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

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

## 1. Introduction

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

1.2 On 6 February 1991, the Council agreed to establish a panel and authorized the Council Chairman to designate the Chairman and members of the Panel in consultation with the parties concerned (C/M/247, page 14).

1.3 The terms of reference are as follows:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United States in documents DS17/2 and DS17/3 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2." (DS17/4)

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

Chairman: Mr. Ephraim F. Haran

Members: Mr. Elvezio Contestabile
Mr. Jorge A. Viganó

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

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

## 2. Factual aspects

2.1 The liquor boards are created by provincial statutes and their monopoly with respect to the supply and distribution of alcoholic beverages within their provincial borders is based on provincial legislation. The provinces are constitutionally empowered to enact such legislation under Section 92 of the Constitution Act, 1867, in particular the heads referring to 'Property and Civil Rights' and 'Local Matters within the Province'. The importation of alcoholic beverages into Canada is, on the other hand, regulated by federal legislation. By means of the 1928 Importation of Intoxicating Liquors Act (now R.S.C, 1985), the Canadian Parliament restricted the importation of alcoholic beverages into a province except under the provisions established by a provincial agency vested with the right to sell alcoholic

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

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

2.3 All provinces have government liquor stores situated throughout their territory. In addition, most provinces also allow beer sales at a variety of privately-owned and -operated retail outlets, as well as at on-site (brewery) stores. In Prince Edward Island and Saskatchewan, imported beer has access to the same retail outlets as domestic beer. In Alberta, New Brunswick and Nova Scotia, imported beer has the same access to retail outlets as domestic beer, with the exception of provincial brewers' own outlets. In Manitoba, two out-of-province breweries have access to privately-owned outlets. In the four other provinces, provincial beer is sold through certain outlets that do not stock or sell imported beer. These additional outlets are privately owned and operated: Licensee Retail Stores and on-site micro-brewers' outlets in British Columbia; hotel vendors for off-premise consumption in Manitoba; Brewers Agent and Retail stores in Newfoundland; Brewers' Retail Inc. stores and on-site brewers' stores in Ontario; and licensed grocery stores in Quebec. Table 1 summarizes the situation.

Table 1: Points of sale for beer in Canadian provinces

| Province | Points of sale[1] | Beer sold |
|---|---|---|
| Alberta | 209 liquor-board stores | Listed beer, imported and domestic |
| | 516 licensee outlets (inc. off-premise sales and cold beer vendors) | Imported and domestic beer (inc. unlisted products) |
| | 11 outlets of Alberta brewers (5 on-site and 6 warehousing and distribution operations) | Only own products |
| | 5,800 outlets for on-premise consumption only | Imported and domestic beer |
| British Columbia | 217 liquor-board stores | Listed packaged beer, imported and domestic |
| | 131 rural agency stores | Listed beer, imported and domestic |
| | 206 licensee retail stores | Listed domestic packaged beer only |
| | 295 licensees for off-premise sales | Listed beer, imported and domestic |
| | 4 on-site outlets of micro-brewers | Only own listed products |
| | 6,439 outlets for on-premise consumption only | Listed beer, imported and domestic |
| Manitoba | 49 liquor-board stores | Listed beer, imported and domestic |
| | 175 licensed liquor vendors for off-premise sale | Listed imported beer |
| | 303 privately-owned hotel vendors | Listed domestic beer only (inc. 2 out-of-province brewers) |
| | 1,270 outlets for on-premise consumption only | Listed beer, imported and domestic |
| New Brunswick | 76 liquor-board stores | Listed beer, imported and domestic |
| | 4 agency stores | Listed beer, imported and domestic |
| | 1 on-site outlet of micro-brewery | Only own listed products |
| | 1,161 outlets for on-premise consumption only | Listed beer, imported and domestic |
| Newfoundland | 37 liquor-board stores | Listed beer, imported and domestic |
| | 55 agency stores | Listed beer, imported and domestic |
| | 1,607 brewer's agent stores | Listed domestic beer only |
| | 2 Brewer's Retail Stores | Only members' listed products |
| | 1,209 outlets for on-premise consumption only | Listed beer, imported and domestic |
| Nova Scotia | 94 liquor-board stores | Listed beer, imported and domestic |
| | 1 on-site brewer's store | Only own listed product |
| | 1,231 outlets for on-premise consumption only | Listed beer, imported and domestic |
| Ontario | 621 liquor-board stores (inc. 176 Combination store, stores) | Listed beer, domestic (1 brand per except in 176 Combination stores) and imported |
| | 473 Brewers' Retail Inc. stores | Listed domestic beer only |
| | 80 Agency Stores | Listed imported and domestic beer |
| | 23 On-site brewers' stores | Only own listed beer |
| | 14,000 outlets for on-premise consumption only | Listed imported and domestic beer and private stock orders |
| P. Edward Island | 16 liquor-board stores | Listed beer, imported and domestic |
| | 175 outlets for on-premise consumption only | Listed beer, imported and domestic |
| Quebec | 337 liquor-board stores | Imported beer only |
| | 11,238 licensed grocery stores | Domestic beer only |
| | 14,670 outlets for on-premise consumption only | Imported and domestic beer |

[1]Outlets for on-premise consumption include restaurants, hotels, bars, etc.

| | | |
|---|---|---|
| Saskatchewan | 85 liquor-board stores | Listed beer, imported and domestic |
| | 193 franchisees | Listed beer, imported and domestic (152 not authorized to sell privately distributed beer) |
| | 500 licensee outlets | Listed beer, imported and domestic |
| | 1,500 outlets for on-premise consumption only | Listed beer, imported and domestic |

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

Table 2: Delivery systems for beer in Canadian provinces.

| Provinces | Imported beer | Domestic beer |
|---|---|---|
| Alberta | Public system: the liquor board warehouses imported beer and distributes it to all points of sale (except to outlets of Alberta brewers), and is responsible for the collection and recycling/disposal of empty imported beer containers. | Private system: the liquor board purchases beer from provincial brewers and requires them to warehouse it themselves, deliver it to all outlets and collect and recycle/dispose of their own empty containers. (The distribution radius of cottage brewers is determined by the circumstances of the market place.) |
| British Columbia | Public system: the liquor board warehouses imported packaged beer and distributes it to points of sale. It is responsible for the collection and recycling/disposal of empty imported beer containers.<br><br>Private system: foreign brewers of draught beer are required to distribute their own products according to the same rules and requirements as for provincial products. | Private system: all provincial brewers are responsible to the liquor board for order taking, invoicing and having their products available to all outlets. A private company owned by the province's two main brewers, along with these brewers, delivers their packaged beer; it is also responsible for collecting and recycling provincial brewers' empty containers. Small provincial brewers deliver their own products.<br><br>Public system: the liquor board warehouses out-of-province domestic packaged beer and distributes it to points of sale. |
| Manitoba | Public system: the liquor board warehouses imported beer and distributes it to its retail outlets and to the licensed liquor vendors. | Private system: a company jointly owned by provincial brewers, Associated Beer Distributors, warehouses and delivers their products to the liquor board's retail outlets and to the privately-owned hotel vendors. Two out-of-province brewers have arranged for private Manitoba-based companies to warehouse and deliver their products to any licensee, and to collect returned empty containers at the private hotel vendors.<br><br>Public system: in the case of four out-of-province domestic brands, the brewers have chosen to have these products handled by the liquor board. |

| Provinces | Imported beer | Domestic beer |
|---|---|---|
| New Brunswick | Public system: the liquor board warehouses imported beer and distributes it to all retail outlets (except the manufacturer's on-site store). Licensed establishments purchase and convey imported beer directly from the liquor board. | Private system: the liquor board purchases beer from provincial brewers, who warehouse and deliver it to all retail outlets (except the manufacturer's on-site store). Licensed establishments purchase and convey domestic beer directly from the liquor board, except provincial draught beer which is delivered by the brewers.<br><br>Public system: the liquor board warehouses out-of-province domestic beer and distributes it to all retail outlets (except the manufacturer's on-site store). |
| Newfoundland | Public system: the liquor board warehouses imported beer and distributes it to its retail outlets and to its agency stores. Licensed establishments purchase and convey imported beer directly from the liquor board's own stores and from agency stores. | Private system: provincial beer is delivered by producers directly to all outlets. |
| Nova Scotia | Public system: the liquor board warehouses imported beer and distributes it to its retail outlets. | Private system: provincial brewers deliver their own beer to all liquor board retail outlets and draught beer to licensed establishments.<br><br>Public system: the liquor board warehouses any out-of-province domestic beer and distributes it to its retail outlets. |
| Ontario | Public system: the liquor board warehouses imported beer and distributes it to its retail outlets and licensees. | Private system: a private-sector corporation, Brewers' Retail Inc. (BRI), owned by four Canadian breweries, warehouses, delivers and sells provincial beer, including beer manufactured in Ontario under a foreign label. Provincial brewers deliver directly to BRI warehouses or stores. BRI delivers to liquor board stores. BRI also collects returned empty containers from private individuals through its own stores, from licensed establishments and via private collectors which it funds. |

| Provinces | Imported beer | Domestic beer |
|---|---|---|
| Ontario (cont'd) | | Public system: the liquor board warehouses out-of-province domestic beer and distributes it to its retail outlets and licensees. One domestic brand is permitted per store, except in Combination stores. |
| Prince Edward Island | If the brewer, foreign or domestic, so wishes, the liquor board warehouses its beer and distributes it to its retail outlets. All brewers have the option of delivering direct to the liquor board stores. Licensed establishments arrange to have their beer delivered from the liquor board. | |
| Quebec | Public system: the liquor board warehouses imported beer and distributes it to its stores, and collects empty imported beer containers. The licensed establishments purchase imported beer from the liquor board. | Private system: licensed provincial brewers deliver their products to licensed grocery stores and licensed establishments. These grocery stores must purchase beer from licensed manufacturers. Licensed establishments may purchase beer directly from licensed manufacturers. Refillable containers of domestic beer are collected by a private system operated by the brewers; non-refillable containers of domestic beer are collected and recycled by a private system. |
| Saskatchewan | Foreign brewers have the option of establishing a private warehousing and distribution system which has access to all points of sale open to provincial brewers - liquor board stores, certain franchisees and licensees including for off-premise consumption. For sales under 20,000 cases per 12-month period, the foreign brewer may request the liquor board to deliver them to its stores, all franchisees, and licensees for on-premise consumption. | Private system: the Saskatchewan Brewers Association, a private company owned by two provincial brewers, warehouses and distributes their own products. |

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

2.6 The retail price of beer sold in a Canadian province is established by adding applicable federal customs duties and taxes, provincial mark-ups and taxes to the base price. British Columbia applies both a volume and a percentage mark-up. Ontario also applies a volume levy. Most provincial liquor boards apply a cost-of-service charge, which can be higher for imported beer depending, inter alia, on the extent of the service prescribed or otherwise provided. The provincial mark-ups and cost-of-service charges are applied in addition to the customs duties bound under Canada's GATT tariff schedule. Four provinces (British Columbia, New Brunswick, Newfoundland and Ontario) also apply a minimum purchase or floor price. The United States and one other contracting party have initial negotiating rights on a concession granted by Canada on beer. Table 3 summarizes the situation.

Table 3: Summary of mark-ups, cost-of-service (COS) charges and minimum pricing practices applied by Canadian provinces.

| Province (1) | Mark-up (2) | COS charges (3) | Minimum pricing (4) |
|---|---|---|---|
| Alberta | Same mark-up (ad valorem) on imported and domestic beer. Applied to imported beer after the COS differential. | Flat-rate COS differential on imports; applied before the mark-up. | |
| British Columbia | Same mark-ups (flat rate + ad valorem) on imported and domestic beers other than draught; applied to imported beer after the out-of-store COS differential and before the in-store COS differential. Draught beer: higher mark-up on imported than on domestic draught beer. (The liquor board does not distribute draught beer.) | Flat-rate out-of-store COS differential on imports, applied before the mark-ups; + flat-rate in-store COS differential on imports, applied after the mark-ups. | Minimum reference price for draught beer. |
| Manitoba | Same mark-up (ad valorem with minimum) on imported and domestic beer. Applied to imported beer before the COS differential. | Flat-rate COS differential on imports; applied after the mark-up. | |
| New Brunswick | Higher mark-up (ad valorem) on imported than on domestic beer. (The differential is lower than the audited COS differential.) | | Imported beer cannot retail at a price less than that of a Canadian out-of-province beer of equivalent size and package type. |
| Newfoundland | Higher mark-up (flat rate) on beer (inc. imported) delivered to port than on beer (inc. provincial) delivered to stores. | | Minimum price based on the lowest price of provincial beer. |

- 10 -

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

| | | | |
|---|---|---|---|
| Quebec | Mark-up on imported beer. (The liquor board does not handle or sell provincial or out-of-province domestic beer.) | Flat-rate COS charge on imports for costs of importing and warehousing; applied before the mark-up. | |

- 11 -

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

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

2.8 The 1988 GATT Panel had examined a complaint by the EEC relating to some of the practices of Canadian provincial liquor boards, namely discriminatory practices relating to listing requirements, to price mark-ups and to the availability of points of sale. In its report[1], the 1988 Panel concluded that (i) 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; (ii) 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; (iii) 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 recommended "that the CONTRACTING PARTIES request Canada 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", and "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". The report of the Panel was adopted by the CONTRACTING PARTIES on 22 March 1988.

2.9 In December 1988, Canada informed the Council that, as a result of the Panel findings, an Agreement had been concluded with the EEC concerning trade and commerce in alcoholic beverages (C/M/227). It later confirmed that the Agreement would be implemented by the provinces on a most-favoured-nation basis. In addition to its provisions on spirits and wine, the Agreement provides that the Canadian Competent Authorities shall accord national treatment to beer that is the product of the Community in respect of measures affecting the listing or delisting of such beer, and shall not increase any mark-up differential that existed on 1 December 1988 between beer that is the product of the Community and beer that is the product of Canada. The Agreement further provides that listing or delisting of alcoholic beverages shall be non-discriminatory, based on normal commercial considerations, transparent and not create disguised barriers to trade, and be published and made available to interested persons. In the context of the Agreement, Canada undertook to bring measures on pricing of beer into conformity with its GATT obligations; this undertaking was contingent on and would follow the successful conclusion of federal-provincial negotiations concerning the reduction or elimination of interprovincial barriers to trade in alcoholic beverages, including beer. An Intergovernmental Agreement on Beer Marketing Practices was concluded in early 1991 between the governments of a number of Canadian provinces and territories representing over 80 per cent of the Canadian beer market. This Agreement is aimed at eliminating long-standing provincial regulations, policies and practices that have effectively precluded interprovincial trade in beer. The Agreement is being implemented in stages, with listing, pricing and other practices which discriminate against products from other provinces being dealt with in various time-frames. While this Agreement applies only to Canadian products, it has been designed to facilitate a rationalization and adjustment process for the domestic market that could ultimately lay the basis for Canada meeting its international obligations.
In their argumentation, the Parties referred to their Free-Trade Agreement, the text of which was submitted to the CONTRACTING PARTIES on 26 January 1989 (L/6464). Chapter 5 of the Agreement incorporates the provisions of Article III of the General Agreement (National Treatment) into the Free-Trade Agreement. However, Chapter 12 of the Free-Trade Agreement, while recognizing that the Parties retain their rights and obligations under the GATT (Article 1205), exempts from the provisions of Chapter 5 non-conforming provisions of existing measures relating to the internal sale and distribution of beer and malt beverages, as long as such provisions are not made more discriminatory

[1]BISD 35S/37

than they were on 4 October 1987 (Article 1204). The Free-Trade Agreement was implemented in Canada in large measure by an Act of Parliament which, inter alia, ensures compliance by the provinces with Canada's obligations under that Agreement.

## 3. Preliminary procedural issue (expedited proceedings)

### A. Main arguments

3.1 The United States argued that Canada had failed to bring into conformity with the General Agreement the provincial liquor board practices relating to beer which had explicitly been found in the 1988 liquor board Panel report to be inconsistent with Canada's obligations under Articles II:4 and XI:1 of the General Agreement, specifically discriminatory practices relating to listing, mark-ups and points of sale. It requested that, with respect to these practices, which would not involve extensive factual analysis, the present Panel make its findings and recommendations before considering the status under the General Agreement of the other Canadian provincial liquor board practices covered by documents DS17/2 and DS17/3. In the United States' view, Canada had not fulfilled its obligation "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", and the continued application of these practices resulted in the nullification or impairment of benefits accruing to the United States under the General Agreement.

3.2 Canada argued that the United States could not assert rights automatically under the 1988 Panel report since it had not been a complaining party. Canada further submitted that it had taken, and was continuing to take, such reasonable measures as were available to it to ensure observance of the provisions of the General Agreement by the provincial governments and authorities with respect to the operations of the provincial liquor boards. Because such extensive and substantial changes had occurred since the 1988 Panel report had been adopted, and given the very basic differences of view that existed between the Parties as to the facts of the case, it was inappropriate for the present Panel to make any findings or recommendations with respect to practices maintained by provincial governments or agencies until it had conducted a full investigation of the existing facts and of the relevance thereto of the provisions of the General Agreement. Finally, there was a close inter-relationship between the practices which existed in 1988 and practices currently in place, and the present Panel could not make a full and fair assessment of the relevant facts if it were to sever its consideration of the "new" practices from that of the practices that existed in 1988.

3.3 The United States requested that, should the Panel decline to examine some of the complaints on an expedited basis, it address the question whether any and all of the Canadian provincial liquor board practices identified by the United States were inconsistent with Canada's obligations under the General Agreement and nullified or impaired United States rights under the General Agreement. It would be the understanding of the United States that the Panel would then consider the GATT consistency of existing practices only and not consider as relevant the recently concluded agreements or any other prior measures.

### B. Decision of the Panel

3.4 The Panel gave careful consideration to the United States' request for expedited proceedings, i.e. for the Panel to make an immediate determination that benefits accruing to the United States under the General Agreement had been nullified or impaired as a result of the practices maintained by the Canadian provincial marketing agencies and examined by the 1988 Panel. In 1988, the Panel had indeed found that certain provincial practices were contrary to the provisions of the General Agreement.

Following its recommendation, the CONTRACTING PARTIES had requested Canada 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". However, as noted in paragraphs 4.21 and 4.25 of the Panel's report, it had not made a detailed factual analysis of the practices complained against. The present Panel had now been informed by Canada that changes had occurred with respect to most of the matters dealt with by the Panel in 1988. It, therefore, believed that, before it could make the immediate determination sought by the United States, it would have to make this detailed factual analysis before it could consider whether the Government of Canada had, since 1988, taken such reasonable measures as were available to it to have the provincial agencies bring their practices into line with the 1988 Panel's findings. In other words, it could not proceed on an expedited basis with respect to the measures addressed in the 1988 Panel report. Under these circumstances, it would accede to the request made by the United States, namely to issue findings and recommendations jointly concerning any and all Canadian provincial liquor board practices which were identified in the submissions of the United States.

4. Substantive issues

A. General

4.1 The United States requested that the Panel find that:

1. the discriminatory practices concerning listing and delisting requirements were restrictions made effective through state-trading operations contrary to Article XI:1 of the General Agreement;

2. restrictions on access by imported beer to points of sale constituted restrictions made effective through state-trading operations contrary to Article XI:1 of the General Agreement;

3. restrictions on private delivery were inconsistent with the provisions of Articles III:4 and XVII of the General Agreement;

4. with respect to import mark-ups:

   (a) the following practices were inconsistent with the provisions of Articles II:4 and XVII of the General Agreement:

      (i) the application of differential mark-ups on all imported beer in New Brunswick, Nova Scotia, Ontario and Quebec, and on imported draught beer in British Columbia;

      (ii) the methodologies used in calculating cost-of-service differentials in Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, and Saskatchewan;

      (iii) the overall methodology of price calculation in Alberta, British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan;

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

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

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

(iii) the application, in British Columbia and Saskatchewan, of a second-stage cost-of-service differential after the mark-up;

(iv) the application, in British Columbia, Nova Scotia and Ontario, of ad valorem provincial and federal taxes at the end of the price calculation;

5. the minimum price requirements in British Columbia and Ontario constituted restrictions made effective through state-trading operations contrary to Articles XI:1 and XVII of the General Agreement; and that, to the extent that they discriminated against United States beer in particular, they were inconsistent with the provisions of Article XIII of the General Agreement;

6. the taxes levied on beer containers in Manitoba, Nova Scotia and Ontario were inconsistent with the provisions of Articles III:4 and XVII of the General Agreement;

7. in British Columbia and Ontario, the notification procedures for new liquor-board practices were inconsistent with the provisions of Article X of the General Agreement;

8. as a result of the practices complained of, United States rights under the General Agreement were being nullified and impaired;

and that the Panel recommend that the CONTRACTING PARTIES request Canada to take such reasonable measures as may be available to it to ensure observance of the provisions of Articles II, III, X, XI, XIII and XVII of the General Agreement by the provincial liquor boards in Canada.

4.2 Canada requested that the Panel find that the provincial practices with respect to importation, delivery and conditions of sale, including all aspects of price determination, were in conformity with the provisions of Articles III:4, XI and XVII of the General Agreement, specifically that:

1. the provincial practices regarding the listing of beer for sale in the provinces were applied on a national treatment basis and were in conformity with the provisions of Article XI of the General Agreement;

2. without prejudice to any alternative argument regarding its GATT consistency, the private system of delivery and sale of domestic beer in Ontario was covered by paragraph 1(b) of the Protocol of Provisional Application;

3. the provincial practices with respect to the delivery and conditions of sale of imported beer were in conformity with the provisions of Articles III:4 and XVII of the General Agreement;

4. with respect to import mark-ups:

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

   (b) Canada had demonstrated through independent audits that the cost-of-service differentials applied to imported products were necessarily associated with the marketing of those products and were, therefore, in conformity with the provisions of Article II:4 of the General Agreement interpreted in the light of the provisions of Article 31.4 of the Havana Charter;

   (c) the practice of applying the COS charge before the mark-up was assessed was in conformity with the provisions of Article II:4 of the General Agreement interpreted in light of the provisions of Article 31.4 of the Havana Charter;

   (d) the application of provincial sales taxes and federal Goods and Services Tax was in conformity with the provisions of Articles II and III of the General Agreement;

5. the Non-discriminatory Reference Price maintained by Ontario and the minimum reference price maintained by British Columbia were in conformity with the provisions of Article III:4 of the General Agreement;

6. the environmental taxes levied on beer containers in Manitoba, Nova Scotia and Ontario were in conformity with the provisions of Article III:4 of the General Agreement;

7. an announcement in a provincial legislature in advance of the introduction of a measure fully met the provisions of Article X of the General Agreement;

8. Canada had taken, and was continuing to take, reasonable measures available to it to ensure observance of the provisions of the General Agreement by the Provincial Marketing Agencies with respect to the importation, distribution and sale of beer.

B. Listing/delisting practices

4.3 The United States recalled that the 1988 Panel had found that practices concerning listing and delisting which discriminated against imports were restrictions made effective through state-trading operations contrary to Article XI:1 of the General Agreement. It stated that in all 10 provinces imported beer continued to be subject to conditions and formalities with regard to listing and delisting that were more onerous than those applied to domestic beer. The same could be said for the manner in which those criteria were applied.

4.4 Canada rejected the United States' assertion that its beer continued to be subject to discriminatory listing/delisting practices in all 10 provinces. It was Canada's view that this issue was limited to the practices of the provincial liquor boards and that Canada's obligation in that regard had been fully addressed in its 1988 agreement with the EEC. The EEC had acknowledged this in its submission. The 1988 EEC agreement provided that the listing and delisting of beer "shall be non-discriminatory, based on normal commercial considerations, transparent and not create barriers to trade, and be published and made available to persons with an interest in the trade and listing or decisions to delist products". All liquor board listing/delisting practices met these criteria. The 1988 EEC Agreement required national treatment to be given to EEC products, and this Agreement was being applied on an m.f.n. basis. The listing/delisting practices were thus in conformity with the provisions of Article III of

the General Agreement. In British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan, regardless of where sold, beer had to be listed according to the same criteria. In some cases, the treatment of imported beer with respect to listing and delisting was now better than that afforded to domestic beer from other provinces: in a number of provinces, for example Manitoba, the minimum sales requirements were significantly lower for imported than for domestic products; in Ontario, domestic brewers were entitled to only one brand listing per liquor-board retail store, while no such restriction limited the listings of foreign suppliers. Canada also stated that in the past year, nine domestic beers had been delisted in Manitoba for failure to meet the minimum sales requirement; in Ontario, 62 domestic beers had been delisted since 1987. No United States beer had been delisted in either Manitoba or Ontario during this period.

4.5 The United States stated that the Ontario listing restrictions on domestic beer cited by Canada applied in liquor-board stores only when there were private retail outlets in the vicinity.

4.6 Canada stated that, in Ontario, domestic brewers were permitted a full range of listings at some liquor board outlets, but that this was a special measure designed to serve small rural and northern communities. These stores accounted for less than 4 per cent of total beer sales and were located in sparsely populated areas.

4.7 The United States claimed that the following specific practices discriminated against imported beer, while Canada stated that, in each case the practice was either fully GATT-consistent and based on the commercial interests of the liquor board, or was actually operating to favour imported products.

Alberta:

The United States claimed that the liquor board had indicated that the listing of United States draught beer would not be granted pending a resolution of the current dispute. Canada stated that there were no prohibitions on the listing of imported draught beer. There had been no United States applications in over three years. An application from a United States brewery for a listing for draught beer would receive the same consideration as all other listing applications for draught beer, domestic or imported. Currently nine imported draught beers were listed.

The Panel noted that the Parties could not agree as to the facts of the listing practices in Alberta.

Manitoba:

The United States claimed that separate listing/delisting directives applied to imported and domestic beer and appeared to discriminate against imports. For example, domestic producers appeared to get warning of delisting and time to appeal, while foreign suppliers did not. Canada stated that the policies for imported and domestic beer did appear in separate directives. However, with regard to listing, Manitoba provided non-discriminatory treatment to imported and domestic beers, the only difference being that minimum sales requirements were higher for domestic than for imported beer. With regard to delisting, although the wording was not identical, the delisting advance warning practices were identical: all brewers, both domestic and foreign, were responsible for monitoring sales of their products and all were provided with delisting notifications by 31 January and given 30 days to appeal. Canada also stated that the Manitoba liquor board had indicated that, in the event of a significant launch of an imported product accompanied by a major promotional campaign, it would consider waiving restrictions on applications for general listing, as it did for a significant launch of a domestic product. Also, since 1988, Manitoba's beer listing policies had undergone two substantive changes: prior to February 1990, provincial brewers had been guaranteed a minimum of 22 listings; and since 1989, all imported beer was subject to the same minimum sales requirement, while previously United States beer had faced a higher minimum sales requirement than other imported beer.

New Brunswick:

The United States claimed that, despite listing/delisting procedures which were stated to be non-discriminatory, imported United States beer appeared to be limited to three listings. Canada stated that United States listings were not limited to three; the current listings were all that had been applied for by United States suppliers. Furthermore, locally-brewed products were limited to their current number of listings while there was no such limitation on imports or other domestic products.

Nova Scotia:

The United States claimed that, despite listing/delisting procedures which were stated to be non-discriminatory, only three listings were granted to imported United States beer. Canada stated that there was no policy limiting the number of United States listings. The liquor board had invited another United States brewer to apply for a listing but that company had declined. No United States beer had ever been delisted. All beer sold in liquor-board stores was subject to listing and delisting requirements, the minimum sales requirement being higher for locally-produced than for imported beer.

Ontario:

The United States claimed that imported beer was limited to listings of the six-pack size, while domestic beer was allowed listings in different package sizes. This enabled domestic brewers to offer volume discounts. Domestic beer could be offered for sale in different package sizes in the 473 Brewers' Retail stores, which may not sell imported beer. Canada stated that, following the 1988 Panel report, Ontario had adopted a new listing/delisting policy which provided to imports treatment equal to or better than that afforded to domestic products. Locally-produced beer must meet similar strict provincial control criteria for listing and delisting in the private distribution system. The six-pack configuration requirement applied in liquor-board stores due to operational limitations and was administered on a national treatment basis to both domestic and foreign suppliers, in conformity with the provisions of Article III:4 of the General Agreement. Canada stated that domestic brewers were only permitted to list larger package sizes (i.e. 24-pack) as a narrow exception to the general rule, in only a limited number of liquor-board outlets serving small rural and northern communities. N°liquor-board suppliers were permitted to offer volume discounts. Each package size had a separate listing and all listings had to meet the minimum sales requirements. In regular liquor-board outlets, which accounted for the vast majority of liquor-board sales, domestic beer faced restrictions more onerous than those applied to imported products. Regular liquor-board outlets had originally not stocked any domestic beer. Because of complaints from Ontario brewers that they received less favourable treatment than imported products, this practice had been changed in the 1970s to permit domestic brewers one six-pack brand per liquor-board store. This requirement still discriminated against domestic beers in relation to imported products. With the exception of Ontario, no liquor board had a policy on packaging options.

Prince Edward Island:

The United States claimed that, despite stated listing/delisting criteria, no listings had been granted to United States beer. Canada stated that there had only been two applications for United States products; they had been rejected because they did not meet the requirement that the product be sold in bottles, a requirement which was applied to all applications.

Quebec:

The United States claimed that beer produced locally was not subject to the regulations that governed the marketing of imported and out-of-province domestic beer, for example minimum sales requirements. Canada stated that there was no discrimination with respect to the beers handled by the liquor board. The liquor board did not handle provincial or out-of-province domestic beer. The principle of minimum sales was a common and widespread commercial practice applied by every wholesaler, whether private or public; it helped reduce costs. The Quebec annual minimum sales requirement was based on commercial considerations and was not an onerous one; it represented an average of eight units of product sold per outlet.

Saskatchewan:

The United States claimed that the liquor board had arbitrarily limited the number of United States listings to four and categorically refused to consider new listings at that time regardless of stated criteria. Canada stated that the liquor board had not categorically refused listings beyond the current four and had indicated to unsuccessful applicants that it would be prepared to consider a re-submission for the next listing period. In introducing United States beer to the Saskatchewan market, the liquor board had decided to commence with four listings; this decision had been a transitional one and was no longer in effect. The liquor board had no set number of listings for imported beers.

C. Restrictions on access to points of sale

4.8 The United States recalled that the 1988 Panel had found that practices concerning the availability of points of sale which discriminated against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1 of the General Agreement. The United States stated that, with the exception of New Brunswick and Prince Edward Island, locally-produced or domestic beer benefited from the availability of points of sale additional to those available for the sale of imported beer. In some cases (e.g. cold beer stores in Manitoba), certain outlets were prohibited from selling imported beer, while in others (e.g. British Columbia) the discrimination against imported beer with respect to availability of points of sale resulted from the fact that the liquor board did not distribute imported beer to certain types of outlets. Some of the additional outlets available for the sale of domestic beer only, for example cold beer stores, were outlets for which there was a strong consumer preference and they accounted for a large proportion of total beer sales. The United States argued that Canada had failed to address its extensive discriminatory point-of-sale practices since the 1988 Panel report.

4.9 Canada stated that the issue of points of sale was a complex one and that practices varied from province to province. Canada said that, as a starting point, it was necessary to distinguish between the existence of import monopolies, which were recognized under GATT, and the existence of private companies that distributed beer in several of the Canadian provinces. An import monopoly carried with it certain rights, for example to have the imported product sold only through the monopoly. This was consistent with the provisions of the General Agreement. All provinces had government liquor stores situated throughout their territory and the obtaining of a listing provided access to them for the product concerned. The favourable treatment provided to imported beer in those government stores had meant that imported beer had access to the private domestic consumer which was unparalleled in the world. As to private companies, the system of having locally-produced beer available for sale at privately-authorized outlets had evolved as a result of a long tradition and had not been established with a view to discriminating against imported beer. The establishment of local private distribution systems in the 1920s and 1930s pre-dated Canada's GATT obligations and were a reflection of the ability of the

local authority to regulate the local industry and at the same time provide a service to its population. In Alberta, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan, imported and domestic beer could be sold at the same government retail stores, agencies, franchises or private outlets (in Alberta, all privately-owned vendors could stock and sell any imported or domestic beer, whether listed or not). In the remaining provinces (British Columbia, Manitoba, Newfoundland, Ontario and Quebec), various forms of private distribution systems had been established; they were limited to provincial breweries which were under the regulatory control of the provincial authority. In these provinces, imported beer was sold at the liquor-board stores or at agency or vendor stores operated under the authority of the liquor board. It was not possible to generalise, however, with respect to the private distribution systems; locally-produced beer could be sold through a variety of combinations of liquor-board stores or agencies and private licensed outlets - in Quebec exclusively in private licensed outlets. The private distribution systems, although regulated by the provincial authorities, were without any state involvement in their ownership or management structure. They were commercially separate and distinct from the provincial control boards. They were not an emanation of government, nor agents of the provincial control boards and had no power over imports. The Ontario and Quebec systems, while different, had both been in place since the 1920s, were the reflection of the ability of the local authority to regulate the local industry, and had developed to reflect social objectives unique to each province. Ontario breweries established Brewers' Retail Inc. (BRI) in 1927 pursuant to provincial legislation. Under that legislation, the liquor boards could authorize only Canadian brewers to sell beer in the province. Although regulated by the liquor board, BRI remained a purely private-sector corporation. It provided beer throughout the province at uniform prices in a manner consistent with the various control practices maintained by the province, and operated a comprehensive container return handling system. There was no law, regulation or government-imposed restriction preventing BRI from selling imported beer; however, it would have to purchase it from the liquor board and whether it did so was a matter within its own discretion. In Quebec, the one exception to the liquor board's monopoly was that beer brewed in Quebec was sold through grocery stores and not through the liquor board. This separate system was established by law in 1921, when the liquor board was created. To sell beer, local brewers had to obtain a permit from the provincial authority. In Manitoba, the system of having locally-produced beer available for sale at privately-authorized outlets had been in place since 1934, established through an amendment of the Liquor Control Act to provide improved service to consumers. Similarly in British Columbia and Newfoundland, the system of having locally-produced beer available for sale at privately-authorized outlets had been in place since the end of prohibition.

4.10 The United States disputed Canada's argument that the restrictions imposed by the liquor boards system reflected a social policy objective. Controlling only foreign-produced beer could not serve to implement a social policy but only to protect domestic production. The United States also stated that nothing in Canada's description of legislation pre-dating GATT suggested that the liquor boards in question could not as a matter of law provide sales of imported beer at points of sale commensurate in number and level of service to those for domestic beer. The United States further stated that Canada appeared to argue that the points of sale provided separate but equal treatment to imported and domestic beer, and thus were not inconsistent with the national treatment obligation of Article III:4 of the General Agreement. However, the denial of access by imported products to cold beer stores of itself amply demonstrated that less favourable treatment was being provided to imported than to domestic beer; private outlets were also more responsive to consumer demand than the liquor boards, which suffered, as Canada had stated was the case for Ontario, from operational limitations. The United States claimed that the 1988 Panel had found these practices to be inconsistent with Article III:4 of the General Agreement.

4.11 Canada recalled that what it had stated was that Ontario liquor board outlets, like all retail businesses, were subject to certain operational limitations which simply prevented it from handling and selling large-size packages in unlimited quantities and from stocking beer without regard to sales levels. Canada also felt that, as far as restrictions on access to points of sale in the form of private retail outlets

were concerned, the 1988 Panel had not addressed the issue with the degree of specificity that would allow Canada to determine how to comply with its GATT obligations. The fact that different systems existed in some provinces with respect to where imported and domestic beer might be purchased by the consumer did not in itself mean that this constituted a breach of Article III:4 of the General Agreement. The national treatment standard did not mean equal treatment; different treatment might be provided where imports were not treated less favourably than the domestic product.

4.12 The United States also argued that, because domestic beer was permitted to be sold at points of sale not operated by the liquor boards and thus not subject to some or all of the service charges, cost-of-service charges discriminated against imported beers. Similarly, because domestically-brewed beer was distributed largely outside the provincially-managed system and thus escaped the application of the strict listing/delisting criteria applied to imported products, the listing/delisting practices of the liquor boards, even when in conformity with the strict national-treatment criteria, still operated in a discriminatory fashion. Thus:

Manitoba:

The United States claimed that minimum sales and other listing/delisting requirements nominally applied to domestic beer were irrelevant because more than 90 per cent of domestic beer was sold in "cold beer stores" not subject to the shelf limitations of liquor board stores. Canada stated that the requirements were not irrelevant for domestic beer. During the past fiscal year, nine domestic beers had been delisted for failing to meet minimum sales and other requirements. No imported beers had been delisted during this period.

Ontario:

The United States claimed that the fact that imported beer could be sold only through the liquor-board system made the minimum sales requirement a real limitation. Canada stated that the liquor board's minimum sales requirements were identical for imported and domestic products and did not discriminate against imported beers. Beer sold through the private system was not taken into consideration for purposes of assessing whether a product met the liquor-board requirements.

Newfoundland:

The United States claimed that the fact that imported beer could be sold only through the liquor-board system made the minimum sales requirement a real limitation. Canada stated that the minimum sales requirement was based on commercial considerations. It required that only an average of 48 cases (of 12) be sold per outlet during the year. Only one United States product had been delisted in the last three years for failure to meet the requirement.

The United States recalled that the Panel on EEC fruits and vegetables had found that two measures acting as a system (a minimum price associated with a deposit) constituted a restriction other than duties, taxes or other charges within the meaning of Article XI:1.

4.13 Canada argued that, in face of the long history of provincial practices which predated GATT, it was reasonable to expect that the Canadian industry would require time to adapt and to make any remaining changes which would lead to a liberalization of distribution rules. In order to ensure that Canada's industry would survive in the face of liberalization, the necessary step was the opening of the Canadian market for Canadian producers. This was being done. The federal and provincial governments were treating points of sale as a priority issue in the Intergovernmental Agreement on Beer Marketing Practices, which would provide the basis for meeting Canada's international obligations. (Also see Section 4.I. below.)

Protocol of Provisional Application

4.14 Canada argued that the private system of delivery and sale of domestic beer in Ontario was covered by paragraph 1(b) of the Protocol of Provisional Application (PPA), according to which Canada applied Part II of the General Agreement to the fullest extent not inconsistent with existing legislation. Canada stated that the complaint before the Panel had been brought as the result of an action taken by a United States firm under Section 301 of the United States Trade Act. This Act provided for trade action by the United States Government where it considered that obligations under international treaties had not been met or that United States trade interests had been affected. Canada was firmly of the view that such trade action must be in accordance with GATT rules. This would require authorization by the CONTRACTING PARTIES of any suspension of concessions or other obligations under Article XXIII:2 of the General Agreement. Bearing in mind the procedures in Section 301, which required a determination on whether trade action was appropriate, Canada requested the Panel to examine the legislation of Ontario as it related to the sale of foreign beer in light of the PPA. Canada stated that what was in question was the consistency of provincial laws with the provisions of the General Agreement, and argued that, just as the Panel would look at the exception clauses of the General Agreement with respect to such provincial laws, so it should consider the applicability of the PPA to these laws. Canada accepted the interpretations of the PPA by previous panels - most recently in the Norwegian apples case (BISD 36S/306) - namely that the relevant legislation must (a) be legislation in a formal sense; (b) predate the Protocol; and (c) be mandatory in character by its terms or expressed intent, i.e. impose on the executive authority requirements which could not be modified by executive action. The Ontario Liquor Control Act (R.S.O. 1937. Ch 294) was in effect on 30 October 1947. The Act restricted the sale of beer in Ontario. In addition to sales of beer by the liquor board, section 46 of the Act provided that the liquor board could authorize only a "brewer duly authorized by the Dominion of Canada" to sell beer in Ontario. Through this reference to federally-licensed brewers (the federal Excise Act (S.C. 1934 c. 32) required that any person manufacturing beer in Canada obtain a license), the Ontario legislation made mandatory a prohibition on authorizing foreign brewers to sell beer in Ontario except through the liquor board. This provision had remained in force verbatim until 1975, when minor amendments were made that had not substantively changed the legislation. These remained in effect. The relevant sections of the current legislation (Liquor Control Act R.S.O. 1980 c. 243 as amended) were sections 3 and 1(d), which defined manufacturer as a person authorized under federal law to manufacture liquor in Canada, again a reference to the federal Excise Act. Currently, as a matter of law, the only persons that could sell beer in Ontario were the liquor board, manufacturers of beer as defined in section 1(d), and the BRI whose members were all Canadian manufacturers. In the event that the Panel were to conclude that Ontario's delivery and sales system was inconsistent with the provisions of the General Agreement, Canada requested that it find that these measures were entitled to the benefit of the PPA since they existed pursuant to mandatory legislation in effect in Ontario in 1947.

4.15 The United States stated that the "existing legislation" question did not arise with respect to Part I of the General Agreement. Accordingly, Canada's obligations with respect to Article II would not be affected by the PPA question. The GATT standard on mandatory legislation was that the requirements imposed on the executive authority could not be modified by executive action. As stated in the Belgian family allowances case (BISD 1S/59), the party claiming exception under the PPA must prove that the executive authority could not, as a matter of law, modify its practices to bring them into conformity with the GATT. Canada thus bore a heavy burden to demonstrate that its provincial authorities could not administer their respective laws relating to alcoholic beverages in a GATT-consistent, non-discriminatory manner. The United States further stated that the 1988 Panel had concluded that Canada had failed to meet that burden with respect to federal legislation. The United States did not believe that the Ontario legislation included a clause making it mandatory by the GATT standard. The United States stated, for example, the use of the term "may" in subsection 1 of section 46 of the Liquor Control Act, which appeared not to mandate restrictions on the importation of foreign brewed beer or discrimination against imported beer. The United States also argued that the later amendments to the legislation were more GATT-inconsistent than the pre-existing legislation.

4.16 Canada stated that the legislation was mandatory both in its terms and in its expressed intent. It could not have been altered by the discretionary action of either the federal or the provincial executive. Moreover, the later amendments to the legislation were not more GATT-inconsistent than the original legislation; they merely restructured it, by taking the definition of manufacturer out of the operative section and putting it into a separate definition section, and clarified that BRI had been authorized to sell beer since 1927. The mandatory nature of the prohibition on authorizing foreign manufacturers to sell beer in the province remained in place. Canada reiterated that the Ontario legislation prevented the liquor board from authorizing a foreign brewer to sell beer in Ontario in 1947 and this prohibition could not have been altered by executive action.

D. Restrictions on private delivery

4.17 The United States stated that, in all 10 provinces, Canadian brewers were allowed to operate private warehousing and delivery systems. These brewers were licensed to perform these functions by the various liquor boards. Private distribution cartels operated in Alberta, British Columbia, Manitoba, Ontario, Quebec and Saskatchewan; in Quebec, provincial brewers could also distribute their product directly. Except in Saskatchewan, foreign brewers were permitted neither to participate in these arrangements nor to form private distribution systems. Such practices were inconsistent with the provisions of Article III:4 of the General Agreement, which required that imported products be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The national treatment issue here was similar to that raised in the context of Canada's Foreign Investment Review Act, when a GATT Panel had found that differential treatment of imports which added to the cost of purchase or imposed other unattractive conditions that prevented such imports from competing fairly with domestic products was inconsistent with the provisions of Article III:4 of the General Agreement (BISD 30S/140). Given the discriminatory restrictions on delivery imposed by the liquor boards on imported beer, the latter clearly faced unfair handicaps in competing with Canadian products. The United States, therefore, claimed that these discriminatory delivery practices were inconsistent with the provisions of Article III:4 of the General Agreement.

4.18 Canada rejected the United States' claim that the difference in how imported and domestic beer could be delivered to points of sale was inconsistent with the provisions of Article III:4 of the General Agreement. Canada argued that Article III:4 of the General Agreement did not require identical treatment for imported and domestic products, only treatment no less favourable than that accorded to like products of national origin. The United States had not demonstrated that the existing difference in treatment constituted less favourable treatment for imported beer. The private corporations (not cartels) which delivered domestic beer did so under authority granted by the liquor board; their activities were closely regulated. In some provinces they were required to distribute beer to all outlets and to have it available at a uniform price throughout the province. Furthermore, Canada did not agree that the national treatment issue raised here by the United States was similar to that raised in the context of the Panel on Canada's Foreign Investment Review Act. That Panel had addressed a situation where no monopoly existed. In the present case, no governmental measure prevented foreign membership in the private corporations that operated in Alberta, British Columbia, Manitoba, Newfoundland, Ontario and Saskatchewan, and thus there was no contravention of the national treatment obligation under Article III. In Quebec, private brewers did not operate a joint distribution system. Access to an existing private corporation did not, in any case, remove the right of the liquor board to first receivership. Nor was it inconsistent with GATT provisions for the import monopoly to move the product from its warehouse to the different points of sale.

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

provisions of Article XVII.

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

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

4.22 Canada said that it had not conceded that the liquor boards had operational limitations, "inherent" or other, which other retailers did not face. Like other commercial operators, the liquor boards faced limits on type and quantity of product that they stocked. Because they were profit-making operations, they could not be expected to handle products without regard to customer preference and other commercial considerations. Canada also rejected the United States' claim that Canada had not complied with the standards laid down in Article 31 of the Havana Charter. Article 31.1 of the Havana Charter called for the Members to negotiate, in the manner provided for under Article 17 of the Charter, in respect of tariffs. Article 31.1(b) dealt with the case of an import monopoly and called for 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 to relax any limitation on imports of the product comparable with a limitation made subject to negotiation under the Charter. Canada stated that there were no limitations on imports of beer into Canada. Article 31.2 of the Havana Charter went on to set out how Members might meet the requirements of Article 31.1(b). This could be done either by the establishment of a maximum import duty on the product concerned or through any other mutually satisfactory arrangement consistent with the provisions of the Charter. Canada stated that it had negotiated its tariff on beer with the United States in fulfilment of Article 31.2(a). Indeed, the United States held an initial negotiating right on this product. Canada further submitted that it had fully complied with Article 31.4 of the Havana Charter, which allowed the import monopoly concerned to add to the price of the imported product "transportation, distribution and other expenses incident to the purchase, sale and further processing, and a reasonable margin of profit". Compliance with these requirements had been demonstrated in the arguments submitted by Canada with respect to the cost-of-service issue (see paragraph 4.41 below). Article 31.4 was specifically related to the import duty negotiated under Article 31.2, which in turn satisfied the requirements referred to under Article 31.1. Further, Canada submitted that it imported and offered for sale quantities of beer sufficient to satisfy the full domestic demand for the imported product. The United States had provided no evidence in support of its claim to the contrary. There was no restriction on the quantity of imports of any beer into any province in Canada.

4.23 In response to a question from the Panel, Canada recalled that Article II:4 of the General Agreement, together with Article 31.4 of the Havana Charter, envisaged the existence of a monopoly. The audits were intended to address the points relating to these provisions and to demonstrate that Canada was meeting its obligations under Article II:4. Furthermore, the provincial monopolies had been in existence since well before 1947. The negotiations on the tariff concession on beer had been carried out in accordance with the provisions of Article 31.4 of the Havana Charter and under expectations concerning the competitive relationship between imported and domestic beer that took into account the existence of the monopolies.

4.24 The United States also argued that the restrictions on private delivery meant that other practices operated in a discriminatory manner; thus (1) the possibility afforded to domestic brewers of organising private delivery systems enabled them to avoid cost-of-service (COS) charges. This practice was inconsistent with the provisions of Article III of the General Agreement; (2) the fact that foreign suppliers were prevented from establishing private distribution systems, which could then be used as a basis for commercially viable systems for the collection of empty containers, meant that the taxes on beer containers operated in a discriminatory manner; (3) in British Columbia, the prohibition on the private delivery of imported packaged beer added an element of discrimination to the mark-up differential on draught beer; importers were forced to form a delivery system solely to handle draught beer, while domestic producers could enjoy the economies of scale of a delivery system which could handle both draught and packaged beer. The United States recalled that the Panel on EEC fruits and vegetables had found that two measures acting as a system (a minimum price associated with a deposit) constituted a restriction other than duties, taxes or other charges within the meaning of Article XI:1.

4.25 Canada rejected the United States' contention that domestic brewers avoided COS charges. The COS differential reflected the difference in the services rendered by the liquor boards to domestic and imported beer. These services quite naturally resulted in additional costs to the liquor boards. All liquor boards provided a range of services for imported beer, such as handling and delivery, which were not generally available to domestic products. Domestic suppliers had to bear these external delivery and handling costs themselves, whereas the liquor boards performed this service for imported products. This constituted better than national treatment. The ability to sell through the public system provided significant economies of scale, without the need to invest in a wholesale/delivery system. Licensed establishments had access to listed imported products without additional cost to the supplier. For domestic beer sold privately, the liquor boards incurred no costs and applied no COS fee; the costs were incurred by the breweries and reflected in their prices. For domestic beer sold through liquor-board stores, the liquor boards incurred no out-of-store costs and no out-of-store COS fee was applied. For imported beer sold through liquor-board stores, the liquor boards incurred out-of-store costs and these were recovered. Both imported and domestic beer involved in-store costs and those were applied on an equal, i.e. national treatment, basis to each. Canada further stated that the imposition of an environmental tax did not violate the provisions of Article III:4 of the General Agreement. Nor did the expense for a foreign brewer to establish a container return system constitute a violation of the provisions of Article III:4.

## E. Import mark-ups

### (i) Mark-ups

4.26 The United States recalled that the 1988 Panel had found that mark-ups which were higher on imported than on like domestic alcoholic beverages could only be justified under Article II:4 of the General Agreement 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 United States stated that following the adoption of the 1988 Panel report, some

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

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

New Brunswick:

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

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

Newfoundland:

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

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

Nova Scotia:

4.32 The United States argued that the discriminatory mark-ups applied by Nova Scotia, which had actually been increased on 1 January 1988, constituted import charges inconsistent with the provisions of Article II:4 of the General Agreement.

4.33 Canada stated that, in Nova Scotia, the calculation of the mark-up on imported bottled beer and provincial bottled beer in 12-packs was based on equivalent landed costs at the retail store and the rate of mark-up of 70.4 per cent was the same for both. For such provincial beer the landed price was the invoiced price because the brewers incurred all delivery costs to the stores; for imported bottled beer the landed price consisted of the invoice price based on delivery to the central warehouse plus the cost-of-service charge to move the product from the warehouse to the retail store. A mark-up of 72.9 per cent applied to provincial bottled beer in six-packs and of 66.9 per cent to provincial bottled beer in 24-packs. Imported and provincial beer in cans was assessed a 72.9 per cent mark-up.

Ontario:

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

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

Quebec:

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

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

British Columbia:

4.38 The United States stated that British Columbia had, in April 1988, replaced a prohibition on the sale of imported draught beer by a mark-up differential, although the liquor board did not distribute either domestic or imported draught beer. The United States argued that, in the light of the findings of the 1988 Panel and of the fact that the liquor board bore no costs with respect to imported draught beer, the differential in the mark-up applied to imported draught beer in British Columbia was inconsistent with the provisions of Articles II:4 and XVII of the General Agreement.

4.39 Canada argued that British Columbia was clearly moving in the direction of bringing its practices on this issue into compliance with the provisions of the General Agreement, in line with the 1988 Panel report. The introduction of imported draught beer on a permanent basis for the first time in 1989 had constituted a major policy change and entailed significant adjustments on the part of the liquor board and the local industry. There were currently 22 listings of foreign draught beer, but no United States brewer had as yet applied for a listing of draught beer. There was at present no provision for listing of draught beer from other Canadian provinces, although it was envisaged in the context of the

interprovincial agreement. British Columbia had committed itself to that agreement and expected that the process underway to liberalize trade within Canada would enable its industry to achieve the competitiveness that would make possible the removal of the mark-up differentials on draught beer. Canada would continue its efforts to have British Columbia bring its practices into full conformity with Canada's international obligations.

(ii) Cost-of-service charges and differentials

4.40 The United States recalled that the 1988 Panel had considered that differential mark-ups could be justified to offset additional costs of transportation, distribution and other expenses incident to the purchase, sale or further processing, such as storage, necessarily associated with importing products. It had concluded that the mark-ups which were higher on imported than on like domestic alcoholic beverages could be justified, under Article II:4 of the General Agreement, 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 burden of proof would be on Canada if it wished to claim that additional costs were necessarily associated with marketing of the imported products. The United States considered that those Canadian liquor boards imposing a cost-of-service differential on imported beer (Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Quebec, Saskatchewan) had failed to show that additional costs were incurred in the handling of imported beer or, if they were incurred, that the differentials accurately reflected them. It appeared that the "additional" costs were the product not only of inappropriate accounting methodologies, but also of discriminatory practices maintained by the boards. Imports generally, and United States beers in particular, were further penalized by the COS methodologies because they were based on a noncompetitive cost structure and an unfairly small volume of sales. For example, in Saskatchewan the COS differential for all imported beer was derived from figures for a period during which sales of United States beer were absolutely prohibited in the province. The United States argued that, to the extent that costs were generated by practices inconsistent with the provisions of the General Agreement, they could not legitimately be included in the calculations. The United States concluded that the methodologies used in calculating the COS differentials applied to imported beer operated in such a way as to afford protection in excess of the amount of protection provided for in Canada's Schedule of Concessions and were, therefore, inconsistent with the provisions of Articles II:4 and XVII of the General Agreement.

4.41 Canada stated that it had the right to operate import monopolies consistent with Article XVII of the General Agreement and to have these monopolies include in their price for the imported product charges incident to the purchase and sale of these products, consistent with Article 31.4 of the Havana Charter. Furthermore, the 1988 Panel had found that the liquor boards were free to apply differential mark-ups on imported alcoholic beverages provided they represented the additional costs necessarily associated with marketing of the imported products. Canada considered that the United States and EEC had had unrealistic expectations of the change which would be yielded by strict application of the provisions of Article II:4 of the General Agreement in the light of Article 31 of the Havana Charter. The United States had not substantiated its claim that the liquor boards had failed to show that additional costs were incurred in the handling of imported beer or, if they were incurred, that the differentials accurately reflected them. Canada rejected that claim. Canada stated that the liquor boards imposed COS charges relating to the services they provided, incident to transportation, distribution, purchase and sale, as well as to facilities used in distribution and marketing. The COS charges might be different for imports and provincial products because there were different or additional services to be provided. Canada and the provinces had taken steps to ensure that such additional charges with respect to imports were justified in a manner which would satisfy the requirement of the 1988 Panel's conclusion. The provinces had provided audits to verify the claim of additional costs incurred by the liquor boards in the importation and marketing of beer. The audits had been carried out by independent, internationally recognized accounting firms, except in the case of Manitoba, where the audit had been

conducted by the Provincial Auditor General who operated at arm's length from the liquor board and provincial government. These auditors had been asked to determine whether the allocations of costs were in accordance with proper accounting methodology, taking into account the GATT requirements as expressed in the 1988 Panel report. Canada considered that the audits fully met the objections raised by the United States and satisfied the obligation to demonstrate that the COS differentials accurately reflected the additional costs which were incurred in the importation and marketing of imported products. The range of COS differentials reflected the variety of conditions under which different liquor boards operated and the differences in liquor-board practices. Canada concluded that the audited COS differentials were consistent with Article II:4 of the General Agreement interpreted in the light of the provisions of Article 31.4 of the Havana Charter, and that it had discharged the burden of proof, as required by the 1988 Panel report, in the best way it could.

4.42 The United States argued that an independent auditor could offer an opinion as to whether certain types of costs had been properly accounted for, but was neither trained nor equipped to determine which types of costs were necessarily associated with marketing of a product. The United States further argued that Canada had given insufficient guidance to the auditors concerning the standards laid down by the CONTRACTING PARTIES in adopting the 1988 Panel report; as a result the audit methodologies were flawed. This was apparent in the case of Saskatchewan, where the auditors believed that all costs, rather than all "additional" costs, necessarily associated with marketing of imported beer could be included in the COS differential.

4.43 Canada stated that the audits had been conducted according to generally accepted auditing standards and argued that the methodology employed in an audit was a matter which professional auditors were qualified to determine. Canada stated also that the letter addressed by the federal authorities to the provinces outlining the cost-of-service audit obligations, while not referring explicitly to GATT obligations, did so implicitly by referring to the terms of the Canada/EEC agreement, which had been negotiated in line with the findings of the 1988 Panel. In the case of those provinces which provided audits, the auditors had been instructed to address the relevant requirements outlined in the 1988 Panel report. The auditors had thus followed the criteria laid down in the 1988 Panel report to ensure that all costs included were necessarily associated with marketing of imported beer. Canada believed that independent auditors, equipped with those criteria, were not only qualified to determine which types of costs were necessarily associated with marketing of imports, but were in the best position to do so. The audits had been provided to the United States and the EEC, and Canada had requested and been prepared to deal with any detailed comments or concerns. Canada stated that audits were the required method for verification of costs of service both in the Canada/United States Free Trade Agreement and in the Canada/EEC agreement. In the specific case of Saskatchewan, Canada stated that the liquor board distributed only imported beer and included these distribution costs in its COS differential on a basis comparable to the practice of domestic brewers.

4.44 The United States stated that the experience with audits under the Free Trade Agreement had also been unsatisfactory. The costing methodology applied in that context with respect to wine and spirits (i.e. full-absorption costing) was subject to the same objections as in the case of beer. However, the audits for wine and spirits were not based on the same factual circumstances, and accordingly might not be generally applicable to beer. The United States suggested that it would be helpful if the present Panel could specify in its findings which were the costs that could be considered to be necessarily associated with marketing of the imported beer. It believed that "additional" costs should not include general overhead costs that were incurred regardless of the volume of sales, "imputed" costs that were not actually incurred by the liquor boards, or variable costs over which foreign brewers had no control. In its view, costs had to meet the following criteria in order to be included in a GATT-consistent COS differential: (1) they must be average costs actually incurred; (2) they must be additional or marginal costs that varied directly because the product was imported rather than domestic; (3) they must be necessarily associated with the importing and marketing of foreign beer: costs incurred as a result of

GATT-inconsistent practices could not be deemed to be necessary; (4) they must be incident to the purchase, sale or processing of beer. The United States stated that it was not aware of any costs other than customs clearance and warehouse control (e.g. palletization) that must be incurred by the liquor boards because the product was imported. Canada would bear the burden of proving that any other types of costs were necessarily involved in the marketing of imported beer. The United States stated that beer coming from different countries of origin might generate different costs; if the liquor boards continued to do business in the way they had been doing so far, then the method of calculating costs should not be such as to penalize United States beer. The United States argued, however, that the provincial monopolies need not continue to perform a whole range of services; they could, for example, license operators to deliver imported beer within the province.

4.45 Canada considered that the concept of "necessarily associated with" could only mean all costs associated with importation and marketing. It was normal for any commercial enterprise, publicly or privately owned, to recover all its costs. This meant that a portion of overhead as well as variable costs had to be borne by imported as well as domestic products. Any other standard would mean that imports would be subsidized and domestic products treated less favourably than imports, which would go beyond the requirement of Article III of the General Agreement. In response to the criteria enunciated by the United States, Canada argued that: (1) the imputation of costs in the Ontario audit was due to the accounting policies of the province; the latter could be altered without any change occurring in the economics of the transactions, and hence the determination of the costs of service; (2) the conclusions of the 1988 Panel did not prohibit the recovery of an appropriate allocation of fixed costs, nor indeed of any costs, so long as they were incident to the importation and marketing of a foreign product consistently with Article 31.4 of the Havana Charter. Canada, thus, rejected the view that there should not be a charge for fixed assets employed, proportional to the use of these assets by a particular product. Examples of pricing based on full-absorption costing were to be found throughout the commercial realm and this costing principle had been recognized by the GATT Group of Experts on Anti-Dumping and Countervailing Duties in 1960. Canada argued further, in reply to the United States, that, in cases where marginal costs were lower than average costs, the United States standard would lead to imported products being costed lower than domestic products; (3) the United States appeared to be arguing that, because imported beer had to be sold through outlets that might differ from those for domestic beer, the cost of service was not necessarily associated with importing and marketing of the imported product. Canada argued that import monopolies were envisaged under the provisions of Articles XVII and II:4 of the General Agreement and that, to the extent that these monopolies sold the imported product, they were permitted to recover the properly allocated fixed and variable costs associated with doing so. If no import monopoly existed, the costs would be borne by each producer; (4) the audits proved that the costs included met the criterion of being incident to the purchase, sale or processing of imported beer. Canada argued that allowable costs for inclusion in COS charges should include all additional costs associated with importing and marketing of foreign products, in addition to the marketing costs shared equitably between imported and domestic products; they should, therefore, include the costs, properly allocated in accordance with generally accepted accounting principles, associated with receiving, purchasing, warehousing, shipping, delivery, retailing, financing, and administrative expenses. Canada stated that, while domestic brewers incurred costs in delivering their products to liquor board outlets, the liquor boards ensured the delivery of imported products and could legitimately charge for doing so.

4.46 The United States stated that what was at issue was not a standard commercial system and that, therefore, standard commercial accounting practices could not apply. The United States argued further that discriminatory COS differentials were also inconsistent with the provisions of Article III of the General Agreement, in that they were assessed after importation without the provision of national treatment.

4.47 Canada considered that the concept of "necessarily associated with" could only mean all costs associated with importation and marketing of foreign beer. Any standards which were adopted which did not permit the recovery of all costs would force a government to treat local products less favourably than imported. This went beyond the requirement of Article III of the General Agreement.

(iii) Methods of assessing mark-ups and taxes on imported beer

4.48 The United States argued that, as the landed cost of imported beer included federal import duties which did not apply to domestic beer, a COS charge calculated, and apparently applied in Nova Scotia and New Brunswick, on an ad valorem basis magnified the differential applied to imports. The practice was inconsistent with the provisions of Article III:2 of the General Agreement.

4.49 Canada stated that the provinces which currently imposed a COS fee applied it on a dollar-per-unit basis, which in some cases was the result of the conversion of an ad valorem rate. Canada considered, however, that the assessment of COS charges on either a per unit or an ad valorem basis was fully consistent with the conclusions and spirit of the 1988 Panel report, which did not specify the manner in which COS charges should be assessed. Those provinces which had chosen to calculate the COS charges on an ad valorem basis had done so following a methodology which was fully consistent with normal commercial considerations. Canada argued that the United States' statement that inclusion of federal duty charges in landed costs magnified or inflated COS differentials was incorrect. In Ontario, for example, both the calculation and the application of COS charges were unaffected by federal duty rates.

4.50 The United States stated that, in Alberta, British Columbia, Nova Scotia, Quebec and Saskatchewan, a COS differential was applied before the mark-up was assessed. The United States argued that this practice had a "cascading" effect which magnified the difference in the final prices of imported and domestic beer and that it was inconsistent with the provisions of Article III:2 of the General Agreement.

4.51 Canada stated that the practice of applying the COS fee before the mark-up was assessed was fully consistent with the findings of the 1988 Panel and with normal commercial practice of applying the mark-up on the full cost of goods: with respect to domestic beer, domestic brewers were responsible for distribution and the costs incurred were included in the price to the liquor boards, on which the mark-up was applied: with respect to imported beer, the distribution costs were borne by the liquor board and similarly applied before the mark-up. In the five provinces in question, the mark-ups applied were equal for domestic and imported beer. Furthermore, while Saskatchewan and British Columbia did apply a two-stage COS differential, it was applied on a dollar-per-unit basis and, therefore, had no cascading effect. Canada stated that corporations, as a matter of practice, charged their operating divisions a charge on capital employed, to reflect the actual costs of operation. They were entitled to a return on assets employed. Additionally, Canada submitted that it was common commercial practice for a mark-up to be applied to the laid-in cost at the warehouse or point of sale, which could include other charges such as the cost of service. Examples of pricing based on full absorbed cost were found throughout the commercial realm. Canada stated that, in the case of public utilities in the United States, it was a well-established fact that prices were set on a rate-base calculated on the totality of relevant costs, including production costs, operating expenses, value of fixed assets, depreciation, wages and administrative costs, in determining an appropriate return for services and assets employed. Canada referred to the conclusions of the 1960 GATT Group of Experts on Anti-Dumping and Countervailing Duties report in paragraphs 12 and 13 in support of its position (see also paragraph 4.45 above).

4.52 The United States also argued that the application of provincial taxes and of the federal Goods and Services Tax (GST) at the end of the price calculation, as was done in the provinces of British Columbia, Nova Scotia and Ontario, increased the discriminatory impact of the COS differentials. This

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

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

4.54 The United States further argued that looked at overall, the approach to price determination by the liquor boards of Alberta, British Columbia, Nova Scotia, Ontario, Quebec and Saskatchewan was also plainly discriminatory and inconsistent with the provisions of Article II:4 of the General Agreement, in that it afforded protection to domestic beer in excess of the amount of protection provided for in Canada's Schedule of Concessions.

4.55 Canada could not accept the United States' allegations and indicated that price determination in all of the above provinces was non-discriminatory and fully consistent with the provisions of the General Agreement.

F. Minimum price requirements

Ontario:

4.56 The United States argued that the "Non-discriminatory Reference Price" (NDRP) applied in Ontario since September 1990 established a minimum price for imported and domestic beer and prevented United States brewers from competing on the basis of price. As such, the NDRP was equivalent to the minimum import price considered by the Panel on EEC fruits and vegetables to constitute a restriction other than duties, taxes or other charges within the meaning of Article XI:1 of the General Agreement (BISD 25S/68). The United States argued that the NDRP was similarly inconsistent with the provisions of Articles XI:1 and XVII of the General Agreement.

4.57 Canada rejected the United States' claim that Ontario's NDRP operated as a minimum import

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

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

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

4.60 Canada stated that the purpose of the NDRP was to ensure that suppliers would not offer deep price discounting, thereby encouraging excessive consumption. When the NDRP was introduced in 1989, it was set at a level which was just below the existing purchase price for domestic and imported beer. N°supplier had been affected. Canada explained that the NDRP, the wholesale floor price below which both imported and domestic beer would not be purchased by the liquor board, included the supplier quote, plus federal excise tax and duty and the liquor-board freight and in-store and out-of-store cost-of-service charges. These components had been chosen because they represented that point in the price structure at which imported and domestic beer costs were most comparable. Because domestic delivery and retail costs were subject to an ad valorem charge (as opposed to imported beer whose delivery and retail costs were not subjected to a provincial charge), the NDRP resulted in a higher retail price for domestic beer than for imported beer. Furthermore, the fact that imported beer was selling at a lower price in Ontario than provincial beer was evidence that foreign beer could compete on a commercially reasonable basis. As the NDRP did not afford less favourable treatment to imported than to domestic beer, Canada's obligations under Article III:4 were being honoured.

4.61 Canada further argued that the existence of a tariff binding on a product did not prevent a government from introducing an internal regulation consistent with Article III. Were the application of such a measure to affect trade in a product subject to a binding, redress might be had through a determination of whether this GATT-consistent measure nonetheless nullified or impaired benefits accruing to a contracting party. In such circumstances, however, the contracting party claiming impairment would, under the terms of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (Annex, paragraph 5), "be called upon to provide a detailed justification".

4.62 The United States further argued that, to the extent that United States beer was more efficiently brewed and competitively priced, the NDRP discriminated against United States beer in particular and was thus also inconsistent with the provisions of Article XIII of the General Agreement.

4.63 Canada stated that the United States had not provided any evidence that United States beer had been affected by the NDRP. Since 1985, no foreign supplier had submitted a quote below the current NDRP level. Implementation of the NDRP had had no effect on imported beer retail prices and there continued to be scope for price competition among domestic and imported beers. Given the fact that the NDRP did not constitute a prohibition or restriction on importation, Canada rejected as not relevant the United States' contention that its application violated obligations under Article XIII of the General Agreement.

British Columbia:

4.64 The United States argued that the minimum reference price for draught beer applied since 1989 in British Columbia was, similarly to Ontario's NDRP, inconsistent with the provisions of Articles XI, XIII and XVII of the General Agreement.

4.65 Canada stated that its observations on Articles III and XI of the General Agreement applied to provincial minimum pricing policies. British Columbia's minimum reference price was a retail price below which provincial or imported beer may not be sold to licensees. A supplier must charge a wholesale price such that after application of all taxes and mark-ups, the minimum reference price was met or exceeded. British Columbia's minimum reference price should be examined under Article III:4 and not Article XI. The liquor board did not sell draught beer below a set wholesale price. As this was not a border measure, it should be examined in light of Article III, not Article XI.

New Brunswick:

4.66 The United States stated that Canada's description of the operation of mark-ups in New Brunswick indicated that a floor price applied through the linking of imported beer prices to prices of out-of-province beer prices.

4.67 Canada stated that, given the nature and size of the New Brunswick market, the floor price was applied to prevent deep discounting which could easily destroy the local industry. The floor price was somewhat above the price of provincial beer. The practice had been in place since 1927.

Newfoundland

4.68 The United States also stated that a minimum floor price operated below which imported beer could not be sold at retail outlets in Newfoundland.

4.69 Canada stated that the Newfoundland floor price was, for reasons similar to those relating to the New Brunswick floor price as well as for social policy reasons, equal to the lowest-priced provincial beer. The practice had been in place since 1973.

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

G. Taxes on beer containers

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

4.72 Canada rejected the United States' claim that the tax was inconsistent with the provisions of Articles III:4 and XVII of the General Agreement. Canada stated that this issue had not been raised by the United States in the consultations held under Article XXIII of the General Agreement in July 1990, and did not feature directly among the practices specifically mentioned in the Panel's terms of reference. However, given the importance of the environmental issue, Canada would welcome the Panel's views. Canada stated that, in Manitoba and Ontario, a container charge was levied on all beverage alcohol containers, domestic and imported, which were not part of a deposit/return system; in Nova Scotia, the charge was levied per unit of non-refillable containers, imported and domestic, that were shipped to the liquor board. The charges were designed to encourage the establishment of systems in which consumers returned bottles for refilling and cans for recycling; and where no such system had been established, they helped offset the cost of disposal of the containers. N°government measure prevented foreign brewers either from establishing, in Manitoba or Ontario, collection systems that included a refund, or from using refillable bottles in Nova Scotia, and thereby being relieved of paying the tax. Canada could not accept that the cost of setting up such a system was relevant when the environmental costs to the province of disposal were high. Canada argued that the issue was not the refundability of the tax, but rather that the imposition of the tax was dependent on the type of container used or the existence of a system for refunding returned containers; such conditions did not violate Article III:4 of the General Agreement. Canada stated that the fact that Canadian breweries had established systems for the return of their own bottles was a private commercial decision, not a law, regulation or requirement within the meaning of Article III:4. Nor did the practice, in Manitoba and Ontario, whereby privately-owned retail outlets collected only containers for which a refund system existed, constitute a government measure within the meaning of Article III:4. Further, there was no discriminatory treatment in liquor-board stores, since in Manitoba and Ontario they did not collect any beer containers and in Nova Scotia they collected all refillable bottles. The expense to a foreign supplier of establishing a collection system for imported beer did not in itself constitute a violation of Article III:4. Canada argued that the case of United States taxes on petroleum and certain imported substances was not relevant, as that Panel's findings had rested on the fact that the rate of tax applied to imported products was higher than that applied to domestic products. The tax on beer containers, in contrast, was applied at the same rate and under the same conditions irrespective of origin of the product. What the United States appeared to be seeking was either an exemption from the environmental tax, which would amount to better than national treatment, or an obligation on the liquor boards to provide a container collection or deposit refund system for imported beer. Canada stated that liquor boards would be entitled to charge for such a system as a cost of service.

4.73 Canada stated, in response to the statement by Australia, that it had not invoked Article XX(d) of the General Agreement because it was of the firm belief that the environmental tax was applied in a manner consistent with Article III. In the event that the Panel should find otherwise, Canada requested that consideration be given to the exception in Article XX(b). The environmental tax was a measure intended and implemented solely to protect the environment. Environmental measures protected human and animal health and therefore qualified for the exception under Article XX(b) provided they were "necessary". This term had been interpreted in the Panel on United States Section 337 (BISD 36S/345) and in the Thai cigarette Panel (DS10/R) to mean that there must not be a less GATT-inconsistent manner which the government could use to accomplish its objective. In Canada's view there could be no less trade-restrictive measure than one that applied equally to domestic and foreign beer. The General Agreement was not designed to protect the commercial considerations that led foreign brewers not to establish collection systems; nor should cost be cited to prevent a government from implementing environmental measures pursuant to Article XX(b).

4.74 The United States argued that, as foreign suppliers were prevented from establishing a system for collecting empty containers on commercially reasonable terms, fewer empty containers were collected and recycled than would otherwise be properly disposed of. Canada could not, therefore, justify the measure under Article XX(b) of the General Agreement. Not only was the measure not necessary, but it appeared to work against the interests of public health and safety.

## H. Notification procedures for new practices

### British Columbia

4.75 The United States stated that the liquor board had shared with domestic brewers the results of the audit of its COS differentials several months before importers were advised of the change in pricing policy that followed from these audits. The United States argued that this practice was inconsistent with the provisions of Article X of the General Agreement.

4.76 Canada argued that it had no obligation to produce COS audits; the provinces had, however, chosen to do so as an independent means of substantiating the COS charges. The British Columbia COS study and audit had not been completed until the latter part of October 1990. A copy of the audit had been provided to United States authorities. The mark-up schedule effective 1 January 1991, together with changes relating to the proposed GST legislation, had been communicated to all suppliers of domestic and imported beer on 29 November 1990 by way of a memorandum from the General Manager of the liquor board.

### Ontario

4.77 The United States stated that, on 5 July 1989, the Minister of Economics of Ontario had announced a new pricing policy for beer sold in liquor-board stores to become effective on 10 July 1989; this had denied importers a meaningful opportunity to adjust to the new policy. The United States argued that this practice was inconsistent with the provisions of Article X of the General Agreement.

4.78 Canada argued that an announcement in a provincial legislature in advance of the introduction of a measure fully met the Article X requirement that regulations affecting the sale of imports be published promptly in a manner that enabled government and traders to become acquainted with them.

I. Obligations under Article XXIV:12

4.79 The United States stated that the Government of Canada had had since 1988 to ensure that the liquor boards brought their practices into conformity with the provisions of the General Agreement. However, it had failed to meet its obligations under Article XXIV:12 of the General Agreement, namely to take "such reasonable measures as may be available to it to ensure observance of the provisions of the Agreement by the regional and local governments and authorities within its territory". The operation of import monopolies with respect to alcoholic beverages for the purpose of revenue-raising was not, in and of itself, inconsistent with obligations under the General Agreement: but their revenue-raising objectives should be carried out without interference with the importation, delivery and sale of beer. The United States stated that liquor-board practices had changed since 1988, but argued that these changes had had either no effect or a negative effect on market access for imported beer. The agreement concluded by Canada and the EEC provided for national treatment to be accorded to imported beer with respect to the provinces' listing and delisting practices; however, the United States stated that this was not being done. Furthermore, Canada had not agreed to eliminate discriminatory mark-ups but merely not to increase the differentials. Points of sale were not addressed at all. In any case, Canada had an obligation to all contracting parties, not just the EEC, to eliminate GATT-inconsistent measures. The United States stated that not all 10 provinces were signatories of the interprovincial agreement and that the agreement did not address access of imported beer; in fact, improved access for Canadian out-of-province beer under current competitive conditions for imports would only serve to increase discrimination against imported beer. The United States stated that the question of time-frame for bringing measures into GATT-conformity was also subject to consideration of what was reasonable.

4.80 Canada rejected as unfounded the claim by the United States that Canada had failed to meet its obligations under Article XXIV:12 of the General Agreement. Canada had taken and continued to take such reasonable measures as might be available to it to ensure observance of the provisions of the General Agreement by the provincial governments and authorities with respect to the operation of the provincial liquor boards. The right of Canada's provinces to operate provincial monopolies for the sale and distribution of alcoholic beverages and to use these monopolies for achieving certain social and revenue objectives was not at issue. Canada stated that, since efforts towards resolving the remaining issues were still actively engaged, the steps to date did not constitute "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". Canada was committed to bringing the liquor-board practices into line with GATT obligations and significant progress had already been accomplished in the context of two major initiatives: the agreement which Canada had concluded with the EEC following the adoption of the 1988 Panel report and which was being applied on an m.f.n. basis, and the intergovernmental agreement. Canada stated that the 1988 Panel had examined essentially the public systems for distribution and sale of beer, and that these had now largely been brought into conformity with GATT provisions. The 300 per cent increase in United States exports of beer to Canada since 1988 belied the statement by the United States that changes in liquor-board practices had had no effect or a negative effect. The agreement with the EEC had settled the long-standing dispute with the EEC over wines and spirits. With respect to beer, it had resulted in national treatment being provided in listing/delisting practices and included an undertaking to bring measures on pricing into conformity with GATT provisions upon successful conclusion of the interprovincial negotiations; however, pricing had been brought largely into conformity with GATT obligations ahead of that target, by the introduction of audited COS charges. Canada underlined that long-standing provincial regulations, policies and practices had shaped the current structure of the Canadian brewing industry, creating in effect 10 distinct regional markets. Following the 1988 Panel report, it had become clear that significant and comprehensive adjustment would have to be made. This process was now engaged but could not be accomplished overnight if Canada was to have a viable, internationally-competitive industry. The intention of the interprovincial agreement was not to erect barriers to trade. The agreement set out to eliminate discrimination in the way beer was treated from one province to another with respect to

listing, pricing and distribution and was thus a critical component in building the international competitiveness of the Canadian brewing industry. While not all the provinces had signed the agreement, all were committed to the work of the Technical Committee, which was preparing a plan, including specific time-frames, for the elimination of all remaining discriminatory practices. All the provinces, as well as the federal government, had recognized that it was essential to resolve this matter satisfactorily and had endorsed the process of change at the highest political level. The creation of a truly national market would provide the basis for bringing all remaining practices into compliance with Canada's international trade obligations. Without the necessity for Canada to respond to the findings of the 1988 Panel, the Canadian brewing industry would not be under threat and the need to deal with interprovincial barriers would not have the same political urgency. The interprovincial agreement had specifically recognized the need for the process of elimination of discriminatory practices to "be consistent with Canada's international obligations". It had set a deadline of 30 June 1993 for establishing a timetable for the elimination of remaining discriminatory practices in each province. Bearing this in mind, Canada had proposed to consult with the EEC in the second half of 1993 with the objective of resolving concerns regarding any remaining discrimination relating to access for foreign beer to private distribution systems. Canada was thus continuing to take such reasonable measures as were available to it; these complementary processes had already produced substantial results and provided the most effective means of completing the process.

4.81 The United States suggested that an example of a reasonable measure available to Canada was to be found in the implementing legislation for the Canada/United States Free Trade Agreement. This gave the federal authorities power to promulgate regulations for the implementation of provisions of the Free Trade Agreement relating to the internal sale and distribution of wines and spirits, with the possibility of exempting those provinces whose practices were already in conformity with the relevant provisions of the Agreement. This legislation demonstrated that there were means available to Canadian federal authorities for imposing discipline on provincial liquor board practices concerning beer.

4.82 Canada restated its view, put to the Council at the time of the adoption of the 1988 Panel report, that what was reasonable and what was available ultimately had to be judged in a domestic context, taking into account the sensitive issues of domestic politics and policies. Therefore, with respect to the conclusions in paragraph 4.34 of the 1988 Panel report, Canada thought it inconceivable that contracting parties would consider substituting their views on a question of internal constitutional and political options for those of the federal government. Canada stated that there could, in a federal state, be circumstances under which it was simply not possible, for a variety of reasons not necessarily legal, to achieve a particular result. What had emerged from the Uruguay Round Negotiating Group on GATT Articles was that, if a federal state had said that it had taken such reasonable measures as were available to it and yet the practice persisted, the issue that the CONTRACTING PARTIES would have to address was the question of compensation or withdrawal of concessions. Canada considered that, subsequently to the 1988 Panel report, liquor-board practices had been brought fully into compliance with GATT obligations as concerned wine and spirits on the one hand, and the distribution and sale of beer in the public system on the other. Canada's current approach was the most effective route for achieving full compliance with its GATT obligations.

4.83 Canada stated that both the EEC agreement and the interprovincial agreement recognized the need to allow time for phasing in the required changes in liquor board practices relating to beer. As the distribution systems long predated GATT, it would be in order to have a reasonable period of adjustment to avoid undue disruption to the domestic industry. It was normal GATT practice to permit time for adjustment to change and Canada anticipated further progress within the reasonable period of time normally envisaged under the dispute settlement process. What was to be considered a reasonable period of time was ideally arrived at through negotiation, and past experience - such as in the case of Japanese imports of beef and Canadian imports of wine - had shown that it could be quite a lengthy period.

J. Statement by Australia

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

4.85 The 1988 Canada/EEC agreement only partially implemented the 1988 Panel's findings. It had not removed mark-up differentials; moreover, the provisions of Article V of the agreement relating to non-discrimination did not extend to mark-ups, giving rise to an inconsistency with Article I of the General Agreement, in addition to the inconsistencies with Articles II and III. Certain other aspects of the agreement required clarification, namely: what interpretation was being given to non-discrimination; whether Canada was ensuring m.f.n. treatment for products from other countries in terms of Article XXIV:12 of the General Agreement or by concrete undertakings from the provinces to the federal government; whether the agreement defined beer that was the product of the EEC; whether "national treatment" was defined in terms of Article III of the General Agreement. In the absence of a national beer market in Canada, the question of national treatment rested on the relative treatment of foreign beer and beer of the province concerned. Australia stated that the agreement with the EEC had not been fully notified to the CONTRACTING PARTIES. By this agreement Canada had sought to implement the 1988 Panel's findings in a manner which, prima facie, constituted a breach of Article I of the General Agreement in the granting of an advantage, favour or privilege to another contracting party. Australia thus considered that its benefits under Article I had been nullified and impaired. Such action was also inconsistent with Canada's obligations under paragraph A.2 of the 1989 Decision on Improvements to the GATT Dispute Settlement Rules and Procedures which stated that "all solutions to matters formally raised under the GATT dispute settlement system ... shall be consistent with the General Agreement and shall not nullify or impair benefits accruing to any contracting party under the General Agreement, nor impede the attainment of any objective of the General Agreement". Australia considered Canada to be bound by the 1989 Decision with respect to all actions which it had taken since its adoption regarding implementation of the 1988 Panel report, and stated that the terms of reference of the present Panel were pursuant to the 1989 Decision.

4.86 Australia stated that the recently concluded interprovincial agreement did not remedy the measures found by the 1988 Panel, to be inconsistent with the General Agreement. The relevance of this agreement to the resolution of the issue of retail outlets was not clear. The agreement addressed only practices relating to domestic beer and could result in even more discrimination against imported beer. The involvement of the federal government of Canada in such an agreement, which might give rise to further GATT-inconsistent measures, did not satisfy the provisions of Article XXIV:12. Australia failed to understand why Canada had not resorted to the same "reasonable measures" with respect to imported beer as it had used in this agreement with respect to domestic beer. Furthermore, Canada had not given any indication of what further progress was being anticipated or what constituted a reasonable period for implementation of the 1988 Panel findings, although it had cited no specific barrier to setting a timetable for implementation.

4.87 Australia argued that Canada could not claim that all the matters ruled on by the previous Panel needed to be re-examined, except possibly in an Article XXIV:12 context. In Australia's view, the Panel did not need to rule on the GATT consistency of measures which had been found by the 1988 Panel to

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

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

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

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

conditions of which were met by the environmental tax.

4.91 Canada rejected Australia's observations about the non-discriminatory application of the Canada-EEC Agreement. Canada confirmed that the agreement was being applied on an m.f.n. basis and that the terms "non discrimination" and "national treatment" were being used in their GATT sense. Canada indicated surprise at Australia's comments, as the Australian Government had kept itself well informed on this issue, as would be expected given their important interests in the Canadian wine market. At no time had the Australian authorities requested consultations to take up these concerns.

## K. Statement by the EEC

4.92 As the complainant before the 1988 Panel, the EEC stated that the report of that Panel had not yet been fully implemented. It stated that, in its bilateral negotiations, the EEC had neither sought nor obtained anything that was inconsistent with the provisions of Article I of the General Agreement. The 1988 agreement between Canada and the EEC contained, as far as beer was concerned, only a commitment with respect to the ending of discrimination with regard to listing/delisting practices. There had been no satisfactory settlement of the problems of discriminatory mark-ups or availability of points of sale and, despite continuing negotiations in good faith to find such a settlement, there appeared at this time no reasonable prospect of arriving at one. The EEC, therefore, limited its intervention to these two problems.

4.93 The EEC argued that, in order to comply with its GATT obligations, Canada had to prove that the cost-of-service differentials represented additional costs necessarily associated with the marketing of imported products. The auditors' reports did not discharge this burden of proof, as it was not an auditor's task to ascertain whether costs were necessarily associated with imports, merely whether, in the light of generally accepted accounting principles, the imputation of costs was reasonable. An auditor consulted by the EEC had pointed out many examples of costs which had been imputed to imports which could just as reasonably have been imputed to sales of domestic products. It was also hard to understand how the level of the cost-of-service differential could vary from 0 per cent to 50 per cent. To discharge fully the burden of proof, Canada should give a complete explanation as to why certain costs were allocated to imports rather than to sales generally. The EEC invited the present Panel to find that the imposition of cost-of-service differentials which did not represent differences in actual costs was contrary to Article II:4 of the General Agreement, and to provide greater precision both on which costs were, in its view, necessarily associated with marketing of imported products, and on the burden of proof to be discharged by Canada.

4.94 The EEC stated that the respective figures for points of sale for imported and domestic beer demonstrated starkly the continuing discrimination. In general, all provinces required that imported beer be sold only in the outlets of the liquor board, while Canadian beer could also be sold in private outlets. Even if, as Canada contended, the Canadian Government could not, and should not, coerce brewers operating retail outlets to stock imported beer, it should comply with its GATT obligations by allowing Canadian brewers to stock imported beers in their retail outlets and by allowing importers to set up their own retail outlets if they so desired. This would allow normal competition between domestic and imported beers. The argument in favour of ending discrimination by giving imports access to outlets such as grocery stores or hotels was even stronger. The EEC was of the opinion that the present Panel should rule that the above practices were contrary to Article XI:1 or Article III:4 of the General Agreement and be specific in suggesting what remedial action Canada could take in order to eliminate discrimination in distribution. The Panel might clarify that compliance by Canada with its trade obligations required that, by a specified date in the near future, the distribution monopoly of the liquor boards regarding imported beer would be transformed, so that imported beers enjoyed the same access to sales outlets as domestic beers.

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

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

4.97 Canada stated that, on the question of audit reports, it was not clear which specific audits the EEC had in mind. If there were such examples, none had been brought to Canada's attention by the EEC. Canada considered that the EEC and the United States had unreasonable expectations of the change which strict application of the provisions of Article II:4 of the General Agreement and Article 31 of the Havana Charter yielded. Canada had submitted that the cost-of-service charges were justified by additional costs necessarily associated with the marketing of imported products. Canada's trading partners assumed that these differentials were excessive. Independent audits had established that they were not.

## 5. Findings

5.1 The Panel noted that Canada had established in its 10 provinces liquor boards which had a monopoly on the importation, distribution and sale of beer. The United States claimed that all or some of these liquor boards maintained listing and delisting practices for imported beer, limited the access of imported beer to points of sale, restricted the private delivery of imported beer to points of sale, levied import mark-ups on beer and imposed minimum price requirements on beer inconsistently with Articles II, III, XI, XIII and XVII of the General Agreement. The United States further considered that the tax on beer containers levied in some provinces accorded less favourable treatment to imported beer than that accorded to domestic beer inconsistently with Articles III and XVII of the General Agreement, and that certain publication procedures for new liquor-board practices in two provinces were inconsistent with Article X of the General Agreement. Finally, the United States considered that Canada had not met its obligations under Article XXIV:12 of the General Agreement to take such reasonable measures as might be available to it to ensure the observance of Articles II, III, X, XI, XIII and XVII by the liquor boards. The Panel decided to examine successively each of these claims.

### Listing and delisting practices

5.2 The Panel noted that the United States had claimed that the listing and delisting practices which had been found to be inconsistent with Canada's obligations under Article XI of the General Agreement by the Panel that had examined these practices in 1988 at the request of the EEC, had not been fully eliminated by Canada; in all ten provinces imported beer continued to be subject to conditions and formalities with regard to listing and delisting that were more onerous than those applied to domestic beer. Canada claimed that this issue had been fully settled by its 1988 agreement with the EC, which was being applied on a most- favoured-nation basis, and that all the provincial liquor boards acted in accordance with the principles of non-discrimination set out in this agreement. The provincial listing and delisting practices were thus in conformity with the provisions of Article XI of the General Agreement.

5.3 The Panel noted that, with the exception of the listing and delisting practices in Ontario, the Parties did not agree on the listing and delisting practices actually pursued by the liquor boards. The Panel also noted that the United States had, on 17 July 1991, specifically requested the Panel not to prolong its proceedings. The Panel therefore decided not to schedule another meeting with the parties to permit the United States to submit further evidence on this issue. For these reasons, the Panel had to conclude that, with the exception of the listing and delisting practices in Ontario, the United States had not substantiated its claim that Canada still maintained listing and delisting practices inconsistent with Article XI of the General Agreement.

5.4 The Panel then turned to the United States claim that the practice of the liquor boards of Ontario to limit listing of imported beer to the six-pack size while according listings in different package sizes to domestic beer[1] was inconsistent with the General Agreement. The Panel noted that this package-size requirement, though implemented as a listing requirement, was in fact a requirement that did not affect the importation of beer as such but rather its offering for sale in certain liquor-board outlets. The Panel therefore considered that this requirement fell under Article III:4 of the General Agreement, which required, inter alia, that contracting parties accord to imported products

> "... treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal ... offering for sale ...".

The Panel found that the imposition of the six-pack configuration requirement on imported beer but not on domestic beer was inconsistent with that provision.

Restrictions on access to points of sale

5.5 The Panel noted that in all provinces of Canada, except Prince Edward Island and Saskatchewan, imported beer had access to fewer points of sale than domestic beer because domestic brewers either were authorized to establish private retail stores or had access to retail outlets in which imported beer could not be sold. In Quebec, for instance, domestic beer could be sold in 11,238 licensed grocery stores while only 337 liquor-board stores were available for the sale of imported beer.

5.6 The Panel which had examined in 1988 the practices of the Canadian liquor boards had analysed the restrictions on access to points of sale under Articles III:4 and XI:1 of the General Agreement. While that Panel had found these restrictions to be inconsistent with Canada's obligations under Article XI:1, it had also pointed out that it "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"[2]. The present Panel, noting that Canada now considered Article III:4 to be applicable to practices of the liquor boards, examined this issue again. The Panel recalled that the CONTRACTING PARTIES had decided in a number of previous cases that the requirement of Article III:4 to accord imported products treatment no less favourable than that accorded to domestic products was a requirement to accord imported products competitive opportunities no less favourable than those accorded to domestic products.[3] The Panel found that, by allowing the access of domestic beer to points of sale not available to imported beer, Canada accorded domestic beer competitive opportunities denied

---

[1]Throughout these findings the reference to domestic beer is a reference to the domestic beer which receives the most favourable treatment by Canada in the province in question, that is in most instances the beer brewed in that province.

[2]Panel report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies", adopted on 22 March 1988, BISD 35S/37, paragraph 4.26.

[3]Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.11.

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

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

5.8 The Panel noted that Canada had argued that the authorization of the private sale of domestic beer in Ontario was covered by paragraph 1(b) of the Protocol of Provisional Application, according to which Canada was committed to apply Part II of the General Agreement to the fullest extent not inconsistent with existing legislation. The Ontario Liquor Control Act, which had been in effect on 30 October 1947, restricted the sale of beer in Ontario to sales by the liquor board and sales by federally-licensed Canadian brewers "duly authorized by the dominion of Canada". In Canada's view, this legislation made mandatory a prohibition on authorizing foreign brewers to sell beer in Ontario except through the liquor board.

5.9 The Panel noted that the Ontario Liquor Control Act in effect on 30 October 1947 had been the legal basis for authorizing the on-site brewery outlets in Ontario, of which there were now 23 (see Table 1 above). The legal basis for authorizing the brewers' retail stores, of which there were now 473 (also see Table 1 above), was Section 3(e) of the Liquor Control Act introduced in 1980, which empowered the liquor board to authorize Brewers Warehousing Company Limited "to operate stores for the sale of beer to the public". The Panel concluded from this that Canada's arguments relating to the Protocol of Provisional Application could apply only to the on-site outlets but not to the brewers' retail stores. The Panel further noted that it had been determined by the CONTRACTING PARTIES that a measure was covered by paragraph 1(b) of the Protocol of Provisional Application only if "the legislation on which it is based is by its terms or expressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action".[1] The Ontario Liquor Control Act, as amended to July 1947, provided in Section 46 that

> "The [Liquor Control Board of Ontario] may, with the approval of the Minister and subject to the provisions of this Act, and to the regulations made thereunder grant a license to any brewer duly authorized by the Dominion of Canada authorizing such brewer or any lawfully appointed agent of such brewer,-
>
> ...
>
> (c) to keep for sale and sell beer under the supervision and control of the Board and in accordance with this Act and the regulations." (emphasis supplied).

The Panel noted that the Liquor Control Act, by its terms, enabled the Dominion of Canada to authorize Canadian brewers to sell beer but it did not mandatorily require it to do so and that Canada had not claimed that the Act, by its terms or expressed intent, prevented the liquor board from withdrawing the authorizations granted. The Panel therefore found that the Act did not require the executive authority to accord domestic beer treatment more favourable than that accorded to imported beer and that the discriminatory restrictions on access to points of sale imposed by Canada in Ontario were consequently

[1]Working party report on "Notifications of Existing Measures and Procedural Questions", adopted on 10 August 1949, BISD Vol.II/62, paragraph 99.

not covered by paragraph 1(b) of the Protocol of Provisional Application.

Restrictions on private delivery

5.10 The Panel noted that the Canadian provincial liquor boards applied two different systems for the delivery of beer to retail stores and other points of sale. The liquor boards of Prince Edward Island and Saskatchewan authorized the private delivery of both domestic (provincial and out-of-province) and imported beer. The delivery system of these liquor boards was not at issue before the Panel. The liquor boards of the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario and Quebec authorized the private delivery of provincial beer, but not of imported beer. It was the practices of these latter liquor boards which the United States considered to be inconsistent with Article III:4 of the General Agreement, which required, inter alia, that contracting parties accord imported products

> " ... treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal ... transportation...".

5.11 The United States argued that this provision required Canada to accord to imported beer opportunities of competition no less favourable than those accorded to domestic beer and that consequently the practice of the liquor boards to prescribe the delivery of imported beer through the liquor boards while permitting the private delivery of domestic beer constituted less favourable treatment of imported beer. Canada argued that the differentiation between imported and provincial beer by these liquor boards was consistent with Article III:4 of the General Agreement because this provision did not require identical treatment of domestic and imported products but only treatment of imported products no less favourable than the treatment accorded to domestic products. Moreover, contracting parties had the right to establish import monopolies in accordance with Article XVII of the General Agreement and, as an inherent part of that right, they also had the right to require their monopolies to deliver the products imported by them to the domestic points of sale. Lastly, the provisions of Article XVII recognized the right of monopolies to charge for transportation and distribution of imported beer.

5.12 The Panel first examined the question of whether Article III:4 of the General Agreement permitted contracting parties to apply regulations to imported products that were different from those applied to domestic products. It noted that the CONTRACTING PARTIES had found in a previous case that Article III:4,

> "sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognized that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject ... to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such difference in the legal provisions applicable do or do not accord to imported products less favourable treatment".[1]

The Panel consequently considered that the mere fact that imported and domestic beer were subject to different delivery systems was not, in itself, conclusive in establishing inconsistency with Article III:4 of

[1]Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.11.

the General Agreement. The Panel then examined whether the application by Canada of the different delivery systems accorded imported beer treatment no less favourable than that accorded to domestic beer. In examining this issue, the Panel recalled that the CONTRACTING PARTIES had further found in a previous case that

> "The words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favourable treatment standard of Article III is met".[1]

The Panel therefore considered that Article III:4 required Canada to ensure that its regulations affecting the internal transportation of imported beer to points of sale accorded imported beer competitive opportunities at least equal to those accorded to domestic beer and that it was up to Canada to demonstrate that, in spite of the application of different transportation regulations to imported and domestic beer, imported beer was accorded no less favourable treatment in this respect.

5.13 The Panel noted that Canada claimed that it met the requirements of Article III:4 by levying charges for the delivery of imported beer to the points of sale which were no higher than the costs actually incurred by the liquor boards. The Panel, therefore, examined whether Canada, by subjecting imported beer to a levy that corresponded to the actual cost of delivery by the liquor board, offered competitive opportunities to imported beer that were equivalent to the opportunities which would result from the application of the same delivery system to both imported and domestic beer. The Panel noted that such a levy did not necessarily correspond to the cost that the liquor board would incur for the delivery of imported beer if it delivered not only imported but also domestic beer. It could reasonably be assumed that it would, in that case, make economies of scale from which also imported beer could benefit. Nor did such a levy necessarily correspond to the cost of private delivery of imported beer. It could reasonably be assumed that the structure and efficiency of private delivery systems would be different from the systems operated by the liquor boards.

5.14 The Panel further noted that, in order to prove that the levies charged by the liquor boards for delivering imported beer to the points of sale did not exceed the cost of private delivery of such beer, Canada could not base itself on the transportation costs actually incurred by the liquor boards or the domestic breweries; it would have to determine the costs of transporting beer under delivery systems not presently in existence. The Panel felt that, given the inherent difficulties in making such a determination, its result would always be open to challenge. The Panel also noted that, in order to meet its national treatment obligations, Canada did not have to abandon the delivery of imported beer by the liquor boards; it merely had to provide competitive opportunities to imported beer that were at least equal to those accorded to domestic beer, in other words allow for the possibility of private delivery of imported beer. This would enable foreign brewers to choose between liquor-board services and private delivery on purely commercial grounds. If, as claimed by Canada, imported beer did enjoy national treatment, there was no need to prohibit the private delivery of imported beer because the services of the liquor boards would be available at a price at which they could compete successfully with private delivery systems. The Panel recognized that the possibilities to demonstrate that imported beer was granted national treatment in spite of different delivery systems applied to imported and domestic beer would be greater if the import monopoly for beer were combined with a complete monopoly for the sale of both imported and domestic beer because, in that case, the monopoly would have full control over the pricing of all beer. The Panel noted however that there was presently no province in which beer was

[1]Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.11.

sold only in liquor-board stores (see Table 1 above).

5.15 The Panel then turned to Canada's argument that its right to deliver imported beer to the points of sale was an inherent part of Canada's right to establish an import monopoly in accordance with Article XVII of the General Agreement which was not affected by its obligations under Article III:4. The Panel noted that the issue before it was not whether Canada had the right to create government monopolies for the importation, internal delivery and sale of beer. The Panel fully recognized that there was nothing in the General Agreement which prevented Canada from establishing import and sales monopolies that also had the sole right of internal delivery. The only issue before the Panel was whether Canada, having decided to establish a monopoly for the internal delivery of beer, might exempt domestic beer from that monopoly. The Panel noted that Article III:4 did not differentiate between measures affecting the internal transportation of imported products that were imposed by governmental monopolies and those that were imposed in the form of regulations governing private trade. Moreover, Articles II:4, XVII and the Note Ad Articles XI, XII, XIII, XIV and XVIII clearly indicated the drafters' intention not to allow contracting parties to frustrate the principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies. Canada had the right to take, in respect of the privately delivered beer, the measures necessary to secure compliance with laws consistent with the General Agreement relating to the enforcement of monopolies. This right was specifically provided for in Article XX(d) of the General Agreement. The Panel recognized that a beer import monopoly that also enjoyed a sales monopoly might, in order properly to carry out its functions, also deliver beer but it did not for that purpose have to prohibit unconditionally the private delivery of imported beer while permitting that of domestic beer. For these reasons the Panel found that Canada's right under the General Agreement to establish an import and sales monopoly for beer did not entail the right to discriminate against imported beer inconsistently with Article III:4 through regulations affecting its internal transportation.

5.16 The Panel found for these reasons that the practice of the liquor boards of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario and Quebec to prohibit the private delivery of imported beer to the points of sale while according domestic brewers the right to deliver their products to the points of sale was inconsistent with Article III:4.

Differential mark-ups

5.17 The Panel noted that the Panel which had examined in 1988 the practices of the Canadian liquor boards had concluded that "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".[1] That Panel had 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". The Panel noted that the United States and Canada did not agree on which costs incurred by the liquor boards constituted "additional costs necessarily associated with marketing of imported products" and requested guidance from the Panel on this issue.

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

[1]Panel report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies", adopted on 22 March 1988, BISD 35S/37, paragraph 4.19.

although they arose both for imported and domestic products, they were higher for imported products; such costs were, for instance, storage or imputed inventory finance costs, where inventory turnover for imported products was slower than for domestic products. On the other hand there were costs, such as general or administrative expenses, which could not be considered "additional", since they were not necessarily associated with the marketing of the imported product, but rather with the overall operation of the liquor monopoly. Nor could costs be considered "additional" which were incurred in respect of services prescribed for imported products but not for domestic products inconsistently with the General Agreement.

5.19 Taking into account the four situations outlined above, the Panel also recalled that, in view of Article 31:4 of the Havana Charter, import monopolies were authorized to charge for transportation, distribution and other expenses incident to the purchase and sale of imported products. The Panel then considered how the liquor boards could and should compute the "differential mark-up" i.e. the difference in the mark-ups on imported and domestic products. It believed that the liquor boards, as commercial enterprises, were entitled to recover both variable and fixed costs arising from their commercial activities incident to the purchase and sale of imported products. Thus, in line with the categorization in the previous paragraph, the Panel considered that the differential mark-up on imported beer should allow the recovery of those costs that were directly associated with the handling of imported beer (variable costs), and of charges for fixed assets employed that were calculated in proportion to the use of these assets by the imported product. All other expenses (e.g. general or administrative expenses) would have to be recovered through mark-ups uniformly applied to both domestic and imported beer.

5.20 The Panel noted in this context that the disagreements between the United States and Canada appeared to arise primarily from the fact that Canada regarded as additional costs all costs arising from services performed by the liquor boards for imported beer that they did not perform for domestic beer, such as the cost of delivering imported beer to the points of sale. The Panel recalled its finding in paragraphs 5.12-5.16 above that, under Article III:4 of the General Agreement, Canada would have to apply the same delivery system to both domestic and imported beer or permit imported beer to be delivered privately if it had done so for domestic beer. In this context the Panel had noted that, in the situation in which the liquor boards authorized the private delivery of domestic beer to the points of sale but prohibited the private delivery of imported beer, a charge on imported beer for delivery to points of sale which corresponded to their actual costs of delivering such beer was not necessarily consistent with Article III:4. The Panel considered that strict observation of the national treatment principle in respect of the services performed by the liquor boards (i.e. identical treatment of imported and domestic beer) would, to a large extent, eliminate the uncertainties as to the proper allocation of the costs of the liquor boards. The Panel considered further that application of the national treatment principle in terms of affording effective equality of opportunities (i.e. permitting imported beer to be treated in the same way as domestic beer) would eliminate any problems with respect to liquor board charges for the services performed; in this situation, the foreign brewers' choice of distribution system would be made on purely commercial grounds.

5.21 The Panel then examined the mark-up practices of the liquor boards in the light of the principles set out above. The Panel noted that most liquor boards had, subsequent to the adoption of the 1988 Panel report, introduced so-called "cost-of-service charges" and that the cost-of-service differential between imported and domestic products was in fact equivalent to the differential mark-up defined in the 1988 Panel report. It further noted that, in seven of the 10 provinces, the differential mark-ups as computed on the basis of cost-of-service charges did not conform to the principles set out above and included additional costs incurred by the liquor boards not necessarily associated with the marketing of imported beer. Two provinces, New Brunswick and Newfoundland, did not introduce separate cost-of-service charges but maintained differential mark-ups. In New Brunswick, this differential again included costs that were not necessarily associated with the marketing of imported beer. In the case of

Newfoundland, no audit of the mark-ups had been provided. Only in Prince Edward Island, where no beer was brewed, no differential mark-up was maintained. The Panel therefore concluded that the differential mark-ups currently levied by the liquor boards (with the exception of Prince Edward Island), including differential mark-ups based on cost-of-service charges, were inconsistent with Article II:4 of the General Agreement.

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

Methods of assessing mark-ups and taxes on imported beer

5.23 The Panel noted that Canada taxed both imported and domestic beer by assessing mark-ups through the liquor boards and by levying provincial sales taxes and the federal Goods and Services Tax at the retail level. The United States considered that the assessment of the mark-ups and the application of the federal and provincial taxes on a value that included cost-of-service charges and import duties discriminated against imported beer inconsistently with Article III because only imported beer was subjected to such cost-of-service charges and duties.

5.24 The Panel noted that, according to Article III:2, first sentence, imported products

> "shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products".

The Panel considered that this provision applied not only to the provincial and federal sales taxes but also to the mark-ups levied by the liquor boards because they also constituted internal governmental charges borne by products. The Panel further considered that Article III:2 required that the computations of the base value for the purposes of assessing these charges be no less favourable for imported beer than for domestic beer. This requirement was met if this value was computed for both imported and domestic beer on the basis of the full cost of the beer, which in the case of the imported beer included charges for cost of services levied by the liquor boards consistently with the General Agreement.

5.25 The Panel further noted that Article III:2 applied to internal taxes levied on imported products, that is products on which duties levied in connection with importation had already been assessed. The Panel therefore found that Canada could, consistently with Article III:2, levy the provincial and federal sales taxes on the basis of the duty-paid value of imported beer.

5.26 In the light of these considerations the Panel found that Canada's methods of assessing mark-ups and taxes on imported beer were not inconsistent with Article III:2.

Minimum prices

5.27 The Panel noted that Canada maintained minimum prices for imported and domestic beer in New Brunswick, Newfoundland, and Ontario and for imported and domestic draught beer in British Colombia. In New Brunswick the minimum price was set at the level of the price of out-of-province beer of equivalent size and package type; in Newfoundland it was based on the lowest price of provincial beer. The Panel further noted that the United States considered the minimum prices to be inconsistent with Article XI:1 of the General Agreement because they restricted the importation of beer, while Canada considered the minimum prices to be covered by, and consistent with, Article III:4 of the General Agreement because they were applied equally to both imported and domestic beer.

5.28 The Panel first examined whether the minimum prices fell under Article XI:1 or Article III:4. The Panel noted that according to the Note Ad Article III a regulation is subject to the provisions of Article III if it "applies to an imported product and to the like domestic product" even if it is "enforced in case of the imported product at the time or point of importation". The Panel found that, as the minimum prices were applied to both imported and domestic beer, they fell, according to this Note, under Article III.

5.29 The Panel proceeded to examine the minimum prices in the light of Article III:4. The Panel recalled that a previous Panel had found that

> "the words 'treatment no less favourable' in paragraph 4 [of Article III] call for an effective equality of opportunities for imported products in respect of the application of ... regulations affecting the internal sale ... of products".[1]

That Panel had further found that this requirement was normally met by applying to imported products legal provisions identical to those applied to domestic products but that

> "there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable".[2]

5.30 The Panel noted that minimum prices applied equally to imported and domestic beer did not necessarily accord equal conditions of competition to imported and domestic beer. Whenever they prevented imported beer from being supplied at a price below that of domestic beer, they accorded in fact treatment to imported beer less favourable than that accorded to domestic beer: when they were set at the level at which domestic brewers supplied beer - as was presently the case in New Brunswick and Newfoundland - they did not change the competitive opportunities accorded to domestic beer but did affect the competitive opportunities of imported beer which could otherwise be supplied below the

[1]Panel report on "United States - Section 337 of the Tariff Act of 1930", adopted on 7 November 1989, BISD 36S/345, paragraph 5.11.

[2]Paragraph 5.11.

minimum price. The Panel noted, moreover, that one of the basic purposes of Article III was to ensure that the contracting parties' internal charges and regulations were not such as to frustrate the effect of tariff concessions granted under Article II and that a previous Panel had found that

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

Under Article II:4 (applied in accordance with the Note Ad Article II in the light of the provisions of Article 31 of the Havana Charter), contracting parties that maintained a monopoly on the importation of a product included in their Schedule of Concessions were under an obligation not to charge a price for that imported product that exceeded the landed costs by more than a specified margin. The effective operation of this obligation was jeopardized if the products imported by the monopoly were purchased not at the suppliers' price but at a higher price fixed in relation to the price of directly competing domestic products.

5.31 The Panel considered that the case before it did not require a general finding on the consistency of minimum prices with Article III:4. However, it did consider that the above considerations justified the conclusion that the maintenance by an import and sales monopoly of a minimum price for an imported product at a level at which a directly competing, higher-priced domestic product was supplied was inconsistent with Article III:4. The Panel concluded for these reasons that the minimum prices imposed by the liquor boards of British Colombia, New Brunswick, Newfoundland and Ontario were inconsistent with Article III:4 to the extent that they were fixed in relation to the prices at which domestic beer was supplied.

5.32 The Panel noted that Canada had argued that the setting of a minimum price for domestic beer was "a social policy objective of the liquor boards to ensure responsible use of beverage alcohol". The Panel recalled that the attainment of social policy objectives through the operation of monopolies was specifically recognized by Article 31:6 of the Havana Charter. The Panel recognized that it might be desirable and indeed necessary for social policy reasons to ensure that beer not be sold to the public at low prices. However, this could readily be achieved in conformity with the provisions of Article II:4, applied in the light of the provisions of Article 31 of the Havana Charter. Thus, for instance, Article 31.4 clearly permitted the application of high internal taxes on beer, as long as they conformed with Article III:2 of the General Agreement.

Taxes on beer containers

5.33 The Panel noted that Canada levied in the provinces of Manitoba and Ontario a charge on all beverage alcohol containers, domestic and imported, which were not part of a deposit/return system; in Nova Scotia, a charge was levied on non-refillable containers, domestic and imported, shipped to the liquor board. The United States considered these charges to be inconsistent with Article III since they were in practice applied only to imported beer because imported beer could not be delivered by the brewers to the points of sale and the establishment of a separate container collection system was, therefore, prohibitively expensive. The Panel noted that it was not the charges on containers as such that the United States considered to be inconsistent with Article III but rather their application in a situation where different systems for the delivery of beer to the points of sale applied to imported and domestic beer. The Panel, therefore, considered that its findings on restrictions on private delivery in paragraph 5.16 above dealt with this matter.

Notification procedures for new practices

---

[1]Panel report on "European Economic Community - Payments and Subsidies paid to Processors and Producers of Oilseeds and related Animal-feed Proteins", L/6627, adopted on 25 January 1990, C/M/238, paragraph 148.

5.34 The Panel noted that the United States had claimed that the liquor board of British Colombia had shared with domestic brewers information relating to pricing policy before that information was available to the United States' authorities, that in the province of Ontario, an announcement of a new pricing policy for beer had been made in the legislature only five days before it entered into effect, and that both these practices were inconsistent with Article X of the General Agreement. The Panel noted that Article X imposed requirements relating to the prompt publication of trade regulations but that this provision did not require contracting parties to make information affecting trade available to domestic and foreign suppliers at the same time, nor did it require contracting parties to publish trade regulations in advance of their entry into force. The Panel, therefore, found that the measures were not inconsistent with Article X of the General Agreement. The Panel noted that the United States did not claim inconsistency of these measures with any other provision of the General Agreement.

Obligations under Article XXIV:12

5.35 The Panel noted that the parties to the dispute agreed that the provincial liquor boards were "regional authorities" within the meaning of Article XXIV:12 of the General Agreement and that this Article was therefore applicable to all the provincial practices at issue. The Panel noted that the United States had claimed that Canada had failed to meet its obligations under Article XXIV:12 of the General Agreement, namely to take "such reasonable measures as may be available to it to ensure observance of the provisions of the Agreement" by the provincial liquor boards. The United States considered that an example of a reasonable measure available to Canada was the implementing legislation for the Canada/United States Free Trade Agreement, under which the Canadian federal authorities had the power to promulgate regulations relating to the internal sale and distribution of wines and spirits to be applied selectively to individual provinces. Canada considered that it had taken, and was continuing to take, such reasonable measures as might be available to it to ensure observance of the provisions of the General Agreement by the liquor boards of its provinces. However, what was available and reasonable had to be judged ultimately in the domestic legal and political context and therefore by the government of Canada and not by the CONTRACTING PARTIES.

5.36 The Panel examined these arguments in detail and found the following. In connection with the last point raised by Canada, the Panel recalled that the 1988 Panel had indeed noted "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". However, at the same time that Panel had 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". The Panel further noted that Article XXIV:12 was not an exception to other rules of the General Agreement; it merely qualified the obligation to implement the provisions of the General Agreement in relation to measures taken by regional and local governments and authorities. Consequently, the provisions of the General Agreement were applicable to measures by regional and local governments and authorities notwithstanding Article XXIV:12. This followed clearly from the obligation set out in this provision "to ensure observance of the provisions of this Agreement" by such governments and authorities because a provision could only be "observed" by a government or authority if it was applicable to it.

5.37 Taking into account these considerations, the Panel proceeded to examine whether Canada had demonstrated that it had taken all reasonable measures available with respect to the different practices which the Panel had found to be contrary to the General Agreement. The Panel considered that, for this purpose, Canada would have to show that it had made a serious, persistent and convincing effort to secure compliance by the provincial liquor boards with the provisions of the General Agreement. The Panel first reviewed Canada's claim that it had taken reasonable measures to eliminate restrictions on access to points of sale for beer, which the Panel had found to be inconsistent with the General

Agreement. It recalled that the 1988 Panel had already concluded that "the availability of points of sale which discriminate against imported alcoholic beverages were restrictions made effective through state-trading operations contrary to Article XI:1". As a result of that finding the CONTRACTING PARTIES had requested Canada to take "such reasonable measures as may be available to ensure observance of the provisions of Article XI of the provincial liquor boards". After reviewing all the information and documentation before it, including the statement made by Canada (see paragraph 4.80 above), the Panel came to the conclusion that, in spite of that request made by the CONTRACTING PARTIES in 1988, Canada had not demonstrated that it had made serious, persistent and convincing efforts to secure elimination of restrictions on points of sale for beer. These discriminatory practices had not been dealt with in the agreement reached with the EEC subsequent to the adoption of the 1988 Panel report, nor had they been specifically addressed in the interprovincial agreement designed to achieve an integrated market for Canadian beer. The Panel therefore concluded that Canada had failed to comply with its obligations under Article XXIV:12 of the General Agreement with respect to availability of points of sale.

5.38 The Panel then turned to the question of private delivery and to its finding in paragraph 5.16 above to the effect that most of the practices of the Canadian provincial liquor boards relating to private delivery contravened the provisions of Article III:4 of the General Agreement. It recalled that, contrary to other practices of the provincial liquor boards, such as restrictions on points of sale and differential mark-ups, the restrictions on private delivery had not been a subject of dispute before the 1988 Panel. The Panel noted that the efforts of the Canadian federal authorities had been directed towards ensuring the observance of the provisions of the General Agreement relating to private delivery as they themselves interpreted them and not as interpreted in the Panel's findings. It therefore concluded that the measures taken by the Government of Canada in this respect were clearly not all the reasonable measures as might be available to it to ensure observance by the provincial liquor boards of the provisions of the General Agreement relating to private delivery, as provided in Article XXIV:12 and that therefore the Government of Canada had not yet complied, in this respect, with the provisions of that paragraph. The Panel was therefore of the view that, in these circumstances, the procedure suggested by the 1988 Panel should be followed also in this case, namely that the Government of Canada should be given a reasonable period of time to take measures to bring the practices of the provincial liquor boards relating to private delivery into line with the relevant provisions of the General Agreement. The Panel considered that, pending the elimination of such discrimination, the liquor boards should in no case levy charges for the delivery of imported beer higher than the costs actually incurred by them.

5.39 The Panel then turned to the differential mark-up practices of the provincial liquor boards and to its finding in paragraph 5.21 above, that these practices were inconsistent with Article II:4 of the General Agreement. It noted that, as a result of the agreement between the European Communities and Canada and of the interprovincial agreement, the liquor boards had accepted to eliminate discriminatory pricing practices on beer (both domestic and imported), not later than 31 December 1994. It recalled, in this context, the last sentence of the Note Ad Article III:1, which indicated that the term "reasonable measures" could be interpreted to permit the elimination of inconsistent measures "gradually over a transition period, if abrupt action would create serious administrative and financial difficulties". Since the CONTRACTING PARTIES had already requested Canada in 1988 to take reasonable measures to ensure that differential mark-ups were not applied contrary to the provisions of Article II:4, the Panel asked itself whether the provincial liquor boards encountered administrative and financial difficulties which could justify a transition period of more than six years to ensure the application of differential mark-ups in full compliance with the 1988 Panel report. This was clearly not the case: as far as administrative practices were concerned, the Panel had already noted that most provincial liquor boards had introduced a system of cost-of-service charges (in addition to a uniform mark-up); any financial difficulties could be resolved by increasing the mark-up uniformly for both imported and domestic beer. By agreeing, in 1991, to become party to an agreement which sanctioned postponement until the end

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

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

## 6. CONCLUSIONS

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

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

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

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

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

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

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

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

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

(i) the notification procedures for new practices followed by Canada in the provinces of British

Columbia and Ontario were not inconsistent with Article X of the General Agreement.

6.2 The Panel further concluded that Canada's failure to make serious, persistent and convincing efforts to ensure observance of the provisions of the General Agreement by the liquor boards in respect of the restrictions on access of imported beer to points of sale and in respect of the differential mark-ups, in spite of the finding of the CONTRACTING PARTIES in 1988 that these restrictions and mark-ups were inconsistent with the General Agreement, constituted a violation of Canada's obligations under Article XXIV:12 and consequently a prima facie nullification or impairment of benefits accruing to the United States under the General Agreement.

6.3 The Panel recommends that the CONTRACTING PARTIES request Canada:

(a) in respect of access to points of sale and differential mark-ups, to take such further reasonable measures as may be available to it to ensure observance of the provisions of the General Agreement by the liquor boards in its provinces;

(b) in respect of the other measures found to be inconsistent with the General Agreement, to take such reasonable measures as may be available to it to ensure observance of the provisions of the General Agreement by the liquor boards in its provinces;

(c) to report to the CONTRACTING PARTIES on the measures taken in respect of access to points of sale and differential mark-ups before the end of March 1992 and in respect of the other matters before the end of July 1992.