GENERAL AGREEMENT ON

TARIFFS AND TRADE

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# PANEL ON IMPORT, DISTRIBUTION AND SALE OF ALCOHOLIC DRINKS BY CANADIAN PROVINCIAL MARKETING AGENCIES

## Report of the Panel

### 1. Introduction

1.1 In June 1984 the European Communities requested the Government of Canada to consult under Article XXIII:1. The consultation did not lead to a solution and the European Communities requested a GATT Panel under Article XXIII:2 to examine the matter (Doc. L/5777, 12 February 1985).

1.2 On 12 March 1985 the Council agreed to establish a Panel and authorized its Chairman to draw up terms of reference and to designate the Members and the Chairman of the Panel in consultation with the parties concerned (C/M/186, item 3). The United States, Spain, New Zealand and Australia reserved their right to make a submission to the Panel. Jamaica and Trinidad and Tobago requested to be included in consultations on the Panel's terms of reference ard composition.

1.3 The following terms of reference were announced by the Chairman of the Council on 12 February 1986 (C/M/195, item 15):

Terms of reference

"To examine in the light of relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the European Communities in document L/5777, that is, whether certain practices of provincial agencies which market alcoholic beverages (i.e. Liquor Boards) are in accordance with the provisions of the General Agreement, and whether Canada has carried out its obligations under the General Agreement; and to make such findings as will assist the CONTRACTING PARTIES in making recommendations or rulings as provided for in paragraph 2 of Article XXIII.

In carrying out its examination the Panel would take into account, inter alia, the provincial statement of intentions concluded in the context of the Tokyo Round of multilateral trade negotiations with respect to sales of alcoholic beverages by provincial marketing agencies in Canada."

1.4 The composition of the Panel was announced on 12 December 1986 (C/143):

Chairman: H.E. Mr. E.F. Haran
Members: Mr. E. Contestabile
Mr. J. Viganó

1.5 The Panel held its meetings on 18 December 1986, 25 and 26 March 1987, 2 May, 7 and 8 July, 21, 22 and 23 July and 8, 9, 10 and 14 October 1987. The delegations of Australia and the United States were heard by the Panel on 26 March 1987.

1.6 In the course of its work, the Panel consulted with the delegations of Canada and the European Communities. Arguments and relevant information submitted by both parties, replies to questions put by the Panel as well as all relevant GATT documentation served as a basis for the examination of the matter. During the proceedings, the Panel provided the two parties adequate opportunity to develop a mutually satisfactory solution in the matter before it.

## 2. Factual aspects

2.1 In Canada, constitutional authority to control import and export transactions across national or provincial boundaries is within the exclusive legislative authority of the Federal Parliament under Section 91 of the Canadian Constitution Act, 1867 (formerly the British North America Act). This "trade and commerce" power of the federal authorities essentially excludes any authority over the distribution of imported or local products within provinces. Legislation of either level of government which is determined to have encroached on areas within the exclusive legislative authority of another level of government, is ultra vires and therefore null and void. Only a Canadian court of competent jurisdiction is empowered to make such a determination.

2.2 All liquor boards in Canada are created by provincial statutes and their monopoly position with respect to the supply and distribution of alcoholic beverages within their provincial borders is based on provincial legislation. The provinces are constitutionally empowered to enact such legislation under Section 92 of the Constitution Act, 1867, in particular the heads referring to 'Property and Civil Rights' and 'Local Matters within the Province'. The importation of liquor into Canada is, on the other hand, regulated by federal legislation. By means of the 1928 Importation of Intoxicating Liquors Act (now R.S.C, 1970) the Canadian Parliament restricted the importation of liquor except under the provisions established by a provincial agency vested with the right to sell liquor. This has resulted in a monopoly on the importation of alcoholic beverages by provincial liquor boards. The federal statute restricts the importation of liquor except under provisions established by a provincial monopoly of supply and distribution. By virtue of the Act importers and consumers in Canada cannot bypass the intermediary of the provincial liquor boards by making direct imports.

2.3 The distribution of alcoholic beverages in Canada is controlled or conducted by the provincial marketing agencies, or "liquor boards". All provinces have government liquor stores situated throughout their

territory. Some provinces also permit off-premises sales, sales through hotels, restaurants, grocery stores and "beer" or "wine" stores at prices and under conditions determined by the provincial authorities (liquor commissions). The objectives of the provincial liquor monopolies include (i) profit maximization for revenue generating purposes (fiscal objectives) and (ii) limitation, for moral and health reasons, of the potential abuse of alcoholic drinks (social objectives).

2.4 The retail price of an alcoholic beverage sold in a Canadian province is established by adding applicable federal customs duties and taxes, provincial mark-ups and taxes to the base price. The provincial mark-ups are applied in addition to customs duties at the rates bound under Canada's GATT tariff schedule. All duties on beer, wines and spirits are bound in this schedule. The European Communities or its particular member States have initial negotiating rights on a number of concessions. Several other Contracting Parties, including the United States, also have initial negotiating rights on a number of concessions granted by Canada on alcoholic beverages.

2.5 The mark-up is the percentage increase over the base price. The base price is defined, both for imported and domestic products, as invoice price plus standard freight to a pre-set destination plus federal charges, including customs duties. The mark-ups being imposed, in part, for fiscal reasons constitute an important source of revenue for provincial governments. Most Canadian provinces have had a longstanding policy of differential mark-ups for provincial and imported alcoholic beverages, the mark-ups applied by the provincial liquor boards being frequently, but in degrees which vary from province to province and with respect to the type of alcoholic drink, higher than those applied to domestic products. Some indication with respect to the level of mark-up differentials in question is given by Table 1 and Table 2 below. Certain provinces apply differential mark-ups to some products from other provinces, as well.

2.6 While the situation varies somewhat from province-to-province, generally any supplier of beer, wine or spirits, domestic or imported, wishing to sell the product in a province must first obtain a "listing" from the provincial marketing agency. A listing request (which may vary by province and by product) is assessed on the basis of criteria such as quality, price marketability, relationship to other products of the same type already listed, performance in other markets, etc. If the listing is granted, it can be subject to conditions under which the product in question may be sold in the province (e.g. minimum sales quotas, bottle/package sizes). Moreover, factors such as space limitations and revenue maximization also affect listing and delisting practices of the various liquor commissions and their marketing agency outlets, which endeavour to operate as commercial enterprises with a certain degree of autonomy. In certain provinces (e.g. British Columbia, Ontario, Quebec) the conditions and formalities to be respected for an imported product to be admitted to the list of items available for sale by a liquor board are more onerous than those applying to domestic wines, spirits and beer. Certain of these practices are to be terminated by 1 January 1988.

Moreover, in a number of provinces additional outlets - such as grocery stores, or "licensed retail stores" - are available for sales of the domestic products or domestically bottled products and are denied for imported products. Several provinces' liquor boards also differentiate between domestic and imported alcoholic beverages through listing and delisting practices and other conditions and formalities.

2.7 The practices described in paragraph 2.5 and 2.6 are referred to in the "Provincial Statement of Intentions with Respect to Sales of Alcoholic Beverages by Provincial Marketing Agencies in Canada" (see Annex). The Statement which should be fully implemented by 1 January 1988, was negotiated by Canada on behalf of its provinces in the context of the Tokyo Round of Multilateral Trade Negotiations with the European Communities and sets out specific undertakings with respect to mark-ups, listing and distribution practices. Similar statements were also negotiated by Canada with the United States, Australia, New Zealand and Finland.

2.8 The Statement refers to policies and practices affecting all alcoholic beverages imported by Canada from the EC. It stipulates, inter alia, that any differential in mark-up between domestic and imported wines will not in future be increased beyond current levels, except as might be justified by normal commercial considerations. The Statement also provides that by 1 January 1988 "any differential in mark-up between domestic and imported distilled spirits will reflect normal commercial considerations, including higher costs of handling and marketing which are not included in the basic delivery price". A number of letters relating to the Statement were exchanged between Canada, on behalf of the Canadian provinces, and the European Communities in April 1979 (see Annex I). In the letter of 5 April 1979, Canada informed the European Communities that the Statement was "necessarily non-contractual in nature". The text of Statement of Intentions, was realised by the Government of Canada and included in a document of the EC Commission reporting on the outcome of the Tokyo Round. Specific reference to the Statement of Intentions was also included from 1982 on in Canada's notification to GATT on state trading persuant to Article XVII:4(a). However, the Statement is not an integral part of Canada's GATT tariff schedule, neither had it been notified to all participants in the Multilateral Trade Negotiations nor to the CONTRACTING PARTIES. In many instances mark-up differentials between imported and domestic alcoholic beverages were reduced or eliminated since April 1979. In a number of cases, mark-up differentials between imported and domestic wines were increased since that date.

2.9 In support of their case both parties supplied the Panel with extensive statistical information and other material relating to imports and domestic sales of alcoholic beverages, mark-ups and other policies and practices affecting sales of liquors in Canada.

TABLE 1

Mark-ups applying to certain types of spirits - 1985

| | WHISKY (STANDARD) | | COGNAC BRANDY | | OTHER SPIRITS | | LIQUORS | |
|---|---|---|---|---|---|---|---|---|
| | D | I | D | I | D | I | D | I |
| ONTARIO | 109 | 122 | 58 | 120 | 115 | 124 | 115 | 127 |
| BRITISH COLUMBIA | 115 | 120 | 115 | 120 | 115 | 120 | 115 | 120 |
| QUEBEC | 113* | 123* | 115** | 118** | 113* | 123* | 113+ | |
| 123+ | | | 100 | 100 | | | | |
| ALBERTA | 116 | 117 | 110 | 111 | 116 | 117 | 107 | 109 |
| NEW BRUNSWICK | 127 | 132 | 127 | 132 | 127 | 132 | 127 | 132 |
| MANITOBA | 133 | 138 | 133 | 138 | 133 | 138 | 133 | 138 |
| NOVA SCOTIA | 120 | 120 | 120 | 137 | 122 | 139 | 120 | 137 |
| SASKATCHEWAN | 131 | 138 | 133 | 138 | 133 | 138 | 133 | 138 |

D = Domestic I = Imported

* Ad valorem mark-up applied only to the portion of cost price (duty paid) over $65.00 per case.

** Quebec cognac: Ad valorem mark-up applied only to the portion of cost price (duty paid) between $65.00 and $90.00 per case. For any surplus portion of the cost price (above $90.00 per case) the mark-up is 100 % for both domestic and imported cognac.

\+ Ad valorem mark-up applied only to the portion of cost price (duty paid) over $55.00 per case.

Source: EC's calculations based on the statistics supplied by Canada.

TABLE 2

Mark-ups applying to beer and table wines - 1985

| | BEER | | | WINES | | |
|---|---|---|---|---|---|---|
| | LOCAL | D | I | LOCAL | D | I |
| ONTARIO<br>(-1986 | ** | 21.2 | 80 | 58<br>1 | 105<br>66 | 123<br>66) |
| BRITISH COLUMBIA | ** | * | 83 | 50 | 110 | 110 |
| QUEBEC | N/A | N/A | 134 | 94*** | 118*** | 125*** |
| ALBERTA | ** | 49 | 57 | 77 | 77 | 83 |
| NEW BRUNSWICK | 59 | 65 | 86 | 93 | 117 | 122 |
| MANITOBA | 76 | 75 | 75 | 65 | 75 | 80 |
| NOVA SCOTIA | ** | 66.6 | 81 | 86 | 111 | 121 |
| SASKATCHEWAN | ** | 54 | 60 | N/A | 84 | 89 |

D = Domestic I = Imported

* British Columbia beer: 43 % mark-up if 1.2-4.0 % alcohol/volume;
50 % mark-up if 4.1-5.7 % alcohol/volume;
54 % mark-up if 5.8-8.5 % alcohol/volume.

** No distinction between Local and Domestic beer.

*** Quebec wine: Ad valorem mark-up applied only to the portion of the cost price (duty paid) between $20.00 and $40.00 per case. For any surplus portion of the cost price (above $40.00 per case), the mark-up is identical for all categories of wine.

Source: EC's calculations based on the statistics supplied by Canada

## 3. MAIN ARGUMENTS

### (a) General

3.1 The European Communities argued that application of the discriminatory mark-ups and other forms of restriction and discrimination by the provincial marketing agencies of alcoholic drinks in Canada were inconsistent with Canada's obligations under the General Agreement and nullified or impaired the advantages accruing to the Community under the General Agreement especially since the duties on products in question were bound in Canada's tariff schedule. The European Communities considered that it was within the competence of the Federal Government of Canada, acting in accordance with the relevant provisions of the Canadian constitution, to remove the inconsistency of provincial and federal measures affecting the importation of alcoholic beverages with Canada's GATT commitments. The European Communities argued that Canada had not taken the measures, reasonably at its disposal and within its power, to ensure observance of its GATT obligations by its provincial governments. It also considered that, where the differential in the mark-up was lower than the bound rate, the Federal Government of Canada could have reduced the customs duty rates to offset the mark-up differentials. The European Communities thus requested the Panel to find that:

(i) the imposition of higher mark-ups on imported alcoholic beverages than on domestic products by the provincial marketing agencies was inconsistent with Canada's obligations under Articles II or III of the General Agreement;

(ii) the application of discriminatory measures concerning listing/delisting procedures and availability of points of sale to imported alcoholic beverages was inconsistent with Canada's obligations under Article III, XI or XVII of the General Agreement;

(iii) Canada had not fully complied with its notification obligations under Article XVII:4 of the General Agreement;

(iv) Canada had failed to carry out its obligations under Article XXIV:12 of the General Agreement;

(v) benefits accruing to the European Economic Community had been nullified or impaired.

The Community moreover invited the Panel to recommend that the CONTRACTING PARTIES request Canada to take appropriate measures to terminate the discrimination against imported alcoholic beverages.

3.2. Canada considered that it was meeting its obligations under Article II according to the commerce of the European Communities treatment no less favourable than that provided for in Canada's tariff schedule. First, it argued that the relevant tariff bindings were being honoured and that no

additional charges were being applied at the border except for normal excise charges. Secondly, Canada considered that also its provinces complied with the obligations of Article II since: (i) the 1979 Statement of Intentions was an agreement between parties in the sense of Article II:4 and that the Statement confirmed and made explicit the European Communities' longstanding acceptance of differential mark-ups and certain other practices of liquor boards differentiating between domestic and imported products; (ii) the mark-up differential between imported and domestic products was generally justified by "commercial considerations" and "reasonable margin of profit"; (iii) the provinces had not applied an amount of protection in excess of that permitted under Article II:4, and (iv) the policy of differential mark-ups was a longstanding policy pre-dating Canada's accession to the General Agreement.

3.3. Canada also considered that it fully complied with the requirements of Article III, XVII and XI of the General Agreement. In respect to Article III Canada noted that (i) it was applicable to 'imported' products, i.e. products that had cleared customs, and not to the 'importation' of products, (ii) it did not refer to mark-ups imposed by liquor boards since such mark-ups were specifically addressed under Article II:4, (iii) it did not apply to state trading enterprises such as liquor boards given the more specific provisions of Article XVII, and that (iv) differential internal charges resulting from different commercial costs associated with imported products were permitted under Article III. Canada noted that also the other commercial practices referred to by the EC could not be considered 'regulatory' requirements as contemplated by Article III. Canada claimed that there was no national treatment obligation applicable to state-trading enterprises under the General Agreement because Article III was not relevant given the provisions of Article XVII which contained the only obligation related to state-trading, that was the most-favoured-nation treatment. Finally, Canada argued that it had fully complied with the provisions of Article XI since (i) the liquor board practices were provincial measures and not measures taken by Canada, (ii) they were measures applied to 'imported' products and not to the 'importation' of products and (iii) they were consistent with the Statement of Intentions. Canada recalled that Canadian provinces had the constitutional authority to control the supply and distribution of alcoholic beverages within their respective borders and it noted that Canada's trading partners had long been aware of the Federal Government's constitutional limitation with respect to concluding treaties in general, and specifically with respect to agreements involving the alcoholic beverage sector. Canada said that the regulatory framework with respect to alcoholic beverages pre-dated Canada's accession to the GATT and that Canada's trading partners had been cognizant of the fact that any concession made by Canada in this sector would be implemented within this framework. Canada's view was that its GATT obligation, with respect to a provincial measure, was that contained in Article XXIV:12, i.e. to take "such reasonable measures as may be available to it to ensure observance of this Agreement by the regional and local governments within its territory". Canada noted that the practices of the liquor boards in question were not controlled by the federal government but by provincial governments. If it had been intended that a federal state were to be deemed to have automatically and directly violated a specific

GATT provision as a result of a measure taken by another level of government then the obligation contained in Article XXIV:12 would be left empty of practical meaning. Canada considered that it had fully complied with its obligations under that paragraph and, therefore, under the GATT. Canada's view was that trade statistics clearly showed that EC access to the Canadian market had not been nullified and impaired and that there had been a substantial increase in EC exports of alcoholic beverages to Canada since 1979.

3.4 Based on the above, Canada asked the Panel to find that:

(i) Canada had not acted in a manner inconsistent with the obligations under Article II, III, XI or XVII;

(ii) The provinces in Canada had acted in a manner which observes the provisions of the General Agreement and the 1979 Statement of Intentions;

(iii) Canada had met its obligation in this matter, as set out in the provisions of Article XXIV:12; and

(iv) No benefit accruing directly or indirectly to the European Communities was being nullified or impaired.

(b) Article II and the Provincial Statement

3.5 The European Communities argued that, as a combination of collection of bound duties and imposition of import mark-ups constituted less favoured treatment than that provided in the Canadian tariff schedule, the practice was inconsistent with Article II:1(a). Since mark-ups above costs and reasonable profit margins were imposed for purposes of revenue raising they constituted "charges of any kind" in the meaning of Article II:1(b). The European Communities considered that the imposition of discriminatory mark-ups could not be justified on the basis of Article II:1(b), second sentence, because the mark-up differentials did not represent duties or charges imposed prior to 30 October 1947, nor were they directly or mandatorily required to be imposed by legislation in force in Canada on that date. The European Communities said that records of the level of the mark-ups and mark-up differentials, in 1947, were not even available and in its view it was evident that new mark-ups had been introduced. Moreover, the Communities argued that Article II:4 contained a specific provision limiting the degree of protection which might be afforded through the operation of import monopolies with respect to products on which tariff concessions had been granted. Article II:4 did not contain any reference to monopoly margins applied on the date of the Agreement and there was no basis for applying Article II:1(b) second sentence by analogy or otherwise in the context of this provision. It was in any event clear that mark-up differentials could not be justified on the basis of Article II:2(a), since they were inconsistent with the national treatment requirements of Article III:2.

3.6 Canada argued that the measures taken by the provincial liquor boards were to be viewed in the light of Canada's obligations as a contracting party and that it was fully meeting its obligations under Article II:1(a). Canada considered that it was according to the commerce of the European Communities treatment no less favourable than that provided for in Canada's tariff schedule and that, under the Importation of Intoxicating Liquors Act, there was no discrimination between suppliers. Canada said that it did not recall ever indicating to the European Communities that all pre-1947 mark-up records were not available, and noted that while some might be difficult or even impossible to obtain, many others were available.

3.7 In the European Communities' view, Canadian liquor boards were monopolies of importations of the kind referred to in Article II:4. The Communities noted that given the provision of Article II:4 the liquor boards were not free to operate so as to afford protection in excess of the amount of protection provided in the Canadian tariff schedule. Under Article II:4 a tariff concession comprised a concession on the monopoly protection level and the application by liquor boards, of higher mark-ups on imported beer, wines and spirits than on like domestic products constituted thus additional charges on imports and broke the tariff bindings. The fact that discriminatory import mark-ups were applied in addition to the bound duty rates, constituted prima facie evidence of the operation of levels of protection which corresponded to the differential in the mark-ups and thus was contrary to the provisions of Article II:4.

3.8 Canada fully accepted that it "... authorized, formally or in effect, a monopoly of the importation" of any alcoholic beverages by means of the Importation of Intoxicating Liquors Act. However, it said that the provinces had the constitutional authority to control the supply and distribution of alcoholic beverages within their respective border. In Canada's view, the provinces had fully observed the provisions of Article II:4 with respect to the application of mark-ups. First, Article II:4, as well as its Interpretative Note, referred to the possibility of an agreement such as the 1979 Statement of Intentions which needed to be fully implemented only by the end of 1987 and which permited differential mark-ups. Second, in Canada's view the drafting history of Article II:4 suggested that a "reasonable margin of profit" in the case of an import monopoly was a margin which "should not be so excessive as to restrict the volume of trade" (see Section (d)) and an analysis of the Communities' alcoholic beverage exports to Canada since 1979 clearly showed significant growth of the volume of trade.

3.9 The European Communities noted that Article II contained an element of choice between the collection of bound duty rate and the operation of protection through import mark-ups. To the extent that the federal government could have chosen to offset the protection afforded through the import mark-ups by a reduction or elimination of the customs duties, in the EC's view, Canada could not claim that the issue was merely one of provincial observance of Article II:4.

3.10 Canada argued that it had never found it necessary to reduce the customs duty rates to offset the mark-up differentials because federal and provincial actions were fully consistent with the General Agreement and the Statement of Intentions. Moreover, in its interpretation the proposal signified that Canada would be asked to apply different rates of duties to different provinces, depending upon the differential mark-up involved. Canada argued that this would be impractical and administratively unenforceable.

3.11 Canada stated that the exchange of letters concerning the "Provincial Statement of Intentions" (see Annex) which took place between the Government of Canada and the European Commission on 12 April 1979 represented an agreement of the kind referred to in Article II:4. In Canada's view by the nature of the terms of this agreement the European Communities accepted that the mark-up differentials on wines would not be increased beyond 1979 levels and that the mark-up differentials on spirits would reflect only commercial considerations. In both instances, increases would be only permitted where they could be justified by normal commercial considerations.

3.12 The European Communities said that it had never agreed under Article II:4 or in any other way that the Canadian liquor boards were free to operate so as to afford protection in excess of the amount of protection provided in the Canadian GATT schedule. In the view of the European Communities an agreement referred to in Article II:4 must be of a contractual nature and it must be transparent, i.e. known to all contracting parties, and must reflect the intention of the parties to exclude or modify the obligations otherwise resulting from the existence of a tariff binding.

3.13 The European Communities argued that the Statement was not an agreement of the kind envisaged under Article II:4 since it was unilateral in nature. The Communities said that it merely took note of a unilateral undertaking by the Canadian provinces. In its view, the statement contained a rollback undertaking with respect to GATT-inconsistent mark-up differentials between domestic and imported spirits and a standstill undertaking with respect to mark-up differentials between domestic and imported wines but there was no indication that these undertakings were intended to replace the obligations under Article II:4. Moreover, the European Communities noted that the statement did not cover mark-ups on beer and could not therefore possibly justify any such mark-ups. It was evident, in the EC's view, from the heading "Statement of Intentions" that this had not been meant to contain legally-binding obligations, but at most unilateral, non-binding undertakings.

3.14 Canada argued that the Statement was a good-faith understanding between the parties, reached in the context of the MTN negotiating process, and intended to have an effect as part of that process. Canada said that the Statement was included in the public documents released by the Government of Canada and the EC Commission reporting on the results of the Tokyo Round. It argued that the following paragraphs from a communication

from the European Commission to the European Council outlining the results of the Tokyo Round (COM(79)514 Final Brussels, 8 October 1979 - page 72-73) clearly established the legitimacy and precise nature of the agreement:

> "In the negotiations with Canada, the Community's objective was ... in the alcoholic beverages sector, to put an end to the discrimination in Canada between foreign and national and between the various foreign suppliers themselves".
>
> "The results obtained with Canada are as follows: ... With regard to alcoholic beverages, there is an exchange of letters (see Annex B17) containing a declaration of intent by Canada's provincial governments providing in respect of all products, for non-discrimination between foreign suppliers; for spirits the discrimination between domestic products and imported products will be abolished over eight years and, in respect of wine, vermouth and champagne, the present difference between domestic products and imported products will be frozen and a minimum price introduced for imports of wines".
>
> "In these circumstances, the Community has given a favourable reply to a number of Canada's requests for tariff offers concerning certain agricultural products (berries, whiskey, maple syrup) and certain fishery products."

In Canada's view the language used by the EC itself, in referring to the "understandings" and "undertaking" of the statement confirmed and made explicit the EC's longstanding acceptance of differential mark-ups. The relevant pages of the document were submitted.

3.15 The European Communities said that the communication quoted by Canada was a purely internal document. It argued that the last paragraph quoted contained a global evaluation of the negotiations with Canada in the agricultural sector, that it was quoted out of context and could not be taken to imply that the Commission had considered the Statement to constitute a GATT concession by Canada. Canada indicated that it had provided the full text of this communication.

3.16 The Communities noted that a tariff binding was the subject of an international agreement, and it could only be modified by another international agreement, clearly made, and not by a unilateral statement. It argued that any document by which a contracting party was said to have unilaterally waived its rights had to come from the party whose rights were said to have been waived, not from the party claiming to be free from its normal obligations. In the Communities' view, it followed from Article II:4 and its interpretative note ("... as otherwise specifically agreed ..."; in the French version "... sauf convention expresse entre les parties contractantes ...") that only an agreement of a contractual nature which specifically excluded the monopoly margins from the obligations resulting otherwise from a tariff concession was acceptable. Such an agreement would determine a different monopoly protection level from the

one which was otherwise legally permitted under Article II. It would therefore necessarily affect the GATT rights, not only of the parties which negotiated the agreement, but the rights of all contracting parties since the obligations under Article II:4 had to be applied erga omnes and in accordance with the MFN principle. In the EC's view efforts to resolve disagreements about the application of GATT would be made more difficult if, when unilateral promises to correct violations were made, it was always necessary for those receiving them to react formally by stating that the promises were not accepted and that no rights were being waived.

3.17 The European Communities, recalled that the letter by the Canadian Government dated 5 April 1979, by which the Statement was transmitted underlined that the Statement was necessarily non-contractual in nature, that it represented a positive undertaking to follow certain policies and practices and that it was considered to be a valuable contribution to a settlement between Canada and the Community in this area. The Government of Canada had merely agreed to be a channel of communication with foreign governments and had only used its good offices with the provincial authorities concerning the implementation of the Statement. There was no indication in the Statement or the letter of transmission that there had been an intention to reach an agreement on the exclusion of the monopoly margins from the obligations under Article II:4, or on other binding and enforceable obligations with respect to these margins. In reply by letter of the same day the Commission had simply acknowledged receipt of the letter of transmission without repeating or otherwise referring to the content of the Statement of Intentions. In the EC's view, the conclusion of an agreement in the form of an exchange of letters customarily required that the content of the agreement be repeated in letters from both sides. In a further letter of 29 June 1979, the Commission had commented on the Statement saying in particular that the terms of the Statement had been examined very closely by the Community, that this examination had led to some disquiet concerning the terms of the Statement about the mark-ups and that the Community would be looking for proof of the effectiveness of the undertaking to eliminate discrimination against Community spirits. In the EC's view there had been no intention on either side to conclude an agreement with respect to the content of the Statement of Intentions.

3.18 The European Communities next recalled that the Statement had not been transmitted on behalf of the Federal Government of Canada, but on behalf of the provinces which could not be party to an international agreement under the GATT. Moreover, the Community did not have initial negotiating rights on concessions of all the products covered by the Statement and could only have concluded an agreement under Article II:4 with respect to those products. In the EC's view, the Statement was a unilateral undertaking by the Canadian provincial authorities, was not part of an agreement between the contracting parties which had negotiated the relevant tariff concessions and did not affect the rights of contracting parties under Article II:4. The mere fact that the Statement of Intentions was included in the terms of reference of the Panel was not, in the view of the Communities, an indication that the Statement itself modified the Community's GATT rights or created additional rights. The Communities

agreed that the consideration of the nature and content of the Statement and of its implementation was relevant to the question of evaluating to what extent Canada had taken reasonable measures to ensure observance by its Provinces of its obligations under the General Agreement. However, this should not obscure the fact that the matter raised by the Communities was not whether the Statement had been fully implemented but whether the practices of the liquor boards were in accordance with the provisions of the General Agreement and whether Canada had carried out its obligations under the Agreement, taking into account the Statement of Intentions.

3.19 Canada argued that the description of the Provincial Statement of Intentions as "non-contractual" was related to the constitutional inability of Canadian provinces to enter into formal treaty obligations with foreign powers and meant that the Statement was not intended to constitute a legally binding treaty in its own right. It had, in other words, no legal status apart from the GATT but it did have a legal effect within the framework of the GATT. In Canada's view there was nothing in the language of Article II:4 ("as otherwise agreed between the parties which initially negotiated the concession.") which could be taken to require an overriding "treaty" obligation within the legal meaning of that term. All that was required was an agreement in a factual sense, a de facto understanding between the parties. In Canada's view the proviso that the Statement of Intentions was "non-contractual" - in other words that it was not an independent treaty obligation in the legal sense - could not deprive the instrument of its effect as an understanding that had been "otherwise agreed" within the framework of Article II.

3.20 Canada saw no logic in the EC argument that because the GATT was an international agreement it could be only modified by another international agreement. In Canada's view, agreements of the kind envisaged under Article II:4 were not intended to override the GATT but rather to constitute a subsidiary instrument. They were specifically contemplated by the GATT itself in order to provide an element of flexibility. Canada said that a favourable reply had been given to a number of Canadian requests for concessions of commercial importance in exchange for the Statement. Canada noted that as in any trade negotiations, the terms of the Statement reflected how far both parties were willing to go, at that time, to reach particular objectives. It also noted that there had been some discussions on drafts of the Statement between the EC and Canada and that the Statement did contain an agreement on specific margins or protection levels. With respect to the aforementioned letter of 29 June, Canada noted that it was not unusual for parties to an agreement to raise issues with each other during the life of the agreement.

3.21 The European Communities maintained that there had been numerous breaches of the Statement of Intentions on the part of the Canadian provinces. The European Communities said that since 1979 a number of increases in the mark-up differentials had taken place and that no satisfactory evidence of the commercial considerations which might justify these increases had been provided. It was precisely because the Communities were not satisfied with the implementation of the Statement and because there were no legal means of securing its enforcement, that the Communities concluded that it had no option other than to invoke its rights under the General Agreement.

3.22 Canada said that it was incorrect to assert that there had been numerous breaches of the agreement. The provinces had, in fact, provided the EC on a number of occasions with an itemized and detailed breakdown of the rationale behind the increases in mark-up differentials and that the EC had never provided any evidence to the contrary. Canada also provided additional extensive information supplied by ten Canadian provinces and concerning provincial adherence to the 1979 Statement. It was Canada's view that the provinces were generally living up to the Statement. In a few instances, it was acknowledged that some further changes were still required to bring a particular practice into line with the Statement and that commitments had been made to comply fully by the time the Statement was to be fully implemented, i.e. by 31 December 1987. Canada noted that it was premature and quite inaccurate to claim that provincial commitments had not been fully met or implemented.

3.23 The European Communities agreed that Article II:4 should, in accordance with its interpretative note, be interpreted in the light of Article 31 of the Havana Charter, in particular its paragraph 4. Accordingly, the imposition by import monopolies of mark-ups on imported products could only be justified by commercial considerations on the basis of: (i) transportation, distribution and other expenses incident to the purchase, sale or further processing and (ii) a reasonable margin of profit. The European Communities did not argue that mark-up differentials between imported and domestic products could never be justified by additional costs associated with imported products. However, in the EC's view, the existence of such differentials constituted prima facie evidence of the protective character of the mark-ups. In the EC's view, Canada had not presented evidence which would justify, in these terms, the various mark-up differentials. It also said that no evidence had been presented which could explain, on the basis of cost differentials, the wide variety of mark-ups applied from province to province. In this context, the Communities noted that a number of provinces did not apply any mark-up differentials, whereas Ontario, British Columbia and Quebec maintained high differential levels. The Communities noted substantial increases in differentials of mark-up between domestic and imported wines. It argued that these increases were not justified by "normal commercial considerations" and were contrary to Canada's commitments contained in the 1979 Statement of Intentions. The European Communities noted that "the environmental cost" invoked by one of the provinces did not seem to represent a "normal commercial consideration" and it did not understand how application of the latter criteria might be compatible with such a wide variety in the mark-up differentials from province to province.

3.24 Canada disagreed that the existence of mark-up differentials between imported and domestic products constituted prima facie evidence of protectionism. First, Canada noted that whereas domestic wine producers were themselves responsible for transporting their products to the stores, provincial liquor boards were responsible for store delivery of imported products. Great distances in a number of Canadian provinces meant that there were significant costs associated with the transportation and distribution of imported products, costs which the provinces tried to

recover through their pricing policies. Canada further said that the provincial liquor boards, consistent with the practice of private commercial enterprises, charged what they believed the market could bear. Since liquor boards marketed imported products as premium products, it was only normal that the products tended to obtain high prices. Canada noted that the Statement of Intentions itself provided an explanation of the various mark-up differentials found amongst the provinces. For example, the wine mark-up provision of the Statement called for the differential to be frozen at 1979 levels (except for any commercially justifiable increases). Canada argued that EC had thus agreed to permit the provincial monopolies to differentiate between imported and domestic products. Canada recalled that there was no undertaking in the Statement which addressed the question of beer mark-ups, even though differential mark-ups did exist in this sector in 1979 and were well-known to Canada's trading partners at the time the Statement was negotiated. In Canada's view the justification for certain isolated increases in mark-up differentials above 1979 levels had been previously provided to the EC and were provided to the Panel.

3.25 Referring to the variety of mark-up differentials applied from province to province, Canada noted that there were in Canada ten independent provincial systems each with its own associated costs and objectives and that there was a substantial degree of regional variations in consumption patterns. In addition, the terms of the Statement itself provided an indication as to why different mark-up differentials existed across the country.

3.26 The European Communities argued that the application of generally higher mark-ups on imported than on domestic products might not be justified on the basis of a "reasonable margin of profit". In the Communities' view, the standard of reasonableness could not be one which distinguished between the origin of the products. Neither was the actual development of the Communities' exports to Canada and of their share in the Canadian market in any way related to the notion of a "reasonable margin of profit". In the EC's view, the development did not say what would have occurred in the absence of the mark-up differentials. The Communities argued that Canada had failed to provide evidence that it conformed with the requirement of a "reasonable margin of profit" and to show on what basis profit margins were calculated.

3.27 Canada said that it also provided a commercial justification for the existence of differential mark-ups drawing, in particular, from the drafting history of Article II:4. Canada argued that in the light of the provisions of Article 31 of the Havana Charter, particularly Article 31:4, the provinces had not applied an amount of protection in excess of that permitted under Article II:4. First, Canada said that the differential mark-ups in each of the provinces generally reflected transportation, distribution and other expenses incident to the purchase as well as a reasonable margin of profit which according to Article 31:4 of the Havana Charter should be excluded from calculation of the amount of protection permitted under Article II:4. In Canada's view, the drafting history of Article II:4 implied that a reasonable margin of profit was initially meant

to be a margin in the case of an export monopoly which "should not be so excessive as to restrict the volume of trade in the product concerned" (Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment - October 1946, page 17). Canada argued that at a later stage of the drafting history of Article II:4, it was made clear that the phrase "reasonable margin of profit" applied to import monopolies as well. Canada showed that its total imports of alcoholic beverages registered significant increases in value signifying that only "reasonable margins of profit" were applied.

3.28 Canada also noted that Ad Article II:4 referred to Article 31 of the Havana Charter as a whole, including the fiscal purposes set out in Article 31:6. It acknowledged that in certain instances differential mark-ups reflected revenue maximization objectives, and that these were particularly important in the wine sector. Canada argued, however, that this was exceptional and that generally mark-up differentials reflected the additional commercial costs associated with imported products and that this was agreed to in 1979 under the Statement of Intentions. Finally, Canada said that in the light of the EC's agreement to the mark-up provisions of the Statement of Intentions - an agreement as foreseen in the Interpretative Note Article II:4 - it was Canada's view that provincial mark-ups which were consistent with the different mark-up obligations under Statement of Intentions were, ipso facto, consistent with Article II:4 and did not provide protection... in excess of the amount of protection provided for in [the Canadian] Schedule.

3.29 The European Communities argued that the high mark-ups and mark-up differentials were set in order to maximize profit for revenue-generating purposes. In the EC's view it was therefore evident that the mark-ups were at a higher level than could be considered to be a reasonable margin of profit, i.e. a margin which could reasonably be expected under normal conditions of competition.

3.30 The European Communities said revenue maximization per se did not justify the imposition of higher mark-ups on imported than on domestic products. Such mark-up differentials were to be considered equivalent to an import duty and the EC maintained that there was no basis in Article II for their justification on grounds of revenue generation. In the Communities' view, it was also doubtful whether Article 31:6 of the Havana Charter was relevant to the interpretation of Article II:4 of the General Agreement. The Communities argued that in any event Article 31:6 could not be interpreted as to justify higher mark-ups on imported than on domestic products. The EC noted that Article II:4 did not take into consideration the fiscal character of a state-trading monopoly and that literal interpretation of Article 31:4 of the Havana Charter suggested that mark-ups applied to imported products for revenue purposes in excess of reasonable profit margins were to be assimilated in their total amount to import duties. The Community did not contend, however, that the entire amount of the mark-up applied for fiscal purposes was necessarily equivalent to an import duty. It accepted instead that Article II:4 could be interpreted to cover only the mark-up differentials since fiscal

mark-ups could be assimilated to internal taxes. The EC noted that Article 31:4 of the Havana Charter did not regard internal taxes conforming to the provisions of Article 18 (Article III of the General Agreement) as import duties. This corresponded to the principle of Article II:2 (a) of the General Agreement and to the definition of "import mark-up" in the Interpretative Note to Article XVII:4 (b). In the Communities' view, fiscal mark-ups applied in conformity with the national treatment requirement of Article III:2 were not covered by Article II:4. A contrario, fiscal mark-ups applied to imported products in excess of those applied to like domestic products were to be treated as protective monopoly margins coming under Article II:4.

(c) Article III

3.31 The European Communities considered that fiscal objectives were the primary purpose of the provincial marketing agencies and that fiscal mark-ups should be also dealt with under Article III. In the Communities' view these mark-ups constituted a form of taxation of the consumption of alcoholic beverages. Such mark-ups came under the broad notions of "internal charges" in Article III:1 and "internal charges of any kind" in Article III:2. In the EC's view these mark-ups were applied to imported alcoholic beverages in excess of those applied to domestic products and were therefore inconsistent with Article III:2. They thereby afforded protection to domestic production and were therefore also inconsistent with Article III:1. The European Communities noted that both the 1967 Report of the Ontario Committee on Taxation (Smith Report) and the 1971 Report of the (Quebec) Commission of Enquiry into Trade in Alcoholic Beverages (Rapport Thinnel) concluded that the revenues derived from the mark-ups imposed by the respective provincial liquor monopolies constituted a form of taxation and severely criticised the protectionist character of the mark-up differentials.

3.32 The European Communities quoted examples of discriminatory requirements relating to listing and delisting procedures and sales outlets and noted that Canada recognized the existence of such practices. In the Communities' view the measures were laid down generally, and in a binding manner, by the provincial authorities and were not merely the result of individual decisions by the managers of the marketing agency outlets. They did apply "across-the-board" and contained conditions which had to be met by a foreign exporter in order to obtain access to the Canadian market. The Communities said that the provincial authorities laid down the conditions for obtaining a listing and pre-established the conditions for a product to remain on that listing, such as minimum sales requirements. The Communities noted that the exclusion of imported alcoholic beverages from certain sales outlets was also prescribed generally and in a binding manner. An importer would only obtain a listing or have access to a sales outlets if the conditions laid down by the provincial authorities were met. The measures in question therefore constituted regulations or at least requirements within the meaning of Article III. In the Communities' view, it followed from the Panel Report on "Canada - Administration of the Foreign Investment Review Act" (BISD 30S/140) that the term "requirement" used in Article III, paragraphs 1 and 4 was given a wide interpretation.

3.33 In the view of the Communities, the discriminatory provincial measures constituted prima facie evidence of protection to domestic production inconsistent with Article III:1. They constituted, in particular, less favourable treatment than that accorded to like products of national (or domestic) origin inconsistent with Article III:4). In the European Communities' view the discriminatory measures could not be justified on the basis of the Statement of Intentions since the Community had not waived its GATT rights by taking note of the Statement. The European Communities also noted that the Statement provided, in the second paragraph of Article 6, for national treatment with respect to access to listings for imported distilled spirits.

3.34 Canada argued firstly that there were no internal discriminatory measures being applied by the Federal Government of Canada and that the Importation of Intoxicating Liquors Act had no relevance to Article III since it was not an internal tax, charge, law, regulation or requirement. In Canada's view, Article III spoke of "imported" products, i.e. product that had already crossed the border and cleared customs, and the federal legislation in question related to the "importation" of product. Secondly, Canada recalled that the Importation of Intoxicating Liquors Act constituted existing legislation within the meaning of paragraph 1(b) of the Protocol of Provisional Application. Thirdly, it was the view of Canada that since the General Agreement specifically addressed the question of mark-ups under Article II:4 in the context of customs duties, they should not deal with the issue under Article III. It was the view of the Canada that Article III was not relevant in this case, given the provisions of Article XVII. First, Canada argued referring to the drafting history of Article XVII, to the subsequent changes in the title of Article XVII of GATT and to the Analytical Index to the GATT (see paras 3.39 and 3.41-3.42) that it clearly was not the intention of the drafters to introduce, with respect to activities carried out by state trading enterprises, the principle of national treatment with respect to Article XVII. Secondly, Canada referred to the Panel report relating to Canada's administration of its Foreign Investment Review Act and concluded that the provincial marketing agencies might legitimately provide more favourable treatment to domestic products than that accorded to imported products because the provincial marketing agencies were not required to observe the principle of national treatment in respect to their mark-up listing or distribution practices (see para 3.43). Notwithstanding this position Canada also argued that differential internal charges resulting from different commercial costs associated with imported products were permitted under Article III.

3.35 Canada also said that by accepting the Statement of Intentions, in particular its mark-up provision for spirits, the EC had recognized that there were different costs associated with imported products. It noted that the Interpretative Note to Article XVII:4 defined the term "import mark-up" as exclusive of what is generally described as 'commercial considerations' in Article XVII:1(b). Moreover, since in the view of Canada the Statement of Intentions constituted an agreement of the type envisaged under Article II:4, differential mark-ups could not be, ipso facto, inconsistent with Article III.

3.36 It was furthermore the view of Canada that Article III was not relevant to this case, given the provisions of Article XVII (see paras 3.47-3.49). Neither did Canada accept the argument that many commercial practices referred to by the EC were truly regulatory "requirements" as contemplated by Article III. Canada said that the two reports quoted by the EC did not reflect the position of the provincial governments concerned. In Canada's view, the texts quoted by the Communities were also taken out of context and were somewhat misleading.

(d) Article XVII:1

3.37 The European Communities asserted that Article XVII:1 contained a national treatment obligation. First, in the EC's view, sub-paragraph (a) of Article XVII:1 referred to the general principles of non-discriminatory treatment in the plural which appeared to cover national treatment. Second, sub-paragraph (b) required state-trading enterprises to have due regard to the other provisions of the Agreement, thereby referring also to Article III, and to act solely in accordance with commercial considerations. This suggested in the EC's view that these enterprises might not treat imported products less favourably than products of national origin. Third, Article XVII:2 contained an exemption from paragraph 1 for imports of products for consumption in governmental use which paralleled the provisions of Article III:8(a). In the second sentence it contained, with respect to such imports, an obligation to accord to the trade of the other contracting parties fair and equitable treatment which meant essentially most-favoured-nation treatment. Article XVII:2 appeared superfluous and self-contradictory if the obligations under paragraph 1 only covered most-favoured-nation treatment.

3.38 Canada considered that Article XVII:1 only contained the most-favoured-nation principle. First Canada argued that the drafting history of the Article XVII:1(b) did not support the EC's claim that it referred, inter alia, to Article III. In Canada's view Article XVII:(b) referred directly to Article XVII:1(a) where the most-favoured-nation principle applies. Canada considered that the purpose of Article XVII:1(b) was to clarify the meaning of Article XVII:1(a) - i.e. to provide some commercial guidelines to purchasing and selling by these enterprises. In this regard, Canada noted that the Canadian delegate had made a specific reference to the phrase "commercial considerations" during the Geneva Conference. The delegate had called attention to the fact that the expression "commercial considerations" should not be defined in narrow terms. "These words did not mean simply the lowest price but referred to other legitimate considerations which the enterprise would be entitled to take into account; they did not simply mean to buy and sell at lowest and highest prices." Second, Canada recalled that "the activities of marketing boards which do not purchase or sell must be in accordance with the other provisions of GATT" (BISD 9S/180, paragraph 8). In Canada's view, the clause indicated that the activities of marketing boards which did purchase and sell were governed by Article XVII and did not need to be in accordance with other provisions of GATT. Third, Canada recalled that the Family Allowance panel report (BISD 1S/60, paragraph 4) noted:

"As regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of the Article, i.e. the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III".

3.39 Canada also said that it could not agree that the wording of Article III:8 paralleled that of XVII:2 and said that, at the Geneva Conference (E/PC/T/A/PV-37; 12 August 1947) one delegate, discussing the differences in wording of the two articles had indicated that the wording "should not necessarily correspond because the nature of the subject was different". Canada also recalled the basis of the language which now formed Article XVII:2 as first suggested by one delegation at the London Conference (E/PC/T/C11 52, page 1) and concluded that this language was not introduced to provide for the concept of national treatment. Canada argued that a Geneva Conference reference (from E/PC/T/A/PV37 12 August 1947) also confirmed this. At the Conference one delegate had said "[I]n the case of Article 15, we find it a question of national treatment and here in the case of state trading such as is envisaged in this Article [read XVII] there is no question of national treatment". Canada also referred to a statement by another delegate to the Geneva Conference who had argued that state-trading enterprises should be subject to the same standard of conduct to which private enterprises adhered (E/PC/T/A/PV37 - 12 August 1947). This was, in Canada's view, noteworthy because private enterprises had no national treatment obligation under the GATT. Canada recalled that at the 1947 Geneva Conference, Article 30, bore the title "Non-discriminatory Treatment" and suggested that a state enterprise should, "in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment applied in this Charter to governmental measures affecting imports or exports by private traders." It noted that the Analytical Index to the GATT (Third Revision pages 93-94)) suggested that the words "General Principles of Non-discriminatory Treatment" were inserted at Geneva "in order to allay the doubt that "commercial principles" meant that exactly the same price would have to exist in different markets" (EPCT/A/SR.14 page 3). In the view of Canada it clearly was not the intention of this amendment to introduce the principle of national treatment into Article XVII.

3.40 Intensive research which Canada had undertaken into the drafting history had revealed no reference to the inclusion of national treatment in the discussion leading to the adoption of Article XVII:1. Under Article 26 of the United States "Suggested Charter for an International Trade Organization of the United Nations", which served as a basis for the London Conference in October-November 1946, state-trading enterprises were to accord "non-discriminatory treatment, as compared with the treatment accorded to the commerce of any country other than that in which the enterprise is located". At the London Conference the non-discrimination obligation was reformulated to read: "... the commerce of other Members shall be accorded treatment no less favourable than that accorded to the commerce of any country, other than that in which the enterprise is located ...". Three references to the Article on state-trading in the records of

the London Conference confirmed, in the view of Canada, that this Article was understood to establish only a most-favoured-nation obligation. A delegate had said introducing the Article that the rule of non-discrimination applied to state trading in the same manner as the most-favoured-nation principle applied to duties, and that the obligation of a country engaged in state trading was to make its purchases in accordance with commercial considerations (E/PC/T/C.II 36, page 11). Canada argued that this reference and others cited at E/PC/T/C.II.52 pages 2 and 3 confirmed that national treatment was not envisaged in the Article but only MFN treatment.

3.41 Canada argued that the Geneva language, with minor editorial changes, was the language incorporated into the Havana Charter and the original text of the General Agreement. The title of Article XVII of the GATT had been modified to read "Non-discriminatory Treatment on the part of the State-Trading Enterprises". The change in the title to the present title "State Trading" only occurred in 1955 because the scope of the Article was expanded to include provisions for negotiations and notification (XVII:3 and XVII:4). Referring to the secretariat analysis connected with this revision of Article XVII (W.9/99, 15 December 1954) Canada noted that there was nothing in this document to suggest that the phrase "non-discriminatory treatment" had evolved to include "national treatment".

3.42 Canada also recalled that during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, on at least two separate occasions, delegations referred explicitly to the scope of the State Trading provisions. One delegate said that the Article on State Trading was limited "to most-favoured-nation treatment and not to national treatment" (EPCT/A/SR.10). Canada also noted that no disagreement had been expressed at the Conference to the interpretation of Article 31 (read Article XVII) by another delegate suggesting that provisions in Chapter V, which include those pertaining to national treatment "would be inoperative" in the case of state enterprises (E/PC/T/A/SR/15, pages 6-7). This interpretation of the scope of Article XVII was also shared by an academic authority on world trade law.

3.43 Canada recalled that the panel on Canada's Administration of its Foreign Investment Review Act "saw great force in Canada's argument that only the most-favoured-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a)".

3.44 The European Communities did not contest that this might have originally been the intention behind a number of earlier drafts to include only an obligation of most-favoured-nation treatment in Article XVII. It noted, however, that this intention was not reflected in the present wording which was based on a text introduced into Article 30 of the draft at the 1947 Geneva Conference. The Communities argued that the interpretation advanced by Canada only appeared to be consistent with the

general principles of GATT if the reference in Article XVII:1(a) to "purchases and sales involving either imports or exports" were interpreted to cover only the purchases from foreign sources and the sales to foreign markets, but not the resale of products bought from foreign sources in the domestic market. In the Communities' view the Canadian interpretation would narrow considerably the scope of Article XVII. The European Communities also argued that if this interpretation were correct then it would appear all the more imperative to apply the provisions of Article III, and in particular its paragraph 4, to discriminatory measures imposed by governmental agencies affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products. The European Communities said that if, on the other hand, Article XVII:1 was interpreted to cover the resale of imported products on the domestic market by state-trading enterprises, as the Community believed was correct, then it would seem quite inconsistent to limit the obligations under this provision to most-favoured-nation treatment.

(e) Article XVII:4 Notification

3.45 The European Communities considered that Canada had not fully complied with its notification obligations under Article XVII:4(a) because the information provided by Canada had been inadequate in the light of the procedures for notifications and reviews adopted on 9 November 1962 (BISD 11S/58) and, in particular, in the light of the questionnaire to be used in submitting notifications (BISD 9S/184). The Communities noted that in one key section contracting parties were invited to provide a description of: "How export prices are determined. How the mark-up on imported products is determined. How export prices and resale prices of imports compare with domestic prices." It also noted that the routine notifications by Canada of national production figures for wine and spirits did not provide a breakdown according to the main product groups (e.g. document L/5445/Add.9). The Communities argued that resolution of its long-standing dispute with Canada over the issue before the Panel would had been facilitated if the notification requirements had been met as the CONTRACTING PARTIES intended.

3.46 Canada held that it had met its obligations under Article XVII:4 as it had been providing information to the CONTRACTING PARTIES since 1977 concerning provincial liquor boards practices, including information pertaining to the determination of provincial mark-ups. Contracting Parties were advised in Canada's 1982 state-trading notification that the provisions of the Statement of Intentions applied to the mark-up policies of the individual provincial liquor control agencies. Given that there were ten provinces and a great number of different mark-up policies involved, Canadian authorities had decided that it would be impracticable to go into such detail on a product-by-product, province-by-province basis. However, Canada said that it had always been willing to provide greater details on the determination of mark-ups in response to any question put by a contracting party. Since 1977 only one such request had been received (from the EC) and Canadian authorities had responded by providing detailed information showing the different costs associated with domestic versus

imported products which justified the application of differential mark-ups. Similar information had been provided to the EC on a number of occasions in the context of the 1979 Statement of Intentions. In some instances, information had not been provided for reasons of commercial confidentiality as permitted under Article XVII:4. Moreover, Canada noted that under the 1979 Statement of Intentions, the provinces undertook to have every liquor board outlet maintain an up-to-date price list of all alcoholic beverages sold within the province and that such price lists were readily available to anyone requesting them. Canada also stated that the mark-up reference in Article XVII:4(b) referred to a product "which is not the subject of a concession under Article II" and that in Canada's tariff schedule in the alcoholic beverage sector every item was bound. Moreover, it pointed out that the EC referred to a number of questions in the questionnaire related to exports. In Canada's view these questions were irrelevant because the liquor boards had no export interests. Statistics provided in the Canadian notification were consistent with agreed notification procedures since there was no requirement for an itemized breakdown as suggested by the EC. Canada also noted that its statistics itemized import and export statistics on a monthly basis.

(f) Relationship between Article III and Article XVII

3.47 Canada contended that Article III was not relevant in this case, given the provisions of Article XVII which contained the only obligation related to state trading, that was, most favoured nation treatment. Canada argued that there was no national treatment obligation applicable to state-trading enterprises. It argued that the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII showed that other GATT provisions applied to state-trading enterprises by specific reference only. In Canada's view this Note would be redundant if all GATT provisions were to apply to state-trading enterprises. In addition, if all provisions of the GATT were to apply equally to state-trading enterprises, this would mean that Article XVII was redundant. In Canada's view, this was certainly not the case. Canada rejected as irrelevant the EC's reference to the Panel Report on Canada - Administration of the Foreign Investment Review Act because, in its view, the Panel was not examining the operation of state-trading enterprises. It also noted that in the light of paragraph 8 of the Panel Report on the Notification of State-Trading Enterprises (BISD 9S/179) and paragraph 4 of the Belgian Family Allowance Panel Report (BISD 1S/60) the activities of trading enterprises, such as liquor boards, needed not be in accordance with Article III. Canada also recalled that no disagreement had been expressed at the United Nations Conference on Trade and Employment as to the interpretation of Article 31 (read Article XVII) suggesting that provisions in Chapter V, which include those pertaining to national treatment "would be inoperative", in the case of state enterprises (E/PC/T/SR/15, pages 6-7).

3.48 The European Communities argued that Article XVII did not exclude application of Article III but imposed certain additional obligations with respect to purchasing and selling by state-trading enterprises. The objective of Article XVII was to submit the operations of state-trading

enterprises to certain rules which did not apply to private enterprises, but clearly not to privilege such enterprises and exempt contracting parties from their other obligations as far as the operation of state-trading enterprises was concerned. It noted that the provisions of Article III, and in particular the national treatment requirement of paragraph 4, applied to all laws, regulations and requirements governing the commercial activities of governmental agencies outside the scope of paragraph 8(a). The Communities also argued that the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII implied that Article XVII was not a lex specialis exempting state-trading from all other provisions of the General Agreement. In the EC's view, both the London Report and the Panel Report on the Notification of State-Trading Enterprises (BISD 9S/180) confirmed that the other provisions of GATT might apply to the activities of marketing boards and did not say that these provisions were not applicable in the context of marketing boards which purchase and sell. In the view of the Community, Article XVII being of a subsidiary character applied only to the extent that the measures in question were not covered by other provisions of the General Agreement. The Communities argued that this opinion was also confirmed by paragraph 5:6 of the Panel report on "Canada - Administration of the Foreign Investment Review Act" (BISD 30S/140), which stated the following: "The Panel did not consider it necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements."

3.49 Canada argued that the EC's claim of "additional obligations" for state-trading enterprises was also not sustainable in the light of the discussions during the Geneva Conference. At the Conference one delegation had felt it had to fight to ensure that the state-trading enterprise was subject to the same standard of conduct to which a private enterprise adhered (E/PC/T/A/PV.14 at 28-29). This same theme was found in E/PC/T/A/SR/17 (24 June 1947, pages 11-12) where another delegation argued that "[t]he Charter should not impose exclusive burdens upon any country ..." and still another delegation noted that the Charter represented a compromise between free trading and controlled foreign trade. Moreover, Canada recalled that one delegate to the Conference had also highlighted the special nature of Article XVII when he noted that "Article 31 [read Article XVII] and 32 were intended to operate only when the special difficulties of the post-war period disappeared, and international trade functioned under normal conditions (E/PC/T/A/SR/14-19 June 1947 at 1). Against this background Canada concluded that Article XVII was a special article designed to address the peculiarities of state-trading enterprises.

(g) Article XI

3.50 The European Communities expressed the view that the discriminatory provincial measures restricting access of foreign alcoholic beverages to listings and sales outlets should also be examined under Article XI in the light of the Interpretative Note to Articles XI, XII, XIV and XVIII, which

provided that the term "import restrictions" included restrictions made operative through state-trading operations. The European Communities argued that these measures operated as restrictions on the importation of alcoholic beverages into Canada and could therefore be considered contrary to Article XI:1.

3.51 Canada argued that no "prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures", were instituted or maintained by Canada on the importation of any alcoholic beverages into Canada. In Canada's view the measures in question were provincial measures, not measures taken by Canada. The measures applied to "imported" product and were not associated with the "importation" of product. Finally, Canada argued that the practices were consistent with the Statement of Intentions. Consequently, Canada believed that the provincial measures in question were consistent with Article XI.

(h) Article XXIV:12

3.52 The European Communities maintained that Article XXIV:12 could not be interpreted as limiting the applicability of other provisions of the GATT but only as qualifying the obligation of Federal States to secure the implementation of these provisions. The Communities argued that the "limited applicability" approach would upset the balance of rights and obligations between unitary and federal states and would open the door to wide and uncontrollable possibilities to escape from many of the most fundamental GATT obligations. The Communities argued that the provisions should be interpreted in the light of the fundamental principle of international law embodied in Article 27 of the Vienna Convention, namely "that a party may not invoke the provisions of its internal laws as justification for its failure to perform a treaty".

3.53 Canada objected to the EC suggestion that federal state clauses should be given a restrictive interpretation in order to avoid "imbalances" in the rights and obligations created by the treaty. Canada also noted that it was not attempting to rely on the provisions of its internal law as a "justification" for "failure to perform a treaty", in contravention of Article 27 of the Vienna Convention. On the contrary in Canada's view, it was the application of the treaty itself which required a consideration of Canada's internal law. Canada said that Article XXIV:12 was a federal state clause, and by definition, the internal constitutional law of contracting parties with a federal structure, was central to the interpretation and application of such a clause. Canada's internal law was relevant not in order to suspend the application of the treaty or to excuse a breach of any of its provisions, but rather in order to give a proper effect to the provisions of the treaty as a whole, including Article XXIV:12.

3.54 The European Communities recalled that the question of the interpretation of Article XXIV:12 had been examined in detail by the Panel on Measures affecting the Sale of Gold Coins and it requested the present Panel to confirm the interpretation of this provision by the Panel. The

Communities supported the finding that according to the drafting history "Article XXIV:12 applied only to those measures taken at a regional or local level which the Federal Government could not control because they fell outside its jurisdiction under the constitutional distribution of competence" (L/5867, paragraph 56). It recalled that the Gold Coins panel came to the conclusion that "as an exception to a general principle of law favouring certain contracting parties, Article XXIV:12 should be interpreted in a way that met the constitutional difficulties which federal states might have in ensuring the observance of the provision of the General Agreement by local governments, while minimizing the danger that such difficulties led to imbalances in the rights and obligations of contracting parties. Only an interpretation according to which Article XXIV:12 did not limit the applicability of the provision of the General Agreement but merely limited the obligations of federal states to secure their implementation would achieve this aim".

3.55 Canada argued that the Gold Coins Panel went beyond interpreting Canada's current GATT obligations and elaborated a new balance of rights and obligations. Canada said that it had never understood the suggestion that provincial action could lead to a prima facie case of nullification and impairment without regard to whether the contracting party had discharged its obligations under Article XXIV:12. In Canada's view, there was no such thing as a prima facie case without a breach of the treaty, and there could be no breach if reasonable measures had been taken as required by Article XXIV:12. The Gold Coins Panel had considered a prima facie case existed because the Ontario measure was "inconsistent" with Article III:2. Canada argued that there was a logical inconsistency in this finding. If Article XXIV:12 qualifies the obligations, as the Panel had suggested, then surely it made no sense to read Article III or any of the other substantive provisions of the GATT in isolation from this clause. Canada suggested that nothing could properly be described as "inconsistent" with a treaty that did not in fact amount to a breach or violation of the treaty terms. In Canada's view, it followed that there could not be a prima facie case involving provincial action unless it was first established that the contracting party had failed to take reasonable measures in any case where Article XXIV:12 applied. In Canada's opinion, the foregoing analysis was equally valid whether one accepted Canada's view that Article XXIV:12 went to applicability or whether one accepted the opposite view urged by the EC. Canada said that the interpretation of Article XXIV:12 found in the Gold Coins report - a report which had no status in GATT and with which Canada and Brazil could not agree - ought to be ignored by this Panel.

3.56 The European Communities argued that if Canada's arguments were accepted no redress would be available in cases where observance of GATT provisions by local governments could not be assured, except perhaps where a tariff concession had been impaired.

3.57 Canada noted that nothing precluded a contracting party from seeking redress through Article XXIII if it believed that a benefit accruing to it directly or indirectly under GATT was being nullified or impaired by, inter alia, an action inconsistent with another Contracting Party's GATT obligations or " the existence of any other situation" (i.e. non-violation nullification or impairment).

3.58 Canada considered that given the lack of GATT jurisprudence referring to Article XXIV:12 it was necessary to analyze the drafting history to determine the basis on which contracting parties made their decision on accession to the General Agreement. Canada recalled that the question of local and regional governments arose very soon after the start of the first preparatory meeting of the UN Conference on Trade and Employment in London in October 1946 where one delegate, in particular, noted that "in several countries it would be constitutionally impossible to control the actions of states and other lower taxing authorities" (E/PC/T/C.II/W.2; page 5). As a result of the ensuing discussion, a revised Article 9 was presented on 31 October 1946 in paragraph 4 of which it read: "Each member agrees that it will take all measures open to it to ensure that the objectives of this Article are not impaired in any way by taxes, charges, laws, regulations or requirements of subsidiary governments within the territory of the member government". (E/PC/T/C.II/W.5 31 October 1946). Canada recalled that already at that time its delegation expressed concerns that the "acceptance of such a commitment would mean that the Canadian Government would be legally bound to exercise in this connection the right of veto, which had been established for dealing with important constitutional matters". (E/PC/T/C.II/W.14, pages 4-5). One delegation noted in that context that "all measures open to it" meant "all measures legally possible" and would not require any action inconsistent with a national constitution (E/PC/T/C.II/W.14, page 7). In Canada's view the aforementioned intervention did indicate that there was an immediate recognition of the need to address the question of to what extent was a member obliged to act with respect to the action of a sub-national level of government and showed that Canada immediately disagreed with the view that "it would take all measures open to it".

3.59 In the context of continuing discussions on this provision at the 1947 Geneva session, one delegation, reflecting the views of the majority, referred to local authorities "which are not strictly bound, so to speak, by the provisions of the Agreement, depending of course upon the constitutional procedure of the country concerned." (UN doc. E/PC/T/TAC/PV.19, p.32-3). Canada concluded that declarations at the early drafting conferences recognized (i) that in the context of the discussions on the General Agreement and the ITO Charter, it was necessary to come to terms with measures taken by another level of government in a federal state; (ii) that several countries would not be in a position to adopt the General Agreement if such local level measures were to create a direct breach of the basic GATT obligations of the national government which was the contracting party; and, therefore, (iii) that a separate obligation was required in order to attempt to come to terms with such a special case, an obligation which was to cover the entire Agreement. This separate obligation was that contained in Article XXIV:12. Canada further argued that this view was reinforced by proposals made at the Havana Conference to extend even further the scope of what was, in effect, the Article XXIV:12 obligation by suggesting the following addition: "Each Member ... shall be responsible for any act or omission to act contrary to the provisions of this Charter on the part of any such governments and authorities." (i.e. of a regional and local nature). This amendment was proposed twice and was twice withdrawn, as several delegations could not accept it. (E/CONF.2/C.6/12, p. 28; E/CONF.2/C.6/48/rev.1, p. 4;

E/CONF.2/C.6/12/add.18, p. 1; E/CONF.2/C.6/SR.32 p. 5) In Canada's view these events clearly indicated that delegations accepted that, depending on the precise nature of specific constitutional regimes, the obligation of a contracting party with respect to measures taken by other levels of government did not necessarily include direct responsibility in terms of basic GATT obligations for such measures but rather responsibility in terms of Article XXIV:12. Canada noted that this position was further reinforced by the statement of the Canadian delegation at Havana (i.e. as reflected in a Canadian Government document entitled the "Report of the Canadian Delegation to the United Nations Conference on Trade and Employment at Havana" (July 13, 1948).

3.60 Canada went on to state that the GATT was a contract which provided an overall balance and that in the case at hand this balance was provided by Article XXIV:12. It considered it necessary and proper to address the nature and scope of Canada's Article XXIV:12 obligations only if the Panel were to find that provincial measures did not observe certain provisions of the GATT. Canada noted that the language of Article XXIV:12 introduced the concept of "observance" of the other provisions of the General Agreement by regional or local levels of government and it was the view of Canada that lack of observance by another level of government did not, in itself, entail a breach of an obligation by the contracting party and represented a distinct and important GATT concept. In Canada's view Article XXIV:12 limited the applicability of the other provisions of the General Agreement because otherwise the paragraph would be deprived of its practical content. This signified that provincial measures, even if not in observance of the GATT, could not be regarded as being inconsistent with the General Agreement and, therefore, did not in themselves be the basis for prima facie case of nullification and impairment.

3.61 The European Communities responded that an interpretation of Article XXIV:12 as limiting the obligation of federal states to secure the implementation of the provisions of the General Agreement would not mean that the Article was redundant. It noted that the CONTRACTING PARTIES had in the past always ruled that measures found to be inconsistent with the General Agreement should be withdrawn and that compensation should be resorted to only if the immediate withdrawal of such measures was impracticable and as a temporary measure pending this withdrawal (BISD 26S/216, paragraph 4). Under the implementation approach redress would be limited to the subsidiary right to compensation, pending the success of reasonable measures taken in accordance with Article XXIV:12. The European Communities considered that this consequence respected the objective of Article XXIV:12 to avoid situations in which a government would be obliged to take actions inconsistent with its constitution, but it respected also the right to redress of a contracting party in cases of nullification or impairment of benefits as a result of a failure of another contracting party to carry out its GATT obligations. In the view of the Communities the drafting history of Article XXIV:12 pre-supposed the application of the GATT provisions to all levels of government and merely addressed the question of how these obligations had to be implemented in situations which were beyond the direct control of central governments. Canada argued that

the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/216, paragraph 4) did not sustain the view that a contracting party had to remove a measure which was inconsistent with, or did not observe, the GATT, nor did GATT practice. Canada noted that clearly, such a removal should "usually" be the "first objective", but in its view, this approach was not absolute; it was not unqualified. Canada argued that a contracting party might choose not to remove a measure found to be inconsistent with or not to observe the GATT; that was why procedures were available for compensation and compensatory withdrawals. If the "implementation" approach to Article XXIV:12 were adopted, it would mean, when comparing a very decentralized federal system like Canada with a more centralized constitutional system, there would be (a) no difference related to the possibility of establishing prima facie nullification or impairment with respect to GATT provisions other than Article XXIV:12; and (b) no difference with respect to securing the removal of a measure inconsistent with or not observant of other GATT provisions. Yet , in Canada's view, Article XXIV:12 had to have practical content.

3.62 The European Communities argued that the provincial measures in question and in particular the imposition of discriminatory mark-ups were ultra vires and that the Federal Government had the power to rectify this situation. First, it quoted a Canadian legal authority who, on the basis of two decisions of the Supreme Court of Canada (Murphy v. C.P.R. (1958), S.C.R. 626, Caloil v. A.G. for Canada (1971) S.C.R. 353), came to the conclusion that the Federal Parliament, because of its exclusive competence over the regulation of trade and commerce, possessed all the necessary powers to assure the observance of the provisions of the GATT by the provinces. In the Communities' view the case was all the more convincing with respect to action by import monopolies authorized by federal legislation and with respect to the imposition of discriminatory mark-ups inconsistent with Canada's tariff concessions. Second, the Communities recalled that both the Commission of Enquiry on Trade in Alcoholic Beverages in Quebec and the Ontario Committee on Taxation, had considered that the protectionist measures by the provincial liquor monopolies were not in line with the distribution of powers under the Canadian Constitution.

3.63 In Canada's view there could not be a serious argument that the provincial legislation was itself invalid because of its allegedly protectionist character, at least as far as the basic principles of that legislation were concerned. Canada recalled that the provinces had full authority to set up the boards and to control their pricing and retail policies and that the Canadian courts had upheld these powers. Canada argued that liquor was a commodity like any other and that provincial marketing boards controlling internal transactions had been upheld on many occasions (e.g. in the Home Oil case of 1940). So in Canada's view there was no question about the validity of the legislation as such. Canada also noted that the situation was different in the Gold Coins case in which Canada did concede the existence of a valid question about the constitutionality of the legislation as such.

3.64 Canada called attention to a number of constitutional limitations on the manner in which the provinces could exercise their constitutional authority over the internal distribution of imported products. On the one hand, it was recognized that provincial legislation respecting local commerce might validly have an effect on international or interprovincial trade. On the other hand, Canada argued, that cases decided in the field of agricultural marketing showed that the provinces could not set up a monopoly board with the specific object of interfering with such trade. Canada argued, however, that the essential principle of exclusive provincial control over internal retailing practices was, nonetheless, beyond dispute.

3.65 Referring to the legal opinion suggesting that the Federal Parliament had all the necessary powers to assure respect of the GATT provisions by the provinces, Canada argued that no decided case justified such sweeping conclusions. In Canada's view the question of whether the Canadian Federal Authority had the legislative authority to control the provincial measures relating to the treatment of imported alcoholic beverages, involved Canadian constitutional law touching on the ultimate scope of the "Trade and Commerce" power (s. 91(2), Constitution Act, 1867) and the issue of treaty implementation. In Canada's view these were issues which could only be authoritatively resolved by the Supreme Court of Canada. Canada said that the constitutional jurisprudence in Canada had undergone a constant evolution since Confederation in 1867, and that it was conceivable that future decisions of the Supreme Court would have the effect of expanding federal powers in these fields. However, Canada recalled that the decided cases did not support the proposition that the federal government could exercise direct control over these matters. First, unlike almost all other federations, the treaty implementation powers of Canada's federal legislation were limited. The Labour Conventions Case of 1937 held that the Canadian Federal Parliament could not intrude into areas of exclusive provincial jurisdiction on the ground that treaty obligations were involved. Second, the "Trade and Commerce" power had been given an extremely restrictive interpretation by the Canadian Courts. Essentially, it had been limited to control over transboundary transactions, excluding any authority over the internal distribution of imported or local products. There were isolated decisions which had allowed, by way of exception, very limited controls over subsequent distribution when such controls had been deemed indispensable to a regulatory scheme respecting import policies. In Canada's view these decisions could not, however, be seen as a basis for any form of comprehensive regulation of retailing policy, either generally or in connection with a particular economic sector. Canada noted that a series of more recent supreme court decisions seemed to reverse the trend towards an expansion of federal "Trade and Commerce" power and effectively to re-establish the traditional limitation of federal authority to transboundary transactions.

3.66 Canada said that the courts had from time to time referred to a nebulous concept known as a "general" Trade and Commerce power. This concept had never been given practical effect and had remained essentially a dead letter. In Canada's view, this aspect of the "Trade and Commerce"

power did not extend to the detailed regulation of local commerce. On numerous occasions, the Courts had stressed that the "Trade and Commerce" power in its general sense could not serve as a basis for the control of a "particular business or trade" - i.e., a specific economic sector. Canada said that in a series of early cases arising out of "temperance" and "prohibition" legislation, the Courts had recognized that the federal Parliament (along with the provinces) could deal with liquor control as a matter of public order and morality. However, this extraordinary power gave the federal government absolutely no authority over the purely commercial aspects of retail marketing. In Canada's opinion, the Courts had stressed that it was a power to prohibit and not to regulate (see e.g. Gold Seal Ltd. v. A.G. Alta (1921) 62 S.C.R. 424 at 465). In any event, the federal Government had withdrawn from the field of "temperance " or "prohibition" legislation. Finally, Parliament could not enact legislation in the form of general principles that would act as constraints on provincial legislative power. That was something that could only be accomplished by a constitutional amendment. Canada quoted the following opinion of a Canadian constitutional scolar: "Our courts, in contrast to those of the U.S. and Australia, now refuse to supersede provincial law for mere abstract or theoretical conflict with an allegedly paramount federal statute. There must be 'operating incompatibility' in the sense that compliance with a provincial statute implies breach of a federal statute in the particular circumstances." Canada argued that the "paramountcy" doctrine dealt with situations of overlapping jurisdiction and allowed federal legislation to suspend the operation of a provincial law where the two were in direct conflict. Under recent jurisprudence, this doctrine applied only where two rules of a concrete nature were in direct conflict. It did not allow for any interference with provincial legislation that might be said to conflict with a general principle set forth in a federal statute. Referring to the views expressed by the Commission of Enquiry on Trade in Alcoholic Beverages in Quebec and the Ontario Committee on Taxation cited by the EC in support of its constitutional argument, Canada noted that these were not authorities with any legal status and that the reports were policy documents that made no pretence of addressing an issue of constitutional validity.

3.67 The European Communities did not consider that Canada had taken such reasonable measures as were available to it to ensure observance of the provisions of the General Agreement by the provinces. The European Communities recalled that according to the Interpretative Note to Article III:1 in determining which measures were 'reasonable', the consequences of non-observance by the local government for trade relations with other contracting parties were to be weighed against domestic difficulties of securing observance. First, the Communities considered that the mark-up differentials and the discriminatory market access conditions had serious consequences for the other contracting parties because they nullified or impaired trade concessions negotiated with Canada. It also had negative consequences for Canada because it could impair its ability to exchange tariff concessions with other contracting parties. Second, the Communities argued that it was not evident that a rectification of the situation would cause serious administrative or

financial difficulties to the provinces. The Communities said that the inadequate character of the Canada's measures followed already from the fact that Canada considered erroneously that the Statement of Intentions set out the full extent of the provinces' obligations in this sector. The European Communities accepted that the implementation of the Statement would represent a step towards ensuring observance of the provisions of the General Agreement by the Canadian provinces. However, in the Communities' view, the measures envisaged under the Statement were clearly insufficient to ensure full observance since with respect to certain GATT inconsistent practices they only related to a standstill undertaking and since other practices, such as discriminatory mark-ups on imported beer, were not covered. The implementation of the Statement would not therefore satisfy fully the obligations under Article XXIV:12. In the Communities' view, the obligations of Article XXIV:12 could only be met by measures ensuring the elimination of all GATT inconsistent practices by the Canadian liquor boards over a reasonable period of time. The European Communities noted that Canada had not ensured the respect of the Statement of Intentions since the undertakings had in a many areas not been progressively implemented, certain mark-up differentials had been increased, and certain new differentials introduced.

3.68 Canada disagreed that the Interpretative Note to paragraph 1 of Article III supported the EC position with respect to Article XXIV:12. First, the examples used in this interpretative note referred to "national enabling legislation authorizing local government to impose internal taxes...". Canada argued that with respect to the provincial measures at issue, the federal government did not authorize anything since provincial authority was derived from Canada's Constitution. Second, the first sentence of Ad Article III:1 made it clear that the application of this paragraph to internal taxes by local governments was subject to the provisions of Article XXIV:12, and not the reverse. Referring to the Community's comments about negative consequences of mark-up differentials Canada argued that GATT provided a balance in its entirety and that the case at hand was clearly an instance in which this balance was provided by Article XXIV:12. Canada said that this confirmed the view that the Canadian obligation was that contained in Article XXIV:12. In order to clarify the meaning of the phrase "such reasonable measures" Canada conducted an extensive research into the drafting history of Article XXIV:12. It noted that during the 1946 London preparatory meeting one delegation referred to "our best efforts" (E/PC/T/13, at 1) and another noted "the obligation to accord fair and equitable treatment in awarding contracts applied to both central and local governments where the central government was traditionally or constitutionally able to control the local government." (E/PC/T/C.II/27, at 1). Canada noted that the subsequent attempts of tightening the obligation to take " all necessary measures open to it", (E/PC/T/C.II/54, at 6) did not survive and that the draft agreements that emerged from the New York Conference (Article 88(5) of the draft Charter) referred to "such reasonable measures as may be available", (E/PC/T/34, at 53 and E/PC/T/34, at 79). Similarly, Canada noted, that a number of other attempts by one delegation during the Havana Conference to tighten the formula (see: E/CONF.2/C.6/12, at 28, E/CONF.2/C.6/48/Rev. 1,

at 4 and E/CONF.2/C.6/12/Add. 18, at 1) had been abandoned "because some countries could not for administrative reasons accept it" (E/CONF.2/C.6/SR.32, at 5).

3.69 Finally, Canada recalled that in its report to the Canadian Government on the Havana Conference, the Canadian delegation commented as follows on what was then Paragraph 3 of Article 104 of the draft Charter: "Paragraph 3, which is independent in operation and applied to all obligations under the Charter was taken without change from the Geneva draft. It deals with the question of the powers of the Members in relation to those of regional and local governments and authorities within that Member's territory. Attempts were made by non-federal states to insert provisions which would have obligated members to 'take all necessary measures' to insure observance of the provisions of the Charter by the regional and local governments and authorities within its territory. This, for obvious reasons, proved unacceptable. The text, as was agreed upon, requires each Member to 'take such reasonable measures as may be available to it' to insure observance of the provisions of the Charter." The Canadian delegation went on to report: "It should be noted that even though a measure may be 'available' (e.g., constitutionally or, in the case of Canada under the British North America Act [now the Constitution Act, 1867]), it may not be 'reasonable'. In such a case there is no obligation on the part of a Member to take any measure which that Member itself considers unreasonable." Canada recalled its view at the time of the Havana Charter - which it still held - that there was no obligation on a contracting party to take any measure, which that contracting party considered to be unreasonable. Clearly "reasonable" meant something less than "all measures open" to the federal authority or "all necessary measures". Canada accepted that it had to take such measures as might be reasonable in the circumstances to attempt to convince the provinces to observe the provisions of the General Agreement with respect to their provincial liquor board policies and practices. It also suggested that the following general guidelines were of assistance in applying this standard:

> (a) Reasonable measures implied efforts made by a contracting party in good faith and with diligence with a view to ensuring observance of the GATT; (b) what was "reasonable" must vary with the factual circumstance of each case; (c) foremost among these circumstances was the general character of the federation in question, and in particular the measure of autonomy enjoyed in law and in practice by the regional and local governments within the federation and the constitutional practices it adopted in co-ordinating its internal affairs; (d) for these reasons, "reasonable measures" were steps that were consistent with the normal political functioning of a federation, and exclude measures that would be considered exceptional or extraordinary within that context; (e) the nature and effect of the non-observance on the balance of rights and obligations under the General Agreement must be considered.

3.70 In Canada's view, "reasonable measures" in this case meant ensuring that the provinces lived up to their obligations under the Statement of Intentions. Canada said that since 1979 the Federal Government had been in constant contact with provincial authorities on a large number of occasions

to review the provinces' progress in implementing the Statement. There had also been numerous communications received from Canada's trading partners since 1979 and in each case Canada had used its good offices in the preparation of responses. Moreover, in Canada's view, the extensive information provided by the Provinces and submitted to the Panel, concerning provincial adherence to the 1979 Statement suggested that the Provinces were generally living up to the Statement. In a few instances, Canada acknowledged that some further changes were still required to bring a particular practice into line with the Statement, but commitments had been made to comply fully by the time the Statement was to be fully implemented (i.e. by 31 December 1987).

3.71 The European Communities argued that a reasonable measure for the federal legislature to take would be legislative action requiring that the provinces respected Canada's GATT obligations. Canada had, however, not even taken the measures clearly available to the Federal Government in order to eliminate the breaches of the tariff concessions or at least reduce their importance, such, for example as a reduction of the customs duties collected at the border. In the view of the European Communities these duties, together with the imposition of the import mark-ups, constituted protection in excess of the tariff concessions given by Canada, inconsistent with Article II.

3.72 The European Communities argued that the initiation by the federal government of a formal constitutional challenge to the provincial rules on import mark-ups and discriminatory market access requirements in violation of Canada's GATT obligations could also be considered a reasonable measure. It recalled an expert's view with respect to a similar case which recommended that the federal government tests the limits of its authority by presenting a formal constitutional challenge to the provincial measures. Consequently, in the EC's view, the failure of the Federal Government of Canada to take any legislative or judicial action in order to rectify the situation was evidence that Canada had not complied with its obligations under Article XXIV:12.

3.73 Canada argued that any overriding federal legislation would have to be of a detailed, regulatory character and would have to intervene directly in the specifics of retailing policy. However, in Canada's view the federal power did not allow for the regulation of a single industry or trade. It did not allow the federal government to take over the detailed regulation of a specific economic sector in its local aspects. Canada recalled that, while the exact outer limits of the Trade and Commerce power were not always clear, the courts had always insisted on the above limitation. In Canada's view this ruled out detailed overriding legislation that would be required to deal with the matter under consideration here. Canada again pointed out that the Canadian constitution was subject to evolution and nothing was cast in stone, but on this point at least the EC theory of the scope of federal legislative power was extremely dubious. In Canada's view, if there was a constitutional question related to the provincial

legislation on liquor boards it was not one that appeared on the face of the legislation but only in its detailed implementation in practice.

3.74 Canada said that, in a nutshell, there were two ways in which constitutional cases came before the Canadian courts. First, in the vast majority of cases - hundreds each year - the issues came up in ordinary litigation brought by private parties in the trial level courts of each province. Second, in extremely rare and exceptional cases the federal government itself took the initiative by way of a direct "Reference" to the Supreme Court of Canada, the highest court in the land. The provinces could also make direct "References" to their own Courts of Appeal, but in Canada's view that was not an option that had any practical relevance here. Canada noted that there were major differences between these two procedures. Ordinary litigation started off with a trial. This was where the factual evidence was developed, through witnesses and discoveries. After the trial decision, there was a possibility of two further appeals, ending up in the Supreme Court of Canada. Although the litigation was generally private, the federal government had an opportunity to participate as an intervenor. In some of the major Trade and Commerce cases, Canada had done just that. The Reference procedure was completely different, even apart from its rarity. There was no trial, no witnesses, no evidence in the ordinary sense and there was only one stage in the whole procedure. In Canada's view, the Reference procedure could play an important rôle in certain exceptional circumstances. It was generally used to obtain a definitive ruling in emergency situations of national importance. Canada noted, however, that the Reference procedure was used where novel, untested constitutional theories were at stake. In Canada's view, References were of exceptional character (there have only been about eight in the last 20 years and this contrasts with hundreds of constitutional cases brought in the ordinary way). Canada argued that there were important reasons of principle behind this practice. A Supreme Court Reference bypasses the provincial court system. In several recent cases the Supreme Court had emphasized that the provincial courts were the pivot of the Canadian constitutional system. Canada argued that that role would be undermined if the Reference procedure initiated by the federal government were used in any but the most exceptional circumstances. In Canada's view the idea of a federal government Reference in this case might be characterized as an abuse of the process of the Supreme Court.

3.75 Canada recognized that the federal legislation undoubtedly enhanced the effective functioning of the provincial regimes, but in its view it could not be characterized as an essential condition of their constitutional validity or their viability. Nor, did the legislation involve any control over the retailing policies of these boards. Canada argued that if the federal legislation were repealed, direct private imports bypassing the boards would, of course, cease to be prohibited, but the provincial monopoly over the subsequent retail distribution of the product would remain intact. Consequently, Canada argued that, whatever the exact scope "reasonable measures" under Article XXIV:12, they could not, include legislation on matters that had traditionally been considered

the exclusive constitutional prerogative of the local governments, nor legislation that would constitute a radical departure from established constitutional practice and that would be open to serious legal challenge under the internal law of the relevant contracting party.

(i) Nullification or Impairment

3.76 Canada argued that since April 1979, imports and the share of total Canadian alcoholic beverage imports from the EC/10 had increased substantially. It agreed that examination of sales by volume was one measure that could be examined, but it also said that it was misleading to examine sales of imported product without examining the overall sales of those products. In Canada's view, the demonstrable reasons for changing sales also included changes in Canadian tastes and consumption patterns, with sales of some types of products increasing while sales of other products decreased. Canada noted that the EC appeared to be a major beneficiary of these changes.

3.77 Canada said that total sales of wine in Canada had shown a steady increase since the early 1970's. In its view, a detailed comparison of differences of annual sales of various types of wine, by volume, between 1980 and 1985, indicated that sales of product imported from the Communities outperformed sales of Canadian product in almost all categories. In instances where consumption of a product type had increased, the sales of EC product had increased to a greater extent than domestic sales. In other instances where overall consumption of a product decreased, sales of Canadian product suffered more than sales of EC product. Canada argued that EC sales had not decreased because of provincial measures, but because of changing Canadian tastes. Further, in Canada's view, these changing tastes had hurt the Canadian industry much more than the EC. Canada noted that while sales of wine had increased, total Canadian sales of spirits had declined almost steadily since 1979. For example, between 1979 and 1985 total Canadian sales of brandy, gin and whisky had all declined. During this period, sales of imported gin and whisky had experienced a decline, but domestic sales of these products had declined at a greater rate. Sales of imported brandy had actually increased during this period while sales of domestic brandy had decreased. Therefore, in Canada's view, over the period in question, the imported product in those categories for which the EC was the major supplier, had increased their market shares while domestic market share had decreased.

3.78 In Canada's view, examination of trade statistics clearly showed that EC access to the Canadian market had not been, nor was it being, nullified or impaired. It was also noted that the EC had not substantiated their claim that liquor board practices constituted obstacles to EC trade. In Canada's view, such a demonstration would be impossible because there had been a substantial increase in EC exports since 1979.

3.79 The European Communities considered that the application of measures which were judged to be inconsistent with the GATT obligations of the

contracting party concerned constituted, prima facie, a case of nullification or impairment. The Communities argued that it was therefore not necessary to provide evidence of the actual damage to its trade caused by the discriminatory measures. The Communities noted that Canada tended to assess trade performance in terms of the Community's share of the total import market without taking into consideration the development of domestic production and shipments in the main product categories. Due attention should be also given to trade volumes rather than value. In this regard the European Communities noted that if one took an average of 1983-85 period and compared it with the situation before 1979, increases in volume of total wine sales over that period coincided with substantial decreases in volume of sales of certain categories of wine or distilled spirits.

3.80 The European Communities considered that the statistics provided by Canada gave no indication of imports which could have taken place in the absence of the discriminatory practices. In addition the European Communities noted that on the basis of information provided by Canada, it was clear that imports as a percentage share of total Canadian sales (in value) of wine had fallen between 1979 and 1985 in six out of ten provinces, including the three most populous provinces of Ontario, Quebec and British Colombia. It argued that the Communities had concentrated its analysis mainly on trade volume and it drew attention to a decline in Canada's imports of a number of major product categories of alcoholic drinks in the period 1978-1985. Moreover, in the Communities view information relating to Communities exports to Canada for the period 1978-1985 confirmed that in volume terms there had been only a modest overall increase in Community exports of alcoholic drinks.

(l) Statement by Australia

3.81 In a statement to the Panel Australia supported the EC position set out in L/5777 with regard to mark-ups and restrictions on the points of sale available to imported products. In Australia's view, the latter practices effectively formed a quantitative restriction on imports. Listing requirements particularly disadvantaged new or specialist products such as specific Australian wines. Australia considered the listings requirements to be a breach of Article III:4. Australia also said that through higher mark-ups, Australian products received less favourable treatment than those provided for in the schedule and Australia considered the mark-ups to breach Article II:4. In Australia's view, Canada had obligations under Article XXIV to use "reasonable measures" to secure from the provincial marketing agents an open import regime in Canada for wines, spirits and other alcoholic beverages particularly as the measures were applied by all the Canadian Provinces and therefore, had the characteristics of a national policy. Australia recalled the following particular instances where the Canadian Government had not taken reasonable measures to ameliorate provincial practices despite representations from Australia:

- The fact that a brand would only be listed for sale if the liquor boards were convinced that it would achieve the required sales volume. This practice discriminated against new or lesser known products.

- In some provinces, government policy required that an inordinately large amount of shelf space be allocated to the local product. Imported wines with a retail price below a certain level were not accepted in British Colombia or Alberta, which, with a cost conscious public, lead to a significant discrimination.

- Imported wines had higher mark-ups than Canadian wines.

- Direct retailing of wine was allowed outside the monopoly stores in two instances but in neither of these instances was imported wine allowed to be sold.

3.82 Despite numerous bilateral representations to the Canadian Government the Australian Government did not consider that the Canadian Government had fully utilized all reasonable measures available to it within its constitutional system. At the same time, Australia considered that the introduction of federal legislation which might have an overriding effect on the political balance of a federation, by impinging on constitutional arrangements and the division of powers between the national and provincial governments, as not being 'reasonable measures'.

3.83 Australia said that at the time of the Canada/Australia Tokyo Round settlement, it had pointed out that the provincial Statement of Intentions would not resolve the Australian wine industry's problems with the Canadian provincial marketing agencies and therefore Australia was not prepared to offer further payment for the inclusion of the statement in a settlement. Australia recalled that the Canadian Government had acknowledged that the statement would not resolve all difficulties experienced by Australia but had seen the statement as 'giving suppliers a foot in the door'. The Canadian Government had indicated its hope that, if the statement were to form part of an Australia/Canada bilateral settlement, Australia could indicate that it welcomed the statement as a positive step which had been 'taken into account' in arriving at the overall settlement. It was argued that this would give the Canadian Government a little more leverage over the provincial governments. In Australia's view the Canadian Government had not sought payment for the inclusion of the statement in the bilateral settlement. The Canadian Statement of Intentions had been passed to the Australian Government under a cover note which included a reference to the preparedness of the Canadian Government to use 'its good offices' to take up Australian concerns with the provincial agencies. The Canadian Government had argued this would help reassure Australia that the Canadian Federal Government would adopt an active (rather than a liaison) role in intervening with the provincial agencies on behalf of foreign governments. Accordingly, it was Austalia's understanding that the Canadian Government had not put the statement forward as an intention of the provincial liquor boards alone. Rather it would appear that the intent of the Canadian

Government had been to undertake a greater degree of obligation under Article XXIV(12) in regard to this matter than would otherwise have been the case. Australia argued that this view was supported by the Canadian Government's action in extracting promises collectively from the provinces and linking these promises through itself in an international settlement. In Australia's view a reasonable action by the Canadian Government on a complaint would be for it to establish the facts of that complaint with the liquor board concerned and demand rectification in accordance with the agreement. Australia was concerned by the proposition put forward by Canada that the liquor board undertaking modified, in a less onerous way, its obligations. Australia said that it had not accepted such an interpretation at the time of the Tokyo Round negotiations nor did it now.

3.84 Responding to Australia's comment on a link between the listing requirements and the sales volume, Canada noted that quotas were supplied to ensure that sales, and therefore profits, justify the liquor board's investment in ordering, warehousing, distributing and retailing these products. While Australia argued that this practice discriminated against new or lesser known products, in Canada's view the sales quota policy was applied to virtually all products - domestic and imported. In some provinces, sales quotas for some imported products, such as spirits, were actually lower than for domestic spirits. In addition, through generating private stock orders by individuals and licensed establishments, agents had ample opportunity to demonstrate to the liquor board that a particular product would be capable of meeting the required sales quota. In response to the Australia's comment on distribution of shelf space, Canada noted that shelving decisions were made by individual store managers to reflect individual store product mixes and sales. It also recalled that the rationale for differential mark-ups was spelled out in detail elsewhere in the report and noted that non-quota based specialty listing were also available to foreign suppliers. Canada also submitted to the Panel a copy of a letter from the Australian Mission in Geneva to the Geneva Mission of Canada and a text signed by the Canadian and Australian delegations, both dated 22 January 1980, concerning the results of the bilateral negotiations between the two countries during the Tokyo Round. Canada said that both documents confirmed that the Provincial Statement of Intentions with Respect to Sales of Alcoholic Beverages by Provincial Marketing Agencies in Canada formed part of the results of bilateral negotiations between Canada and Australia in the Tokyo Round. The submitted text also stated that the offer (Statement of Intentions) and its acceptance was made subject to GATT rights and obligations. Canada also noted that in its submission to the Panel, Australia indicated that in giving the Statement of Intentions, the Government of Canada was undertaking specific 'obligations' reflecting the combined intentions of the Provincial Governments. In Canada's view, this showed that Australian authorities recognized the significance of the Statement as a negotiated obligation.

(m) Statement by the United States

3.85 The United States noted that there were three types of restrictive practices by various provincial liquor boards which it believed were in

conflict with the GATT (i) charging higher price mark-ups on the sale of imported beverages than provincially produced beverages or, in the alternative, beverages produced elsewhere in Canada; (ii) allowing the sale of imported beverages through fewer retail outlets than domestically produced beverages; and (iii) "listing" restrictions that restrict the number of brands of imported products that may be sold.

3.86 The practices in question were maintained by various provincial governments in Canada, with some variations among Canadian provinces. The provinces acted through provincial liquor boards under the control of the provincial governments. While Canada had in the past argued that the boards were state-trading enterprises, in the United States' view they were in fact under the control of the provincial governments, which appointed the boards and which, in a "Provincial Statement of Intentions" of 1979, assumed responsibility for the practices of the boards. The United States argued that the practices in question thus should be viewed as governmental practices, rather than those of a state enterprise in the sense of Article XVII.

3.87 In the United States' opinion, all three types of restrictions referred to above were inconsistent with Article III of the GATT, in that imported products were treated less favourably than domestic products. In addition, the higher mark-ups imposed might also be considered to violate Article II, and Article XI, in that they resulted in an additional charge on imports above the bound Canadian rates of duty, and they constituted a de facto quantitative limitation on imports. The United States further believed that many of the provincial listing practices violated Articles I and XIII of the GATT, because provincial liquor boards permitted proportionately far fewer listings of American wines than other imported wines. Finally, the United States considered that all these restrictions impaired the benefit of tariff concessions granted by Canada in the GATT.

3.88 With regard to mark-up policy on wine, the United States was specifically concerned about the practices of Ontario, Quebec, British Colombia, Saskatchewan, Manitoba and Alberta. It provided statistical evidence suggesting that imported products were marked up more than the provincial product or other Canadian products in these provinces. The United States had the same concerns about discriminatory mark-ups on beer and other alcoholic beverages in all provinces.

3.89 In the view of the United States such discriminatory mark-ups, imposed by state agencies, contravened Article III:2, because they constituted a higher charge on the sale of imported products. They were also inconsistent with Article III:4, in that the requirement of higher mark-ups on imported products than on like products produced within the province clearly treated imported products less-favourably than like domestic products. The fact that in some cases provincial liquor boards also discriminated against like products of other Canadian provinces did not exempt these measures from Article III, since GATT Article III obligations could not be avoided by discriminating in part against other domestic products.

3.90 The United States considered that, in the alternative, the mark-ups might be viewed as a form of import charge, since the provincial boards that established these mark-ups also had a monopoly on importation of the products into the provinces. As such, the mark-ups were inconsistent with Article II, paragraphs 1(b) and 4. Since the United States had not had the opportunity to hear the positions of the parties on these matters , it did not know which alternative approach the panel or the parties would consider, but in its view these practices clearly contravened the General Agreement, regardless of whether one was considering them in the light of Article II or Article III.

3.91 The United States noted that in its bilateral discussions with Canada, the Canadians had at times argued that the higher mark-ups on imports were justified by the smaller volume of retail sales of imported products, which they said entailed a higher per unit cost of handling which must be passed on to the Canadian consumer. However, in the view of the United States, the lower sales volume resulted from restrictions imposed on imports; it was hardly likely that, in the absence of such restrictions, imports would all be sold at low volumes and domestic products would all be sold at high volumes so as to justify the arbitrary discrimination imposed by the provincial governments.

3.92 The United States noted that the provincial liquor control boards delegated domestic beer wholesaling to the local breweries who acted as distribution agents. In some provinces, beer could be sold in grocery stores. Imported beer, however, could only be sold in the liquor control board stores (about 10 per cent of the distribution system) and only after a listing had been granted. The United States had been particularly concerned about the British Columbia "cold beer stores" and sales outlets for wine products in the British Columbia and Quebec. In Quebec, domestic bottled wines could be sold in grocery stores while most imported wines may not. Only imported bulk wine, bottled in Quebec, might be sold in grocery stores. In British Columbia, imported bottled wines might not be sold in certain types of outlets that were permitted to sell wine produced in British Columbia. In the view of the United States such restrictions on distribution of imported products relative to like domestic products clearly contravened Article III:4, in that they treated domestic products more favourably than like imported products.

3.93 With regard to the number of listings granted to US wine products, the United States noted that provincial products might be automatically listed but that imports were not and that listing policies prevented competition among all sources. The United States said that its wines as well as other alcoholic beverages and beer were generally given few listings and it provided statistical evidence to illustrate this point. In the view of the United States, these listing policies were inconsistent with Article III:4, in that they treated imported products less favourably than domestic products. These policies also violated Articles I and XIII insofar as the US wines were treated less favourably than other imported wines. While in this respect the United States claim differed from that of the EC, the United States noted that Canadian compliance with Article III would result in improved treatment for wines of both the United States and the EC.

3.94 The United States said that Canada had in the past contended that the provinces had control over importation and sale of alcoholic beverages, and that the Canadian Federal Government's only obligation with respect to matters under provincial control was to take "such reasonable measures as may be available ... to ensure observance of the provisions" of the GATT. The implication of Canada's argument was that the federal government could do nothing about even such blatantly discriminatory practices as those discussed above, while other contracting parties had no rights other than, presumably, to ask the Canadian Government to exhort the provinces to do better. The United States said that it could not agree with this attitude.

3.95 In the view of the United States Canada could, and had to, do more than merely try to persuade its provincial governments to comply with Canada's GATT obligations. The United States was not convinced that the Federal Government of Canada could not challenge the provincial practices in its courts. The United States considered that the determination of what measures by Canada were "reasonable" to ensure the observance of GATT provisions by provincial governments was not a determination left solely to Canada to make. The United States urged the Panel to recommend that Canada ensure the removal of these GATT-inconsistent measures applied by the provincial liquor boards.

3.96 Referring to the United States' comment on types of restrictive practices Canada argued that one first had to assess whether the differential practices were consistent with the Statement of Intentions. Canada argued that when this test was undertaken, it became clear that the provinces were generally living up to their 1979 commitments. In response to the arguments relating to restrictions on the number of brands imported, fewer listings of U.S. wineries and alleged less favourable treatment, Canada recalled that in exercising their business judgement, the liquor boards considered new listings on the merits of individual products using the following criteria: quality, price, public demand, marketability, relationship to other products of the same type already listed, performance in other markets. Canada recalled that the Statement of Intentions required MFN treatment for listings of imported products. It concluded, therefore, that differential treatment of domestic products was allowed. Canada noted that the rationale for the differential mark-ups was considered elsewhere in this report and said that "cold beer stores" should read "licensed retail stores". With respect to imported products, Canada argued that no country carried an equal number of listings from each of its trading partners. Consumer preference was the determining factor for the number of listings carried from each country. In Canada's view in the private sector, similar differences would also exist. Canada also provided additional listing information to the Panel following, what it considered to be, inaccurate data provided by the US delegation and discussed several US arguments which, in its view, failed to take account of more recent changes that had been made.

## 4. FINDINGS

4.1 The Panel noted that two questions were posed in its terms of reference, namely "whether certain practices of provincial agencies which market alcoholic beverages (i.e. liquor boards) are in accordance with the provisions of the General Agreement" and "whether Canada has carried out its obligations under the General Agreement". It decided to deal with the first question before examining the second.

### Practices of Provincial Liquor Boards

4.2 The Panel recalled that the practices complained of related to mark-up practices, including restaurant discounts on domestic alcoholic beverages; and restrictions on points of sale and listing/delisting procedures.

#### - Mark-Ups

4.3 Since Canada's Schedule of Concessions includes tariff bindings on all imported alcoholic beverages, the Panel first examined the European Communities' contention that the mark-up practices were not in conformity with Article II of the General Agreement.

4.4 The Panel recalled that Canada and the European Communities agreed on the fact that Canada had, through the Importation of Intoxicating Liquors Act, authorized a monopoly of the importation of alcoholic beverages. The Panel noted therefore that the amount of protection admissible under Article II:4 was thus either the amount provided for in the Canadian Schedule or "as otherwise agreed between the parties which had initially negotiated the concession".

4.5 The Panel recalled in this context its terms of reference, which requested the Panel to take into account, "in carrying out its examination ..., inter alia, the provincial statement of intentions concluded in the context of the Tokyo Round of multilateral trade negotiations with respect to sales of alcoholic beverages by provincial marketing agencies in Canada". The Panel examined, therefore, whether the parties had, by the Provincial Statement of Intentions and the related exchange of letters, "otherwise agreed" in the sense of Article II:4, as claimed by Canada, on an amount of protection different from that provided for in the Canadian Schedule.

4.6 The Canadian government's letter of 5 April 1979 made it clear that the Provincial Statement of Intentions was put forward on behalf of the provincial authorities. The title and wording of the Provincial Statement of Intentions indicated that it expressed "intentions" and was, as confirmed in the letter, "necessarily non-contractual in nature". The only undertaking expressed by the Government of Canada in the letter of 5 April 1979 was that it "will be prepared to use its good offices with the provincial authorities concerned regarding any problem which may arise with respect to the application of provincial policies and practices set forth in the statement". Canada's emphasis on the non-binding nature of the undertaking seemed to indicate that it was not meant

to affect Canada's rights and obligations under Article II:4. Nor did the letters of the EC Commission, dated 5 April and 29 June 1979, express an acceptance of an agreement concerning its rights and obligations under Article II:4. The first of these letters restricted itself to acknowledging the receipt of the Canadian letter and the second only expressed "some disquiet" concerning the terms "normal commercial considerations" in the Provincial Statement of Intentions.

4.7 The Panel noted that the Provincial Statement of Intentions and related letters had not been included among the texts listed in the Procès-Verbal embodying the results of the Tokyo Round, that the letters were classified as confidential and had not been notified to the CONTRACTING PARTIES. While the Council has stated in the terms of reference of the Panel that the Provincial Statement had been "concluded in the context of the Tokyo Round of Multilateral Trade Negotiations" it appeared to the Panel that for the Statement to satisfy the conditions of Article II:4, it would have had to be binding to the same extent as the concession in the Schedule which it was intended to supersede.

4.8 The Panel therefore concluded that the Provincial Statement of Intentions and the related exchange of letters could not be held to constitute an agreement in terms of Article II:4 and did not, therefore, modify Canada's obligations arising from the inclusion of alcoholic beverages in its GATT Schedule.

4.9 The Panel then proceeded to examine whether the mark-ups imposed on imported alcoholic beverages plus the import duties, which were collected at the bound rate, afforded protection on the average in excess of the amount of protection provided for in Canada's Schedule contrary to Article II:4, as claimed by the European Communities. The Panel noted that according to the interpretative note to Article II:4 the paragraph was to be applied "in the light of the provisions of Article X of the Havana Charter." The text of Article X, including its interpretative note, is contained in Annex II.

4.10 The Panel noted that Article II:4, applied in the light of Article II:4, prohibited the charging of prices by the provincial liquor boards for imported alcoholic beverages which (regard being had to average landed costs and selling prices over recent periods) exceeded the landed costs; plus customs duties collected at the rates bound under Article II; plus transportation, distribution and other expenses incident to the purchase, sale or further processing; plus a reasonable margin of profit; plus internal taxes conforming to the provisions of Article III.

4.11 The Panel also noted that the retail prices charged by the provincial liquor boards for imported alcoholic beverages were composed of the invoice price; plus federal customs duties collected at the bound rates; plus standard freight to a set destination; plus additional price increases ("mark-ups") which were sometimes higher on imported than on like domestic alcoholic beverages ("differential mark-ups"); plus federal and provincial sales taxes.

4.12 The Panel proceeded to examine the Canadian contention that such differential mark-ups generally reflected higher transportation, distribution and other expenses associated with imported products, such as storage, as well as a reasonable margin of profit, and were therefore in accordance with the provisions of the General Agreement.

4.13 The Panel considered that differential mark-ups could be justified to offset any additional costs of transportation, distribution and other expenses incident to the purchase, sale or further processing, such as storage, necessarily associated with importing products and that such calculations could be made on the basis of average costs over recent periods.

4.14 The Panel noted Canada's statement that, in some instances, the differential mark-ups also reflected a policy of revenue maximization on the part of the provincial liquor boards, which charged higher mark-ups on imported than on domestic alcoholic beverages because they marketed imported products as premium products and exploited less price elastic demand for these products, and that this policy was in accordance with the General Agreement because revenue maximization was justified by normal commercial considerations.

4.15 The Panel considered that a monopoly profit-margin on imports resulting from policies of revenue maximization by provincial liquor boards could not normally be considered as a "reasonable margin of profit" in the sense of Article II:4, especially if it were higher on imported products than on domestic products.

4.16 The Panel considered that the phrase "a reasonable margin of profit" should be interpreted in accordance with the normal meaning of these words in their context of Article II and Article 31 of the Havana Charter, and that "a reasonable margin of profit" was a margin of profit that would be obtained under normal conditions of competition (in the absence of the monopoly). The margin of profit would have on the average to be the same on both domestic and the like imported products so as not to undermine the value of tariff concessions under Article II.

4.17 The Panel also noted Canada's argument that the drafting history implied that a reasonable margin of profit was a margin which "should not be so excessive as to restrict the volume of trade in the product concerned", and that since the volume of imports from the European Communities of the products in question had not declined, the margin of profit was a reasonable one. The Panel noted that the fact that these imports had not declined did not say anything about what they would had been in the absence of a policy of monopolistic profit maximization by the provincial liquor boards.

4.18 The Panel examined Canada's reference to normal commercial considerations and noted that the term "commercial considerations" was mentioned in Article XVII:1(b). It considered that this reference was not relevant to its examination of Article II:4 as the context in which the term 'commercial considerations' had been used was different.

4.19 The Panel therefore concluded that the mark-ups which were higher on imported than on like domestic alcoholic beverages (differential mark-ups) could only be justified under Article II:4, to the extent that they represented additional costs necessarily associated with marketing of the imported products, and that calculations could be made on the basis of average costs over recent periods. The Panel also concluded that the burden of proof would be on Canada if it wished to claim that additional costs were necessarily associated with marketing of the imported products.

4.20 The Panel noted that Article 31:6 of the Havana Charter provided that "in applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes". While the drafting history indicated that Article 31 should be applied to the extent that it was relevant to the context of the General Agreement, the Panel considered that Canada had the right to use import monopolies to raise revenue for the provinces, consistently with the relevant provisions of the General Agreement. The Panel also considered that its conclusions on Article II:4 did not affect this right, because Article II:4, applied in the light of Article 31:4 of the Charter, permitted the charging of internal taxes conforming to the provisions of Article III. It noted that federal and provincial sales taxes were levied on alcoholic beverages and asked itself whether the fiscal elements of mark-ups, which produced revenue for the provinces, could also be justified as "internal taxes conforming to the provisions of Article III", noting that Article III:2 itself referred, not only to internal taxes, but also to "other internal charges". The Panel was of the view that to be so considered, the fiscal element of mark-ups must of course meet the requirements of Article III, e.g. they must not be applied to imported or domestic products so as to afford protection to domestic production. The Panel also considered it important that, if fiscal elements were to be considered as internal taxes, mark-ups would also have to be administered in conformity with other provisions of the General Agreement, in particular Article X dealing with the Publication and Administration of Trade Regulations.

4.21 The Panel noted the view put forward by the European Communities as well as by Canada that the EC's complaint did not necessitate - at least not at this stage of the proceedings - a detailed factual analysis by the Panel of the cost differentials calculated by individual liquor boards for individual imported products in this respect. The Panel did not therefore pursue the matter.

- Restrictions on the Points of Sale and on Listing

4.22 The Panel then examined the contention of the European Communities that the application by provincial liquor boards of practices concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages was inconsistent with Canada's obligations under Articles III:4, XI or XVII of the General Agreement.

4.23 The Panel first examined the arguments relating to the relevance of Article XI to these requirements. The Panel noted Canada's claim that the practices referred to were not "restrictions" in the sense of Article XI because they were not associated with the "importation" of the products, because they were provincial measures and because they were consistent with the Provincial Statement of Intentions.

4.24 The Panel observed that the note to Articles XI, XII, XIII, XIV and XVIII provided that throughout these Articles "the terms 'import restrictions' and 'export restrictions' include restrictions made effective through state-trading operations". The Panel considered it significant that the note referred to "restrictions made effective through state-trading operations" and not to "import restrictions". It considered that this was a recognition of the fact that in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made in the General Agreement between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly. The Panel considered that systematic discriminatory practices of the kind referred to should be considered as restrictions made effective through "other measures" contrary to the provisions of Article XI:1. It also noted that an agreement or arrangement would have to be consistent with the General Agreement. The Panel noted that the relevance of the fact that the measures concerned were provincial measures would be examined in the second part of its findings.

4.25 The Panel therefore concluded that the practices concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1. The Panel considered that it was not necessary at this stage to make a detailed factual analysis by the Panel of the restrictions on points of sale and the discriminatory listing/delisting practices by the individual provincial liquor boards.

4.26 The Panel then examined the contention of the European Communities that the practices complained of were contrary to Article III. The Panel noted that Canada did not consider Article III to be relevant to this case, arguing that the interpretative note to Articles XI, XII, XIII, XIV and XVIII made it clear that provisions other than Article XVII applied to state-trading enterprises by specific reference only. The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in the domestic markets were combined, as was the case of the provincial liquor boards in Canada. This interpretation was confirmed e contrario by the wording of Article III:8(a).

4.27 The Panel next turned its attention to the relevance of Article XVII and in particular to the contention of the European Communities that the practices under examination contravened a national treatment obligation contained in paragraph 1 of that Article. The Panel noted that two previous panels had examined questions related to this paragraph. The Panel report on Belgian Family Allowances (BISD 1S/60) said that "as regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph I of that Article, i.e. the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III". The Panel on Canada - Administration of the Foreign Investment Review Act (BISD 30S/163) "saw great force in Canada's argument that only the most-favoured-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a)". The Panel considered, however, that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article XVII because it had already found that they were inconsistent with Article XI.

4.28 The Panel recalled Canada's claim that the Importation of Intoxicating Liquors Act of 1928 constituted existing legislation within the meaning of paragraph 1(b) of the Protocol of Provisional Application which provided that Part II was applied to the fullest extent not inconsistent with existing legislation. The Panel noted that the CONTRACTING PARTIES had decided in August 1949 that this paragraph only referred to legislation of a mandatory character (BISD II/62) and that this decision had been confirmed on many subsequent occasions, most recently in 1984 (BISD 31S/82). The Panel concluded that the Importation of Intoxicating Liquors Act did not make mandatory restrictions on points of sale and discriminatory listing requirements.

4.29 The Panel wished to stress that nothing in its conclusions on restrictions on points of sale and discriminatory listing requirements affected the right of Canada to use import monopolies for purposes foreseen in the General Agreement, such as the protection of health of its population (Article XX), provided that it was done consistently with the relevant provisions of the General Agreement.

Notification Requirements

4.30 The Panel examined the European Communities' contention that Canada had not fully complied with its notification obligations under Article XVII:4(a), which should be interpreted in the light of the CONTRACTING PARTIES' decisions of 1960 and 1962 (BISD, 9S/182, 11S/58). The Panel found that these decisions did not interpret Article XVII:4(a), but were separate instruments. The Panel found that Canada had complied with its obligations under Article XVII:4(a), but that it should supply the information called for by the decisions of 1960 and 1962 to the extent that it had not already done so.

Canada's Obligations

4.31 The Panel then turned to the second question raised in its terms of reference, namely "whether Canada has carried out its obligations under the General Agreement".

4.32 The Panel noted that the main question related to the interpretation of Article XXIV:12 which states: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory".

4.33 The Panel noted that there was no dispute that the provincial liquor boards were "regional authorities" within the meaning of Article XXIV:12.

4.34 The Panel noted that Canada had taken the position that the only authority that could judge whether all reasonable measures had been taken under Article XXIV:12 was in this case the Canadian government. While noting that in the final analysis it was the contracting party concerned that would be the judge as to whether or not specific measures could be taken, the Panel concluded that Canada would have to demonstrate to the CONTRACTING PARTIES that it had taken all reasonable measures available and that it would then be for the CONTRACTING PARTIES to decide whether Canada had met its obligations under Article XXIV:12.

4.35 The Panel noted that the Government of Canada considered that it had already taken such reasonable measures as were available to it to ensure observance of the provisions of the General Agreement by the provincial liquor boards. The Panel, however, also noted that the efforts of the Canadian federal authorities had been directed towards ensuring the observance of these provisions as they themselves interpreted them and not as interpreted in these findings. The Panel therefore concluded that the measures taken by the Government of Canada were clearly not all the reasonable measures as might be available to it to ensure observance of the provisions of the General Agreement by the provincial liquor boards, as provided in Article XXIV:12 and that therefore the Government of Canada had not yet complied with the provisions of that paragraph. The Panel was of the view, however, that in the circumstances the Government of Canada should be given a reasonable period of time to take such measures to bring the practices of the provincial liquor boards into line with the relevant provisions of the General Agreement.

## V CONCLUSIONS

4.36 In the light of the findings set out above, the Panel recommends that the CONTRACTING PARTIES request Canada:

(a) to take such reasonable measures as may be available to it to ensure observance of the provisions of Articles II and XI of the General Agreement by the provincial liquor boards in Canada;

(b) to report to the CONTRACTING PARTIES on the action taken before the end of 1988, to permit the CONTRACTING PARTIES to decide on any further action that might be necessary.

ANNEX I

CANADIAN DELEGATION

CONFIDENTIAL

MARK-UP

17-19, Ch du Champ d'Anier
1209 Geneva

April 5, 1979

Mr. P. Luyten
Head of Delegation
Permanent Delegation of the EEC
37-39, rue de Vermont
1202 Geneva

Dear Paul,

EC requests on Canada for concessions with respect to alcoholic beverages were put forward in Document MTN/AG/R/8 on November 18 1977. These included a number of non-tariff requests which sought better treatment for EC products in respect of mark-ups and listing policies.

These and similar requests were brought to the attention of the provincial authorities. As a contribution to a substantial outcome in the MTN in areas of importance to them, they have provided the attached statement for the federal government to put forward on their behalf concerning their marketing policies and practices with respect to imported beers, wines and distilled spirits. While the provincial statement regarding the treatment of imported alcoholic beverages is necessarily non-contractual in nature, it represents a positive undertaking to follow policies and practices which should be of considerable benefit to EC trade in this field in future years and, as such, is a valuable contribution to a settlement between us in this area.

We can confirm that the term "alcoholic beverages" in paragraphs 1 and 5 includes distilled spirits, wines, vermouth, champagne and beer and that the term "wines" in paragraph 5 includes vermouth and champagne.

Any communication from the EC concerning matters related to the attached statement should be addressed to the Government of Canada.

The Canadian Government will be prepared to use its good offices with the provincial authorities concerned regarding any problem which may arise with respect to the application of provincial policies and practices set forth in the statement.

Yours sincerely,
signed R. de C. Grey
Ambassador and
Head of Delegation

## Provincial Statment of Intentions with Respect to Sales of Alcoholic Beverages by Provincial Marketing Agencies in Canada

1. Information on the policies and practices of provincial marketing agencies for all alcoholic beverages will be made available on request to foreign suppliers and governments. Any enquiries from foreign governments will receive a response within a reasonable period of time; the Government of Canada agrees to be the channel of communication with foreign governments for such purposes.

2. In each branch store of the provincial marketing agencies, a catalogue of all the products offered for sale by the agency will be available, in order that customers may be aware of what products are available in addition to those carried in the particular branch.

3. Any differential in mark-up between domestic and imported distilled spirits will reflect normal commercial considerations, including higher costs of handling and marketing which are not included in the basic delivery price.

4. Any differential in mark-up between domestic and imported wines will not in future be increased beyond current levels, except as might be justified by normal commercial considerations.

5. Each provincial marketing agency for alcoholic beverages will entertain applications for listing of all foreign beverages on the basis of non-discrimination between foreign suppliers, and commercial criteria such as quality, price, dependability of supply,

demonstrated or anticipated demand, and other such considerations as are common in the marketing of alcoholic beverages. Standards with respect to advertising, health and the safety of products will be applied in the same manner to imported as to domestic products.

Access to listings for imported distilled spirits will in the normal course be on a basis no less favourable than that provided for domestic products and will not discriminate between sources of imports.

6. Any changes which may be necessary to give effect to the above will be introduced as soon as practicable. However, some of these changes, particularly with respekct to mark-up differentials, may be introduced progressively over a period of no longer than eight years.

COMMISSION
DES
COMMUNAUTÉS EUROPÉENNES

Délégation permanente
auprès des organisations internationales
à Genève

Geneva, le April 5, 1979

Dear Rodney,

.. I have the honour to acknowledge receipt of your letter of April 5 concerning Provincial Statement of intentions with respect to sales of alcoholic beverages by Provincial marketing Agencies in Canada.

Yours sincerely,

P. Luyten
Head of the Permanent Delegation

H.E. Mr. Rodney de C. Grey
Ambassador
Head of the Canadian Delegation to the
Multilateral Trade Negotiations
17-19, chemin du Champ d'Anier.
1209 Geneva

COMMISSION
OF THE
EUROPEAN COMMUNITIES

DIRECTORATE-GENERAL FOR
AGRICULTURE

The Director General

MONNAZ07

Brussels, 29. VI. 1979

Dear Mr Ambassador,

I refer to your letter of 5 April enclosing a statement of intention which the Canadian Provincial Liquor Boards are prepared to give concerning the treatment of imported alcoholic beverages.

The Community have, as you will readily appreciate, been examining very closely the terms of this statement of intention given. This examination had led to some disquiet concerning the terms of the statement of intentions about the mark-up. The Community does of course appreciate that an undertaking to eliminate discriminatory practices in this area cannot easily be given in simple and precise terms, but we are nevertheless apprehensive lest the term "normal commercial considerations" should be interpreted by the Boards in such a way as to enable them effectively to continue discrimination against imported spirits. You will be aware that the Provincial Liquor Boards have in the past justified their discriminatory practices with reference to "commercial considerations" - a phrase which is used once again in the statement of intention. I do not know whether you feel able to add anything concerning this phrase which would demonstrate that our fears are groundless ; but I must in any case inform you that the Community will be looking for proof in the performance of the Provincial Liquor Boards that the undertaking is effective in eliminating discrimination against Community spirits. And the Community does of course expect the Canadian Federal Government to maintain its own surveillance of the way in which the undertaking is being implemented.

Sincerely,

Cl. VILLAIN

R. de Charnoy GREY
bassador and Head of Delegation
nadian Delegation
,19 - Chemin du Champ d'Anier
01 GENEVA

# ANNEX II

## Article 31 of the Havana Charter

### Expansion of Trade

1. If a Member establishes, maintains or authorizes, formally or in effect, a monopoly of the importation or exportation of any product, the Member shall, upon the request of any other Member or Members having a substantial interest in trade with it in the product concerned, negotiate with such other Member or Members in the manner provided for under Article 17 in respect of tariffs, and subject to all the provisions of this Charter with respect to such tariff negotiations, with the object of achieving:

(a) in the case of an export monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic users of the monopolized product, or designed to assure exports of the monopolized product in adequate quantities at reasonable prices;

(b) in the case of an import monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic producers of the monopolized product, or designed to relax any limitation on imports which is comparable with a limitation made subject to negotiation under other provisions of this Chapter.

2. In order to satisfy the requirements of paragraph 1(b), the Member establishing, maintaining or authorizing a monopoly shall negotiate:

(a) for the establishment of the maximum import duty that may be applied in respect of the product concerned; or

(b) for any other mutually satisfactory arrangement consistent with the provisions of this Charter, if it is evident to the negotiating parties that to negotiate a maximum import duty under sub-paragraph (a) of this paragraph is impracticable or would be ineffective for the achievement of the objectives of paragraph 1; any Member entering into negotiations under this sub-paragraph shall afford to other interested Members an opportunity for consultation.

3. In any case in which a maximum import duty is not negotiated under paragraph 2(a), the Member establishing, maintaining or authorizing the import monopoly shall make public, or notify the Organization of, the maximum import duty which it will apply in respect of the product concerned.

4. The import duty negotiated under paragraph 2, or made public or notified to the Organization under paragraph 3, shall represent the maximum margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes conforming to the provisions of Article 18, transportation, distribution and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) may exceed the landed cost; Provided that regard may be had to average landed costs and selling prices over recent periods; and Provided further that, where the product concerned is a primary commodity which is the subject of a domestic price stabilization arrangement, provision may be made for adjustment to take account of wide fluctuations or variations in world prices, subject where a maximum duty has been negotiated to agreement between the countries parties to the negotiations.

5. With regard to any product to which the provisions of this Article apply, the monopoly shall, wherever this principle can be effectively applied and subject to the other provisions of this Charter, import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product, account being taken of any rationing to consumers of the imported and like domestic product which may be in force at that time.

6. In applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes.

7. This Article shall not limit the use by Members of any form of assistance to domestic producers permitted by other provisions of this Charter.

## ad Article 31

Paragraphs 2 and 4

The maximum import duty referred to in paragraphs 2 and 4 would cover the margin which has been negotiated or which has been published or notified to the Organization, whether or not collected, wholly or in part, at the custom house as an ordinary customs duty.

Paragraph 4

With reference to the second proviso, the method and degree of adjustment to be permitted in the case of a primary commodity which is the subject of a domestic price stabilization arrangement should normally be a matter for agreement at the time of the negotiations under paragraph 2 (a).