry Gin*, which has a 45 per cent alcohol content and is sold in bottles of 50 ml and 750 ml¹⁴⁶, and *Gilbey's*.¹⁴⁷ As noted above, the domestic gin most sold in the Philippines (*Ginebra San Miguel*) has a Spanish name; the other domestic gins most sold in the Philippines have English or English-associated names, such as

¹³⁶ European Union's first written submission, paras. 82 and 87; European Union's response to Panel question No. 78, paras. 22-24; United States' response to Panel question Nos. 43, para. 35, and 78, para. 17; Philippines' first written submission, para. 162; Philippines' response to Panel question No. 78. See exhibits EU-22, EU-28, EU-55, US-22, US-26, US-38, US-45, PH-28, PH-36 and PH-37. See also Philippines' response to Panel question No. 26; Philippines' comments on the European Union's response to Panel question No. 78, paras. 17-18.

¹³⁷ European Union's first written submission, para. 85; United States' opening statement at first substantive meeting, para. 18. See also exhibits EU-55, US-22, US-38 and PH-32.

¹³⁸ Philippines' first written submission, para. 165. See also *ibid.*, footnote 131 to para. 109 (stating that Philippine gin is "intentionally not neutral") and exhibit EU-99.

¹³⁹ Philippines' response to Panel question No. 26. See also Philippines' comments on the European Union's response to Panel question No. 78, para. 18.

¹⁴⁰ Philippines' comments on the European Union's response to Panel question No. 78, para. 18. [[XXXX]] The Philippines defines "organoleptic properties" as the "properties perceived by the senses". Philippines' first written submission, para. 159.

¹⁴¹ European Union's first written submission, paras. 64-70 and 125; exhibits EU-26, EU-28, EU-30, EU-32, EU-35, EU-41, EU-46 and US-41.

¹⁴² Philippines' response to Panel question No. 26.

¹⁴³ See paras. 2.52 to 2.54 above. The European Union and the United States have stated that, under their respective domestic classification systems, a spirit that has the "organoleptic characteristics of gin" would be classified as gin, irrespective of the raw material from which it is made. See European Union's response to Panel question No. 78, paras. 22-24; United States' response to Panel question No. 43, paras. 34-35.

¹⁴⁴ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15, and exhibits EU-26 and US-51. See also United States' response to Panel question No. 23, para. 13; European Union's response to Panel question No. 88, paras. 38-40; United States' response to Panel question Nos. 83, para. 25, and 88, paras. 33-34; Philippines' response to Panel question No. 35. In promotional materials, *Ginebra San Miguel* refers to its product as "the world's largest selling gin". Exhibit EU-26.

¹⁴⁵ See exhibit EU-22. See also European Union's response to Panel question No. 88, para. 39; figure 3 in United States' first written submission; Philippines' response to Panel question No. 88; exhibit PH-32.

¹⁴⁶ See exhibit EU-28.

¹⁴⁷ See exhibits EU-55 and US-38.

*London, Gilbey's, Oxford or Britannia.*¹⁴⁸ Domestic gins made in the Philippines display the words *Gin* or *Ginebra*, or both words, on their labels.¹⁴⁹

2.58 The imported gin most sold in the Philippines is *Bombay Sapphire*, an English gin that has a 47 per cent alcohol content; its sales represented 40 per cent of the imported gins consumed in the Philippines in 2009.¹⁵⁰ Another imported gin is *Tanqueray*, an English gin that has a 47.3 per cent alcohol content.¹⁵¹

2.59 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for four of the imported gin products most sold in the Philippines (*Bombay Sapphire, Tanqueray, Gordon's* and *Plymouth*)¹⁵² is summarized below:¹⁵³

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ¹⁵⁴
<i>Bombay Sapphire</i>	PHP 620.00	<i>Idem</i>	<i>Idem</i>
<i>Tanqueray</i>	PHP 583.00	<i>Idem</i>	<i>Idem</i>
<i>Gordon's</i>	PHP 501.00	<i>Idem</i>	<i>Idem</i>
<i>Plymouth</i>	PHP 292.50	----	----

All prices are for 750 ml bottles, except in the case of *Plymouth*, for 700 ml bottles. No information was provided by the Philippines in exhibit PH-19 (amended) or in exhibit PH-77 on the net retail price of *Plymouth*.

2.60 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for four of the domestic gin products most sold in the Philippines (*Gilbey's London Dry Gin, Britannia London Dry Gin, Ginebra Especial* and *Gin Kapitan*) is summarized below:¹⁵⁵

¹⁴⁸ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15 and Philippines' first written submission, para. 37. See also exhibit EU-55.

¹⁴⁹ See exhibits EU-22, EU-26, EU-28, EU-55, EU-68, US-22 and US-38. See also Philippines' response to Panel question No. 39.

¹⁵⁰ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15. See also figure 3 in United States' first written submission.

¹⁵¹ See figure 3 in United States' first written submission.

¹⁵² The products chosen are among the gins most sold in the Philippines, according to information contained in the International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15. The Philippines argues that "[i]t is unclear on what basis the Panel is characterizing these gins as the four 'most sold' products." See Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011). We have not suggested that these are *the* four most sold imported gins in the Philippines, but that they are among the most sold, according to the IWSR report in exhibits EU-15 and US-15. The Philippines also objects to similar statements in other paragraphs in this section (see paras. 2.60, 2.66, 2.67, 2.72, 2.73, 2.78, 2.79, 2.84, 2.85, 2.90 and 2.91 below). The Philippines has not provided rebutting evidence that would suggest that these spirits are not among the most sold in the Philippines.

¹⁵³ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8.

¹⁵⁴ Exhibit PH-77 in the Philippines' second written submission replaces exhibits PH-19 (original) and PH-19 (amended).

¹⁵⁵ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8; footnote 86 in Philippines' response to Panel question No. 53.

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ¹⁵⁶
<i>Gilbey's London Dry Gin</i>	PHP 150	<i>Idem</i>	<i>Idem</i>
<i>Britannia London Dry Gin</i>	PHP 115	<i>Idem</i>	<i>Idem</i>
<i>Ginebra Especial San Miguel</i>	PHP 43	<i>Idem</i>	<i>Idem</i>
<i>Gin Kapitan</i>	PHP 17	<i>Idem</i>	<i>Idem</i>

Prices for *Gilbey's London Dry Gin* in 1,000 ml bottles, *Britannia London Dry Gin* in 700 ml bottles, *Ginebra Especial* in 750 ml bottles, and *Gin Kapitan* in 350 ml bottles.

2.61 All gins made in the Philippines are produced from sugar cane molasses, one of the designated raw materials, and are subject to the *Section 141(a)* flat excise tax rate of 14.68 PHP ppl. Imported gins sold in the Philippines are subject to one of the three excise tax rates of PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl applicable under *Section 141(b)* to spirits produced with other than the designated raw materials, depending on their NRP.¹⁵⁷

6. Brandy

2.62 Brandy is traditionally produced from the fermentation of grapes or other fruit.¹⁵⁸ In Europe it is traditionally made from the distillation of wine or fortified wine.¹⁵⁹ The colour, odour and taste normally associated with brandy is a natural result of the distillation of ethyl alcohol from wine or fortified wine (in some cases, caramel may be added to provide a deeper colour¹⁶⁰); in this case, the alcohol is not stripped of its specific congeners.¹⁶¹ In contrast, brandy is produced in the Philippines by stripping the ethyl alcohol made from sugar cane molasses of the congeners that provide its original aroma and taste, and subsequently adding flavouring and other ingredients (including, in some cases, brandy) to the resulting neutral spirit, so that the final product has the taste normally associated with brandy.¹⁶² Most of the higher-priced brandies have a similar alcohol content, of around 40 per cent.¹⁶³ Regardless of the raw materials used in their production, and whether they are domestic or imported, brandies have a similar colour that goes from golden to mahogany.¹⁶⁴ HS subheading 2208.20 covers "Spirits obtained by distilling grape wine or grape marc"; the HSEN to heading 2208 cites "brandy" as an example of such spirits.¹⁶⁵ Brandy can be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails, such as "*sidecar*" or "*stinger*".¹⁶⁶

2.63 The Philippines' Standards Administrative Order (SAO) No. 358 of 1978 defines *brandy* as "an alcoholic distillate obtained solely from the fermented juice of fresh, ripe and sound grapes. The

¹⁵⁶ Exhibit PH-77 in the Philippines' second written submission replaces exhibits PH-19 (original) and PH-19 (amended).

¹⁵⁷ European Union's first written submission, paras. 36-37 and 38-39.

¹⁵⁸ Philippines' first written submission, paras. 11, 98 and 141-142. See also exhibits EU-99, PH-27 and PH-36; and United States' response to Panel question No. 43, para. 35.

¹⁵⁹ Philippines' first written submission, para. 141. See also exhibits EU-99, PH-26, PH-27, PH-37 and PH-41.

¹⁶⁰ Philippines' first written submission, para. 148; exhibits PH-26 and PH-27.

¹⁶¹ Philippines' first written submission, paras. 11 and 141.

¹⁶² *Ibid.*, paras. 11, 98, 141 and 143. See also exhibit PH-26.

¹⁶³ European Union's first written submission, para. 84. See exhibits EU-99 and PH-27.

¹⁶⁴ European Union's first written submission, para. 85; United States' opening statement at first substantive meeting, para. 18. See exhibits EU-55, US-22, US-38 and PH-27.

¹⁶⁵ See paras. 2.52 to 2.54 above.

¹⁶⁶ European Union's first written submission, paras. 64-70 and 125; Exhibits EU-32, EU-35, EU-41, EU-43, US-41 and PH-61.

distillation shall be carried out in such a way that the spirit possesses the natural [...] principles already present in grapes or [...] fermentation".¹⁶⁷ SAO No. 358 of 1978 refers to four different types of "brandies": (i) *Brandy* (made "from the fermented juice of fresh, ripe and sound grapes"); (ii) *Fruit Brandy* ("made from wine or from fermented juice of peaches, apples, cherries, other fruits and other [...] materials"); (iii) *Blended Brandy* ("A mixture of at least 5 percent grape brandy with other brandies or neutral spirits"); and (iv) *Compounded Brandy* ("A product obtained by mixing neutral spirits or alcohol with brandy essences, with permissible coloring and flavoring materials").¹⁶⁸ SAO No. 358 of 1978 adds that "[t]he minimum ethyl alcohol content in brandies shall be 32.5 percent by volume", that brandy "shall be free from added coloring matter except caramel prepared from sugar" and that brandies "shall possess the characteristic aroma and taste".¹⁶⁹ All brandies made in the Philippines are made from cane-sugar-based alcohol and would correspond to the definition of *Blended Brandy* or that of *Compounded Brandy* in SAO No. 358 of 1978.¹⁷⁰

2.64 Spanish brandies represented some 99.6 per cent of the imported brandies consumed in the Philippines in 2009; indeed the sales of three Spanish brandies (*Fundador*, *Alfonso I* and *Tres Cepas*), represented 88.8 per cent of the total consumption of imported brandies in the Philippines that year.¹⁷¹ *Fundador* brandy has a 36 per cent alcohol content.¹⁷² The labels of the Spanish brandies *Fundador*, *Alfonso I* and *Tres Cepas* contain coats of arms and heraldic symbols; the labels prominently display the word "Solera" immediately under the name of the respective brand; the labels also separately claim that each of the brandies was produced using the *Solera* method.¹⁷³

2.65 The domestic brandies most sold in the Philippines have Spanish names, such as *Emperador*, *Gran Matador*, *Generoso*, and *Barcelona*; as noted on the labels of the bottles, these brandies claim to have been made following the Spanish *Solera* method.¹⁷⁴ *Emperador* brandy has a 36 per cent alcohol content and is sold in bottles of 375 ml, 750 ml and 1,750 ml.¹⁷⁵ *Generoso* brandy has a 32.5 per cent alcohol content and is sold in bottles of 375 ml and 700 ml.¹⁷⁶ *Gran Matador* has a 32.5 to 36 per cent alcohol content and is sold in bottles of 350 ml and 700 ml.¹⁷⁷ The labels in the bottles of *Emperador*, *Gran Matador*, *Generoso* and *Barcelona* brandies carry images of coats of arms; the labels of "*Emperador*" and "*Gran Matador*" additionally carry images of bullfighters.¹⁷⁸ Other domestic brandies sold in the Philippines have French names, such as *Napoleon* or *Bouchard*.¹⁷⁹

¹⁶⁷ See SAO No. 358 of 1978, in exhibits EU-24 and US-24, para. 2.1.1. See also Philippines' first written submission, paras. 144-145.

¹⁶⁸ See SAO No. 358 of 1978, in exhibits EU-24 and US-24, paras. 2.1.1 to 2.1.4. See also Philippines' first written submission, para. 144.

¹⁶⁹ See SAO No. 358 of 1978, in exhibits EU-24 and US-24, para. 4. See also United States' first written submission, paras. 47 and 50.

¹⁷⁰ Philippines' first written submission, para. 145. See also European Union's first written submission, footnote 38 to para. 38.

¹⁷¹ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15.

¹⁷² See figure 3 in United States' first written submission.

¹⁷³ See exhibits EU-55, US-34 and US-38.

¹⁷⁴ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15 and exhibits EU-48, EU-55, EU-65, EU-79, EU-94, US-34 and US-38. See also European Union's first written submission, para. 128.

¹⁷⁵ See exhibit EU-19. But see figure 3 in United States' first written submission.

¹⁷⁶ See exhibit EU-19.

¹⁷⁷ See figure 3 in United States' first written submission and exhibit PH-32.

¹⁷⁸ See exhibits EU-48, EU-55, EU-57, EU-65, EU-79, EU-94, US-34, US-38 and PH-32. See also European Union's first written submission, para. 128, and exhibit EU-45.

¹⁷⁹ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15. See also European Union's first written submission, para. 128; Philippines' comments on the European Union's response to Panel question No. 91, paras. 27-28; exhibits EU-39 and EU-56.

Napoleon brandy has a 36 to 40 per cent alcohol content.¹⁸⁰ Domestic brandies made in the Philippines display the word *Brandy* on their labels.¹⁸¹ At least one of the Philippine brandy products uses the acronym VSOP in its label, which is traditionally used for some types of French aged brandies (cognacs).¹⁸² Labels of brandies made in the Philippines do not use the expressions *Blended Brandy* or *Compounded Brandy*; nor does the Philippines' SAO No. 358 of 1978 require that they do so.¹⁸³

2.66 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for seven of the imported brandy products most sold in the Philippines (*Hennessy VSOP* in two different presentations, *Carlos I*, *Fundador*, *Alfonso I*, *Tres Cepas* and *Carlos II*) is summarized below:¹⁸⁴

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ¹⁸⁵
Hennessy VSOP (1)	PHP 6,400	<i>Idem</i>	<i>Idem</i>
Hennessy VSOP (2)	PHP 1,677	<i>Idem</i>	<i>Idem</i>
Carlos I	PHP 742	<i>Idem</i>	<i>Idem</i>
Fundador	PHP 255	<i>Idem</i>	<i>Idem</i>
Alfonso I	PHP 166	<i>Idem</i>	<i>Idem</i>
Tres Cepas	PHP 159	<i>Idem</i>	PHP 140
Carlos II	PHP 16	<i>Idem</i>	----

All prices for 700 ml bottles. No information was provided in exhibit PH-19 (amended) or in exhibit PH-77 on the net retail price of *Carlos II*.

2.67 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for seven of the domestic brandy products most sold in the Philippines (*Napoleon VSOP* in two different presentations, *Gran Matador*, *Emperador*, *Generoso*, *Barcelona*, and *Maximo*) is summarized below:¹⁸⁶

¹⁸⁰ See figure 3 in United States' first written submission; exhibit EU-39.

¹⁸¹ See exhibits EU-39, EU-48, EU-55, EU-56, EU-57, EU-65, EU-79, US-22, US-34 and US-38.

¹⁸² European Union's first written submission, para. 128; exhibits EU-39, EU-56 and EU-99.

¹⁸³ See exhibits EU-48, EU-55, EU-57, EU-65, EU-79, EU-94 and US-38. See also United States' opening statement at first substantive meeting, para. 16; European Union's opening statement at first substantive meeting, para. 65; Philippines' response to Panel question Nos. 37 and 38.

¹⁸⁴ See also exhibits EU-67 and EU-80; European Union's first written submission, para. 154; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question Nos. 57, para. 64, and 73, paras. 4-8; Philippines' response to Panel question Nos. 54 and 62.

¹⁸⁵ Exhibit PH-77 in the Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

¹⁸⁶ See also exhibits EU-67 and EU-80; European Union's first written submission, para. 154; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question Nos. 57, para. 64, and 73, paras. 4-8; Philippines' response to Panel question Nos. 54 and 62.

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ¹⁸⁷
<i>Napoleon VSOP (tin can)</i>	PHP 212	----	<i>Idem</i>
<i>Napoleon VSOP (regular presentation)</i>	PHP 182	----	<i>Idem</i>
<i>Gran Matador</i>	PHP 53	----	<i>Idem</i>
<i>Emperador</i>	PHP 53	----	<i>Idem</i>
<i>Generoso</i>	PHP 46	----	<i>Idem</i>
<i>Barcelona</i>	PHP 37	PHP 24	PHP 48
<i>Maximo</i>	PHP 26	----	<i>Idem</i>

Prices in PH-19 (original) and PH-77 for *Gran Matador*, *Generoso*, *Barcelona*, and *Maximo* in 700 ml bottles; *Napoleon VSOP* in its two different presentations and *Emperador* in 750 ml bottles. The only net retail price of domestic brandies provided in exhibit PH-19 (amended) was that of *Barcelona* in 350 ml bottles.

2.68 All brandies made in the Philippines are produced from sugar cane molasses, one of the designated raw materials, and are subject to the *Section 141(a)* flat tax rate of 14.68 PHP ppl. Imported brandies sold in the Philippines are subject to one of the three excise tax rates of PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl applicable under *Section 141(b)* to spirits produced with other than the designated raw materials, depending on their NRP.¹⁸⁸

7. Rum

2.69 Rum is traditionally produced from the fermentation of sugar cane molasses.¹⁸⁹ In this respect, there is no difference between rum produced in the Philippines and imported rum.¹⁹⁰ More generally, parties agree that rum produced in the Philippines and imported rum are "like products".¹⁹¹ HS subheading 2208.40 covers "Rum and other spirits obtained by distilling fermented sugarcane products"; rum is described in the HSEN to heading 2208 as an example of a spirit obtained "exclusively by distilling fermented products of the sugar cane".¹⁹² Depending on the brand and presentation, rum can have a colour that ranges from clear (transparent) to golden or mahogany.¹⁹³ Rum can be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails, such as "*Cuba libre*", "*Daiquiri*", "*Mojito*" or "*piña colada*".¹⁹⁴

2.70 The Philippines' Standards Administrative Order (SAO) No. 257 of 1976 defines *rum* as "the alcoholic distillate obtained solely from fermented juice of sugarcane, sugarcane molasses or other sugarcane by-products distilled at less than 190 US proof whether or not such proof is further reduced to not less than 60 proof prior to bottling, in such a manner that the distillate possesses the taste,

¹⁸⁷ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

¹⁸⁸ European Union's first written submission, paras. 36-37 and 38-39.

¹⁸⁹ Philippines' first written submission, para. 171. See also exhibits EU-99, PH-26, PH-28, PH-36 and PH-37. Parties use the words "rum" or sometimes "rhum"; we will generally use the word "rum".

¹⁹⁰ Philippines' first written submission, para. 171. See also exhibit PH-26.

¹⁹¹ See for example European Union's first written submission, para. 97; United States' first written submission, para. 30; Philippines' first written submission, para. 171.

¹⁹² See paras. 2.52 to 2.54 above. The United States has stated that, under its domestic system, an imported rum with added flavour enhancers, which constituted less than 5.5 per cent of the volume of the spirit, was still classified under subheading 2208.40. See United States' response to Panel question No. 79, para. 18. See also European Union's response to Panel question No. 79, paras. 27-29; European Union's comments on the Philippines' response to Panel question No. 78, para. 41.

¹⁹³ See exhibits EU-55, US-22, US-38 and PH-28.

¹⁹⁴ European Union's first written submission, paras. 64-70 and 125; Exhibits EU-29, EU-32, EU-34, EU-35, EU-36, EU-37, EU-41, US-41 and PH-61.

aroma and characteristics generally attributed to rum and known to the trade as such and includes mixtures solely of such distillates."¹⁹⁵ SAO No. 257 of 1976 notes that rum can be classified as either "white rum" or "colored rum"; that it "shall possess the color derived from wood during maturation"; that "[o]ther coloring substances may be added provided it is approved by the Food and Drug Administration"; that "[r]um possess[es] the characteristic taste and aroma associated with rum"; that it "shall be matured in wood" and "when labelled as 'matured', shall be matured for the period specified in the label".¹⁹⁶

2.71 The domestic rum most sold in the Philippines is *Tanduay*; its sales in 2009 were equivalent to 94 per cent of domestic consumption of rum in the Philippines.¹⁹⁷ *Tanduay* has a 40 per cent alcohol content.¹⁹⁸ *Tanduay* rum is sold in several presentations, including *Tanduay Centennial Dark Rhum*, *Tanduay Rhum Extra Strong*, *Tanduay 5 years Dark Rhum* and *Tanduay White Rum*.¹⁹⁹ The imported rum most sold in the Philippines is *Bacardí*, with a 40 per cent alcohol content; its sales represented 80 per cent of the imported rum consumed in the Philippines in 2009.²⁰⁰

2.72 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for five of the imported rum products most sold in the Philippines (*Captain Morgan*, *Bacardí 151 Proof*, *Bacardí White*, *Myers's Rum Original Dark* and *Bacardí Superior*) is summarized below:²⁰¹

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²⁰²
<i>Captain Morgan</i>	PHP 470	----	----
<i>Bacardí 151 Proof</i>	PHP 270	PHP 587	<i>Idem</i>
<i>Bacardí White</i>	PHP 252	PHP 420	<i>Idem</i>
<i>Myers's Rum Original Dark</i>	PHP 212	PHP 388	PHP 212
<i>Bacardí Superior</i>	PHP 131	PHP 420	<i>Idem</i>

All prices for 750 ml bottles. No information was provided in exhibit PH-19 (amended) or in exhibit PH-77 on the net retail price of *Captain Morgan*.

2.73 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for five of the domestic rum products most sold in the

¹⁹⁵ See SAO No. 257 of 1976, in exhibit US-27, para. 2.1.1.

¹⁹⁶ *Ibid.*, para. 4.

¹⁹⁷ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15.

¹⁹⁸ See figure 3 in United States' first written submission.

¹⁹⁹ See exhibits EU-93, PH-19 (original), PH-19 (amended), PH-52 and PH-77. See also European Union's response to Panel question No. 90, paras. 41-46; European Union's comments on the Philippines' response to Panel question No. 90, paras. 47-50; United States' response to Panel question No. 90, paras. 35-36; United States' comments on Philippines' response to Panel question No. 90, paras 29-30; Philippines' response to Panel question No. 90; Philippines' comments on the European Union's response to Panel question No. 90, paras. 25-26.

²⁰⁰ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15 and figure 3 in United States' first written submission.

²⁰¹ See also exhibits EU-29, EU-73 and EU-80; European Union's first written submission, paras. 152 and 154; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8; Philippines' response to Panel question No. 54.

²⁰² Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

Philippines (*Paradise Mango Rum, Tanduay Rhum Extra Strong, Tanduay 5 years Dark Rhum and Tanduay White Rum*) is summarized below.²⁰³

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²⁰⁴
<i>Paradise Mango Rum (tin can)</i>	PHP 256	PHP 342	PHP 352
<i>Paradise Mango Rum (regular presentation)</i>	PHP 526	PHP 350	PHP 334
<i>Tanduay Rhum Extra Strong</i>	PHP 138	PHP 125	<i>Idem</i>
<i>Tanduay 5 Years Dark Rhum</i>	PHP 62	<i>Idem</i>	PHP 49
<i>Tanduay White Rhum</i>	PHP 27	PHP 38	PHP 39

Prices for *Paradise Mango Rum* in its two presentations and for *Tanduay Rhum Extra Strong* in 700 ml bottles; prices for *Tanduay White Rum* and *Tanduay 5 years Dark Rhum* in 750 ml bottles.

2.74 All rums made in the Philippines are produced from sugar cane molasses, one of the designated raw materials, and are subject to the *Section 141(a)* flat excise tax rate of 14.68 PHP ppl.²⁰⁵ Some imported rums, such as *Bacardí* (the brand that represents 80 per cent of the imported rum in the year 2009) and *Bardinet*, are also subject to the *Section 141(a)* flat excise tax rate applicable to spirits produced with designated raw materials.²⁰⁶ Other imported rums sold in the Philippines, despite being produced from the designated raw materials, are subject to one of the three excise tax rates of PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl applicable under *Section 141(b)* to spirits produced with other than the designated raw materials, depending on their NRP.²⁰⁷ The following are some of the imported rums subject to the excise tax rates in *Section 141(b)*: *Havana Club Añejo Reserva, Lemon Hart Jamaica Rum, Lemon Hart White Rum, Malibu Caribbean White Rum w/ coco, Malibu Rum, Myers's Rum, and Myers's Rum Planters Punch*.²⁰⁸ The Philippines states that, if the importers of the latter imported rums were to file the proper sworn declarations and excise tax returns, the products would receive the tax treatment set out in *Section 141(a)*.²⁰⁹

8. Vodka

2.75 Vodka is a neutral spirit that can be produced from the distillation of many different products, such as wheat, beets, corn, rye, potatoes, grapes or sugar cane.²¹⁰ It is commonly obtained by stripping the ethyl alcohol from its congeners and often filtering it through activated charcoal or

²⁰³ See also exhibits EU-29, EU-73 and EU-80; European Union's first written submission, paras. 152 and 154; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8; Philippines' response to Panel question No. 54.

²⁰⁴ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

²⁰⁵ European Union's first written submission, para. 40.

²⁰⁶ *Ibid.*, paras. 41 and 177; exhibits PH-45, PH-62 and PH-71.

²⁰⁷ European Union's first written submission, para. 41; European Union's second written submission, para. 7.

²⁰⁸ European Union's first written submission, para. 176; European Union's second written submission, paras. 110-116. See exhibits EU-96, US-7 and PH-64.

²⁰⁹ Philippines' first written submission, para. 174. Response by the European Union in its second written submission, para. 110-116.

²¹⁰ Philippines' first written submission, paras. 153-157. See also European Union's response to Panel question No. 43, para. 69; exhibits EU-90, EU-99, PH-28, PH-37, PH-42 and PH-43.

carbon.²¹¹ Regardless of the raw materials used in their production, and whether they are domestic or imported, vodkas have a similar clear (transparent) colour.²¹² HS subheading 2208.60 covers "Vodka"; vodka is described in the HSEN to heading 2208 as a spirit that is obtained by distilling "fermented mash of agriculture origin (e.g., cereals, potatoes) and sometimes further treated with activated charcoal or carbon".²¹³ Vodka can be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails, such as "*black Russian*", "*bloody Mary*", "*screwdriver*" and "*white Russian*".²¹⁴ Evidence suggests that premium vodkas may be consumed by shots, while less less-expensive vodkas may be largely used as mixers.²¹⁵

2.76 The Philippines' Standards Administrative Order (SAO) No. 258 of 1976 defines *vodka* as "the distilled liquor obtained from neutral spirit filtered through activated carbon (charcoal) so as to render the product without distinctive character, aroma or taste".²¹⁶ SAO No. 258 of 1976 adds that "[v]odka shall be the distilled alcoholic beverage ... which may be obtained from fermented grain, potato, or any other source of fermentable carbohydrates in such a manner that the distillate is free from color and odor and possess the characteristics generally attributed to vodka" and that its "ethyl alcohol content shall be 42.85, 40.01, or 37.15 percent by volume (25, 30 or 35 degrees under proof)".²¹⁷

2.77 Domestic products represented 71.6 per cent of the vodka consumed in the Philippines in 2009.²¹⁸ *Antonov*, a domestic brand that represented 16.6 per cent of the vodka sold in the Philippines in the year 2009, has a 40 per cent alcohol content.²¹⁹ The imported vodka most sold in the Philippines is *Absolut*, with a 40 per cent alcohol content.²²⁰ *Finlandia*, another imported vodka, also has a 40 per cent alcohol content.²²¹ Domestic vodkas made in the Philippines display the word *Vodka* on their labels; some of these vodkas use names with Slavic or Russian connotations, such as *Antonov*, *Cossack* or *Toska*.²²²

²¹¹ European Union's first written submission, para. 82; Philippines' first written submission, para. 109. See exhibits EU-33, EU-46, EU-99 and PH-26. See also United States' response to Panel question No. 43, para. 35.

²¹² European Union's first written submission, para. 85; United States' first written submission, para. 46. See also exhibits EU-55, EU-100, US-22 and US-38.

²¹³ See paras. 2.52 to 2.54 above. The European Union and the United States have stated that, under their respective domestic classification systems, an imported vodka made from any agricultural material (including cane sugar) would be classified under subheading 2208.60. See European Union's response to Panel question Nos. 43, paras. 67-69, 79, para. 30, and 80, para. 31; United States' response to Panel question Nos. 43, paras. 34-35, and 80, para. 19.

²¹⁴ European Union's first written submission, paras. 64-70 and 125; Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011); Exhibits EU-27, EU-31, EU-32, EU-33, EU-34, EU-35, EU-41, EU-110, US-40, US-41, PH-43 and PH-61.

²¹⁵ Philippines' comments on the draft descriptive sections of the Panel Reports (6 April 2011); Exhibit US-40.

²¹⁶ See SAO No. 258 of 1976, in exhibit US-23, para. 2.1.1. See also Philippines' response to Panel question No. 27.

²¹⁷ See SAO No. 258 of 1976, in exhibit US-23, paras. 3.1 and 3.3. See also United States' first written submission, paras. 47 and 50.

²¹⁸ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15.

²¹⁹ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15 and figure 3 in United States' first written submission.

²²⁰ Ibid.

²²¹ Ibid.

²²² See exhibits EU-21, EU-27, EU-33, EU-34, EU-44, EU-46, EU-55, EU-60, EU-61, US-22 and US-38. See also Philippines' response to Panel question No. 39.

2.78 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for eight of the imported vodka products most sold in the Philippines (*Millenium*, *Stolichnaya* in its regular and flavoured presentations, *Finlandia*, *Absolut Blue*, *Arkan*, *Skyy* and *Vodka Cruiser* in different presentations) is summarized below:²²³

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²²⁴
<i>Millenium</i>	PHP 1,004	----	----
<i>Stolichnaya</i>	PHP 635	<i>Idem</i>	PHP 367
<i>Finlandia</i>	PHP 392	<i>Idem</i>	<i>Idem</i>
<i>Absolut Blue</i>	PHP 335	<i>Idem</i>	<i>Idem</i>
<i>Arkan</i>	PHP 260	<i>Idem</i>	<i>Idem</i>
<i>Skyy</i>	PHP 232	<i>Idem</i>	<i>Idem</i>
<i>Stolichnaya</i> (5 flavours)	PHP 203	<i>Idem</i>	<i>Idem</i>
<i>Vodka Cruiser</i> (275 ml bottles)	PHP 71	PHP 67	<i>Idem</i>

Prices for *Stolichnaya* in its flavoured presentations, *Finlandia*, *Absolut Blue*, and *Skyy* all in 750 ml bottles, *Arkan* in 1,000 ml bottles, *Stolichnaya* in 700 ml bottles and *Vodka Cruiser* in 275 ml bottles; no information on size was provided by the Philippines in exhibit PH-19 (amended) or in exhibit PH-77 on the net retail price for *Millenium*.

2.79 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for six of the domestic vodka products most sold in the Philippines (*Gilbey's 1857*, *Gilbey's Premium*, *Toska*, *Antonov*, *The Bar* and *Cossack*) is summarized below:²²⁵

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²²⁶
<i>Gilbey's 1857</i>	PHP 258	<i>Idem</i>	PHP 116
<i>Gilbey's Premium</i>	PHP 119	<i>Idem</i>	<i>Idem</i>
<i>Toska</i>	PHP 94	<i>Idem</i>	<i>Idem</i>
<i>Antonov</i>	PHP 82	<i>Idem</i>	<i>Idem</i>
<i>The Bar</i>	PHP 56	<i>Idem</i>	<i>Idem</i>
<i>Cossack</i>	PHP 46	<i>Idem</i>	<i>Idem</i>

All prices for 700 ml bottles.

2.80 All vodkas made in the Philippines are produced from sugar cane molasses, one of the designated raw materials, and are subject to the *Section 141(a)* flat tax rate of 14.68 PHP ppl.²²⁷ Imported vodkas sold in the Philippines are subject to one of the three excise tax rates of

²²³ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8.

²²⁴ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

²²⁵ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8.

²²⁶ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

²²⁷ European Union's first written submission, para. 42.

PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl applicable under *Section 141(b)* to spirits produced with other than the designated raw materials, depending on their NRP.²²⁸

9. Whisky

2.81 Whisky is traditionally produced from the distillation of a mash of cereals or grains. The production of whisky in each country tends to be based on the raw materials that are grown most efficiently in that region.²²⁹ Whisky is normally made from wheat, barley or malt in Scotland and Ireland, from corn in the United States, from rye in Canada, and from sugar molasses in the Philippines.²³⁰ The colour, odour and taste normally associated with whisky is a natural result of the distillation of ethyl alcohol from products such as wheat, barley or malt; in this case, the alcohol is not stripped of its specific congeners.²³¹ In contrast, whisky is produced in the Philippines by stripping the ethyl alcohol made from sugar molasses of the congeners that provide its original aroma and taste, and subsequently adding flavouring and other ingredients (including, in some cases, whisky) to the resulting neutral spirit, so that the final product has the taste normally associated with whisky.²³² Regardless of the raw materials used in their production, and whether they are domestic or imported, whiskies have a similar golden colour.²³³ HS subheading 2208.30 covers "Whiskies", which are described in the HSEN to heading 2208 as types of spirits made from a "mash of cereal grains" (such as barley, oats, rye, wheat, corn).²³⁴ Whisky can be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails, such as "*Irish coffee*", "*Manhattan*" or "*whisky sour*".²³⁵

2.82 The Philippines' Standards Administrative Order (SAO) No. 259 of 1976 defines *whisky* as "a spirit suitably aged in wood, obtained from the distillation of a fermented mash of grain".²³⁶ SAO No. 259 of 1976 refers to four different types of "whiskies": (i) *Straight Whisky* ("distilled off at a proof not exceeding 160, aged in a new charred white oak barrel for at least two years and reduced by the addition of water at the time of bottling to not lower than 80 proof. Nothing may be added other than the water); (ii) *Malt Whisky* ("produced from the fermented mash of malted or unmalted cereals or a mixture of both"); (iii) *Blended Whisky* ("A mixture containing at least 20 percent by volume of

²²⁸ Ibid., para. 43.

²²⁹ Philippines' first written submission, para. 118. Parties use the words "whisky" or "whiskey"; we will generally use the word "whisky".

²³⁰ Ibid., paras. 11, 98 and 118-119; European Union's second written submission, para. 66. See also exhibits EU-99, PH-24, PH-26, PH-28, PH-35, PH-36, PH-37, PH-38 and PH-39.

²³¹ Philippines' first written submission, paras. 11 and 135. See also exhibits EU-92, EU-99, PH-26 and PH-36.

²³² Philippines' first written submission, paras. 11, 98, 118-119 and 134. See also exhibits EU-58, EU-59, EU-98 and PH-26.

²³³ See exhibits EU-55, US-22 and US-38. See also United States' first written submission, para. 46; United States' opening statement at first substantive meeting, para. 18.

²³⁴ See paras. 2.52 to 2.54 above. The United States has stated that, under its domestic classification system, a whisky made from sugar cane spirit would not be classified under subheading 2208.30 (whiskies), unless it was blended with grain-based whisky. Such a cane sugar-based whisky could instead fall under 2208.90 (other spirits). See United States' response to Panel question No. 43, paras. 34-35. The Philippines has stated that, under its domestic classification system, blended whiskies containing at least 20 per cent volume of 100 proof straight whisky and neutral spirits would likely be classified under subheading 2208.90 (other), while compound whiskies would likely be classified under either 2208.90 (other), or, if the neutral spirit is made from sugar-cane and no grain-based whisky is added to the compound whisky, under 2208.40 (spirits obtained by distilling fermented sugar-cane products). See Philippines' response to Panel question No. 46.

²³⁵ European Union's first written submission, paras. 64-70 and 125; Exhibits EU-32, EU-34, EU-35, EU-41, US-41 and PH-61.

²³⁶ See SAO No. 259 of 1976, in exhibit US-25, para. 2.1.1. SAO No. 259 of 1976 uses the variant spelling "whiskey".

100 proof straight [whisky] and separately or in combination, [whisky] or neutral spirits, if such mixture at the time of bottling is not less than 65 proof"); and (iv) *Compound Whisky* ("The product obtained by mixing neutral spirits or alcohol distilled from any material at above 190° proof, with [whisky] or [whisky] essence, permissible flavoring and coloring materials, and reduced at the time of bottling to not less than 65 proof").²³⁷ SAO No. 259 of 1976 adds that "[t]he ethyl alcohol in whiskies shall not be less than 32.5 percent by volume", that whisky "shall be free from added coloring materials except caramel prepared from sugar" and that "[i]t shall have the characteristic taste and aroma".²³⁸ All whiskies made in the Philippines are made from cane-sugar-based alcohol and would correspond to the definition of *Compound Whiskey* in SAO No. 259 of 1976.²³⁹ Domestic whiskies made in the Philippines display the word *Whisky* on their labels.²⁴⁰ Labels of whiskies made in the Philippines do not use the expression *Compound Whisky*; nor does the Philippines' SAO No. 259 of 1976 require that they do so.²⁴¹

2.83 Scotch whiskies represented 73.9 per cent of the whiskies consumed in the Philippines in 2009; indeed the sales of two Scotch whiskies (*Johnnie Walker Black Label* and *Chivas Regal 12 years*), represented 55.7 per cent of the total consumption of whisky in the Philippines that year.²⁴² *Jack Daniel's*, an imported whisky from the United States with a 40 per cent alcohol content, represented 16.4 per cent of the whiskies consumed in the Philippines in 2009.²⁴³ *White Castle Calibre 69*, the domestic whisky most sold in the Philippines in the year 2009, has a 34.5 per cent alcohol content and is sold in bottles of 187.5 ml, 375 ml and 700 ml.²⁴⁴ The domestic whiskies most sold in the Philippines have English names, such as *Embassy*, *St George*, and *White Castle*.²⁴⁵

2.84 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for six of the imported whisky products most sold in the Philippines (*Johnnie Walker Blue Label*, *Johnnie Walker Black Label*, *Cutty Sark*, *J&B*, *Benmore 4 Casks* and *Benmore Blended*) is summarized below:²⁴⁶

²³⁷ SAO No. 259 of 1976, in exhibit US-25, paras. 2.1.2 to 2.1.6. See also Philippines' first written submission, para. 121.

²³⁸ See SAO No. 259 of 1976, in exhibit US-25, para. 4. See also United States' first written submission, paras. 47 and 50.

²³⁹ Philippines' first written submission, para. 123.

²⁴⁰ See exhibits EU-21, EU-47, EU-55, EU-58, EU-59, EU-79, US-22 and US-38.

²⁴¹ See exhibits EU-47, EU-55, EU-58, EU-79 and US-38. See also European Union's opening statement at first substantive meeting, para. 65; United States' opening statement at first substantive meeting, para. 16; Philippines' response to Panel question Nos. 37 and 38.

²⁴² See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15.

²⁴³ See *ibid.* and figure 3 in United States' first written submission.

²⁴⁴ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15; figure 3 in United States' first written submission; and exhibit PH-32.

²⁴⁵ Exhibits EU-47, EU-55, EU-58, EU-79, US-34, US-36 and US-38.

²⁴⁶ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8.

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²⁴⁷
<i>Johnnie Walker Blue Label</i>	PHP 5,690	<i>Idem</i>	<i>Idem</i>
<i>Johnnie Walker Black Label</i>	PHP 864	PHP 699	<i>Idem</i>
<i>Cutty Sark</i>	PHP 649	PHP 560	PHP 649
<i>J&B</i>	PHP 505	<i>Idem</i>	<i>Idem</i>
<i>Benmore 4 Casks</i>	PHP 150	----	----
<i>Benmore Blended</i>	PHP 153	<i>Idem</i>	<i>Idem</i>

All prices for 700 ml bottles, except in the case of *J&B*, for 750 ml bottles. No information was provided in exhibit PH-19 (amended) nor in exhibit PH-77 on the net retail price of *Benmore 4 Casks*, allegedly because this price "could not be verified".

2.85 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for four of the domestic whisky products most sold in the Philippines (*Embassy*, *St George*, *White Castle 5 Years* and *White Castle Calibre 69*) is summarized below:²⁴⁸

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²⁴⁹
<i>Embassy</i>	PHP 130	<i>Idem</i>	<i>Idem</i>
<i>St George</i>	PHP 123	PHP 108	<i>Idem</i>
<i>White Castle 5 Years</i>	PHP 121	<i>Idem</i>	<i>Idem</i>
<i>White Castle Calibre 69</i>	PHP 58	<i>Idem</i>	<i>Idem</i>

All prices for 700 ml bottles.

2.86 All whiskies made in the Philippines are produced from sugar cane molasses, one of the designated raw materials, and are subject to the *Section 141(a)* flat excise tax rate of 14.68 PHP ppl.²⁵⁰ Imported whiskies sold in the Philippines are subject to one of the three excise tax rates of PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl applicable under *Section 141(b)* to spirits produced with other than the designated raw materials, depending on their NRP.²⁵¹

10. Tequila

2.87 Tequila is traditionally produced in Mexico from the fermentation of the agave plant.²⁵² The colour, odour and taste normally associated with tequila is a natural result of the distillation of ethyl alcohol from agave; in this case, the alcohol is not stripped of its specific congeners. In contrast, tequila or tequila-flavoured spirits are produced in the Philippines by stripping the ethyl alcohol made from sugar molasses of the congeners that provide its original odour and taste, and subsequently

²⁴⁷ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

²⁴⁸ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8.

²⁴⁹ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

²⁵⁰ European Union's first written submission, para. 42.

²⁵¹ *Ibid.*, para. 43.

²⁵² Philippines' first written submission, paras. 168-169. See also United States' response to Panel question No. 43, para. 35; exhibits PH-28 and PH-36.

adding flavouring and other ingredients to the resulting neutral spirit, so that the final product has the taste normally associated with tequila.²⁵³ Regardless of the raw materials used in their production, and whether they are domestic or imported, tequila or tequila-flavoured spirits have a similar colour that can be either clear (transparent) or pale gold.²⁵⁴ HS heading 2208 does not contain a subheading for "tequila", nor is there any specific mention to tequila in the HSEN to heading 2208.²⁵⁵ Tequila is protected in some countries as a geographical indication.²⁵⁶ There is no standards administrative order or other internal regulation that defines what can be considered as tequila in the Philippines.²⁵⁷ Tequilas or tequila-flavoured spirits can be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails, such as "*Margarita*", "*tequila sunrise*".²⁵⁸

2.88 The main domestic tequilas or tequila-flavoured spirits sold in the Philippines have Spanish names, such as *Don Enrique*, *Mojitos* and *El Hombre*.²⁵⁹ Some of the domestic tequilas or tequila-flavoured spirits made in the Philippines display the word *Tequila* on their labels, either alone or in combination with other words. The label of *Don Enrique* describes the product as a "Mixkila Distilled Spirit"; *Mojitos* is described in its label as "Gold Tequila" or "Silver Tequila"; and the label of *El Hombre* describes the product as a "Tequila Flavored Spirit" (the word "Tequila" in the phrase being displayed in larger letters) and carries the image of a man wearing what appears to be a Mexican-hat.²⁶⁰

2.89 The most-sold imported brand, *José Cuervo*, with a 38 per cent alcohol content, represented 70.1 per cent of the tequilas consumed in the Philippines in 2009.²⁶¹ The domestic product *El Hombre* has a 40 per cent alcohol content.²⁶²

2.90 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for six of the imported tequila products most sold in the Philippines (*Añejo Patrón Gold*, *Tequila Rose*, *José Cuervo Gold* (in 1,000 ml and 700 ml bottles), *José Cuervo Clásico*, *Sombrero Negro* and *Sombrero Gold*) is summarized below.²⁶³

²⁵³ Philippines' first written submission, paras. 98 and 169; exhibits EU-63 and PH-44.

²⁵⁴ See exhibits EU-55, US-38, PH-28 and PH-44. See also United States' first written submission, para. 46.

²⁵⁵ See paras. 2.52 to 2.54 above. See also Philippines' response to Panel question No. 78. The European Union and the United States have stated that, under their respective domestic classification systems, an imported tequila would be classified under subheading 2208.90 (other spirits). The United States has added that a tequila or tequila-flavoured spirit made from materials other than agave would not be covered by the tequila 8-digit subheading 2208.90.50 in the United States' domestic nomenclature. See European Union's response to Panel question No. 78, para. 21; United States' response to Panel question Nos. 43, para. 35, and 78, para. 17.

²⁵⁶ See European Union's response to Panel question No. 78, para. 21. See also exhibit PH-36.

²⁵⁷ Philippines' response to Panel question No. 27.

²⁵⁸ European Union's first written submission, paras. 64-70 and 125; Exhibits EU-32, EU-35, EU-41, EU-63, US-41, PH-44 and PH-61.

²⁵⁹ Philippines' first written submission, para. 37; exhibits EU-49, EU-55, EU-63, EU-79 and PH-44.

²⁶⁰ See exhibits EU-21, EU-25, EU-49, EU-55, EU-63, EU-79, US-34, US-38 and PH-44. See also Philippines' response to Panel question No. 39.

²⁶¹ See International Wine and Spirit Research (IWSR) report in exhibits EU-15 and US-15 and figure 3 in United States' first written submission.

²⁶² See figure 3 in United States' first written submission.

²⁶³ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8.

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²⁶⁴
<i>Añejo Patrón Gold</i>	PHP 2,655	----	----
<i>Tequila Rose</i>	PHP 587	<i>Idem</i>	<i>Idem</i>
<i>José Cuervo Gold (1,000 ml bottles)</i>	PHP 479	<i>Idem</i>	<i>Idem</i>
<i>José Cuervo Gold (700 ml bottles)</i>	PHP 444	<i>Idem</i>	<i>Idem</i>
<i>José Cuervo Clásico</i>	PHP 363.5	<i>Idem</i>	<i>Idem</i>
<i>Sombrero Negro / Sombrero Gold</i>	PHP 282	----	----

Prices for *Añejo Patrón Gold* and *Tequila Rose* in 750 ml bottles; *José Cuervo Clasico*, *Sombrero Negro* and *Sombrero Gold* in 700 ml bottles. No information was provided in exhibit PH-19 (amended) nor in exhibit PH-77 on the net retail price of *Añejo Patrón Gold*, *Sombrero Negro* and *Sombrero Gold*, because these prices "could not be verified".

2.91 The information on the net retail prices (before excise tax and value-added tax) for September 2010 provided by the Philippines for five of the domestic tequilas and tequila-flavoured spirits products most sold in the Philippines (*El Hombre Gold*, *Mojitos Gold*, *El Hombre Silver*, *Mojitos Silver* and *Don Enrique Mixkila*) is summarized below:²⁶⁵

	Exhibit PH-19 (original)	Exhibit PH-19 (amended)	Exhibit PH-77 ²⁶⁶
<i>El Hombre Gold</i>	PHP 208	<i>Idem</i>	<i>Idem</i>
<i>Mojitos Gold</i>	PHP 198	<i>Idem</i>	PHP 206
<i>El Hombre Silver</i>	PHP 152	<i>Idem</i>	PHP 114
<i>Mojitos Silver</i>	PHP 134	<i>Idem</i>	<i>Idem</i>
<i>Don Enrique Mixkila</i>	PHP 129	<i>Idem</i>	<i>Idem</i>

All prices for 700 ml bottles.

2.92 All tequilas or tequila-flavoured spirits made in the Philippines are produced from sugar cane molasses, one of the designated raw materials and are subject to the *Section 141(a)* flat excise tax rate of 14.68 PHP ppl.²⁶⁷ Imported tequilas are subject to one of the three excise tax rates of PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl applicable under *Section 141(b)* to spirits produced with other than the designated raw materials, depending on their NRP.²⁶⁸

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The provisions of the WTO covered agreements raised by the complainants are Article III:1 and Article III:2, first and second sentences, of GATT 1994. The complainants have made the following claims:

²⁶⁴ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

²⁶⁵ See also exhibit EU-80; European Union's second written submission, paras. 43-52; European Union's response to Panel question No. 73, paras. 13-18; United States' response to Panel question No. 73, paras. 4-8.

²⁶⁶ Exhibit PH-77 in Philippines' second written submission replaces exhibit PH-19 (original) and PH-19 (amended).

²⁶⁷ European Union's first written submission, para. 42.

²⁶⁸ *Ibid.*, para. 43.

- (a) That the excise tax imposed by the Philippines constitutes an internal tax applied to imported distilled spirits "in excess" of those applied, directly or indirectly, to "like" domestic products and is, therefore, inconsistent with the first sentence of Article III:2 of GATT 1994; and,
- (b) That the Philippines does not apply the excise tax to imported distilled spirits and "directly competitive or substitutable" domestic distilled spirits "similarly", and such tax is applied "so as to afford protection to domestic production". This tax is, therefore, inconsistent with the second sentence of Article III:2 of GATT 1994.

3.2 The Philippines argues that the claims under Articles III:1 and III:2 should be rejected because the imported and domestic products at issue are neither like nor directly competitive or substitutable. With respect to the claim based on the second sentence of Article III:2, the Philippines argues further that, even if the products at issue were directly competitive or substitutable, the claim should nevertheless be rejected because: (1) domestic and imported products are in fact similarly taxed; and, (2) even if they are not similarly taxed, the excise tax at issue is not being applied so as to afford protection to domestic production.

3.3 The Philippines has additionally stated that:

"The claims by the European Union and the United States in this dispute threaten a fundamental right enjoyed by each WTO Member: the right to determine its own tax policy. The claims thus have potentially significant ramifications that go far beyond the specific facts of this dispute. This case involves the right of a developing country WTO Member to impose a tax regime that is best suited to achieve the fiscal objectives set out in its Constitution in light of the administrative and enforcement constraints it faces with respect to tax collection."²⁶⁹

3.4 The Philippines states that the fiscal objectives in its legislation are linked to achieving a progressive system of taxation that imposes higher taxes on "higher-priced goods, typically bought by wealthier consumers" and lower taxes on "lower-priced goods, typically bought by less affluent consumers."²⁷⁰ The constraints with respect to tax collection identified by the Philippines include the fact that the country "possesses a large informal economy, widespread poverty, a large geographical area and an extensive coast line to administer and monitor... and limited taxation resources".²⁷¹

3.5 In response to a question from the Panel, the Philippines has explicitly clarified that the statements it has made:

"[Are] not a reference to any of the provisions of Article XX of GATT 1994. The Philippines believes that its excise tax system embodied in Section 141 of the National Internal Revenue Code is not inconsistent with Article III, and therefore there is no need to invoke the provisions of Article XX."²⁷²

²⁶⁹ Philippines' first written submission, para. 1.

²⁷⁰ Ibid., para. 2. See also *ibid.*, paras. 32 and 296; Philippines' opening statement at first substantive meeting, paras. 5-9; Philippines' opening statement at second substantive meeting, paras. 3-5; Philippines' response to Panel question Nos. 16 and 62.

²⁷¹ Philippines' response to Panel question No. 62. See also Philippines' opening statement at first substantive meeting, para. 4; Philippines' closing statement at first substantive meeting, para. 4; Philippines' opening statement at second substantive meeting, paras. 3 and 38; Philippines' response to Panel question Nos. 16 and 63.

²⁷² Philippines' response to Panel question No. 16.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set forth in the executive summaries of their written submissions and oral statements to the Panel, are attached to these reports as Annexes (A, C, E and F) (see List of Annexes, pages iv and v).²⁷³ The replies of the parties to questions and the parties' comments on each other's replies to questions are not attached to these reports as annexes. They are, however, reflected in the findings section of these reports where relevant.²⁷⁴

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, as set forth in the executive summaries of their written submissions and oral statements to the Panel, are attached to these reports as Annexes (B and D) (see List of Annexes, pages iv and v).²⁷⁵ The replies of the third parties to questions are not attached to these reports as annexes. They are however reflected in the findings section of these reports where relevant.²⁷⁶

VI. INTERIM REVIEW

6.1 The Panel issued its interim reports to the parties on 4 May 2011.²⁷⁷ On 25 May, as foreshadowed in item (l) of the Timetable for the Panel Proceedings and in accordance to Article 15 of the DSU as well as paragraph 16 of the Working Procedures, the European Union, the United States and the Philippines requested the Panel to review precise aspects of the interim reports. On 8 June, as foreshadowed in item (m) of the Timetable for the Panel Proceedings, the parties submitted written comments on each other's comments and requests for interim review. Neither party requested an interim review meeting with the Panel.

6.2 Where appropriate, the Panel has modified certain aspects of its interim reports, in the light of the parties' comments and requests, as explained below. The Panel has also made certain revisions and corrections for the purposes of clarity and accuracy. Section VI of these reports summarizes these changes. References to paragraph numbers and footnote numbers used in Section VI are to those in the interim reports, except as otherwise noted.

A. INTERIM REVIEW CHANGES TO THE DESCRIPTIVE SECTIONS

6.3 The United States requests the inclusion of a new paragraph before paragraph 2.1 of the interim reports so as to clarify the relationship between the descriptive and findings sections of the reports and "how the Panel has based its legal conclusions on the facts before it."²⁷⁸ The Philippines and the European Union did not comment on this request. The Panel has included the United States' proposed text, with a minor change, as a footnote to paragraph 2.1.

²⁷³ The Annexes may contain instead an actual submission or statement when no executive summary was provided because that submission or statement did not exceed the page limit established in paragraph 13 of the Panel's working procedures.

²⁷⁴ As established by paragraph 9 of the Panel's working procedures.

²⁷⁵ Only Australia and Mexico made third party written submissions, and only Australia, India and Chinese Taipei made third party oral statements. The annexes may contain instead an actual submission or statement when no executive summary was provided because that submission did not exceed the page limit established in paragraph 13 of the Panel's working procedures.

²⁷⁶ As established by paragraph 9 of the Panel's working procedures.

²⁷⁷ See also para. 1.14 above.

²⁷⁸ United States' request for review of the interim reports (25 May 2011), para. 3.

6.4 The European Union requests the deletion of the word "normally" in the first sentence of paragraph 2.8 of the interim reports because "there is no evidence on the record that a spirit distilled from one of the designated raw materials in a country where such a raw material is not produced on a commercial scale has ever been taxed at the low and flat rate provided for in Section 141(a) of the NIRC."²⁷⁹ The Philippines and the United States did not comment on this request. The Panel has made the change requested by the European Union.

6.5 The European Union requests adding to footnote 66 to paragraph 2.22 references to paragraph 13 of the Philippines' opening statement at second substantive meeting and to the Philippines' response to Panel question No. 70.²⁸⁰ The Philippines and the United States did not comment on this request. The reference requested by the European Union has been added to paragraph 2.23, since it relates to the factual description of congeners.

6.6 The European Union requests adding to footnote 67 to paragraph 2.22 a reference to exhibits EU-55 and EU-79.²⁸¹ The Philippines and the United States did not comment on this request. The Panel has added the reference to the exhibits requested by the European Union.

6.7 The European Union requests replacing the words "may depend" with the word "depends" in footnote 80 to paragraph 2.29.²⁸² The Philippines and the United States did not comment on this request. The Panel has made the change requested by the European Union.

6.8 The European Union suggests adding to footnote 101 to paragraph 2.38 a reference to a finding by the panel report in *Chile – Alcoholic Beverages II*.²⁸³ While the United States did not comment on this request, the Philippines rejects it because the proposed addition refers to the summary of arguments by the parties and to findings made by another panel in another case.²⁸⁴ In the Panel's view, the findings of the report cited by the European Union, which refer to a different market, are not relevant to the specific factual finding contained in this paragraph. Accordingly, the Panel sees no reason to make the proposed addition.

B. INTERIM REVIEW CHANGES TO THE FINDINGS SECTION

6.9 The United States requests inserting the expression "4-digit" before "HS tariff heading" in paragraph 7.23 because "although the distilled spirits at issue are all classifiable under HS 2208, they fall under different classifications at the six digit level."²⁸⁵ The Philippines and the European Union did not comment on this request. The Panel has made the change requested by the United States.

6.10 The United States requests replacing the words "determinations made" with the words "reasoning used" in the first sentence of paragraph 7.32 because the original wording "could be read to suggest that the panel is applying the specific legal findings in another dispute to this dispute."²⁸⁶ The Philippines and the European Union did not comment on this request. The Panel has made the change requested by the United States.

²⁷⁹ European Union's request for review of the interim reports (25 May 2011), para. 1.

²⁸⁰ *Ibid.*, para. 2.

²⁸¹ European Union's request for review of the interim reports (25 May 2011), para. 3.

²⁸² *Ibid.*, para. 4.

²⁸³ *Ibid.*, para. 5.

²⁸⁴ Philippines' comments on the European Union's and the United States' requests for review of the interim reports (8 June 2011), para. 1.

²⁸⁵ United States' request for review of the interim reports (25 May 2011), para. 4.

²⁸⁶ *Ibid.*, para. 5.

6.11 The European Union requests adding a footnote to the fourth sentence of paragraph 7.32 with a reference to the panel report on *Japan – Alcoholic Beverages II*.²⁸⁷ The Philippines and the United States did not comment on this request. The Panel does not consider that it would be appropriate to include the reference requested by the European Union.

6.12 The European Union requests adding a new last sentence in paragraph 7.37 noting that "the production processes employed to manufacture spirits from the designated raw materials are largely similar to those used to produce spirits from the other raw materials."²⁸⁸ The European Union further requests the addition of a footnote making reference to some submissions by it and the Philippines that would support such a statement.²⁸⁹ The Philippines rejects the inclusion of the references to the Philippines' submissions as they do not support the additional statement requested by the European Union's.²⁹⁰ The United States did not comment on this request. In paragraph 7.37, the Panel notes that it would focus on the physical qualities and characteristics of the distilled spirits as final products, and not on those of the raw materials or production processes used to make the final products. Accordingly, the Panel sees no need to make the addition requested by the European Union.

6.13 The Philippines requests the text of footnote 341 to paragraph 7.38 to be modified to reflect the fact that the Philippines did not concede that imported and domestic rums are like products within the meaning of the first sentence of Article III:2.²⁹¹ While the United States did not comment on this request, the European Union rejects it because the footnote correctly reflects the position of the Philippines on this issue.²⁹² The Panel sees no reason to make the proposed change, as the text accurately reflects the position expressed by the Philippines on this issue.

6.14 The European Union requests adding to footnote 344 to paragraph 7.40 references to paragraphs 63-65 of the European Union's second written submission and to exhibit EU-92.²⁹³ The Philippines and the United States did not comment on this request. The Panel has added the references requested by the European Union to its second written submission. The Panel sees no reason, however, to add the reference to exhibit EU-92, as it concerns only whiskies made from other than the designated raw materials.

6.15 The Philippines requests footnote 344 to paragraph 7.40 to be modified, so as to reflect the fact that it provided concentration data in gas chromatography results in whiskies for eight congeners. The European Union and the United States did not comment on this request. The Panel has made the change requested by the Philippines and has inserted a clarification in the footnote with respect to congener concentration data reported as "Not Detectable".

6.16 The Philippines considers that the statement in paragraph 7.40 is incorrect as the Philippines has presented evidence on the significance of the raw materials used on the final organoleptic properties of the particular type of distilled spirit and on how such differences were perceptible to consumers. The Philippines thus requests the Panel to either address such evidence or modify the sentence that there is no evidence.²⁹⁴ European Union and the United States reject this request because, in their view, the Panel considered all relevant evidence with respect to the relevance of the

²⁸⁷ European Union's request for review of the interim reports (25 May 2011), para. 6.

²⁸⁸ *Ibid.*, para. 7.

²⁸⁹ *Ibid.*

²⁹⁰ Philippines' comments on the European Union's and the United States' requests for review of the interim reports (8 June 2011), para. 2.

²⁹¹ Philippines' request for review of the interim reports (25 May 2011), p. 1.

²⁹² European Union's comments on the Philippines' and the United States' requests for review of the interim reports (8 June 2011), para. 1.

²⁹³ European Union's request for review of the interim reports (25 May 2011), para. 8.

²⁹⁴ Philippines' request for review of the interim reports (25 May 2011), p. 1.

alleged differences between the organoleptic properties between imported and local distilled spirits and concluded that such differences do not support the division of these spirits into "two separate and identifiable groups".²⁹⁵ Noting the evidence on record, in paragraph 7.40 the Panel states that different types of distilled spirits have specific organoleptic properties. As stated in the same paragraph, however, there is no evidence that these differences in organoleptic properties create a distinction between two separate and identifiable groups: distilled spirits made from the designated materials and distilled spirits made from other materials. Accordingly, the Panel sees no reason to make the proposed change.

6.17 The European Union requests adding a footnote to paragraph 7.43 making reference to paragraph 143 of the Philippines' first written submission.²⁹⁶ The Philippines and the United States did not comment on this request. The Panel sees no reason to make the requested change as the citation to the Philippines' submission is already contained in footnotes to paragraphs 2.25 and 2.62, which are cross-referenced in footnote 348 to paragraph 7.43.

6.18 The European Union requests adding a footnote to paragraph 7.45 making reference to paragraph 36 of the Philippines' second written submission.²⁹⁷ The Philippines considers that the reference, in fact, contradicts the statement made by the Panel in paragraph 7.45 and should be referenced as such. The United States did not comment on this request. Having considered the statement made by the Philippines in its second written submission, in paragraph 2.26 the Panel concluded that, although different brands of spirits of the same type may have differences in taste and aroma, there is no evidence to suggest that a non-expert consumer would be able to distinguish between imported and domestic spirits of the same type based only on the different raw materials used in their respective production. Accordingly, the Panel sees no need to make the proposed change.

6.19 The European Union requests adding a footnote to paragraph 7.46 making reference to paragraph 119 of the Philippines' first written submission.²⁹⁸ The Philippines and the United States did not comment on this request. The Panel sees no reason to make the requested change as the citation to the Philippines' submission is already contained in footnotes to paragraphs 2.25 and 2.81, which are cross-referenced in footnote 351 to paragraph 7.46.

6.20 The United States requests the deletion of the second sentence of paragraph 7.49 so as to avoid the possible implication that the section on "Consumers' tastes and habits", under which this paragraph belongs, be understood as the only one relevant one for the issue of "the competitive relationship between the relevant products."²⁹⁹ The Philippines and the European Union did not comment on this request. In order to avoid the possible confusion identified by the United States, the Panel has deleted the sentence.

6.21 The Philippines requests that paragraph 7.50 be amended to state that, in addition to brand loyalty, price is an important factor with respect to consumers' choice. The Philippines adds that the Abrenica & Ducanes study "shows that price exerts the most significant influence on consumers' choice".³⁰⁰ The European Union and the United States reject this request because the issue of price and consumer's choice was adequately and extensively addressed by the Panel in various parts of the

²⁹⁵ European Union's comments on the Philippines' and the United States' requests for review of the interim reports (8 June 2011), para. 2; United States' comments on the Philippines' request for review of the interim reports (8 June 2011), para. 4.

²⁹⁶ European Union's request for review of the interim reports (25 May 2011), para. 9.

²⁹⁷ Ibid., para. 10.

²⁹⁸ Ibid., para. 9.

²⁹⁹ United States' request for review of the interim reports (25 May 2011), para. 6.

³⁰⁰ Philippines' request for review of the interim reports (25 May 2011), p. 2.

reports.³⁰¹ In the Panel's view, the role of price in consumers' decisions is adequately discussed in the reports, including in the first sentence of paragraph 7.50. Accordingly, the Panel sees no need to make the proposed change.

6.22 Regarding distribution channels, the Philippines requests that paragraph 7.51, and consequently also paragraph 7.123, be amended so as to adequately address distribution of "non-sugar-based spirits" in the Philippines, in particular with respect to sari-sari stores as well as the evidence that these products are put to different use when sold in outlets that sell both imported and local spirits.³⁰² The European Union and the United States reject this request because in their view the Panel adequately dealt with the issue of the distribution channels in various passages of its reports and the Philippines has offered no evidence for its assertion that domestic spirits are put to different use when sold side-by-side with imported spirits.³⁰³ In the Panel's view, the importance of distribution channels is adequately discussed in the reports. Accordingly, the Panel sees no need to make the proposed change.

6.23 Regarding marketing campaigns, the Philippines requests that paragraph 7.51, and consequently also paragraph 7.131, be amended so as to address the evidence submitted by the European Union that "importers have had to heavily distinguish their brands from local brands."³⁰⁴ The European Union and the United States reject this request because the Panel reviewed all the evidence submitted by the parties on this matter and concluded that the marketing campaigns of both imported and domestic spirit producers are "largely the similar".³⁰⁵ The European Union adds that the evidence referred to by the Philippines, a paper produced by Dr. Parplies, was merely pointing out that the Abrenica & Ducanes report failed to take into account the influence that the long application of the discrimination against imported spirits had to consumers' perception. In this context, the paper indicates that, as a result of such tax discrimination, "the only chance of surviving for many importers was to try to present their products to potential customers as somewhat different from the (sometimes cheaper) local ones."³⁰⁶ In the Panel's view, the importance of marketing campaigns is adequately discussed in the reports. Based on the evidence on record, including that referred to in paragraph 2.42, the Panel concluded that "marketing campaigns for distilled spirits are very similar". The fact that through these marketing campaigns, each producer may attempt to achieve differentiation for its respective brands does not affect this conclusion. Accordingly, the Panel sees no need to make the proposed change.

6.24 The Philippines requests paragraph 7.55 to be amended to reflect the fact that in their view the Abrenica & Ducanes study is an "econometric study" rather than a "marketing analysis".³⁰⁷ While the United States did not comment on this request, the European Union does not consider this change

³⁰¹ European Union's comments on the Philippines' and the United States' requests for review of the interim reports, para. 4 (8 June 2011); United States' comments on the Philippines' request for review of the interim reports (8 June 2011), para. 5.

³⁰² Philippines' request for review of the interim reports (25 May 2011), p. 2.

³⁰³ European Union's comments on the Philippines' and the United States' requests for review of the interim reports (8 June 2011), para. 3; United States' comments on the Philippines' and the European Union's requests for review of the interim reports (8 June 2011), para. 6.

³⁰⁴ Philippines' request for review of the interim reports (25 May 2011), p. 2.

³⁰⁵ European Union's comments on the Philippines' and the United States' requests for review of the interim reports (8 June 2011), para. 11. See also United States' comments on the Philippines' request for review of the interim reports (8 June 2011), para. 7.

³⁰⁶ European Union's comments on the Philippines' and the United States' requests for review of the interim reports (8 June 2011), paras. 6-7.

³⁰⁷ Philippines' request for review of the interim reports (25 May 2011), p. 3.

necessary as the "crucial input data" of this study was generated by a marketing analysis, i.e. a "conjoint analysis".³⁰⁸ The Panel has made the change requested by the Philippines.

6.25 The European Union suggests that a reference be added at the end of paragraph 7.57 to certain findings made by the panel in *Chile – Alcoholic Beverages*, which the European Union considers to be useful despite the fact that they were made in the context of an analysis under the second sentence of Article III:2.³⁰⁹ The Philippines and the United States did not comment on this request. The Panel sees no need to make the proposed change.

6.26 The European Union suggests adding a new paragraph between paragraphs 7.57 and 7.58 recalling statements made in the Abrenica & Ducanes survey suggesting the existence, among Filipino consumers, of traditional habits and tastes which might create brand loyalty that can limit their propensity to switch brand. Additionally, the new paragraph could state, citing in support a GATT case, that the large tax deferential applied to the products at issue contribute to reinforce or "freeze" such habits and tastes. The Philippines and the United States did not comment on this request. In the Panel's view, the discussion of brand loyalty in the Abrenica & Ducanes survey is adequately addressed in the reports, including in paragraph 7.50 in the same section. Accordingly, the Panel sees no need to make the proposed change.

6.27 The European Union requests adding a sentence at the end of paragraph 7.61 noting that, according to the evidence in the record, imported spirits share the same shelving space of domestic spirits in most outlets, and that previous panels found this to be an indication of substitutability between these products.³¹⁰ The Philippines and the United States did not comment on this request. The Panel has noted elsewhere in the reports, including in paragraph 7.51, that some outlets where imported spirits are sold also offer domestic Philippine spirits. Some evidence on record, including that identified by the European Union³¹¹, suggests that, in at least some of those outlets, imported spirits share the same shelving space of domestic spirits. The Panel does not find, however, enough evidence on record to suggest that this is the situation of "most outlets" in the Philippines. Accordingly, the Panel sees no need to make the proposed change.

6.28 The Philippines requests paragraph 7.62 to be amended "to reflect the fact that, despite their willingness, the vast majority of consumers cannot afford non-sugar-based spirits."³¹² The European Union and the United States reject this request because in their view a contrary conclusion regarding the affordability of imported spirits was already reached by the Panel in several passages of the interim reports.³¹³ In the Panel's view, the issue of the income and expenditure constraints faced by the Philippines' consumers is adequately discussed in the reports. As noted by the Panel, the evidence on record suggests that because of those constraints a large proportion of the Philippine population has a limited ability to purchase distilled spirits beyond certain price levels. The Panel has found, however, no evidence of two separate distilled spirit markets in the Philippines that reflect different levels of purchasing power, i.e. one that would consume distilled spirits made from designated raw materials, and another that would consume distilled spirits made from other raw materials. Accordingly, the Panel sees no need to make the proposed change.

³⁰⁸ European Union's request for review of the interim reports (25 May 2011), para. 14.

³⁰⁹ Ibid., para. 12.

³¹⁰ European Union's request for review of the interim reports (25 May 2011), para. 14.

³¹¹ See exhibits EU-66, EU-67, EU-68, EU-69, EU-71 and EU-104.

³¹² Philippines' request for review of the interim reports (25 May 2011), pp. 2-3.

³¹³ European Union's comments on the Philippines' and the United States' requests for review of the interim reports (8 June 2011), para. 13; United States' comments on the Philippines' request for review of the interim reports (8 June 2011), para. 8.

6.29 The European Union requests a clarification in paragraph 7.77 by rephrasing "distilled spirits at issue" to "distilled spirits made from the designated raw materials and distilled spirits made from other raw materials".³¹⁴ The United States supports the proposed change.³¹⁵ The Philippines did not comment on this request. In the Panel's view, the language of the paragraph is clear. The Panel's finding covers the distilled spirits at issue in the dispute, whether imported or domestic, and irrespective of the raw materials from which they are made; i.e., whether made from the designated raw materials or from other raw materials. Accordingly, the Panel sees no need to make the requested change.

6.30 The European Union requests adding a footnote at the end of paragraph 7.80 referring to paragraphs 2.25 and 7.38 of the interim reports.³¹⁶ Neither the Philippines nor the United States made comments on this request. The Panel has made the change requested by the European Union.

6.31 The United States requests changing the phrase "more specifically sugar cane molasses" to the more general term "designated raw materials" throughout paragraph 7.85 so as to more accurately reflect the fact that the Excise Tax divides spirits between those made from designated raw materials and those made from other raw materials.³¹⁷ The Philippines does not object to the change, but requests that should changes be made that they also include references to the specific factual evidence the Panel relied upon.³¹⁸ The European Union did not comment on this request. The United States is correct that the measure at issue creates a distinction between spirits made from designated raw materials and those made from other raw materials. As the Panel notes in paragraph 2.17, "all distilled spirits produced in the Philippines are made from designated raw materials". At the same time, the domestic spirits that were relevant in the dispute were all made from sugar cane molasses. As noted by the Panel in paragraph 2.17 and footnote 59, "most of the distilled spirits produced in the Philippines are made from one particular designated raw material: sugar cane molasses." Indeed, "[t]here is no evidence ... that raw materials other than sugar cane molasses are currently used by Philippine distilled spirits producers in commercial quantities." Accordingly, the Panel has made the change requested by the United States.

6.32 The European Union requests adding a reference to exhibits EU-101 and EU-102 in footnote 448 to paragraph 7.110.³¹⁹ The Philippines and the United States did not comment on this request. The Panel has added the reference requested by the European Union.

6.33 The European Union requests amending paragraph 7.118 to mention the fact that the Philippines mostly referred to average prices rather than to actual prices of single products, and that similar arguments were discarded by the panel on *Korea – Alcoholic Beverages*.³²⁰ The Philippines and the United States have not made comments on this request. The Panel reports note elsewhere that the Philippines has often referred to average prices of distilled spirits in its market.³²¹ The Philippines' argument noted in paragraph 7.118 "that instances of price overlap between domestic and imported distilled spirits are 'exceptions and aberrations'", however, does not refer to average prices but to prices of single products. Accordingly, the Panel sees no need to make the requested change.

³¹⁴ European Union's request for review of the interim reports (25 May 2011), para. 15.

³¹⁵ United States' comments on the Philippines' request for review of the interim reports (8 June 2011), para. 2.

³¹⁶ European Union's request for review of the interim reports (25 May 2011), para. 16.

³¹⁷ United States' request for review of the interim reports (25 May 2011), para. 7.

³¹⁸ Philippines' comments on the European Union's and United States' request for review of the interim reports (8 June 2011), para. 4.

³¹⁹ European Union's request for review of the interim reports (25 May 2011), para. 17.

³²⁰ *Ibid.*, para. 18.

³²¹ See, for example, paras. 7.143 and 7.162-7.163.

6.34 The European Union requests adding a footnote to the third sentence of paragraph 7.121 by making reference to the Appellate Body report in *Korea – Alcoholic Beverages*.³²² The Philippines and the United States did not comment on this request. The Panel sees no reason to make the requested change as the citation to the Appellate Body report is already contained in footnotes 426 and 427 to paragraph 7.100, which is mentioned in the first sentence of paragraph 7.121.

6.35 The European Union requests adding a new paragraph after paragraph 7.121 to include statements from domestic Philippine companies stating that their products face competition from imported spirits, and that their marketing strategies convey an image of their products as drinks that can and do compete with the best imported distilled spirits. The European Union considers this to be additional evidence supporting the existence of a competitive relationship between the products at issue and additionally requests that a footnote be inserted at the end of this new paragraph referencing the panel report in *Chile – Alcoholic Beverages*.³²³ The Philippines and the United States did not comment on this request. In the Panel's view, the statements from domestic Philippine companies referred to by the European Union relate to actual competition discussed in paragraph 7.120, rather than to potential competition discussed in paragraph 7.121. Accordingly, the Panel has added a reference to the statements from domestic Philippine companies, to certain EU exhibits and to the panel report on *Chile – Alcoholic Beverages* to footnote 472 to paragraph 7.120.

6.36 The European Union requests adding a sentence at the end of paragraph 7.123 noting that in most outlets the products at issue share the same shelving space, and that previous panels (such as *Chile – Alcoholic Beverages*) found this to be an indication of substitutability between the different products.³²⁴ The Philippines and the United States did not comment on this request. The Panel has already rejected a similar request made by the European Union regarding paragraph 7.61. For the same reasons, the Panel sees no need to make the proposed change.

6.37 The European Union requests adding either in the text of paragraph 7.127 or in footnote 485 references to the panel reports on *Chile – Alcoholic Beverages* and *Korea – Alcoholic Beverages*.³²⁵ The Philippines and the United States did not comment on this request. The Panel has added references to the panel reports on *Chile – Alcoholic Beverages* (paragraph 7.53) and *Korea – Alcoholic Beverages* (paragraph 10.67) to footnote 486. The Panel does not consider that it would be appropriate to include a reference to paragraph 7.83 of the panel report on *Chile – Alcoholic Beverages*.

6.38 The European Union suggests adding in footnote 494 to paragraph 7.131 references to paragraphs 10.65, 10.79 and 10.80 of the panel report in *Korea – Alcoholic Beverages*.³²⁶ The Philippines and the United States did not comment on this request. The Panel has added a reference to the panel report on *Korea – Alcoholic Beverages* (paragraph 10.65) in a new footnote at the end of paragraph 7.131. The Panel does not consider that it would be appropriate to include a reference to paragraphs 10.79 and 10.80 of the panel report on *Korea – Alcoholic Beverages*.

6.39 The United States requests amending paragraph 7.147 to clarify that the approach advanced by the United States is specific to the present dispute by adding the phrase "in this case" following the

³²² European Union's request for review of the interim reports (25 May 2011), para. 19.

³²³ European Union's request for review of the interim reports (25 May 2011), para. 20.

³²⁴ *Ibid.*, para. 21.

³²⁵ *Ibid.*, para. 22.

³²⁶ *Ibid.*, para. 23.

words "the correct approach".³²⁷ The Philippines and the European Union did not comment on this request. The Panel has made the change proposed by the United States.

6.40 The Philippines requests amending paragraph 7.159 to note that the Excise Tax on "non-sugar-based" spirits "is also a specific tax, not an *ad valorem* tax", although these products are tiered according to their NRP.³²⁸ The United States disagrees and finds that the term "*ad valorem*" is appropriate to describe the Excise Tax, because the tiered tax rates depend on the net retail price. The United States does not object, however, an additional clarification by the Panel on this issue.³²⁹ The European Union did not comment on this request. The Panel has described the Excise Tax rates in paragraphs 2.2 to 2.5 of the reports. This factual description was not contested by the parties. As noted in those paragraphs, spirits made from designated raw materials are subject to a flat tax rate. In contrast, spirits made from other raw materials are subject to three different tax rates, depending on their net retail price (NRP). While these three tax rates are not imposed as a percentage of the NRP of the products, the tax ultimately depends on the value of the spirit. In this sense, it is an *ad valorem* tax. With this clarification, the Panel sees no reason to make the requested change.

C. INTERIM REVIEW CHANGES TO THE CONCLUSIONS AND RECOMMENDATIONS SECTION

6.41 The United States requests amending paragraph 8.1 to clarify the fact that the reports contain common finding sections, but separate conclusions and recommendations for each complainant.³³⁰ The Philippines and the European Union did not comment on this request. The Panel has made the change proposed by the United States.

D. MINOR CORRECTIONS AND ADDITION OF REFERENCES

6.42 As a result of comments from the parties, minor typographical corrections were made to paragraphs 7.50, 7.101, 7.105 and 7.185. The Panel also made a clerical correction to footnote 210 to paragraph 2.75.

VII. FINDINGS

A. CLAIMS AND ORDER OF ANALYSIS

1. The complainants' claims

7.1 The complainants present their respective claims under the two sentences of Article III:2 of GATT 1994 differently. The European Union generally starts its argumentation with the first sentence of Article III:2.³³¹ It articulates its claim under the second sentence as an alternative, in the event that it does not succeed, either partially or totally, in its claim under the first sentence. Indeed, in its first submission, the European Union explains that:

"[I]f this Panel were not persuaded that some or all of those spirits are 'like' within the meaning of GATT Article III:2, first sentence, *subordinately*, the EU submits that

³²⁷ United States' request for review of the interim reports (25 May 2011), para. 8.

³²⁸ Philippines request for review of the interim reports (25 May 2011), p. 3.

³²⁹ United States' comments on the Philippines' request for review of the interim reports (8 June 2011), para. 9.

³³⁰ United States' request for review of the interim report (25 May 2011), para. 9.

³³¹ See European Union's first written submission, para. 50.

they are 'directly competitive or substitutable' pursuant to GATT Article III:1 and III:2, second sentence."³³² (emphasis added)

7.2 In contrast, the United States presents its claims under each of the two sentences as independent claims; it specifically requests findings that would cover all distilled spirits under both the first and the second sentences of Article III:2.³³³

7.3 The Philippines generally responds to the complainants' arguments under Article III:2 by starting with the first sentence.³³⁴ The Philippines submits that each of the two sentences of Article III:2 establishes independent and distinct obligations and, consequently, a separate and distinct analysis is required for each.³³⁵

7.4 Concerning the products covered by the dispute, the European Union indicates that its claim under the first sentence of Article III:2 is that for each type of distilled spirit relevant in the present dispute (gin, brandy, rum, vodka, whisky and tequila), products made from the designated raw materials are "like" imported products that are made from other materials and are being taxed "in excess".³³⁶ The European Union states that it "does not necessarily claim that all spirits under HS code 2208 are 'like products' within the meaning of Article III:2, first sentence, of the GATT", but that:

"[A]t the very least – and irrespective of the type and origin of the raw materials used for their production, all gins sold in the Philippines are like products, all brandies sold in the Philippines are like products, all whiskies sold in the Philippines are like products, all vodkas sold in the Philippines are like products, all rums sold in the Philippines are like products, and so on."³³⁷

7.5 With respect to its alternative claim under the second sentence of Article III:2, the European Union argues that all distilled spirits falling under HS heading 2208 are "directly competitive and substitutable", irrespective of the raw materials from which they are distilled.³³⁸ The European Union submits, to illustrate the point, "that imported gin is directly competitive and substitutable with Filipino vodka, that imported brandy is directly competitive and substitutable with domestic whisky, etc."³³⁹ However, the European Union subordinately argues that, if the Panel were to conclude that all or some distilled spirits are not "directly competitive and substitutable", then "for each type of spirit (e.g. gin, vodka, whisky, rum, brandy, tequila etc.), the products distilled from the designated raw materials are 'directly competitive and substitutable' with those distilled from the non-designated raw materials".³⁴⁰ In other words, the European Union submits that "a whisky produced from the

³³² Ibid., para. 49. The European Union adds that "if the Panel were to establish that the Philippines violate Article III:2, first sentence, it would not necessarily need to analyze a breach of the second sentence of the same provision". European Union's first written submission, para. 52. See also European Union's response to Panel question Nos. 18, paras. 9-12, and 64, paras. 4-5.

³³³ See, e.g. United States' first written submission, paras. 37 and 100, where it claims, without any qualifications, that the measures violate *both* sentences of Article III:2. See also United States' second written submission, paras. 3-4 and 24; United States' response to Panel question No. 64, para. 2.

³³⁴ See for example Philippines' first written submission, paras. 73-204 and 205-314; Philippines' second written submission, paras. 19-45 and 46-82.

³³⁵ Philippines' first written submission, paras. 56-58.

³³⁶ See European Union's first written submission, para. 62; European Union's response to Panel question Nos. 18, para. 11, and 64, para. 5.

³³⁷ European Union's first written submission, para. 62.

³³⁸ European Union's response to Panel question No. 18, para. 11.

³³⁹ Ibid. (footnote omitted).

³⁴⁰ European Union's response to Panel question No. 18, para. 12.

designated raw materials is directly competitive and substitutable with a whisky produced from other raw materials; a gin produced from the designated raw materials is directly competitive and substitutable with a gin produced from other raw materials; a vodka produced from the designated raw materials is directly competitive and substitutable with a vodka produced from other raw materials; etc."³⁴¹

7.6 With respect to product coverage, the United States suggests that the Panel may compare "Philippine and imported brands of each type of spirit, in order to evaluate whether the measure itself ... is consistent with the Philippines' obligations." On that basis, the Panel could conclude "that domestic spirits of all types made from protected raw materials are not only 'directly competitive or substitutable' with imported distilled spirits, but would indeed be 'like products' with certain of their imported counterparts."³⁴² Specifically, with respect to the first sentence of Article III:2, the United States asks the Panel to "review the evidence of Philippine domestic brands and their imported counterparts to confirm that Philippine 'brandy' is like imported 'brandy,' Philippine 'gin' is like imported 'gin,' etc."³⁴³

2. Applicable provisions

7.7 Parties have brought claims under the two sentences of Article III:2 of the GATT 1994.

7.8 We recall that the first sentence of Article III:2 of the GATT 1994 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."

7.9 The second sentence of Article III:2 of the GATT 1994 provides that:

"Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1 [of Article III]."

7.10 In turn, Article III:1 of the GATT states that:

"The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, *should not be applied to imported or domestic products so as to afford protection to domestic production.*" (emphasis added).

7.11 Finally, we observe that the *Ad Note* to Article III:2 of the GATT provides that:

"A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on

³⁴¹ Ibid.

³⁴² United States' response to Panel question No. 18, para. 7.

³⁴³ United States' second written submission, para. 24 (footnote omitted). See also United States' first written submission, paras. 82 and 90; United States' response to Panel question No. 64, para. 2.

the other hand, a *directly competitive or substitutable product which was not similarly taxed.*" (emphasis added).

3. Order of analysis

7.12 Previous panels have approached the order of analysis of simultaneous claims under the first and second sentences of Article III:2 differently.

7.13 Most panels faced with claims under both sentences of Article III:2 have started their analysis with the first sentence. The panels in *Japan – Alcoholic Beverages II* and *Mexico – Taxes on Soft Drinks* (with respect to the claims concerning Mexico's treatment for sweeteners) considered first whether the challenged measures were inconsistent with the *first* sentence of Article III:2, and subsequently went on to consider whether they were also inconsistent with the second sentence.³⁴⁴

7.14 The panel in *Korea – Alcoholic Beverages*, however, began its analysis with the second sentence, noting that it found it logical to examine "the broader category [of directly competitive or substitutable products] first."³⁴⁵ That panel found that the challenged measure was inconsistent with Article III:2, second sentence, but made no findings under Article III:2, first sentence, as it found insufficient evidence that the relevant products were "like products".³⁴⁶

7.15 In some instances, claims under the two sentences in Article III:2 have been presented by the complainants as alternatives. Such was the case in *Canada – Periodicals*, in *Mexico – Taxes on Soft Drinks* (with respect to claims regarding taxes on soft drinks and syrups) and in *China – Auto Parts*. The three panels were faced with primary claims under Article III:2, first sentence, and alternative claims under Article III:2, second sentence. Once the panels concluded that the challenged measures were inconsistent with the first sentence, they found no need to make additional findings with respect to the second sentence.³⁴⁷

7.16 In *Indonesia – Autos*, even though the claims were *not* presented as alternatives, the panel was of the view that, having found that the tax provisions of the Indonesian car programmes were inconsistent with Article III:2, first sentence, it was unnecessary to examine the same programmes under the second sentence.³⁴⁸

7.17 In the current case, as explained in paragraphs 7.1 to 7.6, we have two different sets of complaints. First, a complaint presented by the European Union, which includes a principal claim under the first sentence of Article III:2 of the GATT 1994 and an alternative claim concerning the second sentence of Article III:2. Second, two independent claims presented by the United States under the first and second sentences of Article III:2. We will start our analysis with the first sentence of Article III:2 and subsequently assess the claims under the second sentence.

³⁴⁴ Panel Report, *Japan – Alcoholic Beverages II*, paras. 6.27, 6.33 and 7.1; Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.59 and 8.96.

³⁴⁵ Panel Report, *Korea – Alcoholic Beverages*, para. 10.36.

³⁴⁶ *Ibid.*, para. 10.104.

³⁴⁷ Panel Report, *Canada – Periodicals*, paras. 3.111, 5.27 and 5.30; Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.161; and Panel Reports, *China – Auto Parts*, para. 7.226. In the case of *Canada – Periodicals*, the claim under the second sentence of Article III:2 was eventually analysed by the Appellate Body, which found it necessary to "complete the analysis" after it had reversed the panel's finding under the first sentence (Appellate Body Report, *Canada – Periodicals*, DSR 1997:I, 449, at 468).

³⁴⁸ Panel Report, *Indonesia – Autos*, paras. 14.115-14.117.

B. BURDEN OF PROOF

7.18 The general rule is that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.³⁴⁹ Following this principle, the Appellate Body has explained that the complaining party in any given case should establish a prima facie case of inconsistency of a measure with a provision of the WTO covered agreements, before the burden of showing consistency with that provision or defending it under an exceptional provision is passed to the defending party.³⁵⁰ According to the Appellate Body, a prima facie case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case."³⁵¹ To establish a prima facie case, the party asserting a particular claim must adduce evidence sufficient to raise a presumption that what is claimed is true. In this regard, precisely how much and what kind of evidence will be required to establish a presumption that a claim is valid will necessarily vary from case to case.³⁵²

7.19 The Philippines argues that both the European Union and the United States have failed to discharge their burden of proof.³⁵³ The Philippines submits that the European Union inappropriately assumes that the finding of a breach of the first sentence of Article III:2 of the GATT 1994 inevitably entails a breach of the second sentence; in the Philippines' view, the obligations in each of the sentences are separate and distinct and each requires a separate and distinct analysis.³⁵⁴ The Philippines adds that the United States appears to rely on findings made by panels and the Appellate Body in previous cases involving alcoholic beverages. Such precedents would constitute "an inadequate evidentiary basis" for the determinations to be made in the present case, which should be based instead on the circumstances of the Philippines market.³⁵⁵ The Philippines also argues that the complainants have failed to provide a complete analysis regarding the likeness of each distilled spirit "on a product-by-product basis".³⁵⁶ In the Philippines' view, the complainants have instead produced limited evidence regarding a limited number of distilled spirits, which would be insufficient to establish a violation of Article III:2 of the GATT 1994.³⁵⁷ The Philippines submits that "[i]f the Panel pursues a 'grouping' approach in this case [for all distilled spirits in HS heading 2208], it must exercise great care to ensure that the categories of products they are grouping together are 'sufficiently similar' in terms of 'composition, quality, function and price'."³⁵⁸ Finally, the Philippines argues that it has "presented evidence to rebut the complainants' assertions, including the types of evidence that previous panels have required in their Article III:2 analysis".³⁵⁹

³⁴⁹ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323 at p. 335. Panel Report, *US – Shrimp*, para. 7.14.

³⁵⁰ Appellate Body Report, *EC – Hormones*, para. 104.

³⁵¹ *Ibid.*

³⁵² Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323 at p. 335.

³⁵³ Philippines' first written submission, para. 70. See also Philippines' opening statement at first substantive meeting, paras. 11-13; Philippines' second written submission, paras. 6-18; Philippines' opening statement at second substantive meeting, paras. 7-9; Philippines' response to Panel question Nos. 17 and 51.

³⁵⁴ Philippines' first written submission, paras. 56-58.

³⁵⁵ *Ibid.*, paras. 59-60. See also Philippines' second written submission, paras. 11-12 and 15-18.

³⁵⁶ Philippines' first written submission, para. 62.

³⁵⁷ *Ibid.*, paras. 61-71. See also Philippines' second written submission, paras. 7-10.

³⁵⁸ Philippines' second written submission, para. 14.

³⁵⁹ Philippines' opening statement at second substantive meeting, para. 10. See also Philippines' second written submission, para. 18; Philippines' response to Panel question No. 51.

7.20 The European Union and the United States reject the Philippines' arguments and submit that they have produced sufficient evidence to support their respective cases.³⁶⁰ The complainants argue that they have produced "a very extensive and thorough examination of why distilled spirits made from designated raw materials are similar to distilled spirits made from the non-designated raw materials."³⁶¹ This examination demonstrates that, irrespective of the raw materials used in their production, the relevant distilled spirits are "like", or, "at the very least", directly competitive and substitutable.³⁶² The European Union adds that:

"[G]iven that both like and directly competitive and substitutable products are part of the same broad category of similar products, all evidence advanced with respect to each element of the similarity assessment (concerning physical characteristics, end uses, consumer tastes and preferences, channels of distribution, prices, etc.) is relevant to the consideration of the products as either like, or as directly competitive and substitutable."³⁶³

7.21 In this dispute, the initial burden of proof rests upon each complainant to establish a prima facie case that the measure at issue is inconsistent with Article III:2 of the GATT 1994. If we were to find that the complainants have established a prima facie case of inconsistency of the challenged measure with the relevant provisions, the burden will then fall on the Philippines to rebut such claims.

C. CLAIMS UNDER THE FIRST SENTENCE OF ARTICLE III:2 OF GATT 1994

1. The complainants' claims

7.22 The European Union and the United States claim that the Philippines' excise tax is inconsistent with the first sentence of Article III:2.

7.23 The European Union and the United States argue that domestic Philippine distilled spirits produced from the raw materials designated in the excise tax law are "like" imported spirits produced with other raw materials.³⁶⁴ In the complainants' view, the basic physical properties of all distilled spirits, irrespective of the raw materials from which they are produced, are "essentially the same"³⁶⁵; distilled spirits in general have the same end uses³⁶⁶; the consumers' tastes and habits are not affected

³⁶⁰ See European Union's opening statement at first substantive meeting, paras. 7 and 13-18; United States' opening statement at first substantive meeting, paras. 35-48.

³⁶¹ European Union's second written submission, para. 23. See also European Union's opening statement at first substantive meeting, paras. 14 and 17; European Union's second written submission, paras. 26-34.

³⁶² European Union's second written submission, para. 23. See also European Union's opening statement at first substantive meeting, paras. 17-18; United States' opening statement at first substantive meeting, paras. 31-45; United States' second written submission, paras. 3-11; United States' opening statement at first substantive meeting, para. 18.

³⁶³ European Union's second written submission, para. 25. See also European Union's opening statement at first substantive meeting, para. 15; United States' opening statement at first substantive meeting, paras. 36-38.

³⁶⁴ See for example European Union's first written submission, paras. 49 and 58-99; United States' first written submission, paras. 37 and 80-98; United States' opening statement at first substantive meeting, para. 42.

³⁶⁵ See for example European Union's first written submission, paras. 79-88; European Union's second written submission, paras. 28 and 78-84; European Union's opening statement at second substantive meeting, paras. 20-24; United States' first written submission, paras. 90-94.

³⁶⁶ See for example European Union's first written submission, paras. 64-70; European Union's second written submission, paras. 28 and 104-107; United States' first written submission, para. 95.

by the different raw materials used in their production³⁶⁷; all distilled spirits fall under the same 4-digit HS tariff heading and the classification of different types of spirit into sub-groups does not depend on the raw material used in their production³⁶⁸; and internal regulations in the Philippines as well as other countries do not distinguish between spirits on the basis of the raw material from which they are distilled.³⁶⁹

7.24 The complainants add that imported distilled spirits produced with raw materials other than those designated in the excise tax law are being taxed "in excess" of domestic Philippine distilled spirits produced from the designated raw materials.³⁷⁰

7.25 The European Union and the United States conclude that the Philippines' excise tax imposed on distilled spirits is inconsistent with the first sentence of Article III:2 of the GATT 1994.³⁷¹

2. The Philippines' response

7.26 The Philippines responds that the complainants have failed to provide the required evidence to allow the Panel to conclude that the products in the dispute are "like".³⁷²

7.27 In addition, the Philippines states that distilled spirits produced from the raw materials designated in the excise tax law are not "like" distilled spirits produced with other raw materials. In the Philippines' view, there are significant physical differences between both categories of spirits³⁷³; distilled spirits produced from the raw materials designated in the excise tax law do not compete in the market with distilled spirits produced with other raw materials because of market segmentation in the Philippines³⁷⁴; and tariff classification based on the Harmonized System groups distilled spirits on the basis of the raw materials used in their respective production.³⁷⁵ The Philippines adds that, although all distilled spirits have the same end uses, this does not mean that they are like products.³⁷⁶

³⁶⁷ See for example European Union's first written submission, paras. 71-78; European Union's second written submission, paras. 28 and 85-95, 97-103 and 108-109; United States' first written submission, paras. 96-98.

³⁶⁸ See for example European Union's first written submission, paras. 92-96; European Union's second written submission, para. 96.

³⁶⁹ See for example European Union's first written submission, paras. 89-91; United States' first written submission, paras. 37 and 83-89.

³⁷⁰ See for example European Union's first written submission, paras. 100-106; European Union's second written submission, para. 127; United States' first written submission, para. 99; United States' opening statement at first substantive meeting, para. 43; United States' second written submission, para. 13.

³⁷¹ See for example European Union's first written submission, paras. 48-49 and 106; United States' first written submission, paras. 37 and 79-99; United States' opening statement at first substantive meeting, paras. 36-43; United States' second written submission, para. 56.

³⁷² Philippines' first written submission, paras. 62-72 and 81; Philippines' opening statement at first substantive meeting, para. 13; Philippines' second written submission, paras. 7-9.

³⁷³ See for example Philippines' first written submission, paras. 10-13, 85-88 and 94-175; Philippines' opening statement at first substantive meeting, paras. 12-24; Philippines' second written submission, paras. 19-33.

³⁷⁴ See for example Philippines' first written submission, paras. 89-90 and 176-188; Philippines' opening statement at first substantive meeting, paras. 21-22; Philippines' second written submission, paras. 34-42 and 50-75; Philippines' response to Panel question Nos. 35 and 36.

³⁷⁵ See for example Philippines' first written submission, paras. 189-200; Philippines' opening statement at first substantive meeting, para. 19; Philippines' second written submission, paras. 43-45.

³⁷⁶ Philippines' first written submission, paras. 201-203; Philippines' opening statement at first substantive meeting, para. 23.

7.28 The Philippines considers that, because the relevant products are not "like", there is no need for the Panel to proceed to consider whether one group of distilled spirits is being taxed "in excess of" another group of distilled spirits.³⁷⁷

7.29 Finally, the Philippines states that the distinction in its legislation between distilled spirits made from designated raw materials and those made from other raw materials does not seek to protect domestic production, but rather to enforce "a tax regime that is best suited to achieve the fiscal objectives set out in [the Philippines'] Constitution in light of the administrative and enforcement constraints [the Philippines] faces with respect to tax collection."³⁷⁸ The fiscal objectives in its legislation are linked to achieving a "progressive" system of taxation that imposes higher taxes on "higher-priced goods, typically bought by wealthier consumers" and lower taxes on "lower-priced goods, typically bought by less affluent consumers."³⁷⁹ The constraints with respect to tax collection identified by the Philippines include the fact that the country "possesses a large informal economy, widespread poverty, a large geographical area and an extensive coast line to administer and monitor ... and limited taxation resources".³⁸⁰

3. Panel's analysis

7.30 As articulated by the Appellate Body in its report in *Canada – Periodicals*, the analysis of whether a measure is inconsistent with the first sentence of Article III:2 of the GATT 1994 requires a two-step test:

"[T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence."³⁸¹

7.31 The consistent interpretation by dispute settlement bodies under the GATT 1947 and the WTO is that whether products are "like" under Article III:2, first sentence³⁸² must be determined "on a case-by-case basis, by examining relevant factors".³⁸³ These factors include "the product's properties, nature and quality"; "the product's end-uses in a given market"; and "consumers' tastes and habits, which change from country to country".³⁸⁴ Another relevant factor identified by the Appellate Body is the tariff classification, which, if sufficiently detailed, "can be a helpful sign of product similarity",

³⁷⁷ Philippines' first written submission, para. 204; Philippines' opening statement at first substantive meeting, para. 24. See also European Union's second written submission, para. 127; United States' second written submission, para. 13; Philippines' second written submission, para. 4.

³⁷⁸ Philippines' first written submission, para. 1. See also Philippines' response to Panel question No. 16.

³⁷⁹ Philippines' first written submission, para. 2. See also Philippines' first written submission, paras. 32 and 296; Philippines' opening statement at first substantive meeting, paras. 5-9; Philippines' opening statement at second substantive meeting, paras. 3-5; Philippines' response to Panel question Nos. 16 and 62.

³⁸⁰ Philippines' response to Panel question No. 62. See also Philippines' opening statement at first substantive meeting, para. 4; Philippines' closing statement at first substantive meeting, para. 4; Philippines' opening statement at second substantive meeting, paras. 3 and 38; Philippines' response to Panel question Nos. 16 and 63.

³⁸¹ Appellate Body Report, *Canada – Periodicals*, pp. 22-23, DSR 1997:I, p. 449, at p. 465-66.

³⁸² In the French and Spanish versions of the GATT 1994, the equivalent expressions to "like products" are "*produits similaires*" and "*productos similares*", respectively.

³⁸³ Appellate Body Report, *Canada – Periodicals*, p. 21, DSR 1997:I, p. 449, at p. 466. See also, Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20, DSR 1996:I, p. 97, at p. 113.

³⁸⁴ GATT Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18, as quoted in Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20, DSR 1996:I, p. 97, at p. 113.

and has been used to assess likeness in several adopted panel reports.³⁸⁵ In addition to the tariff classification, previous panels have looked at other internal regulations as a useful indicator of the degree to which a Member would tend to regard different products as being similar.³⁸⁶ The Appellate Body has noted that a panel should examine the evidence relating to each of these four criteria and, then, weigh all of that evidence, along with any other relevant evidence, in making an overall determination of whether the products at issue may be characterized as "like".³⁸⁷

7.32 We will take into account the reasoning used by other panels and the Appellate Body in previous cases, including those made in cases involving challenges against internal taxes on distilled spirits. Our analysis will focus on the relevant market in the present case; namely, the Philippines' market.³⁸⁸ We will keep in mind the Appellate Body's statement that the definition of "like products" under Article III:2, first sentence, must be construed narrowly.³⁸⁹ We understand this to mean that likeness under the first sentence of Article III:2 is not limited to products that are identical. Indeed, had this sentence intended to cover only identical products, the agreement would have used the word "identical", instead of using the expression "like products" (and the expressions "*productos similares*" and "*produits similaires*" in the corresponding texts in Spanish and French, respectively). Likewise the Appellate Body, in describing like products, has never indicated that the first sentence covers only identical products.

7.33 In order to address the likeness requirement of the first sentence of Article III:2, we will consider the evidence presented by the parties regarding the products' properties, nature and quality; their end uses, with reference to the Philippine market; Philippine consumers' tastes and habits; the tariff classification of the products based on the Harmonized System; and other relevant internal regulations in the Philippines. We will construe the likeness test in a narrow manner in accordance with previous interpretations of the first sentence of Article III:2 of the GATT 1994.³⁹⁰

(i) *Products' properties, nature and quality*

7.34 As noted by the Appellate Body, "properties, nature and quality" may be seen "as intended to cover the physical qualities and characteristics of the products".³⁹¹

7.35 All distilled spirits relevant in the present dispute (gin, brandy, rum, vodka, whisky, tequila and tequila-flavoured spirits) are concentrated forms of potable alcohol obtained through the process of distillation. Ethyl alcohol and water combined account for almost all of their content. The average alcohol content for distilled spirits relevant to the present dispute ranges from around 25 per cent to 40 per cent (50 to 80 degrees under proof). Distilled spirits of the same type tend to have similar alcohol content.³⁹² They are all translucent, with colours that range from clear (transparent) to golden

³⁸⁵ Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 21-22, DSR 1996:1, p. 97, at p. 114.

³⁸⁶ See for example Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.441-7.442. See also European Union's opening statement at second substantive meeting, para. 62.

³⁸⁷ Appellate Body Report, *EC – Asbestos*, para. 109.

³⁸⁸ See Panel Report, *Japan – Alcoholic Beverages II*, para. 6.22; Panel Report, *Korea – Alcoholic Beverages*, para. 10.57. See also Philippines' first written submission, para. 59; Philippines' second written submission, paras. 16-17.

³⁸⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-21, DSR 1996:1, p. 97, at 112-114.

³⁹⁰ Appellate Body Report, *Canada – Periodicals*, p. 21, DSR 1997:I, p. 449, at p. 468. See also, Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 19-21, DSR 1996:1, p. 97, at pp. 112-114.

³⁹¹ Appellate Body Report, *EC – Asbestos*, para. 110 (the reference in that case was to the likeness analysis under Article III:4 of the GATT 1994, rather than under Article III:2. We find no reason, however, why the statement should not also be applicable to Article III:2).

³⁹² See paras. 2.22, 2.57, 2.58, 2.62, 2.63, 2.64, 2.65, 2.70, 2.71, 2.76, 2.77, 2.82, 2.83 and 2.89 above.

or mahogany.³⁹³ Consumption of distilled spirits may cause similar physiological effects on humans, due to the presence of ethyl alcohol.³⁹⁴

7.36 Traditionally, the colour, flavour and aroma associated with specific distilled spirits are a result of the particular distillation of ethyl alcohol from certain raw materials, such as wine or fortified wine, sugar molasses, wheat, barley or malt, or agave, and of its production process.

7.37 Alternative processes involve the use of non-traditional raw materials in creating final products that closely mimic traditional products. In these circumstances, a panel should focus its "likeness" analysis on the physical qualities and characteristics of the final product, and not on the different raw materials used. The difference in raw materials would only be relevant to the extent that it results in final products that are not similar. This approach was followed by the panel on *Mexico – Taxes on Soft Drinks*, when comparing beet sugar with cane sugar, and when comparing soft drinks and syrups sweetened with non-cane sugar sweeteners (including high-fructose corn syrup) with soft drinks and syrups sweetened with cane sugar.³⁹⁵ We consider that this is the approach we should use in the present case. We will therefore focus on the physical qualities and characteristics of the distilled spirits as final products, and not on those of the raw materials or production processes used to make the final products.

7.38 The evidence suggests that distilled spirits produced in the Philippines from the designated raw materials (specifically, sugar cane molasses) closely replicate, in terms of physical characteristics, including colour, flavour and aroma, the distilled spirits, such as gin, brandy, vodka, whisky or tequila, produced from other raw materials through traditional methods.³⁹⁶ Producers of distilled spirits from designated raw materials achieve such similarity through the production process. Depending on the specific spirit being produced, this process may involve stripping the ethyl alcohol made from designated raw materials from its natural congeners, and/or adding natural or artificial flavourings.

7.39 With respect to these physical qualities and characteristics – colour, flavour and aroma – on the basis of the evidence before us, we conclude that there is no difference between imported and domestic Philippine distilled spirits, nor between distilled spirits made from the designated materials and those made from other materials.

7.40 The Philippines refers to differences in the chemical composition of different brands of spirits, as well as in the organoleptic properties of different spirits.³⁹⁷ In terms of chemical composition, the Philippines compares the congener content of a number of "sugar-based spirits" with that of a number of "non sugar-based spirits" of the same type (gins, brandies and whiskies). The gas chromatography studies indeed show evidence of differences in the chemical composition between the brands.³⁹⁸ However, we do not consider that this evidence assists us in our likeness analysis because the differences in chemical composition between spirits made from the same raw materials, as reported in these gas chromatography studies, are in most cases greater than those between spirits

³⁹³ See paras. 2.25, 2.26, 2.55, 2.62, 2.69, 2.70, 2.75, 2.76, 2.81 and 2.87 above.

³⁹⁴ See para. 2.27 above.

³⁹⁵ Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.30-8.31 and 8.131.

³⁹⁶ See paras. 2.25, 2.55, 2.62, 2.75, 2.81 and 2.87 above. For the purpose of the current dispute, this point is irrelevant in the case of rum. As will be noted below, rum is produced through the traditional method, from the fermentation of sugar cane molasses, both in the Philippines and abroad. Moreover, the parties agree that imported and domestic rums should be considered "like products". See para. 7.44 below.

³⁹⁷ See Philippines' first written submission, paras. 105, 138, 149 and 164; exhibit PH-80.

³⁹⁸ See European Union's second written submission, paras. 60-67; United States' opening statement at first substantive meeting, para. 12.

made from different raw materials.³⁹⁹ Consequently, the difference in chemical composition does not show a distinction between spirits made from designated raw materials and those made from other raw materials. We also find evidence that each of the different types of distilled spirits has specific organoleptic properties. Furthermore, within each type of distilled spirit, different brands, and even subproducts within each brand, may have differences in colour, flavour and aroma. There is, however, no evidence that these differences in organoleptic properties create a distinction between distilled spirits made from the designated materials and distilled spirits made from other materials such that they could be divided into two separate and identifiable groups.⁴⁰⁰

7.41 We now address the physical properties of specific types of distilled spirits relevant for this dispute.

7.42 With respect to gin, all gins are transparent and all have the characteristic flavour and aroma associated with the presence of juniper berries. The spirit can also have traces of other botanical products. Irrespective of the raw materials from which they are made, all the gins at issue share the same organoleptic characteristics, which are common to traditional gins.⁴⁰¹ This is so, even though gas chromatography indicates that there may be differences in the chemical composition of different brands of gins, which may not necessarily result from the use of different raw materials. Accordingly, there is no evidence of perceptible differences between the physical qualities and characteristics of imported gins and domestic Philippine gins, nor between those of gins made from the designated raw materials and gins made from other raw materials.⁴⁰²

7.43 Turning to brandy, according to the evidence, all the brandies at issue have an alcohol content of between 32.5 and 40 per cent and a colour that, depending on the specific brand, ranges from golden to mahogany, regardless of the raw materials used in their production, and whether the brandy is domestic Philippine or imported. Traditional brandies retain the elements that naturally result from their distillation process. In contrast, domestic Philippine brandies are produced by stripping the ethyl alcohol made from sugar cane molasses of the congeners that provide its original colour, odour and taste and subsequently adding flavouring and other ingredients to the resulting neutral spirit, so that the final product has the taste normally associated with brandy. This is so, even though gas chromatography indicates that there may be differences in the chemical composition of different brands of brandies, which may not necessarily result from the use of different raw materials. Therefore, irrespective of the raw materials from which they are made, all the brandies in the current dispute share the same organoleptic characteristics. Accordingly, there is no evidence of perceptible

³⁹⁹ For example, in the case of the gas chromatography results provided by the Philippines on whiskies, the differences in five of the eight identified congeners (acetal, acetaldehyde, isoamyl alcohol, methanol and n-propanol) are reported to be greater between two "non-sugar based" whiskies, than between one "non-sugar based" and one "sugar-based" whisky. In the case of the gas chromatography results provided by the Philippines on brandies, the differences in five of the seven identified congeners (acetal, acetaldehyde, isoamyl alcohol, isobutanol and methanol) are reported to be greater between two "non-sugar based" brandies, than between one "non-sugar based" and one "sugar-based" brandy. Finally, in the case of the gas chromatography results provided by the Philippines on gins, the differences in four of the five identified congeners (isoamyl alcohol, isobutanol, methanol and n-propanol) are reported to be greater between two "sugar based" gins, than between one "non-sugar based" and one "sugar-based" gin. See European Union's second written submission, paras. 63-65; Philippines' first written submission, paras. 138, 149 and 164. See also exhibit PH-80. For the purpose of comparing the congener concentrations reported by the Philippines, the Panel assumed that the values identified as "Not Detectable" (ND) are equal or close to zero.

⁴⁰⁰ See para. 2.26 above.

⁴⁰¹ As noted above, the Philippines agrees that domestic gins have "the organoleptic characteristics of [traditional] gin". See para. 2.55 above; Philippines' comments to European Union's response to Panel question No. 78, para. 18.

⁴⁰² See paras. 2.25 and 2.55 above.

differences between the physical qualities and characteristics of imported brandies and domestic Philippine brandies, nor between brandies made from the designated raw materials and brandies made from other raw materials.⁴⁰³

7.44 With regard to rum, all rums, both imported and domestic Philippine, are made from the fermentation of sugar cane molasses. Depending on their brand and presentation, rums have a colour that ranges from transparent to golden or mahogany. All parties agree that there is no difference between the physical qualities and characteristics of imported rums and domestic Philippine rums and that both should be considered "like products".⁴⁰⁴

7.45 In the case of vodka, all vodkas are neutral spirits. Irrespective of the raw materials from which they are made, all relevant vodkas in the current dispute share the same organoleptic characteristics, including the fact that they are transparent. Accordingly, there is no evidence of perceptible differences between the physical qualities and characteristics of imported vodkas and domestic Philippine vodkas, nor between those of vodkas made from the designated raw materials and vodkas made from other raw materials.⁴⁰⁵

7.46 In the case of whisky, irrespective of the raw materials from which they are made, all the whiskies at issue share the same organoleptic characteristics, including the fact that all have a golden colour. Traditional whiskies retain the elements that naturally result from their distillation process. In contrast, domestic Philippine whiskies are produced by stripping the ethyl alcohol made from sugar cane molasses of the congeners that provide its original colour, odour and taste, and subsequently adding flavouring and other ingredients to the resulting neutral spirit, so that the final product has the taste normally associated with whisky. This is so, even though gas chromatography indicates that there may be differences in the chemical composition of different brands of whiskies, which may not necessarily result from the use of different raw materials. Therefore, irrespective of the raw materials from which they are made, all the whiskies in the current dispute share the same organoleptic characteristics. Accordingly, there is no evidence of perceptible differences between the physical qualities and characteristics of imported whiskies and domestic Philippine whiskies, nor between whiskies made from the designated raw materials and whiskies made from other raw materials.⁴⁰⁶

7.47 Finally, all tequilas and tequila-flavoured spirits, irrespective of the raw materials from which they are made, share the same organoleptic characteristics, including the fact that all are either transparent or pale gold in colour. Traditional tequilas retain the elements that naturally result from their distillation process from agave. In contrast, domestic Philippine tequilas and tequila-flavoured spirits are produced by stripping the ethyl alcohol made from sugar cane molasses of the congeners that provide its original colour, odour and taste, and subsequently adding flavouring and other ingredients to the resulting neutral spirit, so that the final product has the taste normally associated with tequila. Accordingly, there is no evidence of perceptible differences between the physical qualities and characteristics of imported tequilas and domestic Philippine tequilas and tequila-flavoured spirits, nor between tequilas or tequila-flavoured spirits made from the designated raw materials and traditional tequilas made from agave.⁴⁰⁷

⁴⁰³ See paras. 2.25 and 2.62 above.

⁴⁰⁴ See para. 2.69 above.

⁴⁰⁵ See paras. 2.25 and 2.75 above.

⁴⁰⁶ See paras. 2.25 and 2.81 above.

⁴⁰⁷ See paras. 2.25 and 2.87 above.

(ii) *End uses*

7.48 We will now focus on the extent to which the different types of spirits at issue are capable of serving the same, or similar, end uses. In this respect, the evidence suggests that all distilled spirits relevant in the present dispute share the same end uses, namely "thirst quenching, socialization, relaxation, pleasant intoxication".⁴⁰⁸ In addition, all distilled spirits may be drunk straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of cocktails.⁴⁰⁹ The end uses of each distilled spirit, and the manner in which each is drunk, does not depend on the origin of the spirit (domestic or imported), nor on the raw materials used in its production.⁴¹⁰ In other words, there is no evidence of any differences between the end uses of the relevant imported spirits and domestic Philippine distilled spirits, nor between the end uses of spirits made from the designated raw materials and those made from other raw materials.

(iii) *Consumers' tastes and habits*

7.49 We now turn to consider the extent to which consumers are willing to use the different products to perform the same, or similar, functions ("consumers' tastes and habits").⁴¹¹

7.50 We have noted above that the evidence suggests that in the Philippines' market for distilled spirits certain factors, such as price, but also information, distribution, brand recognition, habits and tastes, limit the ability or willingness of consumers to switch brands. As indicated in the survey by Abrenica & Ducanes from the University of Philippines School of Economics provided by the Philippines, the characteristics of specific distilled spirits are known to consumers through personal experience or product reputation. Even if consumers have information about specific products, habits and tastes may create brand loyalty that can limit their propensity to switch brands.⁴¹² Furthermore, a large proportion of households in the Philippines have significant income and expenditure constraints, which in turn limit the ability of certain consumers to purchase distilled spirits.⁴¹³

7.51 We have also noted that, generally speaking, imported brands tend to be more expensive in the Philippines (even before taxes) than the corresponding domestic brands of the same type of distilled spirit. However, there are a number of high-priced domestic Philippine distilled spirits, as well as less expensive imports.⁴¹⁴ Although some establishments (especially small retail stores) that offer domestic Philippine distilled spirits do not carry imported distilled spirits, other outlets where imported spirits are sold either for consumption on the premises (such as bars or restaurants) or off the premises also offer domestic Philippine spirits.⁴¹⁵ Marketing campaigns for distilled spirits are very similar; there is no indication that those campaigns are different for imported distilled spirits than for domestic Philippine distilled spirits, nor for spirits made from the designated raw materials than for those made from other raw materials.⁴¹⁶

7.52 With regard to the competitive relationship between the relevant products, parties have provided different studies of consumers' perceptions in the Philippines' distilled spirits market. The complainants submitted a survey by *Euromonitor International* suggesting that consumers in the Philippines would be more willing to purchase imported distilled spirits if the price of those spirits

⁴⁰⁸ European Union's first written submission, para. 64. See para. 2.38 above.

⁴⁰⁹ See para. 2.39 above.

⁴¹⁰ See paras. 2.38 and 2.39 above.

⁴¹¹ Appellate Body Report, *EC – Asbestos*, para. 117.

⁴¹² See para. 2.45 above.

⁴¹³ See paras. 2.31-2.32 above.

⁴¹⁴ See para. 2.36 above.

⁴¹⁵ See para. 2.41 above.

⁴¹⁶ See para. 2.42 above.

decreases and the price of domestic Philippine spirits increases, even if the prices of imported spirits remains higher than those of domestic spirits.⁴¹⁷ In turn, the Philippines submitted a survey by Abrenica & Ducanes that concludes that there is low price elasticity in the Philippine domestic distilled spirits market and, therefore, local and imported brands of distilled spirits are non-substitutable. The same survey suggests that narrowing price differentials between imported distilled spirits and domestic Philippine distilled spirits would only result in a small change in their respective market shares.⁴¹⁸

7.53 The Philippines and the complainants have criticized the methodology and the conclusions of the studies on consumers perceptions submitted by the opposing party.⁴¹⁹ The Philippines questions, for example, whether the *Euromonitor International* survey can serve as an indication of price elasticity of substitution between distilled spirits made from the designated raw materials and those made from other raw materials.⁴²⁰ Likewise, the complainants raise doubts about the "validity of [the] findings on cross-price elasticities" contained in the Abrenica & Ducanes survey.⁴²¹

7.54 The *Euromonitor International* survey is described as an evaluation on "consumers' price-based purchase preferences for different distilled spirit types across consumers in the Philippines that consume distilled spirits at least one time per month".⁴²² It states that it is based on "a quantitative online survey, carried out by a structured standard questionnaire with closed-end questions applied to individuals of a representative sample of the population under review".⁴²³ The survey report contains a section on "price elasticity", which concludes that "[o]verall, the closer the price between imported and domestic spirits, the more likely consumers are to increase their consumption of imports while decreasing their consumption of domestics."⁴²⁴ In the same section, the report adds that:

"On average, at an import price decrease of 25% and domestic increase of 50%, consumers were 4.9% more willing to purchase imports and 4.0% less likely to purchase domestics"; "On average, at an import price decrease of 40% to 60% and domestic increase of 100% to 200%, consumers were 10.1% more willing to purchase imports and 6.5% less likely to purchase domestics"⁴²⁵; and, "If price were no issue, on average, consumers were 43% more likely [to] purchase local brands and 86% more likely to purchase imported ones."⁴²⁶

⁴¹⁷ *Euromonitor International* survey in exhibits EU-41 and US-41. See para. 2.43 above.

⁴¹⁸ Abrenica & Ducanes survey from the University of Philippines School of Economics in exhibit PH-49. See para. 2.44 above.

⁴¹⁹ See for example European Union's second written submission, paras. 97-103; United States' second written submission, paras. 51-52; Philippines' first written submission, paras. 180-182, 240-241 and 268; Philippines' second written submission, paras. 66-67; Philippines' opening statement at second substantive meeting, paras. 25, 29 and 33; Philippines' comments to European Union's and United States' responses to Panel question No. 83, paras. 19-23; and exhibits EU-101, EU-102 and US-48.

⁴²⁰ Philippines' first written submission, para. 241.

⁴²¹ See for example European Union's second written submission, para. 101. See also United States' second written submission, paras. 51-52.

⁴²² *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 5.

⁴²³ *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 6.

⁴²⁴ *Ibid.*, p. 9.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*, pp. 30 and 33.

7.55 The survey by Abrenica & Ducanes is an econometric study based on a marketing analysis that attempts to estimate cross-price elasticity for imported distilled spirits and domestic Philippine distilled spirits. It states that it is based on a "conjoint choice experiment" "using stated preferences of consumers in response to hypothetical adjustments in prices".⁴²⁷ According to this survey, a narrowing of price differentials between imported distilled spirits and domestic Philippine distilled spirits results in a small change in their respective market shares.⁴²⁸ The same survey also concludes that, if the excise tax is imposed at a uniform rate on all distilled spirits in the Philippines, the share of imported spirits would increase between 16 and 17 per cent (from a current level of 9.4 per cent to between 10.9 to 11 per cent). Likewise, if the excise tax is imposed at similar *ad valorem* rates on all distilled spirits in the Philippines, the share of imported spirits would increase to between 13 and 19 per cent (from a current level of 9.4 per cent to between 10.6 to 11.2 per cent). Finally, the survey concludes that if the excise tax is completely removed on all distilled spirits, the market share of imported spirits would increase by about 24.5 per cent (from a current level of 9.4 per cent to around 11.7 per cent).⁴²⁹ Similar variations are reported in the survey to occur in the market shares of specific imported distilled spirits such as gin, brandy, vodka and whisky. In contrast, no significant variation is reported to occur in the shares of imported rum in these scenarios.⁴³⁰ The Abrenica & Ducanes survey estimates cross-price elasticities for imported and domestic distilled spirits in the Philippines market to range between -0.01 and 0.07, which it considers "low". The authors then conclude that "local and imported brands [of distilled spirits are] non-substitutable".⁴³¹

7.56 The *Euromonitor International* report is not an attempt to estimate and provide figures for the cross-price elasticity for imported distilled spirits and domestic Philippine distilled spirits. Furthermore, the conclusions in both the *Euromonitor International* report and the Abrenica & Ducanes survey with respect to variations in the quantities consumed of imported distilled spirits and domestic Philippine distilled spirits are based on scenarios where the prices of imported and domestic spirits are both said to change at the same time.⁴³² Accordingly, it is not possible to conclude from either the *Euromonitor International* survey or the Abrenica & Ducanes survey whether the hypothetical increase in consumption of imported distilled spirits would be attributable to the increase in price of domestic Philippine spirits, or to the reduction in price of imported spirits, or to some combination of both factors.

7.57 We will consider the studies of consumers' perceptions provided by the parties in more detail when looking at the issue of the competitive relationship in the Philippines' market between the distilled spirits relevant in the present dispute, under the second sentence of Article III:2. For now, it is sufficient to recall that we have already noted⁴³³ that both studies suggest that a simultaneous

⁴²⁷ Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, p. 2.

⁴²⁸ See *Ibid.*, p. 14.

⁴²⁹ See *Ibid.*, p. 14.

⁴³⁰ See Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, pp. 13-14. The survey considered selected distilled spirits brands of gin, brandy, rum, vodka and whisky. It did not include brands of tequila or tequila-flavoured spirits. The lack of significant variation in the market share of imported rum reported in the survey may be related to the fact that the imported rum brand selected (*Bacardí*) enjoys the *Section 141(a)* flat tax rate applicable to spirits produced with designated raw materials. See para. 2.74 above.

⁴³¹ See Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, pp. 2 and 20. It is worth noting that the same study concludes that "beer and liquor [distilled spirits] are substitutes." *Ibid.*, p. 16.

⁴³² For example, the structure of the choices given to respondents creates a starting point bias, as well as some shortcomings associated with the regression model used for the calculations (a mixed logit model). See exhibits EU-101, EU-102 and US-48.

⁴³³ See para. 2.45 above.

increase in the price of domestic Philippine distilled spirits and decrease in the price of imported spirits, such as that which would result from an equalization in the respective levels of the excise tax, could result in the substitution of the consumption of domestic spirits for imported spirits in the Philippines market. This refers both to distilled spirits as a general category, as well as to specific spirits such as gin, brandy, vodka and whisky.

7.58 The Philippines has also argued that, because of the difference in the purchasing power of its population, the Philippine domestic market is segmented into two groups. According to the Philippines, one of these segments, corresponding to the majority of the Philippine population, would only be able to consume distilled spirits made from designated raw materials. In contrast, the other segment, which would represent a minority of the population, would consume distilled spirits made from other raw materials.⁴³⁴ The Philippines suggests that the market segmentation "reflects the existence of at least two different groups of 'consumers' in the Philippines, each with a different set of tastes, habits, perceptions and behaviour."⁴³⁵ This market segmentation would be a result of the purchasing power disparity in the Philippine population, as well as the "significantly different" attributes offered by imported spirits and domestic spirits.⁴³⁶

7.59 The evidence suggests that, because of their income and expenditure constraints, a large proportion of the Philippine population has a limited ability to purchase distilled spirits beyond certain price levels. The Philippines' argument on market segmentation, however, assumes the existence of two separate population groups, with distinct consumption patterns. The Philippines has not provided any evidence to substantiate this assertion. While, generally speaking, imported brands tend to be more expensive than the corresponding domestic brands of the same type of distilled spirit, there are a number of high-priced domestic Philippine spirits, as well as less expensive imports.⁴³⁷ Further, in terms of income, the population in the Philippines does not appear to be divided into two separate groups, but is rather distributed along a continuum of income brackets. A large proportion of Philippine consumers may not have access to high-priced spirits, including those made from other than designated raw materials. Many consumers, however, may be able to purchase high-priced spirits, at least on special occasions. The situation in this respect is similar to that examined by the panel on *Korea – Alcoholic Beverages*, when considering the argument of whether high-priced spirits are akin to luxury automobiles:

"Korea offers an analogy between the alcoholic beverage market and the automobile market which we do not find particularly useful. Korea argues that the imported products are Ferraris compared to soju's Renault Clio. However, the analogy is inapt. Automobiles are durable goods of great value relative to income that are only purchased periodically, generally only once every several years. It is probable that the purchaser of a Renault Clio has no option to purchase a Ferrari which might cost considerably more than the Clio purchaser's annual salary. Alcoholic beverages, on the other hand, are consumer goods which are purchased frequently, and even the Clio purchaser can afford to purchase a bottle of a more expensive beverage at least occasionally. The ratios between \$10 and \$100 products may be the same as between

⁴³⁴ See for example Philippines' first written submission, paras. 177-188; Philippines' second written submission, paras. 3, 40 and 42.

⁴³⁵ Philippines' first written submission, para. 178. See also Philippines' response to Panel question No. 17, paras. 19-23.

⁴³⁶ Philippines' first written submission, para. 178. As noted below, this argument was not raised as a request for differential and more-favourable treatment as a developing country Member under the WTO Agreements. See para. 7.195 below.

⁴³⁷ See paras. 2.36 and 7.51 above.

\$10,000 and \$100,000 products, but the purchasing decisions of ordinary consumers in the two situations are quite distinct."⁴³⁸

7.60 We find no evidence of the existence of two separate distilled spirit markets in the Philippines that reflect different levels of purchasing power, i.e. one that would consume distilled spirits made from designated raw materials, and another that would consume distilled spirits made from other raw materials.

7.61 As an additional point related to consumer perceptions, we note that the domestic distilled spirits in the Philippines, irrespective of the raw materials from which they are made, are labelled as either gin, brandy, rum, vodka, whisky, tequila or tequila-flavoured spirits. In the case of brandy and whisky, for example, the domestic Philippine products are labelled as "brandy" or "whisky", and not as "blended brandy", "compounded brandy" or "compound whisky". Generally speaking, labels of domestic Philippine distilled spirits made from the designated raw materials tend to mimic or replicate the names of products and designs of the similar imported spirits made from other raw materials. The raw materials used in the manufacture of domestic Philippine distilled spirits are not mentioned on the labels. Thus, there is nothing that would suggest to the consumer that these products are different from imported spirits made from other raw materials.⁴³⁹

7.62 In conclusion, the evidence suggests that, with respect to their tastes and habits, consumers in the Philippines are willing to consume distilled spirits, whether imported or domestic, irrespective of the raw materials from which they are made, to perform similar functions. In other words, despite the shortcomings of the studies submitted by the parties with regard to the competitive relationship between the relevant products, we consider that there is enough evidence to suggest a significant degree of competitiveness or substitutability for those distilled spirits in the Philippines market.

(iv) *Tariff classification*

7.63 All distilled spirits at issue in this dispute, whether imported or domestic, and irrespective of the raw materials from which they are made, fall within the Harmonized System (HS) heading 2208, which refers to "undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages".⁴⁴⁰ We consider that the fact that all distilled spirits at issue in this dispute, irrespective of the raw materials from which they are made, fall within the Harmonized System (HS) heading 2208 provides an indication of similarity.

7.64 With respect to specific distilled spirits, at the six-digit code level there are differences for each type of distilled spirit relevant in the present dispute, namely, gin, brandy, rum, vodka, whisky, tequila and tequila-flavoured spirits. We consider, not only the description of the relevant products in the HS subheadings, but also the text of the HS Explanatory Notes (HSEN). Although the HSEN are not binding, for the reasons explained below we find them to be useful for our analysis.⁴⁴¹

7.65 In the case of gin, HS subheading 2208.50 covers "Gin and Geneva", irrespective of the raw materials from which they are made, as spirituous beverages "containing the aromatic principles of juniper berries".⁴⁴² In other words, the six-digit subheading for gin does not distinguish between spirits based on the raw materials from which they are made.

⁴³⁸ Panel Report, *Korea – Alcoholic Beverages*, para. 10.74.

⁴³⁹ See paras. 2.57, 2.63, 2.64, 2.65, 2.77, 2.82, 2.83 and 2.88 above.

⁴⁴⁰ See para. 2.49 above.

⁴⁴¹ See Appellate Body Report, *EC – Chicken Cuts*, para. 224; Panel Reports, *China – Auto Parts*, para. 7.410; Panel Report, *EC – IT Products*, para. 7.1450.

⁴⁴² See para. 2.52-2.54 and 2.56 above.

7.66 In the case of brandy, HS subheading 2208.20 covers "brandy" as a "[Spirit] obtained by distilling grape wine or grape marc"; accordingly, brandies made from sugar cane molasses (or other designated raw materials) would not fall under this subheading.⁴⁴³ In other words, brandies may be classified in different six-digit subheadings, depending on the raw materials from which they are made. This is confirmed by the statements of all the parties and Australia.⁴⁴⁴

7.67 In the case of rum, HS subheading 2208.40 covers all rums relevant in this dispute, whether imported or domestic, as they are all "[S]pirits obtained by distilling fermented sugarcane products" (more specifically, sugar cane molasses).⁴⁴⁵

7.68 In the case of vodka, HS subheading 2208.60 covers "Vodka", irrespective of the raw materials from which it is made.⁴⁴⁶ In other words, the six-digit subheading for vodka does not distinguish between spirits based on the raw materials from which they are made.⁴⁴⁷

7.69 In the case of whisky, subheading 2208.30 covers "Whiskies", as spirits made from a "mash of cereal grains" (such as barley, oats, rye, wheat, corn); accordingly, whiskies made from sugar cane molasses (or other designated raw materials) would not fall under this subheading.⁴⁴⁸ In other words, it seems that whiskies may be classified in different six-digit subheadings, depending on the raw materials from which they are made. This is confirmed by the statements of the parties and Australia.⁴⁴⁹

7.70 Finally, there is no specific six-digit subheading for "tequila" or "tequila-flavoured spirits".⁴⁵⁰ In other words, tariff classification provides no additional guidance at this level to determine similarity among tequila and tequila-flavoured spirits.

7.71 The review above indicates that at a six-digit level the HS is not conclusive. The product description in the HS subheadings for brandy, rum and, to a lesser extent, whisky, in light of the applicable HSEN, takes into account the raw material used for the production of the distilled spirit. At the same time, for other relevant distilled spirits such as gin, vodka and tequila the distilled spirit is classified irrespective of the raw material used for the production of the ethyl alcohol used for the spirit. Consequently, we take note that, at the six-digit level, the HS classification does not give us a conclusive guidance.

⁴⁴³ See para. 2.52-2.54 and 2.62 above.

⁴⁴⁴ European Union's first written submission, footnote 109 to para. 94; European Union's response to Panel question No. 43, paras. 67-69; United States' response to Panel question No. 43, paras. 34-35; Philippines' first written submission, paras. 190-200; Philippines' response to Panel question No. 43; Australia's response to Panel question No. 1. But see India's response to Panel question No. 1.

⁴⁴⁵ See para. 2.52-2.54 and 2.69 above.

⁴⁴⁶ See para. 2.52-2.54 and 2.75 above.

⁴⁴⁷ European Union's response to Panel question No. 43, paras. 67-69; United States' response to Panel question No. 43, paras. 34-35; Philippines' first written submission, paras. 190-200; Philippines' response to Panel question No. 43; India's response to Panel question No. 1. But see Australia's response to Panel question No. 1.

⁴⁴⁸ See para. 2.52-2.54 and 2.81 above.

⁴⁴⁹ United States' response to Panel question No. 43, paras. 34-35; Philippines' first written submission, paras. 190-200; Philippines' response to Panel question No. 43; Australia's response to Panel question No. 1. But see European Union's response to Panel question No. 43, paras. 67-69; India's response to Panel question No. 1.

⁴⁵⁰ See para. 2.52-2.54 and 2.87 above.

(v) *Internal regulations*

7.72 With respect to domestic regulations on distilled spirits in the Philippines, we have noted that local ordinances against drunk driving do not distinguish between imported and domestic spirits, nor between spirits made from the designated materials and those made from other materials. Nor is a distinction made in local ordinances with respect to "the sale, dispensation and/or distribution of alcoholic beverages".⁴⁵¹

7.73 We find further confirmation of similarity in the language used in the Philippines' domestic legislation. Republic Act No. 9334, one of the relevant instruments in the present dispute, defines "Spirits or distilled spirits" as "the substance known as ethyl alcohol, ethanol or spirits of wine, including all dilutions, purifications and mixtures thereof, *from whatever source, by whatever process produced*, and shall include whisky, brandy, rum, gin and vodka, and other similar products or mixtures."⁴⁵² In other words, Republic Act No. 9334 refers to distilled spirits as "similar", without distinguishing between spirits made from different raw materials or through different production processes.

7.74 We note the Philippines' argument that whisky and brandy made from the designated raw materials would be prohibited by law from being marketed as whisky or brandy in the European Union and the United States, as those products would not meet the applicable standards.⁴⁵³ Even if this is the case, however, we find this to be irrelevant for our analysis. As the Philippines argues, the relevant market in which to make the determination of "likeness" is the Philippines market, and not others. In the words of the Philippines, "[t]he Panel must ... examine whether the evidence shows that the products are 'like' products and/or 'directly competitive or substitutable' in the Philippines market."⁴⁵⁴ The important issue for us is that the Philippines allows whisky and brandy made from the designated raw materials to be marketed as whisky or brandy.

(vi) *Conclusions on "likeness"*

7.75 Based on the above analysis, we find that, with respect to the physical qualities and characteristics of the products, as well as with regard to their end uses, there is similarity between all the relevant imported and domestic distilled spirits, irrespective of whether they are made from the designated raw materials or from other raw materials.

7.76 With respect to consumers' tastes and habits, some elements, such as the manufacturers' marketing campaigns, suggest similarity between all distilled spirits relevant in the present dispute. Despite the shortcomings of the studies submitted by the parties with regard to the competitive relationship between the relevant products, we have also found enough evidence to suggest a significant degree of competitiveness or substitutability for those distilled spirits in the Philippines market. Moreover, the labels of domestic distilled spirits made from designated raw materials do not suggest to the consumer that these products are different from imported spirits made from other raw materials. With respect to tariff classification, the fact that all distilled spirits at issue in this dispute, irrespective of the raw materials from which they are made, fall within the HS heading 2208 is a further indication of their similarity. Finally, domestic regulations on distilled spirits in the Philippines do not distinguish between imported and domestic spirits, nor between spirits made from the designated raw materials and those made from other raw materials.

⁴⁵¹ See para. 2.30 above.

⁴⁵² See exhibits EU-2, US-2 and PH-4, p. 3 (emphasis added).

⁴⁵³ Philippines' first written submission, paras. 11-12, 125-128, 131-133, 141-143; Philippines' opening statement at first substantive meeting, para. 16.

⁴⁵⁴ Philippines' first written submission, para. 59.

7.77 Having considered all these factors, we conclude that the distilled spirits at issue in the present dispute, whether imported or domestic, and irrespective of the raw materials from which they are made, are "like products" within the meaning of the first sentence of Article III:2 of the GATT 1994.

7.78 In addition, since the complainants have asked for determinations concerning specific types of distilled spirits, we now turn to each type of spirit (gin, brandy, rum, vodka, whisky, tequila and tequila-flavoured spirits), in order to consider whether those spirits, imported or domestic and irrespective of the raw materials from which they are distilled, are "like products".

7.79 Specifically, in the case of rum, all parties agree that both domestic and imported spirits are made from the same raw material (namely, sugar cane molasses) and are like products.⁴⁵⁵

7.80 With regard to the physical qualities and characteristics of the remaining distilled spirits relevant in the present dispute (gin, brandy, vodka, whisky, tequila and tequila-flavoured spirits), there is similarity between imported spirits and domestic Philippine spirits, irrespective of the raw materials from which they are made. We consider it particularly important that the production process for each type of distilled spirit in the Philippines is designed to ensure, as far as possible, that the final product has similar physical characteristics, in terms of its colour, flavour and aroma, to distilled spirits made from other raw materials. In other words, the process of production is such that the organoleptic physical qualities and characteristics of imported gin are similar to those of domestic Philippine gin, irrespective of the raw materials from which they are made; those of imported brandy are similar to those of domestic Philippine brandy, irrespective of the raw materials from which they are made; those of imported vodka are similar to those of domestic Philippine vodka, irrespective of the raw materials from which they are made; those of imported whisky are similar to those of domestic Philippine whisky, irrespective of the raw materials from which they are made; and those of imported tequila are similar to those of domestic Philippine tequila or tequila-flavoured spirits, irrespective of the raw materials from which they are made.⁴⁵⁶

7.81 With regard to the end uses of specific types of distilled spirits, there is similarity between imported and domestic spirits, irrespective of the raw materials from which they are made. Specific types of distilled spirits share the same end uses common to all distilled spirits, namely "thirst quenching, socialization, relaxation, pleasant intoxication".⁴⁵⁷ Additionally, each specific type of distilled spirit, imported or domestic, is normally consumed in a similar manner (straight or with ice, diluted with soft drinks or fruit juices or used in the preparation of the same type of cocktails) irrespective of the raw materials from which it is made.⁴⁵⁸

7.82 With regard to the consumers' tastes and habits for specific types of distilled spirits, there is enough evidence to suggest similarity between imported spirits and domestic Philippine spirits, irrespective of the raw materials from which they are made. Manufacturers' marketing campaigns make no distinction among the *specific types of spirits*, which suggests a closer similarity than the general similarity we have already found between *all distilled spirits* relevant in the present dispute. We have already found that the evidence submitted by the parties suggests a significant degree of competitiveness or substitutability for those distilled spirits in the Philippines market. We have also noted that the Abrenica & Ducanes survey submitted by the Philippines notes how a change in the rates of the excise tax on distilled spirits could lead to an increase in the share of specific imported

⁴⁵⁵ See para. 2.69 above.

⁴⁵⁶ See paras. 2.25 and 7.38 above.

⁴⁵⁷ See paras. 2.38 and 7.48 above.

⁴⁵⁸ See paras. 2.39 and 7.48 above.

spirits such as gin, brandy, vodka and whisky.⁴⁵⁹ Moreover, as noted above, the labels of domestic Philippine distilled spirits made from designated raw materials do not suggest to the consumer that these products are different from imported spirits made from other raw materials.

7.83 With respect to tariff classification, the evidence suggests that the respective six-digit subheadings for gin and vodka (2208.50 and 2208.60, respectively) make no distinction between different distilled spirits based only on the raw materials from which they are made.⁴⁶⁰ Tariff classification provides no guidance at this level to determine similarity in the case of tequila and tequila-flavoured spirits.⁴⁶¹ The evidence suggests that brandies and whiskies may be classified in different six-digit subheadings, depending on the raw materials from which they are made. In other words, only brandy based on grape wine or grape marc (and not brandy made from the designated raw materials, including sugar cane molasses) would be covered by HS subheading 2208.20 and only whisky made from cereal grains, such as barley, oats, rye, wheat and corn (and not whisky made from the designated raw materials, including sugar cane molasses) would be covered by HS subheading 2208.30.⁴⁶² Based on the totality of the evidence, we consider that tariff classification does not exclude the similarity between domestic and imported distilled spirits, made respectively from the designated materials or from other raw materials.

7.84 Finally, we have noted that domestic regulations on distilled spirits in the Philippines do not distinguish between imported spirits and domestic spirits, nor between spirits made from the designated materials and those made from other materials.⁴⁶³

7.85 Having considered all these factors, we conclude that the specific distilled spirits at issue in the present dispute – namely, gin, brandy, rum, vodka, whisky, tequila and tequila-flavoured spirits – whether imported or domestic, and irrespective of the raw materials from which they are made, are "like products" within the meaning of the first sentence of Article III:2 of the GATT 1994. Specifically:

- (a) Gin made in the Philippines from the designated raw materials is "like" imported gin made from other raw materials, within the meaning of the first sentence of Article III:2 of the GATT 1994;
- (b) Brandy made in the Philippines from the designated raw materials is "like" imported brandy made from other raw materials, within the meaning of the first sentence of Article III:2 of the GATT 1994;
- (c) Rum made in the Philippines is "like" imported rum, within the meaning of the first sentence of Article III:2 of the GATT 1994;
- (d) Vodka made in the Philippines from the designated raw materials is "like" imported vodka made from other raw materials, within the meaning of the first sentence of Article III:2 of the GATT 1994;
- (e) Whisky made in the Philippines from the designated raw materials is "like" imported whisky made from other raw materials, within the meaning of the first sentence of Article III:2 of the GATT 1994; and,

⁴⁵⁹ See Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, pp. 13-14.

⁴⁶⁰ See paras. 7.65 and 7.68 above.

⁴⁶¹ See para. 7.70 above.

⁴⁶² See paras. 7.66 and 7.69 above.

⁴⁶³ See paras. 2.30 and 7.72 above.

- (f) Tequila and tequila-flavoured spirits made in the Philippines from the designated raw materials are "like" imported tequila made from other raw materials, within the meaning of the first sentence of Article III:2 of the GATT 1994.

(vii) *Excess taxation*

7.86 As noted above, the European Union and the United States argue that the excise tax on imported distilled spirits made from raw materials other than those designated in the Philippines' legislation is "in excess" of that imposed on the like domestic spirits made from designated raw materials.⁴⁶⁴ The Philippines does not dispute this. The Philippines argues only that, because the relevant products are not "like", there is no need for the Panel to proceed to consider whether one group of distilled spirits is being taxed "in excess of" another group of distilled spirits.⁴⁶⁵

7.87 Past panels have interpreted the term "in excess of" to encompass even the slightest difference in the levels of taxation imposed on imported and domestic products. Indeed, the Appellate Body has noted that, under Article III:2, first sentence:

"Even the smallest amount of 'excess' is too much. '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."⁴⁶⁶

7.88 The excise tax imposed on imported distilled spirits made from raw materials other than the designated raw materials is well "in excess of" that applied to domestic spirits made from the designated raw materials. As noted above, this difference in taxation may be as much as between ten and forty times the rate imposed on the domestic spirits, depending on the specific tax bracket for imported spirits.⁴⁶⁷

7.89 *De jure*, the Philippines' excise tax is in principle origin-neutral as the lower tax for spirits made from designated raw materials (currently, PHP 14.68 ppl) and the much higher tax rates for spirits made from other raw materials (currently, from PHP 158.73 ppl to up to PHP 634.90 ppl) apply irrespective of where the spirits originate. *De facto*, however, as noted above, *all* distilled spirits produced in the Philippines enjoy the lower tax rate, while the vast majority of spirits imported into the Philippines are made from other raw materials and are thus subject to one of the three higher tax rates.⁴⁶⁸

(viii) *Conclusions regarding the claims under the first sentence of Article III:2 of GATT 1994*

7.90 In the light of the above, we conclude that, through its excise tax, the Philippines subjects imported distilled spirits made from raw materials other than those designated in its legislation to

⁴⁶⁴ See for example European Union's first written submission, para. 106; United States' first written submission, paras. 37 and 79 and 99; United States' opening statement at first substantive meeting, para. 43.

⁴⁶⁵ Philippines' first written submission, para. 204; Philippines' opening statement at first substantive meeting, para. 24. See also European Union's second written submission, para. 127; United States' second written submission, para. 13; Philippines' second written submission, para. 4.

⁴⁶⁶ Appellate Body Report, *Japan – Alcoholic Beverages II*, p.23, DSR 1996:I, p. 115. See also Panel Report, *Argentina – Hides and Leather*, para. 11.243.

⁴⁶⁷ See para. 2.17 above. See also United States' first written submission, paras. 73 and 99; United States' second written submission, paras. 13 and 56; EU's first written submission, paras. 21 and 159; European Union's opening statement at first substantive meeting, para. 81.

⁴⁶⁸ See para. 2.17 above. This is confirmed by the Philippines' own statement that "[a]ll distilled spirits currently commercially produced in the Philippines market are sugar-based distilled spirits." Philippines' first written submission, para. 23 (emphasis added).

internal taxes in excess of those applied to like domestic spirits made from the designated raw materials, and is thus acting in a manner inconsistent with Article III:2, first sentence, of the GATT 1994.

D. CLAIMS UNDER THE SECOND SENTENCE OF ARTICLE III:2 OF THE GATT 1994

1. Complainants' claims

7.91 The European Union and the United States claim that the Philippines' excise tax is inconsistent with the second sentence of Article III:2 of the GATT 1994 because it is dissimilarly applied to domestic distilled spirits, which are produced from designated raw materials, and to "directly competitive or substitutable" imported distilled spirits, which are produced with other raw materials, in a manner "so as to afford protection to domestic production".⁴⁶⁹

7.92 As mentioned in paragraphs 7.1 and 7.2, the complainants present their respective claims under the two sentences of Article III:2 of GATT 1994 differently. The European Union articulates its claim under the second sentence as an alternative, in the event that it does not succeed, partially or totally, in its claim under the first sentence. In contrast, the United States presents its claims under each of the two sentences independently.

7.93 In its claim under the second sentence of Article III:2, the United States specifically requests findings that would cover all distilled spirits. In its alternative claim under the second sentence of Article III:2, the European Union argues as its principal argument that all distilled spirits falling under HS heading 2208 are "directly competitive and substitutable", irrespective of the raw materials from which they are distilled. Within this alternative claim under the second sentence, the European Union advances a subordinate claim in case the Panel were to conclude that all or some distilled spirits are not "directly competitive and substitutable". In such case, the European Union asks the Panel to consider subordinately "that, for each type of spirit (e.g. gin, vodka, whisky, rum, brandy, tequila etc.), the products distilled from the designated raw materials are 'directly competitive and substitutable' with those distilled from the non-designated raw materials".⁴⁷⁰

2. The Philippines' response

7.94 The Philippines submits that the complainants claims under Article III:2, second sentence, should be rejected because the imported and domestic products at issue are not directly competitive or substitutable.⁴⁷¹ The Philippines further argues that, even if the products at issue were directly competitive or substitutable, the claim should nevertheless be rejected because (i) domestic and imported products are in fact similarly taxed; and, (ii) even if they are not similarly taxed, the excise tax at issue is not being applied so as to afford protection to domestic production.⁴⁷²

3. Panel's analysis

7.95 We recall our findings in paragraph 7.90 that, through its excise tax, the Philippines subjects imported distilled spirits made from raw materials other than those designated in its legislation to internal taxes in excess of those applied to like domestic distilled spirits made from the designated

⁴⁶⁹ See for example European Union's first written submission, paras. 48-49 and 107-189; United States' first written submission, paras. 37-78; United States' opening statement at first substantive meeting, paras. 44-48; United States' second written submission, paras. 6 and 14-16.

⁴⁷⁰ European Union's response to Panel question No. 18, para. 12. See also para. 7.5 above.

⁴⁷¹ See for example Philippines' first written submission, paras. 14-15, 210-285; Philippines' second written submission, paras. 7, 18, 46-82.

⁴⁷² See for example Philippines' first written submission, paras. 16-17, 286-314.

raw materials, and is thus acting in a manner inconsistent with Article III:2, first sentence, of the GATT 1994. We also note that the European Union's claim under the second sentence of Article III:2 was only made in the alternative, in case we had not found that the Philippines' excise tax at issue is inconsistent with the first sentence of Article III:2. At the same time, the United States' claim concerning the second sentence of Article III:2 was made as a separate and independent claim. We will therefore proceed with our analysis of the compatibility of the Philippines' excise tax with the second sentence of Article III:2 with respect to the United States' claim. Our consideration of this issue will take account of all the arguments and evidence on record, including those submitted by the European Union and third parties⁴⁷³, where relevant.

7.96 For a panel to find that a tax measure is inconsistent with the second sentence of Article III:2 of the GATT 1994, three issues have to be considered and established separately by a complainant. As explained by the Appellate Body, these issues are the following: (i) whether the imported and domestic products at issue are "*directly competitive or substitutable*" with respect to each other; (ii) whether these directly competitive or substitutable products are "*not similarly taxed*"; and, (iii) whether the dissimilar taxation of these directly competitive or substitutable products is "*applied ... so as to afford protection to domestic production*".⁴⁷⁴

7.97 We will start our analysis with the first issue, which in this dispute is whether the imported and domestic distilled spirits at issue are "*directly competitive or substitutable products*."

(a) "Directly competitive or substitutable products"

(i) *Introduction*

7.98 In *Korea – Alcoholic Beverages* the Appellate Body observed that:

"'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'."⁴⁷⁵

7.99 We have found at paragraph 7.77 that the imported and domestic distilled spirits at issue in the present dispute are "like products" within the meaning of the first sentence of Article III:2.⁴⁷⁶ Nonetheless, as noted by the Philippines, a breach of the first sentence of Article III:2 does not automatically imply a breach of the second sentence, as these two sentences establish "separate and distinct obligations."⁴⁷⁷ In effect, the question of whether the relevant products are directly competitive or substitutable is only the first of the three elements we will consider when assessing the consistency of the Philippine excise tax with the second sentence of Article III:2. If the imported and domestic distilled spirits at issue in the present dispute are "like" under the first sentence, it follows that, in principle, they would also be "directly competitive or substitutable" within the meaning of the second sentence of Article III:2.⁴⁷⁸ However, we will consider the issue of "direct competitiveness or

⁴⁷³ We also recall that the European Union is a third party in this dispute with respect to the complaint brought by the United States. See para. 1.6 above.

⁴⁷⁴ See Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 97, at p. 116; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 107; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 47; and Appellate Body Report, *Canada – Periodicals*, DSR 1997:1, p. 449, at p. 470.

⁴⁷⁵ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118.

⁴⁷⁶ We have also additionally found above at para. 7.85 that the *specific* distilled spirits at issue in the present dispute – namely, gin, brandy, rum, vodka, whisky, tequila and tequila-flavoured spirits – are also "like products".

⁴⁷⁷ Philippines' first written submission, para. 58.

⁴⁷⁸ See also United States' opening statement at first substantive meeting, para. 45.

substitutability" under the second sentence of Article III:2 as if *arguendo* we had found that the products at issue were *not* like.

7.100 We recall that the Appellate Body has clarified that products are "*directly competitive or substitutable*" within the meaning of the second sentence of Article III:2 if these products are interchangeable or if they offer "alternative ways of satisfying a particular need or taste".⁴⁷⁹ The term "directly competitive or substitutable" implies a relationship between the imported and domestic products at issue that can essentially be described as "in competition" in the marketplace.⁴⁸⁰ This is a "dynamic, evolving process"⁴⁸¹, which means that "the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences".⁴⁸² Thus, the expression "competitive or substitutable" in *Ad Note* to Article III:2, second sentence, "indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another".⁴⁸³

7.101 The question before us under Article III of the GATT 1994 is not so much what the "degree of competition" between the products at issue is, but what is the "nature" or "quality" of their "competitive relationship".⁴⁸⁴ The term "directly", as used in the *Ad Note* to Article III:2, "suggests a degree of proximity in the competitive relationship between the domestic and imported products."⁴⁸⁵ However, we disagree with the Philippines that this means that the imported and domestic distilled spirits at issue will only be directly competitive or substitutable if they are in "'complete, absolute or exact' competition with one another."⁴⁸⁶ We consider that the Philippines' reading of the word "directly" is too narrow and does not conform with a proper interpretation of the second sentence of Article III:2 as clarified by the Appellate Body and by other panels. We agree with the complainants that requiring "complete, absolute or exact" competition between the products at issue as a condition to be considered directly competitive or substitutable would "blur" the distinction between this category of products under the second sentence of Article III:2 of the GATT 1994 and that of "like products" under the first sentence of that provision.⁴⁸⁷ It would also go against the understanding that the competitive relationship under the second sentence of Article III:2, as stated above, deals not only with *actual*, but also with *potential* competition.⁴⁸⁸

⁴⁷⁹ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 115. See also Appellate Body Report, *US – Cotton Yarn*, para. 91, and the Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.68.

⁴⁸⁰ See Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118. See also Appellate Body Report, *US – Cotton Yarn*, para. 91, and Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.68.

⁴⁸¹ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 114. See also Appellate Body Report, *US – Cotton Yarn*, para. 91.

⁴⁸² Appellate Body Report, *Korea – Alcoholic Beverages*, para. 114 (emphasis original).

⁴⁸³ *Ibid.*, para. 114. See also Appellate Body Report, *US – Cotton Yarn*, para. 91.

⁴⁸⁴ Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 128-131 and 132-134. But see *ibid.*, paras. 127-131.

⁴⁸⁵ Appellate Body Report, *Korea – Alcoholic Beverages*, para. 116 (adding that this term "does not, however, prevent a panel from considering both latent and extant demand."). See also Appellate Body Report, *US – Cotton Yarn*, paras. 97-98.

⁴⁸⁶ Philippines' first written submission, para. 214 (also stating that "the relationship described in Article III:2 second sentence is one that requires a very high degree of proximity."). See also Philippines' opening statement at first substantive meeting, para. 26; Philippines' second written submission, paras. 46-49; Philippines' opening statement at second substantive meeting, para. 24.

⁴⁸⁷ European Union's response to Panel question No. 48, para. 74. The European Union additionally states that "... not even under the first sentence of Article III:2 can one *always* describe the competitive relationship between products as '*complete, absolute, or exact*'...". (emphasis original). *Ibid.* See also the United States' response to Panel question No. 48, paras. 36-41; Australia's response to Panel question No. 2.

⁴⁸⁸ See also the European Union's response to Panel question No. 48, para. 75-77.

7.102 To assess whether the imported and domestic products are directly competitive or substitutable, we will examine several of the factors considered under the analysis of "like products" of Article III:2, i.e. consumers' tastes and habits, in terms of the competitive relationship between the products; channels of distribution; the products' properties, nature and quality; their end uses in a given market; the tariff classification of the products based on the HS system; and relevant internal regulations in the Philippines.⁴⁸⁹

7.103 Parties have discussed extensively the issue of the competitive relationship between the products at issue (domestic and imported distilled spirits, made from different raw materials) in the relevant market (the Philippines' market). Therefore, we will start our analysis with this factor. This does not mean however that the other factors listed above, in particular the physical characteristics of the products, are not relevant, or even less important. As the panel in *Korea – Alcoholic Beverages* stated:

"It would be an incorrect reading of the law to argue that products' physical similarities were somehow less relevant for the category of directly competitive or substitutable products than for the subcategory of like products. To put it another way, if two products are physically identical or nearly so, it is highly probable that they are 'like.' They should not then be found to be not directly competitive or substitutable because marketing campaigns (or government tax regimes) have created a distinction in consumer perceptions. Such consumer perception distinctions are relevant but not determinative when the question is the nature of an actual or potential competitive relationship rather than merely a quantitative analysis of the current extent of competition. To find otherwise might allow allegedly discriminatory government measures to create self-justifying product distinctions between identical or nearly identical products."⁴⁹⁰

(ii) *The competitive relationship between the products at issue*

7.104 We start by looking at the direct competitive relationship between the relevant products, i.e. the extent to which consumers are willing to use the different products to satisfy the same, or similar, needs ("consumers' tastes and habits").⁴⁹¹ We will focus our analysis on how those products relate to each other in the market. Although at some level all products may be said to be "at least indirectly competitive," given that consumers have limited disposable income for competing needs, the second sentence of Article III:2 only regulates situations where products compete directly.⁴⁹²

7.105 As stated at paragraph 7.101, the question before us under Article III of the GATT 1994 is not so much what the "degree of competition" between the products at issue is, but what is the "nature" or "quality" of their "competitive relationship".⁴⁹³ Therefore, as noted by previous panels, we should not place too much emphasis on quantitative analyses where "systems of government tax policies may

⁴⁸⁹ See e.g. Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 97, at p. 117; Panel Report, *Korea – Alcoholic Beverages*, para. 10.61; Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.68. See also Panel Report, *Chile – Alcoholic Beverages*, paras. 7.14 and 7.30; and United States' opening statement at first substantive meeting, para. 38.

⁴⁹⁰ Panel Report, *Korea – Alcoholic Beverages*, para. 10.66.

⁴⁹¹ See Appellate Body Report, *EC – Asbestos*, para. 117; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 115.

⁴⁹² Panel Report, *Korea – Alcoholic Beverages*, para. 10.40. But see above at para. 7.101, where we disagreed with the narrow interpretation of "directly" advanced by the Philippines.

⁴⁹³ Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 128-131.

have the effect of freezing consumer preferences in place of or in favour of the domestic product" because such policies tend to understate the competitive relationship.⁴⁹⁴

7.106 Additionally, as stated at paragraph 7.100, the second sentence of Article III:2 protects both *actual* and *potential* competition in a given market. In this respect, even in cases where there is no actual competition, a complainant may satisfy the requirements of the second sentence of Article III:2 by showing that the products potentially have a directly competitive relationship. This is especially so if there are indications that the challenged measure may have the effect of freezing consumer preferences for certain products.⁴⁹⁵

7.107 The Philippines argues that a competitive relationship can only be analysed in the context of the market realities of each country and whether a competitive relationship exists depends on the market that exists for the majority of consumers.⁴⁹⁶ To support its argument, the Philippines points to the panel report on *Chile – Alcoholic Beverages*, which stated that, although the products do not necessarily have to be substitutable all the time, there still must be a pattern of substitutability for *some consumers*. *Some consumers*, the Philippines argues, must be a representative sample of the entire market. Therefore, isolated and exceptional competition, such as that resulting from "occasional substitutability on special occasions", should be ignored when it contradicts general market trends.⁴⁹⁷

7.108 The competitive relationship between relevant products may be assessed through cross-price elasticity studies, which can be a useful analytical tool to determine the degree of substitutability between two goods or if they are in a competitive relationship.⁴⁹⁸ The Appellate Body has noted that, while cross-price elasticity is not necessarily a "decisive criterion" when looking at the conditions of competition between products at issue in the relevant market, it is not inappropriate to consider it "as one means of examining those relevant markets".⁴⁹⁹

7.109 With regard to the competitive relationship between the products at issue, we have noted that parties have provided different studies of consumers' perceptions in the Philippines' distilled spirits market. The complainants submitted a survey by *Euromonitor International* suggesting that consumers in the Philippines would be more willing to purchase imported distilled spirits if the price of those spirits decreases and the price of domestic Philippine spirits increases, even if the prices of imported spirits remains higher than those of domestic spirits.⁵⁰⁰ In turn, the Philippines submitted a survey by Abrenica & Ducanes from the University of Philippines School of Economics that concludes there is low price elasticity in the Philippine domestic distilled spirits market and, therefore, local and imported brands of distilled spirits are non-substitutable. The same survey suggests that

⁴⁹⁴ Panel Report, *Japan – Alcoholic Beverages II*, para. 6.28. See also Panel Report, *Korea – Alcoholic Beverages*, para. 10.44; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 25, DSR: 1996:I, p. 97, at p. 117; Panel Report, *Chile – Alcoholic Beverages*, para. 7.15.

⁴⁹⁵ Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 119-120. For example, potential competition was particularly relevant in *Chile – Alcoholic Beverages* because the evidence showed the existence of a substantial tax differential between the relevant products, as well as other measures that greatly influenced market conditions. Panel Report, *Chile – Alcoholic Beverages*, para. 7.25.

⁴⁹⁶ See generally Philippines' first written submission, paras. 210-219; Philippines' oral statement at the first substantive meeting, para. 10; and Philippines' response to Panel question No. 17.

⁴⁹⁷ Philippines' second written submission, paras. 65-68.

⁴⁹⁸ See for example Panel Report, *Japan – Alcoholic Beverages II*, para. 6.22. See also Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 25, DSR 1996:1, p. 117; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 121; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.451.

⁴⁹⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 25, DSR 1996:1, p. 117.

⁵⁰⁰ *Euromonitor International* survey in exhibits EU-41 and US-41. See para. 2.43 above.

narrowing price differentials between imported and domestic distilled spirits would only result in a small change in their respective market shares.⁵⁰¹

7.110 Both the Philippines and the complainants have criticized the methodology and the conclusions of the studies on consumers perceptions submitted by the opposing party.⁵⁰² The Philippines questions, for example, whether the *Euromonitor International* survey can serve as an indication of price elasticity of substitution between distilled spirits made from the designated raw materials and those made from other raw materials.⁵⁰³ Likewise, the complainants raise doubts about the "validity of [the] findings on cross-price elasticities" contained in the Abrenica & Ducanes survey from the University of Philippines School of Economics.⁵⁰⁴

7.111 In principle, the estimation of cross-price elasticity requires the use of an econometric analysis of historical quantity and price data of the goods at issue in a given market. In the absence of historical data, it is possible to estimate cross-price elasticity through the use of survey data, that is, data collected by means of questionnaires. To produce reliable results, the survey would have to be based on an appropriate methodology and be conducted on a sample that is representative of the consumer population. However, an estimate of cross-price elasticity on the basis of surveys has limitations, when compared to traditional estimates made using historical data. This is primarily because the data on quantities consumed would not reflect actual choices of consumers, but only hypothetical choices, which may not match consumer behaviour when faced with real life situations.

7.112 Neither the *Euromonitor International* survey, nor the Abrenica & Ducanes survey, is based on historical quantity and price data. The *Euromonitor International* survey is described as an evaluation on "consumers' price-based purchase preferences for different distilled spirit types across consumers in the Philippines that consume distilled spirits at least one time per month".⁵⁰⁵ This survey is not, in our view, an attempt to estimate and provide figures for the cross-price elasticity for imported and domestic distilled spirits. The Abrenica & Ducanes survey, in turn, estimates cross-price elasticities for imported and domestic distilled spirits in the Philippines market to range between -0.01 and 0.07, which the authors consider "low". The authors then conclude that "local and imported brands [of distilled spirits are] non-substitutable".⁵⁰⁶ Furthermore, the conclusions in both the *Euromonitor International* report and the Abrenica & Ducanes survey, with respect to variations in the quantities consumed of imported and domestic distilled spirits, are based on scenarios where the prices of imported and domestic distilled spirits are both said to change at the same time.⁵⁰⁷ The

⁵⁰¹ Abrenica & Ducanes survey from the University of Philippines School of Economics in exhibit PH-49. See para. 2.44 above.

⁵⁰² See for example European Union's second written submission, paras. 97-103; United States' second written submission, paras. 51-52; Philippines' first written submission, paras. 180-182, 240-241 and 268; Philippines' second written submission, paras. 66-67; Philippines' opening statement at second substantive meeting, paras. 25, 29 and 33; Philippines' comments to European Union's and United States' responses to Panel question No. 83, paras. 19-23; and exhibits EU-101, EU-102 and US-48.

⁵⁰³ Philippines' first written submission, para. 241.

⁵⁰⁴ See for example European Union's second written submission, para. 101. See also United States' second written submission, paras. 51-52; and exhibits EU-101 and EU-102.

⁵⁰⁵ *Euromonitor International*, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, p. 5.

⁵⁰⁶ See Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49, pp. 2, 11, 12 and 20. It is worth noting that the same study concludes that in the Philippine market "beer and liquor [distilled spirits] are substitutes." *Ibid.*, p. 16.

⁵⁰⁷ For example, the structure of the choices given to respondents creates a starting point bias, as well as some shortcomings associated with the regression model used for the calculations (a mixed logit model). See exhibits EU-101, EU-102 and US-48.

conclusions in both studies regarding the competitiveness or substitutability between imported and domestic products in the Philippines distilled spirits market would have been clearer had the studies attempted to isolate the effects of an increase in the price of domestic spirits on the quantities consumed of imported spirits (for example, by leaving the price of imported spirits fixed).

7.113 Nonetheless, the studies support the proposition that there is a significant degree of competitiveness or substitutability in the Philippines' market between the distilled spirits at issue in the present dispute. This refers both to distilled spirits as a general category, as well as to specific types of distilled spirits such as gin, brandy, vodka and whisky.⁵⁰⁸

7.114 The Philippines states that its domestic distilled spirits market is different from those of other countries involved in previous alcoholic beverages cases (Japan, Chile and Korea)⁵⁰⁹, because of the impact that price and income play on consumers' ability to purchase both domestic and imported spirits.⁵¹⁰ The Philippines argues that there is a huge gap in its market between the prices of "non-sugar based spirits" and "sugar-based spirits", which results from market forces and not from the excise tax⁵¹¹, and is compounded by the huge discrepancy in incomes indicated by the economic profiles of Philippine consumers.⁵¹² The income disparity, together with the general gap in prices, prevents most consumers from purchasing distilled spirits irrespective of the raw materials from which they are made, thus creating two market segments: one for distilled spirits made from designated raw materials and another for distilled spirits made from all other raw materials.⁵¹³ For this reason, the Philippines concludes that distilled spirits made from designated raw materials and spirits made from other raw materials are not directly competitive or substitutable.⁵¹⁴

7.115 The European Union and the United States disagree with the notion that income distribution is a valid distinction for determining whether products are directly competitive or substitutable.⁵¹⁵ The United States argues:

"If income distribution could affect whether goods are 'substitutable' for the purposes of GATT Article III:2, it would draw emphasis away from the goods themselves and

⁵⁰⁸ See also para. 7.57 above.

⁵⁰⁹ Philippines' first written submission, paras. 220 and 221. See also Philippines' oral statement at the second substantive meeting, para. 7.

⁵¹⁰ Philippines' oral statement at the second substantive meeting, paras. 8-9 and 17.

⁵¹¹ Philippines' first written submission, paras. 36-37 and 231; Philippines response to Panel question No. 53; Philippines' oral statement at the second substantive meeting, para. 17. See also Philippines' oral statement at the second substantive meeting, paras. 4-5.

⁵¹² Philippines' first written submission, paras. 42-44, 224 and 233; Philippines' oral statement at the first substantive meeting, para. 26; Philippines' second written submission, paras. 50-54; Philippines' response to Panel question No. 72. See also para. 2.31 above. But see United States' comments on the Philippines' response to Panel question No. 72; and European Union's comment on Philippines' response to Panel question No. 72.

⁵¹³ Philippines' second written submission, para. 66. See also exhibits PH-22 and PH-18; Philippines' oral statement at the first substantive meeting, paras. 20-21 and 27; Philippines' response to Panel question Nos. 17 and 50; Philippines' oral statement at the second substantive meeting, para. 6; and Philippines' oral statement at the second substantive meeting, para. 18.

⁵¹⁴ Philippines' first written submission, para. 46, 226-227, 233-234, 248; Philippines' oral statement at the first substantive meeting, para. 28; Philippines' response to Panel question Nos. 35 and 89; Philippines' second written statement, para. 42.

⁵¹⁵ See European Union's oral statement at the first substantive meeting, para. 77; United States' response to Panel question No. 30; United States' second written submission, para. 35. But see Philippines' oral statement at the second substantive meeting, para. 19.

whether they may be substituted, where it belongs, and allow purchasing power or affordability to affect whether such goods are substitutes."⁵¹⁶

7.116 The complainants argue that, although distilled spirits made from other raw materials are generally more expensive than distilled spirits made from designated raw materials⁵¹⁷, there is no clear gap in prices between them.⁵¹⁸ Rather, any notion that the market is segmented is defeated by the fact that both groups of distilled spirits are priced on a continuum, resulting in a significant amount of overlap.⁵¹⁹ Further, both complainants argue that any comparison of the relevant distilled spirits' current prices should take into account the fact that the measure at issue significantly raises the final prices of imported distilled spirits. Consequently, the measure masks a significant amount of latent demand and prevents importers from realizing economies of scale in the Philippine market because they are unable to sell at efficient quantities.⁵²⁰

7.117 Finally, the United States stresses that even if the market is indeed segmented, imported and domestic distilled spirits are directly competitive and substitutable for those consumers who compose the market segment where imported products are affordable.⁵²¹ Both the United States and the European Union argue that it is not accurate to conclude that just because some Philippine consumers can afford expensive distilled spirits, the rest of consumers can never afford them.⁵²²

7.118 We have found at paragraph 2.36 that, generally speaking, imported brands of distilled spirits tend to be more expensive in the Philippines, even before taxes, than the corresponding domestic brands of the same type of distilled spirit. At the same time, in the Philippine market there are a number of high-priced domestic distilled spirits, as well as less expensive imports. The Philippines contends that instances of price overlap between domestic and imported distilled spirits are "exceptions and aberrations".⁵²³ However, evidence shows that the overlap in prices of imported and domestic distilled spirits is not exceptional and that it occurs for both high- and low-priced products.⁵²⁴ In this regard, we note the statement of the panel on *Chile – Alcoholic Beverages* that "[p]roducts do not have to be substitutable for all purposes at all times to be considered competitive."⁵²⁵ Therefore, we find that the overlap in prices between imported and domestic distilled spirits in the Philippine market, irrespective of the raw materials from which they are made,

⁵¹⁶ United States' second written submission, para. 37.

⁵¹⁷ European Union's first written submission, para. 157.

⁵¹⁸ European Union's first written submission, para. 151; European Union's response to Panel question Nos. 30, 33, 35 and 49; European Union's oral statement at the second substantive meeting, paras. 55-58; United States' second written submission, paras. 30-31; United States' response to Panel question Nos. 30 and 33. See e.g. exhibit EU-80. European Union's second written submission, para. 38.

⁵¹⁹ European Union's first written submission, paras. 152 and 154-157; European Union's oral statement at the first substantive meeting, paras. 26 and 37-40. See also exhibits EU-15, EU-26, EU-29, EU-43, EU-72 and EU-80.

⁵²⁰ European Union's first written statement, paras. 148-150; European Union's oral statement at the first substantive meeting, para. 67; European Union's oral statement at the second substantive meeting, paras. 48-49; United States' oral statement at the second substantive meeting, paras. 20-21 and 28-29.

⁵²¹ European Union's first written submission, paras. 114 and 123; European Union's oral statement at the first substantive meeting, para 17; European Union's response to Panel question No. 48; United States' first written submission, para. 64; United States' oral statement at the first substantive meeting, paras. 32-33; United States' second written submission, paras. 32-33; exhibit US-40.

⁵²² United States' response to Panel question Nos. 35, paras. 25-27, and 54, paras. 51-52. See also European Union's second written submission, paras. 39-41; United States' oral statement at the second substantive meeting, para. 32; United States' oral statement at the second substantive meeting, paras. 20-21 and 28-29.

⁵²³ Philippines' second written submission, para. 56.

⁵²⁴ See e.g. paras. 2.36, 2.66, 2.67, 2.72 and 2.73.

⁵²⁵ Panel Report, *Chile – Alcoholic Beverages*, para. 7.43.

suggests that the market is not segmented and that in some cases imported and domestic products compete with respect to price.

7.119 With regard to the argument advanced by the Philippines concerning the purchasing power of Philippine consumers⁵²⁶, we have already found at paragraph 7.59 that, while a large proportion of Philippine consumers may not currently have access to high-priced distilled spirits, including those made from raw materials other than those designated in the measure, many others may be able to purchase high-priced distilled spirits, at least on special occasions.

7.120 The Philippines asserts that distilled spirits made from other raw materials are out of reach for "most" or a "majority" of its population, or are only available to a "narrow segment" of the population. It argues that "the capacity of a limited segment of the population to purchase non-sugar-based spirits should not be used as the basis for determining that these products are directly competitive or substitutable."⁵²⁷ In our view, the Philippines' statement implies that, at least a narrow segment of the market has access to both groups of spirits.⁵²⁸ Article III of GATT 1994 does not protect just *some* instances or *most* instances, but rather, it protects *all* instances of direct competition.⁵²⁹ It follows that the competitive relationship does not need to occur throughout the *whole* market for a panel to find that a measure is inconsistent with the second sentence of Article III. We thus conclude that, even if the Philippine distilled spirits market were segmented, actual direct competition exists within at least a segment of that market. We consider that this is enough for us to find a direct "competitive relationship" for the purpose of the second sentence of Article III:2 of the GATT 1994.⁵³⁰

7.121 Finally, as indicated at paragraph 7.100, the competitive relationship protected under the second sentence of Article III:2 includes not only *actual*, but also *potential* competition between the products at issue. Therefore, the alleged absence of actual competition within the majority of the market cannot decide the issue. Rather, one must look at whether the products are *capable* of being competitive. The Philippines argues that since there is no evidence that the income distribution will drastically change in the near future, distilled spirits made from raw materials other than those designated in the measure will still be out of reach for the majority of the Philippine population.⁵³¹ In our view, an Article III analysis should not depend on predicting income distribution patterns, but rather on whether there is evidence that consumers are willing, or may be willing, to use the different products to satisfy the same or similar needs. In this respect, the instances of actual competition we

⁵²⁶ See para. 7.114 above.

⁵²⁷ Philippines' first written submission, para. 249; Philippines' oral statement at the first substantive meeting, para. 29; Philippines second written submission para. 64.

⁵²⁸ See Philippines' first written statement, paras. 43, 46, 226, 230, 233 244, 248; Philippines' oral statement at the first substantive meeting, para. 29; Philippines' response to Panel question No. 52; and Philippines' second written submission, para 55. See also Philippines' oral statement at the first substantive meeting, para. 27. The existence of at least some degree of a competitive relationship between the relevant products seems to be confirmed by the statements from domestic Philippine companies that their products face competition from imported spirits, and that their marketing strategies convey an image of their products as drinks that compete with the imported distilled spirits. See European Union's first written submission, paras. 127-136 and exhibits EU-22, EU-25, EU-29, EU-43, EU-58, EU-59, EU-60, EU-63, EU-64, EU-65 and EU-87. See also Panel Report, *Chile – Alcoholic Beverages*, para. 7.85. The European Union notes that the top 15 per cent of the population amounts to over 13.7 million citizens. European Union's second written submission, para. 4; European Union's opening statement at second substantive meeting, para. 34.

⁵²⁹ Panel Report, *Chile – Alcoholic Beverages*, para. 7.43.

⁵³⁰ See also the European Union's oral statement at the first substantive meeting, para. 77.

⁵³¹ Philippines' first written submission, para. 250; Philippines' second written submission, para. 48; Philippines' response to Panel question No. 52. See also Philippines' oral statement at the second substantive meeting, para. 24.

noted in paragraph 7.118 are a clear indication that the imported and domestic products at issue in this dispute are indeed *capable* of being directly competitive or substitutable in the future.

(iii) *Products' channels of distribution*

7.122 The complainants assert that in the Philippines, all distilled spirits at issue use the same channels of distribution and sale. For them, this is an indication that these products compete with each other in the Philippine market and are thus directly competitive or substitutable within the meaning of the second sentence of Article III:2.⁵³² The Philippines states in response that the fact that distilled spirits made from designated raw materials and distilled spirits made from other raw materials "operate in different markets, and are not directly competitive or substitutable, is also reflected in their manner of distribution. In the Philippines, non-sugar-based distilled spirits and sugar-based spirits are sold through distribution channels that *are almost entirely different* – through 'sari-sari' stores.^{533,534}

7.123 We note that the evidence shows that some establishments (especially small retail stores) that offer domestic Philippine distilled spirits do not carry imported distilled spirits. However, all outlets where imported spirits are sold either for consumption on the premises (such as bars or restaurants) or off the premises also offer domestic Philippine spirits.⁵³⁵ We consider that this is an indication of similarity between the products at issue.

(iv) *Products' properties, nature and quality*

7.124 The United States argues that "based on physical attributes such as appearance, taste, color and alcohol content, distilled spirits made of indigenous materials in the Philippines are directly competitive or substitutable with imported distilled spirits."⁵³⁶

7.125 In turn, the European Union submits that:

"[T]he basic physical properties of all distilled spirits – irrespective of the raw materials used for distillation – are essentially the same. All spirits are concentrated forms of alcohol produced by the process of distillation. At the point of distillation, all spirits are nearly identical, which means that raw materials used in this process have almost no impact [on] the final product."⁵³⁷

⁵³² European Union's first written submission, paras. 137-144; European Union's opening statement at first substantive meeting, paras. 69-72; European Union's second written submission, paras. 108-109; European Union's opening statement at second substantive meeting, paras. 38-42; United States' first written submission, paras. 53-58; United States' opening statement at first substantive meeting, para. 41; United States' second written submission, paras. 8 and 11; United States' comments on the Philippines' response to Panel question No. 76, para. 19.

⁵³³ (*footnote original*) "Sari-sari" is a Philippine word that means "variety".

⁵³⁴ Philippines' first written submission, para. 253 (*emphasis original*). See also Philippines' opening statement at first substantive meeting, para. 29; Philippines' second written submission, paras. 72-75; Philippines' opening statement at second substantive meeting, para. 23; Philippines' response to Panel question Nos. 71 and 76.

⁵³⁵ See para. 2.41 above.

⁵³⁶ United States' first written submission, para. 52. See also United States' opening statement at first substantive meeting, paras. 10-18; United States' second written submission, paras. 7 and 11; United States' opening statement at second substantive meeting, paras. 14-16.

⁵³⁷ European Union's first written submission, para. 120. See also European Union's first written submission, paras. 121-122; European Union's second written submission, paras. 78-84; European Union's opening statement at second substantive meeting, paras. 18-37.

7.126 The Philippines responds that "the different physical characteristics" between the relevant products "are substantial"⁵³⁸, in particular given the fact that they are respectively made from different raw materials and using distinct distillation processes. For many of the spirits at issue in the present dispute, the producers of distilled spirits from designated raw materials strip the ethyl alcohol made (normally sugar cane molasses) of its natural congeners and add natural or artificial flavourings. In contrast, distilled spirits made from other raw material are allowed to retain their natural congeners in order to distinguish the products.⁵³⁹

7.127 In our discussion on the issue of the products' properties, nature and quality, as part of the "likeness" analysis under the first sentence of Article III:2, we stated that, according to the Appellate Body, such elements may be seen as covering the physical qualities and characteristics of the products at issue.⁵⁴⁰ We concluded there, as we conclude here, that the various elements associated with the properties, nature and quality of the products at issue (such as alcohol content, colour, physiological effects on humans, process of production, organoleptic properties) suggest that there is a close similarity between these products.⁵⁴¹ We consider that those various elements are also relevant to our inquiry under the second sentence. As stated by the panel in *Chile – Alcoholic Beverages*, "the closer the physical similarity [between the products at issue] the greater the likelihood of a directly competitive or substitutable relationship [between them]."⁵⁴²

(v) *End uses and marketing*

7.128 The complainants argue that the products at issue have common end uses, as they are *inter alia* drunk in the same way, place and occasions.⁵⁴³ The Philippines responds that any overlap in end uses "cannot by itself overcome the clear physical differences in the products, or, more significantly, market segmentation caused by price differences."⁵⁴⁴ The Philippines further claims that given the market segmentation in the Philippines, even though the products at issue may satisfy the same needs (such as thirst quenching, relaxation, socialization), "they do so for different, non-interchangeable audiences."⁵⁴⁵

7.129 In our discussion on the issue of the relevant products' end uses as part of the "likeness" analysis under the first sentence of Article III:2, we stated that we would focus on the extent to which the different types of spirits relevant for the present dispute are capable of serving the same, or similar, end uses. We found no evidence of any differences between the end uses of imported and domestic distilled spirits at issue in the present dispute, nor between the end uses of distilled spirits made from the designated materials and those made from other materials.⁵⁴⁶ We concluded there, as we conclude here, that the various elements associated with the relevant products' end-uses suggest that there is similarity between these products.⁵⁴⁷

⁵³⁸ Philippines' first written submission, para. 272. See also *ibid.*, para. 278.

⁵³⁹ Philippines' first written submission, para. 274. See also Philippines' second written submission, paras. 19-32.

⁵⁴⁰ See para. 7.34 above.

⁵⁴¹ See paras. 7.75 and 7.80 above. See also paras. 7.35 to 7.47 above.

⁵⁴² Panel Report, *Chile – Alcoholic Beverages*, para. 7.48. See also Panel Reports, *Chile – Alcoholic Beverages*, para. 7.53, and *Korea – Alcoholic Beverages*, para. 10.67.

⁵⁴³ European Union's first written submission, paras. 123-125; European Union's second written submission, paras. 104-107; United States' first written submission, paras. 59-63, United States' opening statement at first substantive meeting, para. 41; United States' second written submission, paras. 9 and 11.

⁵⁴⁴ Philippines' first written submission, para. 281.

⁵⁴⁵ *Ibid.*, para. 282.

⁵⁴⁶ See para. 7.48 above.

⁵⁴⁷ See paras. 7.75 and 7.81 above.

7.130 The complainants also argue that the fact that all distilled spirits producers use similar marketing strategies to advertise their products in the Philippines indicates that the imported and domestic spirits at issue compete with each other in that market.⁵⁴⁸ The Philippines responds that any overlap in advertising or marketing strategies is of "limited relevance", and that "different marketing techniques" are a result of the physical differences between the products at issue and the market segmentation caused by price differences.⁵⁴⁹

7.131 When addressing the "likeness" issue under the first sentence of Article III:2, we noted that marketing campaigns for distilled spirits are very similar and that there is no indication that those campaigns are different for imported distilled spirits and domestic Philippine distilled spirits, nor for spirits made from the designated materials and those made from other materials.⁵⁵⁰ We also noted that the domestic distilled spirits in the Philippines, irrespective of the raw materials from which they are made, are labelled as either gin, brandy, rum, vodka, whisky, tequila or tequila-flavoured spirits.⁵⁵¹ Further, generally speaking, labels of domestic Philippine distilled spirits made from the designated raw materials tend to either mimic or replicate the names of products and designs of the similar imported spirits made from other raw materials.⁵⁵² All these factors, we believe, are additional elements that suggest that the products at issue are directly competitive and substitutable.⁵⁵³

(vi) *Tariff classification*

7.132 The complainants argue that another indication that the imported and domestic distilled spirits at issue are directly competitive or substitutable is the fact that these products fall within the same HS heading, i.e. HS heading 2208.⁵⁵⁴ The Philippines responds that the tariff classification at the HS four-digit level is not "detailed enough" to support the complainants' view. The Philippines notes that at the six-digit level the HS separates spirits between those made with sugar cane and those that are not made with sugar cane. It argues that this demonstrates that the products at issue are not directly competitive or substitutable.⁵⁵⁵

7.133 In our discussion with respect to the question of "likeness" under the first sentence of Article III:2 we considered the product descriptions under the HS at both the four-digit level and six-digit level. We consider, however, that the six-digit subheadings descriptions under the HS are relevant only for the discussion of the similarity of specific types of distilled spirits, rather than for the *whole category* of distilled spirits. Accordingly, the four-digit level of HS heading 2208 is the appropriate level for the purpose of the issue of "direct competitiveness or substitutability" of the *whole category* of distilled spirits in the present case under the second sentence of Article III:2.

⁵⁴⁸ European Union's first written submission, paras. 126-136; European Union's second written submission, paras. 90-94; European Union's opening statement at second substantive meeting, paras. 43-47; United States' first written submission, paras. 48-49; United States' second written submission, para. 8 and 11; United States' comments on the Philippines' response to Panel question No. 76, para. 19.

⁵⁴⁹ Philippines' second written submission, paras. 25 and 37. See also Philippines' response to Panel question No. 76.

⁵⁵⁰ See paras. 7.51, 7.76 and 7.82 above.

⁵⁵¹ See para. 7.61 above.

⁵⁵² See para. 7.61 above.

⁵⁵³ See Panel Report, *Korea – Alcoholic Beverages*, para. 10.65.

⁵⁵⁴ European Union's opening statement at first substantive meeting, para. 76; European Union's second written submission, para. 96; United States' first written submission, paras. 44 and 65-66; United States' opening statement at first substantive meeting, para. 41; United States' second written submission, paras. 10, 11 and 27. See also United States' response to Panel question No. 42, para. 33.

⁵⁵⁵ Philippines' first written submission, para. 284.

7.134 In our discussion under the first sentence of Article III:2 for the *whole category* of distilled spirits, we concluded, as we conclude here, that the fact that all distilled spirits at issue fall within the HS heading 2208 is an indication of their similarity.⁵⁵⁶

(vii) *Internal regulations*

7.135 With respect to domestic regulations on distilled spirits in the Philippines, we have noted above in our "likeness" analysis that certain local ordinances against drunk driving do not distinguish between imported and domestic spirits, nor between spirits made from the designated materials and those made from other materials. Nor is any such distinction made in local ordinances with respect to "the sale, dispensation and/or distribution of alcoholic beverages".⁵⁵⁷ We also found further confirmation of similarity in the language used in Republic Act No. 9334, one of the relevant instruments in the present dispute.⁵⁵⁸ We consider that such determinations are also relevant here in that they constitute additional indications that the products at issue may be considered directly competitive and substitutable.

(viii) *Conclusions on "directly competitive or substitutable"*

7.136 We found at paragraph 7.77 that the imported and domestic distilled spirits at issue in the present dispute are "like products" within the meaning of the first sentence of Article III:2. If the imported and domestic distilled spirits at issue in the present dispute are "like" under the first sentence, it follows that, in principle, they would also be "directly competitive or substitutable" within the meaning of the second sentence of Article III:2. However, as explained above⁵⁵⁹, we decided to consider the issue of "direct competitiveness or substitutability" under the second sentence of Article III:2 as if *arguendo* we had found that the products at issue were *not* like.

7.137 Based on the above analysis, we find that there is a direct competitive relationship between domestic and imported distilled spirits, made from different raw materials, for the purpose of the second sentence of Article III:2 of the GATT 1994. We also recall our conclusions above on the following elements: (i) the products' channels of distribution; (ii) the products' properties, nature and quality; (iii) the products' end uses and marketing; (iv) the product descriptions under HS heading 2208; and (v) certain domestic regulations on distilled spirits in the Philippines. We concluded that each of these elements constitute an indication of the similarity between the products at issue. We therefore consider that, together, these conclusions suggest that those products may be directly competitive and substitutable.

7.138 Having considered all the above factors and elements, we conclude that the distilled spirits at issue in the present dispute, whether imported or domestic, and irrespective of the raw materials from which they are made, are "directly competitive or substitutable" within the meaning of the second sentence of Article III:2 of the GATT 1994.

(b) "Not similarly taxed"

(i) *Introduction*

7.139 Now that we have found that the domestic and imported products at issue, irrespective of the raw materials from which they are made, are "directly competitive or substitutable", we continue our

⁵⁵⁶ See para. 7.63 and 7.76 above.

⁵⁵⁷ See para. 7.72 above.

⁵⁵⁸ See para. 7.73 above.

⁵⁵⁹ See para. 7.99 above.

inquiry into the second question under the second sentence of Article III:2 of the GATT 1994, i.e. whether these products are "not similarly taxed."

(ii) *Arguments of the parties*

7.140 The complainants assert that the tax differential applied to domestic and imported distilled spirits is "enormous"⁵⁶⁰, with imported spirits being charged approximately 10 to 40 times the excise tax applied to directly competitive or substitutable domestic products. They submit that such a differential is much greater than the tax differentials found to be more than *de minimis* in previous similar disputes. Consequently, they argue that the imported and domestic distilled spirits at issue are "not similarly taxed" within the meaning of the second sentence of Article III:2.⁵⁶¹

7.141 The Philippines responds that, even if the distilled spirits at issue were considered to be directly competitive or substitutable, any difference between the excise tax applied to them will only be *de minimis* and, as a consequence, permissible under the second sentence of Article III:2.⁵⁶² The Philippines argues that, in order to assess whether the taxation at issue is *de minimis*, the appropriate comparison is not between the *nominal tax rates* applied to distilled spirits made from designated raw materials and those made from other raw materials, but rather between the *relative tax burdens* of those products.⁵⁶³ The Philippines further elaborates on this view by articulating what it believes to be the correct "*de minimis* test" under the second sentence of Article III:2, as follows:

"[T]he concept of *de minimis* for the purposes of Article III:2, second sentence, is defined by the extent to which the tax burden affects the competition of products in the market in question. If the taxation rate has little or no impact on consumer choice, it will be deemed to be *de minimis*."⁵⁶⁴

7.142 Applying the above standard to the facts of this case and borrowing from its previous arguments made under the first element of the Article III:2 second sentence analysis, the Philippines asserts that the evidence indicates that the average net retail price of distilled spirits made from raw materials other than those designated in the Philippines legislation is such that "the vast majority of consumers will not be able to afford these products", irrespective of the amount of excise tax applied to them.⁵⁶⁵

⁵⁶⁰ European Union's second written submission, para. 129.

⁵⁶¹ European Union's first written submission, paras. 105, 158-165 and 170; European Union's opening statement at first substantive meeting, paras. 81 and 83; European Union's response to Panel question No. 56, para. 86; European Union's second written submission, para. 129; European Union's opening statement at second substantive meeting, para. 75; United States' first written submission, paras. 67-70, 73 and 79; United States' opening statement at first substantive meeting, paras. 43-46; United States' response to Panel question Nos. 56, paras 56-57, and 57, para. 60; United States' second written submission, para. 56; United States' opening statement at second substantive meeting, para. 48. See also Australia's third party written submission, para. 42, and Australia's response to Panel question No. 5.

⁵⁶² Philippines' first written submission, para. 286.

⁵⁶³ *Ibid.*, paras. 287 and 309. See also Australia's response to Panel question No. 5; and India's response to Panel question No. 5.

⁵⁶⁴ Philippines' first written submission, para. 289; Philippines' opening statement at first substantive meeting, para. 33; Philippines' second written submission, paras. 77-79. See also India's response to Panel question No. 4.

⁵⁶⁵ Philippines' first written submission, paras. 286 and 289, referring to Euromonitor International, "Consumer perceptions regarding substitutability in the Philippines distilled spirits market", in exhibits EU-41 and US-41, and to Abrenica & Ducanes, "On Substitutability between Imported and Local Distilled Spirits" (University of Philippines School of Economics Foundation), in exhibit PH-49). See also Philippines' opening

7.143 The Philippines also claims that the difference in the *relative tax burden* imposed on distilled spirits produced from designated raw materials as compared to that imposed on distilled spirits produced from other raw materials is a "minor difference, particularly in light of the significant price differences between non-sugar-based and sugar-based spirits".⁵⁶⁶ In support of its contention that the difference in the *relative tax burden* is "minor", the Philippines estimates that the "average tax burden" on distilled spirits produced from designated raw materials and that on distilled spirits produced from other raw materials, as provided by a sample of spirits in Republic Act 8240, would be 13 per cent and 22 per cent, respectively. The Philippines asserts that this "difference of only 9 percentage points" is "certainly not the degree of higher taxation found to exist" in previous similar cases.⁵⁶⁷

7.144 Finally, because in the Philippines' view *de minimis* taxation is to be ascertained in light of the facts of each case, it asks the Panel to take into consideration the particularities of the Philippine domestic market (composed mostly of low income consumers). The Philippines also asks the Panel to take into consideration the mandate enshrined in the Philippine Constitution requiring a "progressive system of taxation", which, in the case of the excise tax on distilled spirits, is aimed at taxing those who can afford "luxury goods" more than those who cannot.⁵⁶⁸

7.145 Based on the foregoing considerations, the Philippines claims that because the excise tax at issue "has no effect in the [Philippine] market" it results in a tax burden that is only *de minimis*.⁵⁶⁹ Consequently, directly competitive and substitutable imported and domestic distilled spirits are "similarly taxed" and the excise tax at issue is permissible under the second sentence of Article III:2.⁵⁷⁰

7.146 The complainants disagree that this is the appropriate standard applicable to an analysis under the second sentence of Article III:2.

7.147 The United States argues that the correct approach in this case should focus on the "size of the tax differential" between the products at issue.⁵⁷¹ In its view, the Philippines' approach is akin to a "trade effects" test. Requiring that a measure must affect trade and consumer' choices for it to meet the more than *de minimis* requirement is, therefore, incorrect. Such an approach would read Article III:2 backwards by requiring one to look first at the trade effects before ascertaining if there is a difference in tax treatment. Further, the United States argues that the standard advanced by the Philippines "could lead to extreme results" as it could allow a Member to have an explicitly discriminatory measure as long as this measure was put in place "before there was significant import penetration" in that market.⁵⁷²

statement at first substantive meeting, para. 34; Philippines' opening statement at second substantive meeting, para. 6(c).

⁵⁶⁶ Philippines' first written submission, para. 290.

⁵⁶⁷ Ibid., paras. 290-291; Philippines' opening statement at first substantive meeting, para. 33.

⁵⁶⁸ Philippines' first written submission, para. 291. See also the Philippines' opening statement at first substantive meeting, para. 33.

⁵⁶⁹ Philippines' first written submission, paras. 16 and 289.

⁵⁷⁰ Ibid., paras. 286 and 290.

⁵⁷¹ United States' response to Panel question No. 56, para. 56.

⁵⁷² Ibid., paras. 56-59; United States' opening statement at second substantive meeting, paras. 45-49.

The complainants also argue that, in any event, they have already demonstrated that eliminating the tax difference would indeed affect the market and that they have shown that the different tax rates at issue in this dispute have resulted in a "dramatic impact" on products that are "clearly competing in the Filipino market". European Union's response to Panel question No. 56, para. 86. See also United States' opening statement at first substantive meeting, para. 47.

7.148 The European Union asserts that a *de minimis* tax differential is one that is so small that it is "negligible" from the perspective of both the consumers and producers.⁵⁷³ Noting that the Appellate Body has not developed a specific list of criteria for analysing whether a given level of tax differential is more than *de minimis*, the European Union submits that a panel facing such a question could look at the following elements: (i) the actual impact of the tax on the final price of the products; (ii) the degree of proximity and similarity of the products; and (iii) the degree of competition in the market and the relative strength of the companies producing the goods which are subject to different taxes.⁵⁷⁴

7.149 The complainants also claim that comparing the average tax burdens of *all* imported spirits with the average tax burden of *all* domestic products is not appropriate. The United States considers that such an approach would "mask [the] tax discrimination among the same types of spirits."⁵⁷⁵ The European Union argues that the Philippines' approach is particularly problematic because the averages used are based on a very restricted sample of products.⁵⁷⁶ The European Union further states that because under the second sentence of Article III:2 it is unnecessary to find that all imported and domestic products are similar, it follows that using average prices or average tax burdens is "quite irrelevant" to assess the claims in this dispute.⁵⁷⁷ The European Union claims that instead of looking at the "average" tax burdens, the Panel should look at the "actual" tax burdens on the competing products at issue.⁵⁷⁸ The United States further asserts that even if one were to accept the Philippines' own averaged numbers, they would still show that the average excise tax applied to imported distilled spirits is "almost double" the average excise tax applied to domestic distilled spirits.⁵⁷⁹

(iii) *Consideration by the Panel*

7.150 We start by recalling that in *Chile – Alcoholic Beverages*, developing its reasoning on this issue, the Appellate Body explained:

"In *Japan – Alcoholic Beverages*, we stated that 'to be "not similarly taxed", the tax burden on imported products must be heavier than on "directly competitive or substitutable" domestic products, and that burden must be more than *de minimis* in any given case.' (...) we consider that this is the appropriate legal standard to apply under the second issue of 'not similarly taxed'. We must, therefore, assess the relative tax burden imposed on directly competitive or substitutable domestic and imported products."⁵⁸⁰

7.151 We will follow the Appellate Body's guidance mindful that a determination of what is or is not more than *de minimis* can only be made on a case-by-case basis.⁵⁸¹

⁵⁷³ European Union's response to Panel question No. 56, paras. 89, 90 and 94.

⁵⁷⁴ European Union's response to Panel question No. 56, paras. 88, 91-93. See also Australia's response to Panel question No. 4.

⁵⁷⁵ United States' response to Panel question No. 57, para. 64.

⁵⁷⁶ European Union's opening statement at first substantive meeting, para. 82. See also United States' response to Panel question No. 57, paras. 62-64; European Union's response to Panel question No. 57, paras. 95-97; European Union's second written submission, para. 131.

⁵⁷⁷ European Union's response to Panel question Nos. 57, paras. 96-97, and 92, paras. 51-53.

⁵⁷⁸ European Union's opening statement at first substantive meeting, para. 82.

⁵⁷⁹ United States' response to Panel question No. 57, para. 61.

⁵⁸⁰ Appellate Body Report, *Chile – Alcoholic Beverages*, para. 49 (footnotes omitted) (citing the Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 97, at p. 119).

⁵⁸¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 97, at p. 119. See also the European Union's first written submission, para. 158 and European Union's response to Panel question No. 57, para. 95. See further Australia's third party written submission, para. 41.

7.152 We note that the Philippines relies on the following passage from the panel report on *Chile - Alcoholic Beverages* to support its interpretation of the *de minimis* test:

"In our view this means that panels should look at the particular market in question and the products themselves. That is, there is no set level of tax differential which can be considered *de minimis* in all cases. This follows from the Appellate Body's observation that with respect to 'like products' the similarities between the products are so strong that it can be presumed that any differential in taxation will have an impact on the market. However, when products are somewhat different, but are still directly competitive or substitutable, then *de minimis* differences in taxation are permissible because it is not necessarily true that small differences in tax levels will have an effect in the market."⁵⁸²

7.153 We agree with the above statement by the panel in *Chile – Alcoholic Beverages*. We note, however, that the differences in tax levels which, in that panel's view, would not necessarily have an effect in the market were only those considered to be "small". This is in line with the accepted meaning of the term *de minimis*, which is a "legal term describing that something is of *little* or *no* importance in the matter concerned."⁵⁸³ This is also how the term has been used by the Appellate Body. Further, we note that in previous similar disputes significantly smaller tax differentials than those in the present case were nevertheless considered sufficient to support a finding of dissimilar taxation.⁵⁸⁴

7.154 As we have already indicated above, all distilled spirits produced in the Philippines are made from the raw materials designated in the legislation and thus subject to the current *Section 141(a)* flat tax rate of PHP 14.68 ppl. In contrast, the vast majority⁵⁸⁵ of distilled spirits imported into the Philippines are made from other raw materials and are thus subject to one of the three current tax rates under *Section 141(b)*: PHP 158.73 ppl, PHP 317.44 ppl or PHP 634.90 ppl, depending on their NRP.⁵⁸⁶ This results in imported distilled spirits being subject to approximately 10, 20 or 40 times the excise tax applied to directly competitive or substitutable domestic spirits. We consider therefore that we are not presented here with "small differences in tax levels" but rather, with large ones.⁵⁸⁷

⁵⁸² Panel Report, *Chile – Alcoholic Beverages*, para. 7.90. See also Philippines' first written submission, para. 288; Philippines' second written submission, para. 77.

⁵⁸³ *Dictionary of Trade Policy Terms*, W. Goode, CICS/WTO, fifth edition, 2007, p. 121 (emphasis added). The term *de minimis* comes from the Latin maxim "*de minimis non curat lex*", which means "the law does not care for, or take notice of, *very small* or *trifling* matters." (*Black's Law Dictionary*, abridged sixth edition, 1991, p. 297 – emphasis added). See also *The Shorter Oxford English Dictionary*, sixth edition, 2007, Volume 1 (A-M), p. 640 (defining *de minimis* as "[t]oo minor or trivial to merit consideration by the law."). See further European Union's response to Panel question No. 56, para. 89.

⁵⁸⁴ In *Japan – Alcoholic Beverages II*, the tax differential that was considered more than *de minimis* ranged from 1.3 to 9.6 times; in *Korea – Alcoholic Beverages*, the tax differential that was considered more than *de minimis* ranged from 1.4 to 2.8 times; and in *Chile – Alcoholic Beverages*, the tax differential that was considered more than *de minimis* was an overall differential of 1.75 times between the lowest *ad valorem* rate (27 per cent) and the highest (47 per cent). Further, in *Chile – Alcoholic Beverages*, even the incremental 4 percentage point difference between each of the tax sub-categories of the New Chilean System, ranging from the 27 per cent and 47 per cent *ad valorem* rates, was considered *per se* as more than *de minimis*.

⁵⁸⁵ As indicated in paras. 2.37 and 2.74 above, some imported distilled spirits produced from designated raw materials (rums) are subject to the lower flat tax rate under *Section 141(a)*. These imports represent less than 0.1 per cent of total imported distilled spirits. See exhibits EU-15, pp. 7 and 57 and US-15, pp. 7 and 57.

⁵⁸⁶ See para. 2.17 above.

⁵⁸⁷ See also para. 7.140 above. We further note that a similar magnitude of tax differential can be seen when looking at the actual amount of excise tax that is currently levied on certain imported and domestic

7.155 The Philippines does not contest that the nominal tax differential identified above is large. The Philippines argues instead that under the second sentence of Article III:2, the dissimilar taxation must be assessed not in absolute but rather in relative terms, i.e. based on the relative tax burden applied to the products at issue. The Philippines calculates a relative tax burden by dividing the NRP of the distilled spirits brands listed in the annexes of Republic Act 8240 by the amount of the tax applicable to each of those brands. It then averages the resulting relative tax burdens of each brand classified under *Section 141(a)* and each brand classified under *Section 141(b)*. The result, claims the Philippines, is an *average* tax burden of 13 per cent for distilled spirits made from designated raw materials and an *average* tax burden of 22 per cent for distilled spirits made from other raw materials. The Philippines argues that the 9 percentage point difference between these average tax burdens is "minor" and, thus, a *de minimis* one.

7.156 We stated above that we would follow the Appellate Body's guidance that a finding of dissimilar taxation under the second sentence of Article III:2 would include an assessment whether the tax burden on imported products is "heavier" than on the domestic products, and whether such burden is "more than *de minimis* in any given case." We understand that the Appellate Body considered that in making such an analysis, a panel *ipso facto* would be undertaking an assessment of the "relative tax burden" imposed on these products.

7.157 We have already concluded that, in *nominal* terms, the tax differential applicable to the *vast majority* of imported distilled spirits is larger (and, thus, imposes a "heavier" burden) than that applicable to all domestic directly competitive or substitutable distilled spirits. Therefore, from this perspective, we consider that such differential is more than *de minimis* within the meaning of Article III:2 of the GATT.

7.158 We further believe that, in *relative* terms, the tax burdens of the products at issue are also more than *de minimis*.

7.159 We recall again that, given the structure of the Philippine excise tax system, all domestic spirits are subject to a specific tax, whereas the vast majority of imported spirits is subject to an *ad valorem* tax. This means that no matter what the NRP of domestic distilled spirits are, these products will always pay a flat rate tax of PHP 14.68 ppl. As a result, the more expensive a domestic distilled spirit is, the lower the relative tax burden of that spirit. Even if we were to agree with the Philippines' description of its market as segmented, this would mean that the domestic distilled spirits that are in greater competition with most imported products enjoy the lowest tax burden under *Section 141 (a)*.

7.160 The evidence before us shows that, as applied to specific imported and domestic brands of distilled spirits, the Philippine excise tax results in differences of relative tax burdens that are significantly more than *de minimis*.⁵⁸⁸ The table below illustrates this very clearly.⁵⁸⁹

brands. As indicated above in footnote 61 to para. 2.17, the current amount of excise tax applicable to certain brands of "local distilled spirits" made from designated raw materials in 750 ml bottles can range from PHP 6.86 to PHP 9.98. Conversely, the current amount of excise tax applicable to certain brands of "imported distilled spirits" made from other raw materials in 750 ml bottles can range from PHP 85.71 to a maximum of PHP 409.51. This corresponds to an actual tax differential of between 12 and 40 times for comparable spirits.

⁵⁸⁸ See also United States' opening statement at first substantive meeting, para. 47 and United States' response to Panel question No. 57, paras. 62-63 (comparing the average tax burden of 9 imported and 14 domestic spirits using information from the Abrenica and Ducanes Report (Exhibit PH-49), and claiming that such data reveal that the highest tax burden faced by an imported spirit in the sample is almost 62 per cent (*Jack Daniel's Tennessee Sour Mash Whiskey*), while the highest tax burden faced by a domestic spirit in the sample was 18 per cent (*Tanduay Rhum ESQ*). See further the United States' second written submission, para. 54;

Brand/Origin	Type of spirit	Volume bottle	Relative tax burden (NRP/tax)
<i>Bombay Sapphire</i> (imported)	gin	750 ml	33 per cent
<i>Ginebra Especial</i> (domestic)	gin	750 ml	19 per cent
<i>Alfonso I</i> (imported)	brandy	700 ml	45 per cent
<i>Maximo</i> (domestic)	brandy	700 ml	27 per cent
<i>Stolichnaya</i> (imported)	vodka	1,000 ml	47 per cent
<i>Gilbey's 1857</i> (domestic)	vodka	1,000 ml	7 per cent
<i>Benmore Blended</i> (imported)	whisky	700 ml	108 per cent
<i>White Castle 5 Years</i> (domestic)	whisky	700 ml	6 per cent
<i>José Cuervo Gold</i> (imported)	tequila	700 ml	35 per cent
<i>El Hombre Gold</i> (domestic)	tequila-flavoured	700 ml	3.5 per cent

7.161 It is clear therefore that the relative tax burdens imposed on imported and domestic distilled spirits, when calculated as a ratio of their statutory NRP and the applicable tax rate, reveal tax differentials that are significantly more than *de minimis*.

7.162 We now turn to the "averaging" approach advanced by the Philippines. We recall the statement of the panel in *Chile – Alcoholic Beverages* that for a finding of dissimilar taxation, "it is sufficient to find that *certain* of the imports are taxed dissimilarly compared to *certain* of the domestic substitutable products."⁵⁹⁰ Thus, there is no need to find that *all* domestic and imported products are dissimilarly taxed.⁵⁹¹ For the same reason, the fact that under the Philippine excise tax some brands of imported distilled spirits (specifically, some brands of imported rum⁵⁹²) are similarly taxed is irrelevant to the present analysis.

7.163 Furthermore, if the "averaging" approach proposed by the Philippines were to be used, it could result in a situation where the dissimilar taxation imposed on certain groups of products would be compensated or diluted when compared to the tax treatment received by other groups of products.

7.164 For the foregoing reasons, we consider that the "averaging" of relative tax burdens, as proposed by the Philippines, is not the appropriate standard applicable to an analysis under the second sentence of Article III:2.

7.165 Even assuming that a *de minimis* analysis could be based on a comparison of average relative tax burdens of imported and domestic products, and accepting *arguendo* the figures proposed by the

European Union's first written submission, para. 164; European Union's opening statement at first substantive meeting, paras. 43-46; European Union's response to Panel question No. 56, para. 86.

⁵⁸⁹ The examples correspond to some important domestic and imported distilled spirits sold in the Philippines, as listed above in the tables in paras. 2.59-2.60 (for gins); 2.66-2.67 (for brandies); 2.78-2.79 (for vodkas); 2.84-2.85] (for whiskies); and 2.90-2.91 (for tequila and tequila-favoured spirits). See also exhibit PH-77 (which uses the 2009 excise tax rates).

⁵⁹⁰ Panel Report, *Chile – Alcoholic Beverages*, para. 7.97 (emphasis added) (also citing the Appellate Body Report, *Canada – Periodicals*, DSR 1997:1, p. 449, at p. 474 and the Panel Report, *Korea – Alcoholic Beverages*, para. 10.100 (fn. 412)). See also the European Union's first written submission, para. 177.

⁵⁹¹ Further, as stated by the Appellate Body in *Japan – Alcoholic Beverages*, the tax differential must be more than *de minimis* "in any given case." Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 97, at p. 11.

⁵⁹² See footnote 585 to para.7.154 above.

Philippines, the tax differential would still be more than *de minimis*. The Philippines claims that the 9 percentage point difference between these averages is "minor". However, an average tax burden of 22 per cent imposed on imported distilled spirits made from other raw materials is almost 70 per cent more than an average tax burden of 13 per cent imposed on domestic spirits made from designated raw materials. We note that in *Chile – Alcoholic Beverages*, an incremental 4 percentage point difference between the tax sub-categories of the Chilean tax system was considered *per se* to be more than *de minimis*.⁵⁹³

7.166 Finally, the Philippines argues that the tax differential is *de minimis* because imported and domestic distilled spirits do not compete against each other in the Philippine market, given that the average domestic consumer cannot afford imports with or without taxes, so that the "taxation rate has little or no impact on consumer choice". This however is a question that more properly falls under the first issue under Article III:2, second sentence; i.e. whether the products at issue are directly competitive or substitutable.

7.167 For all the foregoing reasons, we find that under the Philippine excise tax imported distilled spirits and directly competitive or substitutable domestic distilled spirits are not similarly taxed within the meaning of the second sentence of Article III:2 of the GATT 1994.

(c) "So as to afford protection to domestic production"

(i) *Introduction*

7.168 Now that we have found that the domestic and imported products at issue are "not similarly taxed", we continue our inquiry into the third and final question under the second sentence of Article III:2, i.e. whether such dissimilar taxation is being applied "so as to afford protection" to Philippine domestic production of distilled spirits.

(ii) *Arguments of the parties*

7.169 The complainants argue that the following facts and circumstances regarding the structure, overall application and aim of the excise tax at issue demonstrate that such measure is applied "so as to afford protection" to the Philippine production of distilled spirits.

7.170 First, the magnitude of the tax differential applied to domestic and imported spirits is such that it alone would support the claim that the excise tax is applied "so as to afford protection".⁵⁹⁴

7.171 Second, the structure of the excise tax reveals that it has been designed to favour the domestic distilled spirits industry, as indicated by the following elements: (i) the "lack of rationality" of the product differentiation used by the measure, as there is no "objective reason" for applying a lower rate to distilled spirits made from a certain set of raw materials (all grown in the Philippines) and much higher rates to spirits made from other raw materials (all grown outside the Philippines)⁵⁹⁵; (ii) the

⁵⁹³ See footnote 584 to para. 7.153 above.

⁵⁹⁴ European Union's first written submission, paras. 167-170; United States' first written submission, paras. 72-75; United States' opening statement at first substantive meeting, paras. 46-47; United States' second written submission, para. 15; United States' comments on the Philippines' response to Panel question Nos. 68-69, para. 7.

⁵⁹⁵ European Union's first written submission, paras. 171-173. See also United States' opening statement at second substantive meeting, para. 25. The complainants also claim that the Philippine excise tax, based on the type of raw material rather than on price or alcoholic content of the distilled spirits, is neither necessary to attain nor capable of attaining the objectives enshrined in the Philippine Constitution of having a uniform, equitable and progressive tax system. The complainants further note in this regard that the Philippines

fact that the measure is *de facto* discriminatory (although it is, in principle, origin-neutral) with respect to imported products. This is so because most (if not all) domestic distilled spirits are made from designated raw materials, thus benefiting from the lower flat tax rate, while the vast majority of imported distilled spirits, which are not made from those designated raw materials, are subject to one of the three higher tax rates⁵⁹⁶; and (iii) the additional requirement that distilled spirits made from designated raw materials must come from countries where these materials are "produced commercially", which further reduces the scope of application of the lower tax rate under the measure.⁵⁹⁷ The European Union adds that the "protectionist application" of the measure is also evidenced by the fact that even some imported rums produced from the designated raw materials (like *Malibu Caribbean White Rum with Coco, Malibu Rum, Havana Club Anejo Reserva, Lemon Heart Jamaica Rhum, Lemon Heart White Rhum, Myers's Rhum* and *Myers's Rhum Planters Punch*) are subject to the same higher rates applicable to distilled spirits made from other raw materials.⁵⁹⁸

7.172 Finally, as some Philippine authorities were "aware" of the WTO incompatibility of the measures⁵⁹⁹ as well as that some domestic legislation distinguishes between domestic ("local") and imported products⁶⁰⁰, these constitute further evidence of the protective application of the measure.

has not invoked any defence under Article XX of the GATT 1994. European Union's opening statement at first substantive meeting, paras. 90-95; European Union's response to Panel question No. 16, para. 5; European Union's second written submission, paras. 117-126; European Union's opening statement at second substantive meeting, paras. 71-72; United States' second written submission, paras. 38-45; United States' opening statement at second substantive meeting, paras. 3-5 and 23-27.

⁵⁹⁶ European Union's first written submission, paras. 174-175; European Union's opening statement at first substantive meeting, paras. 85-86; European Union's second written submission, paras. 7 and 13; European Union's opening statement at second substantive meeting, para. 76; European Union's closing statement at second substantive meeting, para. 3; United States' first written submission, para. 76 and 78; United States' second written submission, para. 16.

⁵⁹⁷ European Union's first written submission, paras. 14-17; European Union's opening statement at second substantive meeting, paras. 64-70; European Union's comments on the Philippines' response to Panel question No. 68, paras. 4-9, United States' first written submission, para. 77; United States' second written submission, para. 47; United States' opening statement at second substantive meeting, paras. 12-13.

⁵⁹⁸ European Union's first written submission, paras. 176-177 and footnotes 195-197 (citing the Panel Report, *Chile – Alcoholic Beverages*, footnote 438). See also European Union's second written submission, paras. 9-13 and 111-116; European Union's opening statement at first substantive meeting, paras. 87-89; European Union's comments on the Philippines' response to Panel question No. 67, para. 2; United States' second written submission, paras. 48-49.

⁵⁹⁹ European Union's first written submission, para. 178-185. The European Union submits the following evidence in this regard: *December 2004 Statement of Senator Ralph G. Recto*, sponsor of Republic Act 9334 (which constitutes one of the instruments containing the measure at issue), explaining that under the bill that later became this legislation, while local spirits would enjoy lower taxes, imported spirits would face "much higher" ones; and also stating that the separate provision providing for a lower tax rate for spirits made from designated raw materials should be maintained as it "... would be to the interest of the nation if we protect our local manufacturers" (Exhibit EU-74, at p. 30); *September 2007 Statement of the President of the Filipino Senate*, Mr. Enrile, before the Ways and Means Committee of the country's House of Representatives, explaining that the purpose of subjecting spirits made from designated raw materials to a lower tax rate was "to protect the domestic people" (exhibit EU-77); *December 2007 Letter from the Philippines Department of Finance* to the Spanish ambassador to the Philippines, acknowledging that the current excise tax system needed to be reformed so as "to make it consistent with the [Philippines'] commitments under the WTO agreement;" (exhibit EU-75); *March 2009 Letter from the Philippines Department of Finance* to the "Consejo Regulador del Brandy de Jerez", acknowledging that the current excise tax system disfavors imported spirits made from raw materials other than indigenous ones (exhibit EU-76); *May 2009 Letter from the Philippines Department of Trade and Industry* to the Chairman of the Ways and Means Committee of the country's House of Representatives, supporting an amendment of Republic Act 9334 (one of the instruments containing the measure at issue) because it is "inconsistent with GATT 1994 as it gives preferential treatment to domestic

7.173 The Philippines responds that the excise tax is not applied "so as to afford protection" for the following reasons.

7.174 First, because the magnitude of the tax differentials applied to domestic and imported distilled spirits is *de minimis*.⁶⁰¹

7.175 Second, because the structure of the excise tax does not indicate any protectionist intent. The Philippines contends that its measure does not "lack rationality" as it is "rooted in the historical association between liquor made from the designated raw materials and the average Filipino", who is a low income person. Subjecting these consumers of mostly cane sugar-based spirits to a tax burden lower than that for the most affluent consumers of spirits made from other raw materials is not only a "legitimate tax policy" but also one that is mandated by the Philippine Constitution.⁶⁰² Additionally, the fact that none of the raw materials indicated in the measure is grown exclusively in the Philippines, and are instead found all over the world, means that the lower tax rate is accessible to any country. The Philippines argues that this demonstrates that its excise tax is origin-neutral and does not discriminate, even on a *de facto* basis.⁶⁰³ The Philippines also argues that the "produced commercially" requirement in the measure is not discriminatory as the distilled spirits of any country can be entitled to the lower rate of *Section 141(a)* when they are made with ethyl alcohol from a designated raw material producing country.⁶⁰⁴ The Philippines further asserts that with regard to any instance in which imported distilled spirits made from designated raw materials (like in the case of *Malibu* rum and other imported rums) were classified as under the provision providing for higher taxes (i.e. *Section 141(b)*), such a classification is illegal and thus "null and void."⁶⁰⁵

7.176 Third, the purpose of Article III:2 is "the protection of competitive opportunities." The Philippines argues that, given the low purchasing power of the vast majority of the Philippine population as well as the pre-tax price differences between imported and domestic distilled spirits, it follows that the measure "is unable to impact on competitive conditions" and thus cannot violate Article III:2.⁶⁰⁶

products produced from indigenous or locally sourced raw materials." (exhibit EU-11). See also European Union's first written submission, paras. 22-23 (referring to statements made in the context of certain draft bills proposed at the Philippine Parliament to change the current excise tax system for distilled spirits – exhibits EU-11, EU-12, EU-13 and EU-14); European Union's response to Panel question No. 61, paras. 99-104; United States' response to Panel question No. 61, paras. 65-67.

⁶⁰⁰ European Union's first written submission, paras. 186-189. The European Union refers to Revenue Regulation 2-97 (exhibits EU-4 and US-4), pointing out the fact that Table A-1 of that legislation, which lists certain brands classified under the lower tax rate for designated raw material spirits, is entitled "Local Distilled Spirits Brands Produced From Sap of Nipa, Coconut etc. covered by Section 138(b)." See also United States' first written submission, paras. 24-26.

⁶⁰¹ Philippines' first written submission, para. 309.

⁶⁰² *Ibid.*, paras. 1-5, 7, 26, 31-32 and 296; Philippines' opening statement at first substantive meeting, paras. 46-47; Philippines' closing statement at first substantive meeting, paras. 2-4; Philippines' response to Panel question Nos. 62 and 63; Philippines' second written submission, para. 1; Philippines' opening statement at second substantive meeting, para. 3; Philippines' closing statement at second substantive meeting, para. 7.

⁶⁰³ Philippines' first written submission, paras. 8-9, 24-26, 29, 297-302; Philippines' opening statement at first substantive meeting, paras. 37-38; Philippines' second written submission, paras. 80-82; Philippines' opening statement at second substantive meeting, para. 4.

⁶⁰⁴ Philippines' response to Panel question No. 68(c).

⁶⁰⁵ Philippines' first written submission, paras. 172-174, 303; Philippines' opening statement at second substantive meeting, para. 37.

⁶⁰⁶ Philippines' first written submission, paras. 310-314; Philippines' opening statement at first substantive meeting, para. 40; Philippines' opening statement at second substantive meeting, para. 39.

7.177 Fourth, the statements from some government officials are irrelevant as those statements are simply the personal opinions of such individuals, who are not experts in WTO law. The Philippines contends that none of the statements reflects the official position of the government, which is reflected in the Philippines' submissions in this dispute.⁶⁰⁷

7.178 Finally, the use of the term "local" in Revenue Regulation 2-97 does not demonstrate the existence of an intentional legal distinction between domestic and imported products as the use of this term in Annexes A-1 and A-2 of the regulation was merely a "technical error". The Philippines considers that, in any case, the tables contained in this and other Philippines regulations are just "illustrative" in nature and serve "an administrative purpose only: to provide a clear and transparent description of how the excise tax will be calculated and applied to those existing brands" listed therein.⁶⁰⁸

(iii) *Consideration by the Panel*

7.179 We start by recalling that, as explained by the Appellate Body:

"[A]n examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure."⁶⁰⁹

7.180 Therefore, whether the dissimilar taxation affords protection is not a question of intent or aim⁶¹⁰, but rather one of the protective *application* of the measure.⁶¹¹ This means that we should ascertain the protective application of the Philippine excise tax by examining its design, architecture, and revealing structure.⁶¹² The Appellate Body has explained that in some cases the dissimilar taxation may be so much more than *de minimis* that "it will be clear from that very differential that the dissimilar taxation was applied 'so as to afford protection'."⁶¹³ In such cases, such differential "may be

⁶⁰⁷ Philippines' first written submission, para. 308. See also Philippines' response to Panel question No. 61; exhibit PH-65.

⁶⁰⁸ Philippines' first written submission, paras. 304-307.

⁶⁰⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 97, at p. 120.

⁶¹⁰ See *ibid.*, p. 27, DSR 1996:I, 97, at p. 119.

⁶¹¹ See *ibid.*, p. 29, DSR 1996:I, 97, at p. 120.

⁶¹² This does not mean however that we cannot take into consideration any other elements when considering this final question under the second sentence of Article III:2, if not to ascertain, at least to confirm the protective application of a measure. See, e.g., Appellate Body Report on *Canada – Periodicals*, pp. 31-32 DSR 1997:I, 449, p. 475-476 (finding that statements made by public officials that the very design of the measure in question was to afford protection to domestic industry were probative); Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62 (considering that the "statutory purposes of objectives – that is, the purpose or objectives of a Member's legislature and government as a whole – to the extent that they are given objective expression in the statute itself" are pertinent) and Panel Report on *Mexico – Taxes on Soft Drinks*, para. 8.91 (considering that "the declared intention of legislators and regulators of the Member adopting the measure should not be totally disregarded, particularly when the explicit objective of the measure is that of affording protection to domestic production.").

⁶¹³ Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 97, at p. 122.

enough to show a violation."⁶¹⁴ The Appellate Body also stated, however, that in "other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied 'so as to afford protection.'"⁶¹⁵

7.181 We now turn to the facts and arguments before us.

7.182 Concerning the design, architecture and structure of the measure, we recall that the excise tax at issue creates a system that combines specific and *ad valorem* taxes. Under this system, distilled spirits produced from certain designated raw materials (i.e. the sap of the *nipa*, coconut, cassava, *camote*, or *buri* palm, or from juice, syrup or sugar of the cane) are subject to a low flat tax rate of PHP 14.68 ppl. In contrast, distilled spirits produced from raw materials other than those designated in the measure are subject to taxes that can vary between PHP 158.73 ppl to PHP 634.90 ppl, depending on their NRP. All designated raw materials are grown in the Philippines⁶¹⁶ and all domestic distilled spirits are produced from designated raw materials.⁶¹⁷ Conversely, the vast majority of imported distilled spirits are *not* made from designated raw materials. This means that *de facto* the measure results in all domestic distilled spirits enjoying the favourable low tax, while the vast majority of the imported spirits are subject to higher taxes.⁶¹⁸

7.183 As we have concluded at paragraph 7.154, under the Philippine excise tax, the vast majority of imported distilled spirits is subject to taxes that are, in nominal terms, approximately 10 to 40 times that applicable to all domestic spirits. This results in a dissimilar level of taxation between imported and domestic distilled spirits that is nominally large.⁶¹⁹

⁶¹⁴ Ibid. See also Appellate Body Report, *Canada – Periodicals*, DSR 1997:1, p. 449, at pp. 475-476 (considering that the design and structure of the measure, including the magnitude of the differential taxation, demonstrated that the measure was applied so as to afford protection to domestic production); Appellate Body Report, *Korea – Alcoholic Beverages*, para. 150 (upholding the panel's finding that the magnitude of the tax difference alone was sufficient to show the protective nature of the measures, although the panel still went on to look at, and based its decision on, other factors); Appellate Body Report, *Chile – Alcoholic Beverages*, para. 66 (considering that since, among other factors, the magnitude of the tax difference was "considerable", it followed that "the application of dissimilar taxation of directly competitive or substitutable products will 'afford protection to domestic production.'"); and Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.87 (finding that the "magnitude of the tax differential between imported and domestic products, resulting from the application of the soft drink tax and the distribution tax, is additional evidence of the protective effect of the measure on Mexican domestic production of sugar.").

⁶¹⁵ Appellate Body Report, *Japan – Alcoholic Beverages II*, DSR 1996:1, p. 97, at p. 122.

⁶¹⁶ So Philippine distilled spirits producers always qualify under the other requirement of the excise tax, i.e. that the "designated raw materials" be "produced commercially in the country where they are processed into distilled spirits". This may not necessarily be the case of producers from other countries. See above at para. 2.17. In this regard, we recall that the measure has been challenged by the complainants "as such", so we consider that the very existence of this additional requirement in the measure, regardless of how or whether it has been applied in practice, is *per se* another indication of its protective nature.

⁶¹⁷ More specifically, all domestic distilled spirits use ethyl alcohol as a base for their production. The ethyl alcohol can be either distilled from sugar cane molasses produced in the Philippines or imported from, and distilled in, countries where sugar cane molasses are "produced commercially."

⁶¹⁸ As indicated above in footnote 585 to para. 7.154, some, but not all, rums imported into the Philippines are subject to the lower flat tax rate under *Section 141(a)*. We also recall that imported rums represent less than 0.1 per cent of total imported distilled spirits. See also United States' second written submission, para. 49. In any case, we consider that just because some few imported products are subject to the same tax treatment as domestic products cannot change the protective nature of the measure overall.

⁶¹⁹ We have also concluded above at paras. 7.158 and 7.161 that even in relative terms the dissimilar level of taxation between these products is significantly more than *de minimis*.

7.184 With regard to the statements of various Philippine government officials submitted by the complainants as evidence of the protective nature of the measure⁶²⁰, we bear in mind the Appellate Body's statement that it is not necessary "to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent" for "it is irrelevant that protectionism was not an intended objective."⁶²¹ Therefore, we will not review the statements submitted by the complainants in the present dispute.

7.185 Finally, we understand the Philippines to be arguing that the measure cannot violate Article III:2 because it "is unable to impact on competitive conditions" in the Philippine market given the low purchasing power of the vast majority of the Philippine population as well as the pre-tax price differences between the imported and domestic distilled spirits at issue. In this respect, we note that the Appellate Body dealt with a very similar argument in a previous case. In *Korea – Alcoholic Beverages*, Korea claimed that the panel erred in failing to take into consideration the argument that the pre-tax price differences between diluted soju and imported alcoholic beverages were so large that the Korean tax could not affect the competitive relationship between these products.⁶²² The Appellate Body stated that in making these arguments, Korea seemed "to be revisiting the question whether the products can be treated as directly competitive or substitutable."⁶²³ The Appellate Body then added that:

"... Korea overlooks the fact that the two products have already been found to be directly competitive or substitutable. Its arguments are, therefore, misplaced at this stage of the analysis and do not cast doubt on the Panel's finding that the contested measures afford protection to domestic production.

Korea also seems to be insisting that a finding that a measure affords protection must be supported by proof that the tax difference has some identifiable trade effect. But, as we have said above, Article III is not concerned with trade volumes. It is, therefore, not incumbent on a complaining party to prove that tax measures are capable of producing any particular trade effect."⁶²⁴

7.186 We dismiss the Philippines' arguments for these same reasons. We have already decided above that the products at issue are directly competitive and substitutable and, like the Appellate Body in *Korea – Alcoholic Beverages*, we also consider that the Philippine's arguments "are, therefore, misplaced at this stage of the analysis and do not cast doubt on the Panel's finding that the contested measures afford protection to domestic production."

7.187 In light of the foregoing considerations, we find that the design, architecture, and structure of the measure, including the magnitude of the tax differential applicable to imported and domestic products, reveal the protective nature of the measure. In conclusion, the dissimilar taxation imposed by the Philippine excise tax on imported distilled spirits and on directly competitive or substitutable domestic spirits is applied "so as to afford protection" to Philippine domestic production of distilled spirits.

⁶²⁰ See a full description of these statements in footnote 599 to para. 7.172 above.

⁶²¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27, DSR 1996:I, 97, at p 119.

⁶²² Appellate Body Report, *Korea – Alcoholic Beverages*, para. 151.

⁶²³ *Ibid.*, para. 152.

⁶²⁴ *Ibid.*, paras. 152-153 (footnotes omitted).

(d) Conclusions regarding the claim under the second sentence of Article III:2 of GATT 1994

7.188 For the reasons stated above, we conclude that, through its excise tax, the Philippines applies dissimilar internal taxes on domestic distilled spirits made from designated raw materials and to directly competitive or substitutable imported distilled spirits made from other raw materials in a manner so as to afford protection to the Philippine domestic production of distilled spirits and is thus acting in a manner inconsistent with Article III:2, second sentence, of the GATT 1994.

E. SPECIAL AND DIFFERENTIAL TREATMENT

7.189 Pursuant to Article 12.11 of the DSU:

"[W]here one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures."

7.190 In addition, the DSU provides in Article 12.10 that:

"[I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation."

7.191 During the proceedings, we took into account the respondent's status as a developing country Member, particularly when preparing the timetable for the process after having heard the views of the parties.

7.192 We have also noted that the Philippines has stated that the present dispute:

"[I]nvolves the right of a developing country WTO Member to impose a tax regime that is best suited to achieve the fiscal objectives set out in its Constitution in light of the administrative and enforcement constraints it faces with respect to tax collection."⁶²⁵

7.193 The Philippines clarified that the fiscal objectives in its legislation to which it referred are linked to achieving a progressive system of taxation that imposes higher taxes on "higher-priced goods, typically bought by wealthier consumers" and lower taxes on "lower-priced goods, typically bought by less affluent consumers."⁶²⁶ The constraints with respect to tax collection identified by the Philippines include that the country "possesses a large informal economy, widespread poverty, a large geographical area and an extensive coast line to administer and monitor... and limited taxation resources".⁶²⁷

⁶²⁵ Philippines' first written submission, para. 1. See also para. 3.3 above.

⁶²⁶ Philippines' first written submission, para. 2. See also *ibid.*, paras. 32 and 296; Philippines' opening statement at first substantive meeting, paras. 5-9; Philippines' opening statement at second substantive meeting, paras. 3-5; Philippines' response to Panel question Nos. 16 and 62.

⁶²⁷ Philippines' response to Panel question No. 62. See also Philippines' opening statement at first substantive meeting, para. 4; Philippines' closing statement at first substantive meeting, para. 4; Philippines' opening statement at second substantive meeting, paras. 3 and 38; Philippines' response to Panel question Nos. 16 and 63. See also para. 3.4 above.

7.194 In response to a question from the Panel, the Philippines did not refer to any provision in the WTO agreements on special and differential treatment for developing countries and clarified that the statements it made:

"[Are] not a reference to any of the provisions of Article XX of GATT 1994. The Philippines believes that its excise tax system embodied in Section 141 of the National Internal Revenue Code is not inconsistent with Article III, and therefore there is no need to invoke the provisions of Article XX."⁶²⁸

7.195 In conclusion, the Philippines did not raise any specific provisions on differential and more-favourable treatment for developing country Members that would require particular consideration by the Panel.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 We recall the complainants' request that the Panel issue its findings in the form of a single document containing two separate reports with common sections but separate conclusions and recommendations for each complaining party.⁶²⁹ In accordance with the requests by the complaining parties, we therefore provide two separate sets of conclusions and recommendations.

⁶²⁸ Philippines' response to Panel question No. 16. See also para. 3.5 above.

⁶²⁹ See para. 1.12 and its footnote 10 above.

COMPLAINT BY THE EUROPEAN UNION (DS396): CONCLUSIONS OF THE PANEL

8.2 With respect to the claims advanced by the European Union, we find that, through its excise tax, the Philippines subjects imported distilled spirits made from raw materials other than those designated in its legislation to internal taxes in excess of those applied to like domestic spirits made from the designated raw materials, and is thus acting in a manner inconsistent with Article III:2, first sentence, of the GATT 1994.

8.3 We abstain from making findings with respect to the European Union's claim under the second sentence of Article III:2 of GATT 1994, because this claim was advanced as an alternative, only in the event that the Panel had not found that the measure at issue is inconsistent with the first sentence of the same provision.

8.4 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent with the GATT 1994, it has nullified or impaired benefits accruing to the European Union under that agreement.

8.5 Pursuant to Article 19.1 of the DSU, we recommend that the Dispute Settlement Body request the Philippines to bring its measure into conformity with its obligations under the GATT 1994.

COMPLAINT BY THE UNITED STATES (DS403): CONCLUSIONS OF THE PANEL

8.2 With respect to the claims advanced by the United States, we find that:

- (a) Through its excise tax, the Philippines subjects imported distilled spirits made from raw materials other than those designated in its legislation to internal taxes in excess of those applied to like domestic spirits made from the designated raw materials, and is thus acting in a manner inconsistent with Article III:2, first sentence, of the GATT 1994.
- (b) Through its excise tax, the Philippines applies dissimilar internal taxes on domestic distilled spirits made from designated raw materials and to directly competitive or substitutable imported distilled spirits made from other raw materials in a manner so as to afford protection to the Philippine domestic production of distilled spirits and is thus acting in a manner inconsistent with Article III:2, second sentence, of the GATT 1994.

8.3 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measure at issue is inconsistent with the GATT 1994, it has nullified or impaired benefits accruing to the United States under that agreement.

8.4 Pursuant to Article 19.1 of the DSU, we recommend that the Dispute Settlement Body request the Philippines to bring its measure into conformity with its obligations under the GATT 1994.
