CONTINUING THE LIQUOR TAX CASES SAGA, *PHILIPPINES – TAXES ON DISTILLED SPIRITS*: A CRITICAL ANALYSIS*

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INTRODUCTION

On 19 January 2010, the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO") established a panel to review the European Communities' ("EC") challenge against the Philippines' excise tax regime on distilled spirits.[1] The complaint, docketed as DS 396, was a result of a series of unsuccessful consultations between the EC and the Philippines initiated back in 29 July 2009.[2] A similar complaint, docketed as DS 403, was filed by the United States after the breakdown of similarly unsuccessful consultations.[3] On 20 April 2010, pursuant to the rule on multiple complaints[4], the DSB referred the US Complaint to the panel reviewing the EC Complaint.[5]

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[1] World Trade Organization, *Panel to Examine US Complaint on Philippine Taxes on Spirits,* WTO News, 20 April 2010, *available at* http://www.wto.org/english/news_e/news10_e/dsb_20apr10_e.htm (last visited 2 June 2010).

[2] *Id.*; Bayan Cave International Trade LLC, *WTO Dispute Settlement Body Puts Philippine Excise Tax on Distilled Spirits on Agenda,* Asia Trade Bulletin, January-February 2010, *available at* http://www.bryancavetrade.com/sitebranches/publications/docs/BCIT%20Asia%20Trade%20Bulletin_Jan-Feb%2010.pdf (last visited 5 July 2010).

[3] *See supra* note 1.

[4] Article 9.1, The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

[5] *See supra* note 1.

In their respective requests for consultation, the EC and the US alleged that the Philippine excise tax system on distilled spirits unfairly discriminates against imported spirits by taxing the latter at substantially higher rates than their domestic counterparts.[6] According to the complainants, imported spirits, such as Spanish brandies, Scotch and American whiskies, are taxed 10 to 50 times higher than similar domestic spirits.[7] Consequently, exporters from the EC and the US were unable to compete fairly in the Philippine market, causing a significant fall in exports to the Philippines.[8] It is argued that this discriminatory tax regime, which has been in place since 1997, is inconsistent with the National Treatment obligation under Article III:2 of the General Agreement on Tariffs and Trade ("GATT").[9] The complainants point out that Philippine excise tax laws, which subject spirits made from domestic raw materials to much lower tax rates than sprits made from other raw materials, discriminate against imported spirits which are either similar or directly competitive or substitutable to domestic distilled spirits.[10]

The Philippines acceded to the WTO on 1 January 1995 and committed to faithfully comply with all its obligations therein. The present dispute, entitled *Philippines—Taxes on Distilled Spirits* ("*Philippines*"), not only puts to test the Philippines' fidelity to this commitment, it also continues the long standing discourse on the concept of "like" and "directly competitive or substitutable" products under the GATT's National Treatment Principle and adds to the ever increasing jurisprudence in this area. This essay intends to be a modest contribution to this discourse. It shall take an in depth look at *Philippines* in an attempt to determine whether the Philippines indeed breached its obligations

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[6] *See supra* note 2.

[7] Cahiles-Magkilat, B., *EU Brings WTO Case vs RP on Taxes on Imported Spirits,* B-2, Manila Bulletin, 31 July 2009, *available at* http://www.allbusiness.com/trade-development/international-trade-export/12599468-1.html (last visited 14 May 2010).

[8] *Id.*; According to EU Trade Commissioner Catherine Ashton, while sales of local spirits have grown over 8% since 2005, overall sales of imported spirits have declined during the same period. From 2004 to 2007, EU exports of spirits to the Philippines fell from around 37 million Euros to 18 million Euros. The international Wine and Spirits Record estimated that consumption of spirits in the Philippines in 2007 was about 47 million cases (of nine litres), making it one of the largest spirits market in the Asia-Pacific region.

[9] *See supra* note 2; Republic Act No. 8240, adopted by the Philippines on November 1996, imposed a lower flat excise tax rate on spirits produced from raw materials such as the sap of palms, the juice, sugar or syrup of cane which "were produced commercially in the country where they were processed into distilled spirits."; *See also Long-running Tariff Feud Results in WTO Rap—EU,* 8 The Daily Tribune, 4 August 2009, *available at* http://www.tribuneonline.org/business/20090804bus1.html(last visited 14 May 2010).

[10] *Id.*

under the GATT. In the process, it will revisit the relevant rules, governing principles and standing jurisprudence on the National Treatment Principle under the GATT. It aims to clarify the various issues surrounding the dispute and to aid in gaining a more informed understanding of this increasingly complex area of international trade law.

THREE PILLARS OF NON-DISCRIMINATION: TARIFF BINDINGS, MOST FAVORED NATION AND NATIONAL TREATMENT PRINCIPLES

Discriminatory trade policies and protectionism are antithetical to a multilateral trade system.[11] The GATT, an international treaty aimed at eliminating discriminatory treatment in international commerce, limited tariffs and controlled the use of non-tariff barriers.[12] Its main substantive feature is the imposition of tariff bindings upon member countries. Under Article II of the GATT, member states exchange tariff concessions and agree not to raise tariffs beyond committed levels.[13] These tariff commitments are not found in any binding agreement but are instead listed by individual member states in the schedules annexed to the Marrakesh Protocol to the GATT.[14] By way of tariff bindings, member states commit to cut and "bind" their custom duty rates, in some instances even cutting tariffs down to zero.[15] While it is possible for member states to "break" a commitment by raising tariffs beyond the bound rate, they can only do so after having negotiated with members most concerned with the planned tariff increase.[16]

Two other provisions directly supplement tariff bindings in Article II; these are the Most Favored Nation ("MFN") Principle in Article I and the National Treatment ("NT") Principle in Article III. These three obligations, i.e., tariff bindings, MFN and NT, make up the three pillars of the Non-Discrimination Principle and constitute the core discipline of the world trading system since the

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[11] Awanish Kumar & Aritra Chatterjee, *Reflections on the Bubble of Likeness,* 16 (2) International Trade Law and Regulation 51 (2010).

[12] Chi Carmody, *When Cultural Identity Was Not An Issue: Thinking About Canada—Certain Measures Concerning Periodicals'* 30 Law & Policy in International Business 232, 252 (1998-1999).

[13] *Id.*

[14] World Trade Organization, *Tariffs: More Bindings and Closer to Zero,* Understanding the WTO, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm(last visited 5 July 2010).

[15] *Id.*

[16] *Id.*

GATT's inception in January 1948.[17] In essence, the non-discrimination obligation prohibits WTO members not only from discriminating against goods[18], services,[19] and intellectual property rights[20] originating from among the different member states but also from discriminating in favor of those originating domestically within the member state.[21]

Whereas the MFN Principle requires member states to grant every other member state the most favorable treatment it grants to any other country with respect to imports and exports of products,[22] the NT Principle requires members to treat foreign products no differently from similar or directly competitive or substitutable domestic products in terms of laws, regulations and other internal requirements. In other words, while the MFN Principle prohibits a country from discriminating *between other countries,* the NT Principle prohibits a country from discriminating *against other countries.*[23] Thus, under the NT Principle, once foreign products have cleared customs and became part of internal commerce, members are prohibited from maintaining laws and requirements which discriminate between domestic and imported products.[24]

MOST FAVORED NATION PRINCIPLE: THE EXTERNAL DIMENSION OF NON-DISCRIMINATION

The MFN principle, a cornerstone of the GATT and a pillar of the international trading system, is essential in a multilateral trading system such as the WTO.[25] Article I:1 of the GATT provides that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to like products originating in or destined for the territories of all other contracting

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[17] *See supra* note 12 at 253.

[18] Article I, General Agreement on Tariffs and Trade ("GATT").

[19] Article II, General Agreement on Trade in Services.

[20] Article IV, Trade-Related Aspects of Intellectual Property Rights.

[21] SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW 45 (2007).

[22] *Id.* at 44.

[23] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 321 (2008).

[24] *See supra* note 21 at 45.

[25] MITSUO MATSUSHITA ET AL. THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 146 (2006) *citing* Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985, par. 69.

parties."[26] Thus, under the MFN Principle, every concession a member makes to another member state becomes generalized in favor of all the other members of the WTO[27] such that *any* advantage granted by a member to any product from or for another country must be granted to *all* like products from or for *all other* members.[28] Furthermore, any advantage granted by a member state to a non WTO member must also be granted to all other WTO members.[29]

This "unconditional" MFN treatment drastically reduces transaction costs involved in negotiating individual bilateral agreements, something developing countries, which do not have the capacity to bargain for better terms of trade from countries with more advanced and progressive economies, find especially beneficial.[30] The MFN Principle also avoids the "prisoner's dilemma" in trade negotiations whereby a party attempts to cheat the system by pocketing any benefit derived from the negotiation without conceding something in return. Under the MFN Principle, the fruits of any bargain would immediately be claimed by all the other member states.[31]

The MFN Principle allows for two major exceptions, however, first, it does not prohibit tariff and trade preferences in connection with customs unions and free trade areas;[32] second, it does not prohibit trade preferences in favor of developing countries.[33]

NATIONAL TREATMENT PRINCIPLE: THE INTERNAL DIMENSION OF NON-DISCRIMINATION

Whereas Article I of the GATT governs external trade, Article III of the GATT, embodying the NT Principle, governs domestic trade.[34] Article III

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[26] The GATT contains a number of other provisions requiring MFN or MFN-like treatment, to wit: Article III:7 (internal quantitative regulations); Article V (freedom of transit); Article IX:1 (marking requirements); Article XIII (the non-discriminatory administration of quantitative restrictions); and Article XVII (state trading enterprises); *See supra note* 23 at 322.

[27] *See supra* note 25 at 145.

[28] *See supra* note 23 at 327.

[29] *Id.*

[30] *See supra* note 25 at 145.

[31] *Id.*

[32] Article XXIV, GATT.

[33] Article XXV:5, GATT.

[34] PETROS MAVROIDIS, TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS 193-194 (2007).

prohibits the use of internal measures to accord protection to domestic production.[35] It imposes an obligation of non-discrimination and like treatment between domestic and imported goods.[36] Under the NT Principle, once imported products have cleared customs and paid their ticket to entry by way of tariffs or duties, they must be assimilated into domestic commerce and subjected to an identical regulatory regime. Failure to do so would defeat the tariff concessions and bindings granted under the MFN Principle.[37]

The NT Principle ensures that domestic measures do not subvert tariff bindings under Article II and limits national protective measures to border controls.[38] It prohibits the use of internal taxes and other internal regulatory measures to afford protection to domestic production[39] and aims to secure an equal opportunity for imported products to compete with similar local products within the domestic market of a member state.[40] The NT Principle is thus an insurance against the risk that tariff commitments, which were obtained through multilateral negotiations, would be rendered meaningless and inutile by unilaterally defined internal policies.[41] It also serves as an incentive for members to continue negotiating and further liberalizing trade,[42] secure with the knowledge that the fruits of their negotiation will not be undone through subsequent unilateral acts they are unable to influence.[43] Its obvious aim is to establish a "level playing field"

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[35] *See supra* note 34.

[36] PETROS MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY 128 (2005); *See also* WON-MOG CHOI, 'LIKE PRODUCTS' IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT GATT/WTO JURISPRUDENCE 105 (2003); The Appellate Body Report in *Japan—Taxes on Alcoholic Beverages II* stated that "the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production'. Towards this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. The national treatment obligation is, hence, a promise given by each WTO Member to its trading partners, and at the same time a sanction: policies will be unilaterally defined, and they will eventually have international spill over (externalities); adherence to national treatment guarantees that 'tolerance' of their international spill over." (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97).

[37] *See supra* note 25 at 156; *See also* note 34 at 193-194.

[38] *See supra* note 25 at 157; *See also* Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125, par. 6.13.

[39] *See supra* note 23 at 346.

[40] *See supra* note 25 at 157; *See also United States—Section 337 of the Tariff Act of 1930*, 7 November 1989, GATT BISD (35th Supp.) 345, para. 5.13 (1990).

[41] *See supra* note 34 at 194.

[42] *Id.*

[43] *See supra* note 36 at 128.

of fair competitive conditions in the domestic market for both imported and domestic products.

The NT obligations are set forth in Article III of the GATT. Article III:1 begins by reiterating the general principle that internal measures should not be applied so as to afford protection to domestic production.[44] Article III:2 governs internal tax measures, such as value added taxes, sales taxes and excise duties, while Article III:4 covers internal regulatory (non-tax) measures, such as regulations affecting the sale and use of products.[45]

Article III:2 consists of two sentences, each of which covers a particular aspect of the NT obligation. The first sentence refers to the internal taxation of "like products". It states that imported products should not be subject to internal taxes or other charges in excess of those applied to "like" domestic products.[46] The second sentence on the other hand, prohibits the application of internal tax measures contrary to the terms of Article III:1.[47] An "Ad Note" to Article III:2 explains that a violation of Article III:2 is committed when imported "directly competitive or substitutable products" are taxed in excess of domestic "like products" "so as to afford protection" to domestic production.[48]

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[44] Article III:1 provides: "The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production."; *See also* note 23 at 347.

[45] Article III:4 provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."; *See also* note 23 at 350, 368-369.

[46] Article III:2, first sentence, provides: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

[47] Article III:2, second sentence, provides: "Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

[48] Ad Note to Article III:2 provides: "A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed."; *See* Aaditya Mattoo & Arvind

Under Article III:2, internal taxes, while not "bound", as tariffs are, have to be applied to both domestic and imported products in a non-discriminatory manner.[49] It contemplates of both "in law" (*de jure*) and "in fact" (*de facto*) discrimination.[50] Hence, taxes and regulatory measures, which are on their face "origin-neutral" with respect to imports and domestic products, but have discriminatory effects when applied, will be deemed incompatible with Article III. [51] The reach of the NT Principle is far and wide, as it covers virtually *all* governmental policies of *all* the members states, be they taxes, laws, regulations, etc., which affect the conditions for the sale and distribution of imported products and services. Moreover, it covers not only explicitly discriminatory internal measures, but also facially neutral measures having discriminatory consequences.[52]

A WHISKY IS A WHISKY IS A WHISKY: LIKE PRODUCTS, THEORY AND PRACTICE

As mentioned above, Article III:2, consisting of two sentences, governs two distinct situations: the first concerns "like products" and the second concerns "directly competitive or substitutable products ("DCS")."[53] In assessing the compatibility of internal tax measures with Article III:2, first sentence, it is necessary to determine (a) whether the imported and domestic products subject of the tax are "like"; and (b) whether taxes applied to the imported products are "in excess of" those applied to "like" domestic products.[54] In contrast, in assessing the compatibility of tax measures with Article III:2, second sentence, it is necessary to determine (a) whether the imported and domestic products are "directly competitive or substitutable"; and (b) whether the directly competitive or substitutable imported products are "not similarly taxed"; and (c) whether the

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Subramanian, *Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution* 1 International Journal of Economic Law 303, 304 (1998) ; *See also* note 23 at 348.

[49] *See supra* note 25 at 167.

[50] *See supra* note 23 at 346.

[51] *See supra* note 25 at 173; beginning with *Japan—Alcoholic Beverages* in 1987, the GATT and WTO panels have unequivocally ruled that *de facto* discrimination violates Article III.

[52] Henrik Horn & Petros Mavroidis, *Still Hazy After All These Years: The Interpretation of National Treatment in GATT/WTO Case-Law on Tax Discrimination* 15(1) European Journal of International Law 39, 40 (2004).

[53] Ole Kristian Fauchald, *Flexibility and Predictability under the World Trade Organization's Non-Discrimination Clauses* 37(3) Journal of World Trade 443, 452 (2003).

[54] *See supra* note 36 at 106-107.

difference in tax treatment is imposed "so as to afford protection" ("SATAP") to domestic production.[55]

Hence, if it were established that a particular pair of imported and domestic products are "like", and therefore falling under Article III:2, first sentence, then any tax imposed on the foreign products which is "in excess" of that imposed on domestic products would be in breach of Article III:2.[56] On the other hand, if the foreign and domestic products are not "like" but are instead only DCS, hence falling under Article III:2, second sentence, then mere difference in tax treatment would not automatically constitute a breach of Article III:2, it would have to be shown that the difference in treatment was SATAP to domestic production.[57] Thus, whereas Article III:2, first sentence, demands absolute equality of taxation and admits of no flexibility, in that even the slightest tax differential would lead to the conclusion that the internal tax imposed on the imported products is inconsistent with the national treatment obligation; Article III:2, second sentence, permits of some flexibility, in that the tax differential has to be more than *de minimis* for the tax imposed on imported products to be found in breach of Article III:2, second sentence, a small differential in taxation is generally not considered as being imposed SATAP to domestic production.[58] Therefore, a complainant seeking to file a claim for violation of the NT obligation under Article III should show either that (a) the domestic and the foreign products are "like" and that (b) the latter is taxed "in excess" of the former, or that (a) the two products are DCS but (b) are not similarly taxed and (c) the dissimilar taxation operates SATAP to domestic production.[59] Hence, central to any investigation concerning an alleged breach of the NT obligation is the determination of whether the imported and domestic products concerned are either "like" or "DCS".

"Like products" is a central concept in WTO trade agreements and appears in numerous provisions of the GATT. Unfortunately, while the concept of like products has been in place since 1947, when the GATT initially came into

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[55] *See supra* note 36 at 106-107.

[56] *See supra* note 48 at 304.

[57] *Id.*

[58] *See supra* note 23 at 364; note 48 at 304; note 25 at 170; note 34 at 222-223.

[59] *See supra* note 34 at 216; *See also* JOHN JACKSON ET AL. LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 551-552 (2008); *See also supra* note 52 at 41.

existence, the term has never been formally defined.[60] As a result, the concept of like products has shifted over the years and has generated a fair number of disputes, the latest of which is *Philippines.*

Panels have always considered "likeness" to be a fluid concept. The 1970 Working Party Report on *Border Tax Adjustment* stated that "likeness" should be examined on a "case-by-case" basis to allow a fair assessment of the different elements which constitute a "similar" product. It suggested the examination of, among others, the product's end-users in a given market, the consumers' tastes and habits, and the product's properties, nature and quality in determining whether two products are "similar".[61] *Japan — Alcoholic Beverages II* ("*Japan*") clarified the *Border Tax Adjustments* criteria by stating that the definition of "like products" depends on where it is found in the WTO Agreement, employing the now classic image of the accordion, it ruled thus:

> The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.[62]

In *Mexico—Taxes on Soft Drinks*,[63] the Panel, in determining whether beet sugar and cane sugar are "like" products, considered "the products' properties, nature and quality; their end-uses in a given market; consumers' tastes and habits; and the tariff classification of the products based on the Harmonized System."[64] It

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[60] MARCO C.E.J. BRONCKERS, A CROSS SECTION OF WTO LAW 15 (2001); the drafters of Article III formulated no precise definition for the term "like products," deciding instead to leave the task to the then proposed International Trade Organization ("ITO"). However, since the ITO never came into existence, the term was never officially defined. Hence, despite the powerful scope of the term, the GATT has never functioned without a clear definition of "like products" since its inception; *see* Richard L. Matheny, *In the Wake of the Flood: "Like Products" and Cultural Products After the World Trade Organization's Decision in Canada Certain Measures Concerning Periodicals* 147 University of Pennsylvania Law Review 245, 251 (1998-1999).

[61] Report of the Working Party on *Border Tax Adjustment,* GATT Doc. L/3464, BISD 18S/97, 2 December 1970, par. 18; *See also* note 23 at 352.

[62] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, 21. ("*Japan—Taxes on Alcoholic Beverages*")

[63] Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages,* WT/DS308/R, adopted 24 March 2006, as modified by Appellate Body Report WT/DS308/AB/R, DSR 2006:I, 43.

[64] *See supra* note 63 at par. 8.29.

concluded that beet sugar and cane sugar, both sweeteners in the production of soft drinks and syrups, are "like" products.[65] In *Dominican Republic—Import and Sale of Cigarettes*,[66] the Panel, in examining whether the Selective Consumption Tax was consistent with Article III:2, first sentence, considered: "as products 'alike' to the imported cigarettes, those domestic cigarettes that were sold at a similar price."[67] It considered imported Viceroy cigarettes to be "like" domestic Lider cigarettes since both were sold at similar prices.[68]

A WHISKY BY ANY OTHER NAME: DIRECTLY COMPETITIVE OR SUBSTITUTABLE PRODUCTS

DCS products are products which are interchangeable or offer "alternative ways of satisfying a particular need or taste."[69] Two products are DCS if one is able to use the product (a) in place of the other (b) for the similar purpose of satisfying a particular need or taste and (c) without significant reduction of consumption utility.[70] The concept of DCS products is broader than the concept of "like products" as it encompasses even distinctly different kinds of goods.[71] By establishing a concurrent application between the first and the second sentences of Article III:2, the NT obligation reaches even products with absolutely no physical similarity to each other.[72]

Like products are a subset of DCS products, hence, all like products are, by definition, DCS, whereas not all DCS products are "like".[73] Indeed, if the concepts of "like", "identical", "similar" and "different" were to be plotted on a continuum, the concept of "like" and "identical" would be found on one extreme while the concept of "different" would be found on the other extreme.[74] In

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[65] *Id.* at par. 8.36.

[66] Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425.

[67] *Id.* at par. 7.336

[68] *Id.*; *See also* note 23 at 354.

[69] Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3. ("*Korea—Taxes on Alcoholic Beverages*"); *See also* note 36 at 17.

[70] *See supra* note 36 at 17.

[71] *Id.* at 109.

[72] *Id.*

[73] Like products are *per se* DCS; *See supra* note 36 at 130-131; *See also Korea – Taxes on Alcoholic Beverages.*

[74] *See supra* note 36 at 12.

between these two ends would be found the concepts of "similar", "directly competitive or substitutable" and "indirectly competitive or substitutable".[75]

In *Japan*,[76] the Japanese Liquor Tax Law subjected predominantly western drinks (i.e, vodka, liqueurs, gin, genever, rum, whisky and brandy) to a heavier tax than domestically produced drinks (i.e. shochu). As a result, sochu was subjected to less burdensome taxation than, vodka and other alcoholic beverages predominantly produced in Europe and the US. The Appellate Body stated that the concept of "like products" should be interpreted narrowly because of the existence of the concept of DCS products in Article III:2, second sentence,[77] such that while imported and domestic products may not be "like products" under Article III:2, first sentence, they may fall under the broader category of DCS products under Article III:2, second sentence.[78] In addition to the *Border Tax Adjustment* criteria,[79] the Appellate Body in *Japan* also considered the "tariff classification" of the products in question as relevant and helpful in determining product similarity.[80] The Appellate Body ruled that shochu and vodka were "like products". Thus, by taxing vodka "in excess of" shochu, the Japanese Liquor Tax Law contravened Article III:2, first sentence. Furthermore, it also ruled that shochu and whisky, brandy, rum, gin, genever, and liqueurs were DCS products but were taxed differently SATAP to domestic production. Hence, the Japanese Liquor Tax Law was also found to be in violation of Art. III:2, second sentence.

While physical characteristics, common end-uses, and tariff classification are the elements taken into account when determining whether two products are DCS, it has also been ruled that it is the consumers in the marketplace who ultimately decide whether two products are indeed in competition or substitutable with each other.[81] As between the "like products" and the "DCS products" rules

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[75] *Id.*

[76] *Japan – Taxes on Alcoholic Beverages.*

[77] See supra note 23 at 352.

[78] *Japan – Taxes on Alcoholic Beverages*, 25.

[79] Factors in determining "likeness" include: the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.

[80] It ruled that: "a uniform tariff classification of products can be relevant in determining what are 'like products'. If sufficiently detailed, tariff classification can be a helpful sign of product similarity."; *See also* Panel Reports on *EEC—Measures on Animal Feed Proteins*, L/4599 - 25S/49, 14 March 1978; *Japan—Alcoholic Beverages I*, L/6216 - 34S/83, 10 November 1987; and *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29.

[81] *Japan – Taxes on Alcoholic Beverages*; *See also* note 34 at 221.

under Article III:2, the latter embodies the ideal of unfettered global free trade since it captures internationally traded products based on their competitive relationship even if they share no physical similarity.[82]

In *Canada — Periodicals*,[83] the United States argued that the Canadian Excise Tax Act, which imposed excise taxes on split-run periodicals,[84] created an "artificial distinction between split-run magazines and other types of magazines." According to the US, by taxing only split-run magazines, Canada discriminated against imported magazines and favored "like" domestic magazines. Canada argued that since editorial content was an essential characteristic of a periodical, periodicals with Canadian market-specific editorial content were distinguishable from split-run periodicals reproducing foreign editorial content, hence, the two types of periodicals were not "like products".[85] The Panel found that imported split-run periodicals and domestic non split-run periodicals were "like products" within the meaning of Article III.2 and that the Canadian excise tax on magazines was inconsistent with Article III:2, first sentence. On appeal, the Appellate Body, while upholding the Panel's findings and conclusions on the applicability of Article III:2 to Canada's Excise Tax Act, reversed its finding that said tax is inconsistent with Article III:2, first sentence. Instead it ruled that Canada's Excise Tax Act is inconsistent with Article III:2, second sentence, and found that split-run and non-split-run periodicals are DCS products in so far as they are part of the same segment of the Canadian market for periodicals. The Appellate Body ruled that, to be DCS, products do not have to be perfectly substitutable.[86]

In *Korea—Alcoholic Beverages* ("*Korea*")[87], the US and EC claimed that Korean tax measures, which imposed different tax rates for different categories of distilled spirits, favored distilled and diluted Korean soju over similar imported liquor products such as vodka, whiskies, rum, gin, brandies, cognac, liqueurs, tequila and ad mixtures. The Appellate Body upheld the Panel's conclusion that

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[82] *See supra* note 60 at 265.

[83] Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449 ("*Canada – Certain Measures Concerning Periodicals*").

[84] A split-run periodical is a periodical whereby different editions are distributed in different countries. The different editions have the same or substantially the same content, differing only in the advertisements which focus on the local markets of each specific edition.

[85] Robert Eberschlag, *Culture Clash: Canadian Periodical Policies and the World Trade Organization* 26(1) Manitoba Law Journal 65, 77(1998-1999) .

[86] *Canada – Certain Measures Concerning Periodicals*, 473; *See also* note 23 at 361.

[87] *Korea – Taxes on Alcoholic Beverages.*

the Korean tax measures at issue were inconsistent with Art. III:2, second sentence. Taking *Japan* one step further, the Appellate Body in *Korea* explained that the term DCS "describes a particular type of relationship between two products, one imported and the other domestic" and that the term DCS "implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences" since "the word 'substitutable' indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another."[88] Hence, products are "competitive or substitutable when they are interchangeable or if they offer...*alternative ways of satisfying a particular need or taste.*"[89] The Appellate Body also ruled that, in examining whether products are DCS, an analysis of *latent* as well as *extant* demand is required since "competition in the marketplace is a dynamic, evolving process".[90]

THOU SHALL NOT BEGGAR THY NEIGHBOUR: THE SATAP PROHIBITION

It is not sufficient for the complainant to show that a pair of products are DCS to establish a breach of Article III:2, second sentence, it has to additionally demonstrate that the difference in taxation was SATAP to domestic production. This entails going behind the law to ascertain its protectionist intent, a task which is next to impossible given the diverse legal systems and legislative processes of the member states. Panels have however ruled that a measure's protective application may nevertheless be discerned from a) the design, b) the architecture, and c) the revealing structure of a measure.[91] For instance, the fact that a tax measure operates in such a way that domestic products are classed under lower tax brackets while imported products are classed under higher tax brackets, serves as a strong

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[88] *See* supra note 87 at par. 114.

[89] *Id.* at par. 114-115, italics supplied.

[90] *See supra* note 23 at 362; *citing Korea – Taxes on Alcoholic Beverages*, par. 120; *Korea* explained the dynamic view of the concept of DCS products, thus: "In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term 'directly competitive or substitutable'. The object and purpose of Article III confirms that the scope of the term 'directly competitive or substitutable' cannot be limited to situations where consumers *already* regard products as alternatives. If reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit."

[91] *Japan – Taxes on Alcoholic Beverages*, 120; *See also* note 23 at 366.

indication that the tax measure is imposed SATAP to domestic production.[92] The magnitude of the tax differential is also an indication of the protective application of a tax measure.[93] Hence, the tax differential between a pair of DCS products either by itself, when the magnitude of the tax differential is great, or in conjunction with other factors, such as the design, architecture and "revealing" structure of the measure, when the tax differential is more than *de minimis* but less than significant, establishes a violation of the SATAP prohibition.[94]

In *Chile—Alcoholic Beverages* ("*Chile*"),[95] Chilean law distinguished between three categories of alcoholic beverages: drinks with alcoholic content of less than 35°; between 35° and 39°; and, more than 39°. Whereas, the products in the first and second categories were taxed at 27% *ad valorem,* the products in the last category were taxed at 47% *ad valorem.* The US and EC argued that some imported distilled spirits, such as whisky, brandy and cognac, which have alcoholic contents of slightly more than 39°, were taxed at the higher 47% rate than the DCS Chilean pisco. The latter has an alcoholic content of less than 35° and was taxed at the lower 27% rate resulting in a tax differential which operated SATAP to the domestic spirits.[96] Chile pointed out that majority of the products hit by the higher tax rates in the over 39° tax category were domestic products such that no protection could have resulted from such a taxation scheme.[97] The Appellate Body, while agreeing that most of the alcoholic drinks hit by the higher tax rates were of Chilean origin, nevertheless ruled that the more than *de minimis* tax differential (i.e., a 20% difference between the two tax rates) was significant and operated SATAP to Chilean pisco.[98]

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[92] See supra note 23 at 366.

[93] *Id.*

[94] *See supra* note 52 at 51

[95] Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281 ("*Chile – Taxes on Alcoholic Beverages*").

[96] *Id.* at par. 7.83; *See also* note 23 at 360.

[97] *See supra* note 52 at 48-49.

[98] *See supra* note 36 at 139 ; In par. 67, the Appellate Body further stated that: "The relative proportion of domestic versus imported products within a particular fiscal category is not, in and of itself, decisive of the appropriate characterization of the total impact of the New Chilean system under Article III:2, second sentence, of the GATT 1994. This provision, as noted earlier, provides for equality of competitive conditions of all directly competitive or substitutable imported products, in relation to domestic products, and not simply, as Chile argues, those imported products within a particular fiscal category. The cumulative consequence of the New Chilean System is, as the Panel found, that approximately 75 percent of all domestic production of the distilled alcoholic beverages at issue will be located in the fiscal category with the lowest tax rate, whereas approximately 95 percent of the directly competitive or substitutable imported products will be found in the fiscal category subject to the highest tax rate."; *See also* note 52 at 48-49.

PHILIPPINES—TAXES ON DISTILLED SPIRITS: A CRITICAL ANALYSIS

In their respective requests for the establishment of a Panel, the EC[99] and the US[100] alleged that the Philippines' excise tax regime with respect to distilled spirits is inconsistent with Article III:2, first and second sentences. More specifically, they point to Section 141 of the Philippine National Internal Revenue Code of 1997 ("NIRC") as having a discriminatory structure and adversely affecting imports of distilled spirits into the Philippines.

Section 129 of the NIRC[101] provides that excise taxes shall be imposed on goods manufactured or produced in, or imported into, the Philippines.[102] Chapter III Title VI of the NIRC, entitled "Excise Tax on Alcohol Products" consists of three sections[103] covering three different kinds of alcoholic products: distilled spirits,[104] wines[105] and fermented liquor.[106] Section 141 of the NIRC ("Section 141"),[107] imposing excise tax on distilled spirits, in part provides:

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[99] WT/DS396/4, dated 11 December 2009.

[100] WT/DS403/4, dated 29 March 2010.

[101] Rep. Act No. 8424, This is the Tax Reform Act of 1997, *available at* http://www.lawphil.net/statutes/repacts/ra1997/ra_8424_1997.html (last visited 5 July 2010).

[102] § 129 provides: "Goods subject to Excise Taxes. - Excise taxes apply to goods manufactured or produced in the Philippines for domestic sales or consumption or for any other disposition and to things imported. The excise tax imposed herein shall be in addition to the value-added tax imposed under Title IV.

For purposes of this Title, excise taxes herein imposed and based on weight or volume capacity or any other physical unit of measurement shall be referred to as 'specific tax' and an excise tax herein imposed and based on selling price or other specified value of the good shall be referred to as 'ad valorem tax."

[103] §§ 141, 142 and 143.

[104] § 141.

[105] § 142. *Wines.* - On wines, there shall be collected per liter of volume capacity, the following taxes:

(a) Sparkling wines/champagnes regardless of proof, if the net retail price per bottle (excluding the excise tax and the value-added tax) is:

(1) Five hundred pesos (P500.00) or less - One hundred forty-five pesos and sixty centavos (P145.60); and

(2) More than Five hundred pesos (P500.00) - Four hundred thirty-six pesos and eighty centavos (P436.80).

(b) Still wines containing fourteen percent (14%) of alcohol by volume or less, Seventeen pesos and forty-seven centavos (P17.47); and

Section 141. *Distilled Spirits.* - On distilled spirits, there shall be collected, subject to the provisions of Section 133 of this Code, excise tax as follows:

(a) If produced from the sap of nipa, coconut, cassava, camote, or buri palm or from the juice, syrup or sugar of the cane, provided such materials are produced commercially in the country where they are processed into distilled spirits, per proof liter, Eleven pesos and sixty-five centavos (P11.65);

(b) If produced from raw materials other than those enumerated in the preceding paragraph, the tax shall be in accordance with the net retail price per bottle of seven hundred fifty milliliter (750 ml.) volume capacity (excluding the excise tax and the value-added tax) as follows:

(1) Less than Two hundred and fifty pesos (P250.00) - One hundred twenty-six pesos (P126.00), per proof liter;

(2) Two hundred and fifty pesos (P250.00) up to Six hundred and seventy-five pesos (P675.00) - Two hundred fifty-two pesos (P252.00), per proof liter; and

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(c) Still wines containing more than fourteen percent (14%) but not more than twenty-five percent (25%) of alcohol by volume, Thirty-four pesos and ninety-four centavos (P34.94).

Fortified wines containing more than twenty-five percent (25%) of alcohol by volume shall be taxed as distilled spirits. 'Fortified wines' shall mean natural wines to which distilled spirits are added to increase their alcohol strength. xxx (as amended by RA 9334)

[106] § 143. *Fermented Liquors.* - There shall be levied, assessed and collected an excise tax on beer, lager beer, ale, porter and other fermented liquors except *tuba, basi, tupuy* and similar fermented liquors in accordance with the following schedule:

(a) If the net retail price (excluding the excise tax and the value-added tax) per liter of volume capacity is less than Fourteen pesos and fifty centavos (P14.50), the tax shall be Eight pesos and twenty- seven centavos (P8.27) per liter;

(b) If the net retail price (excluding the excise tax and the value-added tax) per liter of volume capacity is Fourteen pesos and fifty centavos (p14.50) up to Twenty-two pesos (P22.00), the tax shall be Twelve pesos and thirty centavos (P12.30) per liter;

(c) If the net retail price (excluding the excise tax and the value-added tax) per liter of volume capacity is more than Twenty-two pesos (P22.00), the tax shall be Sixteen pesos and thirty-three centavos (P16.33) per liter.

Variants of existing brands and variants of new brands which are introduced in the domestic market after the effectivity of this Act shall be taxed under the proper classification thereof based on their suggested net retail price: *Provided, however,* That such classification shall not, in any case, be lower than the highest classification of any variant of that brand.

A 'variant of a brand' shall refer to a brand on which a modifier is prefixed and/or suffixed to the root name of the brand.

Fermented liquors which are brewed and sold at micro-breweries or small establishments such as pubs and restaurants shall be subject to the rate in paragraph (c) hereof. xxx" (as amended by RA 9334).

[107] Rep. Act No. 9334, entitled "*An Act Increasing the Excise Tax Rates Imposed on Alcohol and Tobacco Products, Amending for the Purpose Sections 141, 142, 143, 144, 145 and 288 of the National Internal Revenue Code of 1997, as amended*" was signed into law on 21 December 2004 and took effect on 1 January 2005. It increased excise tax rates of primarily locally produced spirits by 30% and imported spirits by 50%., *available at* http://www.lawphil.net/statutes/repacts/ra2004/ra_9334_2004.html (last visited 5 July 2010).

> (3) More than Six hundred and seventy five pesos (P675.00) -Five hundred four pesos (P504.00), per proof liter.
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> 'Spirits or distilled spirits' is the substance known as ethyl alcohol, ethanol or spirits of wine, including all dilutions, purifications and mixtures thereof, from whatever source, by whatever process produced, and shall include whisky, brandy, rum, gin and vodka, and other similar products or mixtures. xxx

The EC and US alleged that distilled spirits produced from raw materials enumerated in paragraph (a) of Section 141(which are indigenous to the Philippines) are subjected to a lower tax rate compared to distilled spirits produced from other raw materials, which are taxed at rates 10 to 40 times higher, depending on their price bands. According to them, this regime not only taxed imported distilled spirits made from "non-indigenous" raw materials "in excess of" "like" domestic spirits,[108] it also taxed DCS imported distilled spirits in a way that affords protection to domestic spirits.[109] They claim that Section 141 is inconsistent with the Philippines' NT obligations under the GATT and nullifies and impairs the benefits otherwise accruing to them under the GATT.

A WOLF IN SHEEP'S CLOTHING? A DE FACTO DISCRIMINATION ANALYSIS

Paragraph (a) of Section 141 applies a lower excise tax rate to distilled spirits produced a) using raw materials listed therein, which are b) "produced commercially in the country where they are processed into distilled spirits." Paragraph (b) of Section 141 on the other hand applies higher tax rates on distilled spirits produced using raw materials other than those listed in paragraph (a). Since Section 141 taxes distilled spirits based on the raw materials used, it appears that, *prima facie,* no distinction is made between imported and domestic distilled spirits. Hence, as long as it can be demonstrated that any distilled spirit was produced using any of the raw materials listed in paragraph (a) and that these raw materials were produced commercially in the country where the distilled spirit was made, then, regardless of origin, the distilled spirit will be taxed under the lower rate provided in paragraph (a).

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[108] WT/DS396/4, dated 11 December 2009.
[109] WT/DS403/4, dated 29 March 2010.

It appears however that most of the raw materials under paragraph (a) of Section 141 are indigenous to the Philippines and other tropical countries. It also appears that most, if not all, domestic distilled spirits are manufactured from these indigenous raw materials. Hence, domestic distilled spirits are automatically taxed at the lower rate provided in paragraph (a). In contrast, it is unlikely for imported distilled spirits to have been manufactured from these indigenous raw materials, much less is it likely that such raw materials be produced commercially in countries such as the EC or the US. Hence, most imported distilled spirits are taxed at the higher rates provided in paragraph (b).

This point brings to mind the three liquor tax cases of *Japan*, *Korea* and *Chile* involving accusations of *de facto* tax discrimination. Interestingly, the EC and the US were also the complainants in all these three cases. In these cases, the tax measures in question, while *on their face* neutral and do not distinguish between products based on their origin, had the effect of discriminating against "like" or DCS imported products *when applied.*[110] In *Japan,* the products concerned were found to be DCS and, one pair, vodka and sochu, were deemed to be "like products". In *Korea,* Korean laws were found to be in violation of Article III:2 for having imposed heavier taxes on imported drinks than on soju, a DCS product to the imported spirits. *Chile* arrived at a similar result since the products concerned were found to be DCS and the differential taxation operated in favour of domestically produced pisco.[111]

In the above cases, since most sochu is produced in Japan, most soju in Korea, and most pisco in Chile, the taxation systems in Japan, Korea and Chile respectively, while on their face non discriminatory, had the effect of conferring an advantage on these predominantly national products, to the prejudice of their imported counterparts.[112] Similarly, in *US—Malt Beverages*,[113] the State of Mississippi applied a lower excise tax rate on wines made from a certain grape variety. The Panel ruled that while the excise tax structure did not on its face discriminate against imports, since the favored grape variety was grown only in the

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[110] *See supra* note 52 at 41.

[111] *Id.*

[112] *Id.*

[113] *US—Measures Affecting Alcoholic and Malt Beverages*, DS23/R - 39S/206, 19 June 1992, GATT B.I.S.D. (39th Supp.).

State of Mississippi and Mediterranean regions, the tax differential was deemed discriminatory. Following the reasoning behind the above cited cases, it is reasonable to believe that the Panel reviewing *Philippines* will find that, as applied, Section 141 discriminates against imported distilled spirits.

WALKS LIKE A DUCK, QUACKS LIKE A DUCK, IS IT A DUCK? A LIKE PRODUCTS ANALYSIS

Are domestic distilled spirits made from indigenous raw materials "like" imported distilled spirits made from other raw materials? Case law suggests that "likeness," under Article III:2 first sentence, can be determined by examining, among others, the product's end-users in a given market, consumers' tastes and habits, the product's properties, nature and quality,[114] tariff classification,[115] and price.[116] Under this "physical characteristics test", a case-specific assessment and comparison is made of two or more products. The term "like product" is construed narrowly in Article III:2, first sentence, given the broader concept of DCS products in Article III:2, second sentence.[117]

The properties, nature and quality of the distilled spirits in question, are defined by the respective product standards authorities in the Philippine, EC and US.[118] Whereas Philippine brandies are "obtained solely from the fermented juice of fresh, ripe and sound grapes",[119] brandies in the EC are "produced from wine spirit"[120] while US brandies are distilled from "fermented juice, mash, or wine of

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[114] Report of the Working Party on *Border Tax Adjustment,* GATT Doc. L/3464, BISD 18S/97, 2 December 1970, par. 18; *See supra* note 23 at 352.

[115] Panel Reports on *EEC—Measures on Animal Feed Proteins*, L/4599 - 25S/49, 14 March 1978; *Japan—Alcoholic Beverages I*, L/6216 - 34S/83, 10 November 1987; and *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29.

[116] Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425.

[117] *See supra* note 23 above at 352; *See* also note 25 at 159.

[118] *See* Appendix A.

[119] § 2.1.1., Standards Administrative Order No. 558, series of 1978, Bureau of Standards, Department of Trade and Industry, Republic of the Philippines., *available at* http://www.bfad.gov.ph/default.cfm?page_id=837 (last visited 6 July 2010).

[120] Annex II, Section 5(a)(i), EC Regulation No. 110/2008, 15 January 2008, *available at* http://www.mee.government.bg/ind/doc/LexUriServ.pdf (last visited 6 July 2010).

fruit, or from the residue thereof."[121] Whereas Philippine brandies have a minimum ethyl alcohol content of 32.5% by volume,[122] its EC counterpart has a minimum alcoholic strength of 36% by volume.[123] Whereas Philippine and US whiskies are distilled from "a fermented mash of grain",[124] EC whiskies are distilled from "a mash made from malted cereals with or without whole grains of other cereals".[125] While Philippine whiskies have an alcoholic content of at least 32.5% by volume,[126] EC whiskies have a minimum alcoholic content of 40% by volume.[127] Whereas Philippine and US rums are made from alcoholic distillate obtained "solely from fermented juice or sugarcane, sugarcane molasses or other sugarcane by-products",[128] EC rums are produced "either from molasses or syrup produced in the manufacture of cane sugar or from sugar-cane juice".[129] Finally, while Philippine and US vodkas are obtained from "neutral spirit filtered through activated carbon (charcoal)" made from "fermented grain, potato, or any other source of fermentable carbohydrates",[130] EC vodkas are "obtained following

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[121] Title 27, Part 5, Subpart C, Chapter 5.22 (d), Code of Federal Regulations, United States of America, *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b60b705b2c7359324b725a17a5119140&rgn=div8&view=text&node=27:1.0.1.1.3.3.25.2&idno=27 (last visited 6 July 2010).

[122] Standards Administrative Order No. 558, *supra* note 119.

[123] Annex II, Section 5(a)(i), EC Regulation No. 110/2008, *supra* note 120..

[124] § 2.1.1., Standards Administrative Order No. 259, series of 1976, Bureau of Standards, Department of Trade and Industry, Republic of the Philippines, *available at* <http://www.bfad.gov.ph/default.cfm?page_id=837> (last visited 6 July 2010); Title 27, Part 5, Subpart C, Chapter 5.22 (b), Code of Federal Regulations, United States of America, *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b60b705b2c7359324b725a17a5119140&rgn=div8&view=text&node=27:1.0.1.1.3.3.25.2&idno=27 (last visited 6 July 2010).

[125] Annex II, Section 2(a), EC Regulation No. 110/2008, 15 January 2008, *available at*http://www.mee.government.bg/ind/doc/LexUriServ.pdf (last visited 6 July 2010).

[126] Standards Administrative Order No. 259, *supra* note 124.

[127] Annex II, Section 2(a), EC Regulation No. 110/2008, *supra* note 125.

[128] § 2.1.1., Standards Administrative Order No. 257, series of 1976, Bureau of Standards, Department of Trade and Industry, Republic of the Philippines, *available at*http://www.bfad.gov.ph/default.cfm?page_id=837 (last visited 6 July 2010); Title 27, Part 5, Subpart C, Chapter 5.22 (f), Code of Federal Regulations, United States of America. *available at*http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b60b705b2c7359324b725a17a5119140&rgn=div8&view=text&node=27:1.0.1.1.3.3.25.2&idno=27> (last visited 6 July 2010).

[129] Annex II, Section 1(a), EC Regulation No. 110/2008, 15 January 2008, *available at*http://www.mee.government.bg/ind/doc/LexUriServ.pdf (last visited 6 July 2010).

[130] § 2.1.1., Standards Administrative Order No. 258, series of 1976, Bureau of Standards, Department of Trade and Industry, Republic of the Philippines, *available at* http://www.bfad.gov.ph/default.cfm?page_id=837 (last visited 6 July 2010); Title 27, Part 5, Subpart C, Chapter 5.22 (a)(1), Code of Federal Regulations, United States of America, *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b60b705b2c7359324b725a17a5119140&rgn=div8&view=text&node=27:1.0.1.1.3.3.25.2&idno=27 (last visited 6 July 2010).

fermentation with yeast from either potatoes and/or cereals or other agricultural raw materials".[131]

A cursory comparison of the properties, nature and quality of Philippine and imported distilled spirits will show that while these properties are not entirely "like"[132] each other, they are at least "similar"[133] to each other, both having similar characteristics and component materials, thereby enabling them to perform the same functions and be commercially interchangeable. Furthermore, under Chapter 22 of the Asean Harmonized Tariff Nomenclature Book,[134] brandy, whisky, rum, gin and vodka are all listed under heading 22.08 entitled "undenatured ethyl of an alcoholic strength by volume of less than 80% vol.; spirits, liqueurs and other spirituous beverages".[135] Hence, following settled case law,[136] which ruled that product properties, nature and quality as well as tariff classification are indicators of likeness, these distilled spirits can be treated as "like products". It will also be recalled that in *Japan*, the AB found vodka to be "like" Japanese sochu.

The United States, in its written submission, points out that the above process of analysis is not even applicable to the present. It posits that the above analysis is applicable in cases where two different types of spirits are being compared, for instance imported vodka vis-a-vis domestic *soju*, as in the case of

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[131] Annex II, Section 15(a), EC Regulation No. 110/2008, 15 January 2008, *available at* http://www.mee.government.bg/ind/doc/LexUriServ.pdf (last visited 6 July 2010).

[132] Article 15 of the Customs Valuation Agreement provides a definitive interpretation of the concept of 'identical': "Identical goods means goods which are the same in all respects including physical characteristics, quality and reputation. Minor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical." *available at* http://www.worldtradelaw.net/uragreements/customsvaluationagreement.pdf (last visited 6 July 2010); *See also* note 36 at 12.

[133] Article 15 of the Customs Valuation Agreement also provides a definitive interpretation for the concept of 'similar goods': "Similar goods means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar." *available at* http://www.worldtradelaw.net/uragreements/customsvaluationagreement.pdf (last visited 6 July 2010); The reference to "similar" as a synonym of "like" echoes the French version of Article III:4, "*produits similaire*" and the Spanish version "*productos similares*"; *See* note 23 at 329; *See also* note36 at 13.

[134] *available at* http://www.tariffcommission.gov.ph/AHTN%20Chapter22.pdf (last visited 6 July 2010).

[135] *See* Appendix B.

[136] Panel Reports on *EEC—Measures on Animal Feed Proteins*, L/4599 - 25S/49, 14 March 1978; *Japan—Alcoholic Beverages I*, L/6216 - 34S/83, 10 November 1987; and *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29.

Korea. In this case, the products being compared are imported *whisky* and domestic *whisky.* Thus, whereas in other disputes the question before the Panel and Appellate Body is "whether *vodka* is like *soju*" or as to be shown below, "whether *pisco* is DCS with *whisky*?" The appropriate question in this case is "whether *whisky* is like *whisky*"?[137] The answer is painfully obvious.

Are "like" Philippine and imported distilled spirits taxed similarly as required by Article III:2, first sentence? Under Section 141, distilled spirits produced using indigenous raw materials are taxed at a specific flat rate of Php 11.65 per proof litre. On the other hand, distilled spirits produced using any other raw materials are taxed based on the net retail price per bottle (*ad valorem*) ranging from Php 126.00 per proof litre to Php 504.00 per proof litre. This translates to a tax differential of between Php 114.35 to Php 492.35. Evidently, imported distilled spirits, manufactured using non-indigenous raw materials, are taxed "in excess of" similar domestic spirits.

Section 2 of Revenue Regulations 12-2004 ("the Regulations")[138] , which implements Section 141, is revealing. It lists the excise taxes applicable to various brands of distilled spirits under either of these two headings: a) *Local* Distilled Spirits Brands Produced from Sap of Nipa, Coconut, etc. covered by Section 141 (a) and b) *Imported* Distilled Spirits Brands Produced from Grains, Cereals, and Grains covered by Section 141 (b). Whereas Section 141 subtly went around the product origin discrimination, imposing excise taxes based on the raw materials used, resulting in a *de facto* discrimination; the "slip of the pen"[139] in the Regulations, unequivocally distinguishing between "local" and "imported" distilled spirits, resulted in a *de jure* discrimination.

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[137] Second Written Submission of the United States, paragraphs 21-22, *available at* http://www.worldtradelaw.net/wtodisputesubmissions/us/DS403_USSecondWrittenSubmission.pdf (last visited 6 February 2011).

[138] This regulation, entitled "*Tax Rates for Alcohol and Tobacco Products introduced on or before December 31, 1996 and those enumerated under Revenue Regulations No. 22-2003 and 23-2004*" was issued on December 29, 2004 and implements the provisions of Republic Act No. 9243, entitled "*An Act Rationalizing the Provisions on the Documentary Stamp Tax (DST) of the National Internal Revenue Code (NIRC) of 1997, as Amended, and for Other Purposes*". *available at* ftp://ftp.bir.gov.ph/webadmin1/pdf/15439rr04_12.pdf (last visited 6 July 2010).

[139] First Written Submission of the European Union, paragraph 187, *available at* http://www.worldtradelaw.net/wtodisputesubmissions/eu/DS396_EUFirstWrittenSubmission.pdf (last visited 6 February 2011).

To illustrate, under the Regulations, Ginebra San Miguel, a famous local gin is taxed at Php 4.11, while the Gordon Gin, a similarly famous, albeit imported gin, is taxed at Php 107.15, resulting in a tax difference of around Php 103.03 between these two brands. The local White Castle Whisky is taxed at Php 8.80 while the "low-priced" imported Scottish Leader, of similar proof, is taxed at Php 95.23, the "medium-priced" imported Canadian Club, of similar proof, is taxed at Php 190.47 and the "high-priced " imported Martell XO, of similar proof, is taxed at Php 380.94. This amounts to a difference of Php 86.43, Php 181.67 and Php 372.14 across the three whisky price ranges, a categorization which incidentally is found only in imported brands. Finally, Napoleon VSOP Brandy, a famous local 84 proof brandy is taxed at Php 7.41 while Napoleon Brandy, an imported 84 proof Spanish brandy, which interestingly has a similar name, is taxed at Php 100.00, resulting in a difference of Php 92.59 between local and imported Spanish brandies. The discriminatory effect of the two-tiered tax structure set forth in Section 141 is difficult to escape notice. As applied to specific brands sold in the market, the conclusion is inevitable that taxes on imported distilled spirits are not only "in excess" of domestic spirits, the tax differential is also more than *de minimis*, resulting in a violation of both the first and second sentences of Article III:2.

WILL A WHISKY BY ANY OTHER NAME TASTE AS SWEET? A DCS ANALYSIS

Assuming for the sake of argument that domestic and imported distilled spirits are not "like products", may they be considered DCS products under the less stringent "substitutability" test under Article III:2, second sentence? It will be recalled that DCS products are products which are interchangeable and offer "alternative ways of satisfying a particular need or taste"[140] and that the concept of DCS is broad enough to encompass even distinctly different kinds of goods.[141] For instance, an internal tax on imported *oranges* may be disallowed when such tax results in affording protection to domestic *apples* which have been granted tax exemptions.[142] Furthermore, in determining whether two products are DCS,

[140] *Korea – Taxes on Alcoholic Beverages*; *See supra* note 35 at 17.
[141] *See supra* note 35 at 109.
[142] *See supra* note 35 at 109.

panels have considered not only *existing* competition but also *potential* [143]and even *future* competition.[144]

Two products are DCS if one is able to use the product (a) in place of the other; (b) for the similar purpose of satisfying a particular need or taste; and (c) without significant reduction of consumption utility.[145] Local and imported distilled spirits, apart from differing in brand and price, have similar properties, nature and qualities, hence one may easily be used in place of the other. In fact, domestic and imported distilled spirits are often mistaken for each other because of the oftentimes similar packaging and "imported sounding" brand names of local distilled spirits. Moreover, either variant of distilled spirits may be used to satisfy a particular need or taste without any significant effect on consumption utility. Prescinding from the foregoing, it is safe to conclude that domestic and imported distilled spirits are DCS products. Indeed, if domestic and imported distilled spirits may be considered "like" products, with all the more reason may they be considered DCS products.

As discussed above, imported distilled spirits are taxed "in excess" of domestic spirits and that the tax differential is more than *de minimis*. Did this difference in taxation operate SATAP to domestic production? An examination of whether dissimilar taxation has been applied SATAP requires a comprehensive and objective analysis of the structure and application of the disputed measure on domestic as compared to imported products.[146] As mentioned above, while the protective aim of a measure may not easily be ascertained, its design, architecture and revealing structure may however give an indication of the measure's protective application.[147] Indeed, an objective examination of a tax measure's underlying criteria, structure, and overall application will reveal whether it is applied in a way that affords protection to domestic products.[148]

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[143] *Japan – Taxes on Alcoholic Beverages; Canada – Certain Measures Concerning Periodicals; Korea – Taxes on Alcoholic Beverages.*

[144] *Korea – Taxes on Alcoholic Beverages.*

[145] *See supra* note 36 at 17.

[146] *See supra* note 34 at 223.

[147] *Japan – Taxes on Alcoholic Beverages*, at 120; VAN DEN BOSSCHE,*supra*note 23 above, at 366.

[148] *See supra* note 34 at 223.

Comparing the structure of Section 141 (Distilled Spirits) to Sections 142 (Wines)[149] and 143 (Fermented Liquors)[150] all of which are found in Chapter III Title VI (Excise Tax on Alcohol Products) of the NIRC, it is at once noticeable that the "two-tiered" system of imposing excise taxes, first distinguishing according to the raw materials used, then distinguishing according to net retail price, is found only in Section 141. In contrast, Section 142 taxes sparkling wines based only on the net retail price and taxes still wines based only on their alcoholic content. Section 143 on the other hand taxes fermented liquor based only on alcoholic content. Unlike Section 141, both Sections 142 and 143 are indifferent to the raw materials used and the origin of said raw materials. Furthermore, a comparison between the Philippines' excise tax structure for distilled spirits and those of its neighbouring countries[151] reveal that only the Philippines distinguishes distilled spirits based on the raw materials used.

This "revealing structure" of Section 141, betrays an underlying protectionist agenda. Such agenda is confirmed by the fact that Section 141, *as applied*, results in domestic spirits, mostly made from indigenous raw materials, being classified under the lower tax bracket while the imported spirits, mostly made from "other" raw materials, being classified under the higher tax bracket. This discriminatory effect is a strong indication that Section 141 is imposed SATAP to domestic production.[152] The Regulations implementing Section 141 further confirmed this suspicion when it explicitly and unequivocally distinguished between "local" and "imported" distilled spirits.

The very magnitude of the tax differential between domestic and imported spirits also evidences this protectionist objective.[153] As mentioned above, the tax differential under Section 141 makes imported spirits more expensive by an average of Php 114.35 to Php 492.35 *per bottle* compared to their domestic counterparts, a disparity which can hardly be considered *de minimis*. As applied to certain brands, this differential translates to imported gins being about Php 103.03 more expensive; imported whiskies about Php 86.43 to Php 372.14

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[149] § 142, *See* note 105.

[150] § 143, *See* note 106.

[151] *See* Appendix C on the distilled spirits excise tax structure of China, Japan, Korea, Thailand and Vietnam.

[152] *See supra* note 23 at 366.

[153] *Japan – Taxes on Alcoholic Beverages*; *See supra* note 23 at 366.

more expensive; and imported brandies about Php 92.59 more expensive than their local counterparts. Given the magnitude of the tax differential between local and imported distilled spirits, the design, architecture and "revealing" structure of Section 141 and the Regulations, it is difficult not to conclude that Philippine excise tax law on distilled spirits discriminates against imported DCS spirits SATAP to domestic spirits.[154]

The protectionist agenda behind the Philippine's excise tax regime is also betrayed by statements made by the Philippine negotiating team in *Philippines—Taxes on Distilled Spirits*. In particular, they state that "the Philippines notes that this issue has implications for distilled spirits from very specific type of produce like nipa, coconut, cassava, camote, buri palm, and sugar cane, which are home-grown by Filipino farmers as well as other nations' farmers"[155] and that the case implicates "the livelihood of small-scale industries and manufacturers of distilled spirits locally sourced from indigenously grown crops such as nipa, camote, coconut, cassava, buri, palm and sugar cane, grown by Filipino farmers." [156] It can be inferred from these statements that Philippine excise tax law on distilled spirits is aimed at the protection of *both* domestic distilled spirits and the farmers of indigenous raw materials. By giving preferential tax treatment to distilled spirits manufactured using indigenous raw materials, Philippine excise tax laws ensure that distilled spirits manufacturers will prefer to use these raw materials over other types of raw materials and in the process continue to take advantage of the lower tax rates.

Furthermore, the position paper of the Office of Policy and Research of the Philippine Department of Trade and Industry ("DTI"), dated 11 May 2009[157]

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[154] *See supra* note 52 at 51.

[155] Irma Isip, *RP to Use EU Case Argument in US Suit on Distilled Spirit,* Malaya, 18 January 2010, *available at* http://www.malaya.com.ph/01182010/busi8.html (last visited 6 July 2010).

[156] Max De Leon & Estrella Torres, *RP Hopes for Resolution of WTO Case,* A1, BusinessMirror, 31 July 2009, *available at*http://businessmirror.com.ph/index.php?option=com_content&view=article&id=13972:rp-hopes-for-resolution-of-wto-case&catid=23:topnews&Itemid=58 (last visited 6 July 2010).

[157] Position Paper of the Office of Policy and Research of the Department of Trade and Industry addressed to Congressman Exequiel B. Javier, Chairman of the Ways and Means Committee of the House of Representatives, entitled: *"DTI Position on Proposed Measures Restructuring the Excise Tax on Alcohol and Tobacco Products"*.

and 8 September 2009,[158] commenting on the proposed amendments to Section 141, all but admitted that Section 141 is in violation of the GATT. Therein the DTI stated that "the proposed amendments will align RA 9334[159] with the General Agreement on Tariffs and Trade (GATT) 1994 of the World Trade Organization (WTO) of which the Philippines is a signatory. The current tax structure under RA 9334 is inconsistent with GATT 1994 as it gives preferential treatment to domestic alcohol products produced from indigenous or locally sourced raw materials."[160]

DIFFERENT PRICES + DIFFERENT MARKETS = DIFFERENT PRODUCTS?
AN ANALYSIS OF THE PHILIPPINES' DEFENSES

The Philippines defended its excise tax regime on distilled spirits and stressed that imported spirits from the US and EU cater to markets different from those targeted by local brands.[161] Philippine Permanent Representative to the WTO Ambassador Manuel Teehankee noted that "a closer look at the products involved, their price ranges and the consumers they cater to will show that EU products are in an altogether different market from those targeted by local brands."[162] The Philippines argue that notwithstanding the fact that producers in the Philippines and other Member states who export into the Philippines both produce distilled spirits such as whisky, brandy, vodka and rhum, the Philippine market should be

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[158] Position Paper of the Office of Policy and Research of the Department of Trade and Industry addressed to Senator Panfilo M. Lacson, Chairman of the Ways and Means Committee of the Senate, entitled "*DTI Position on Sin Taxes*".

[159] Rep. Act 9334—*An Act Increasing the Excise Tax Rates Imposed on Alcohol and Tobacco Products, Amending for the Purpose Sections 131, 141, 142, 143, 144, 145 and 288 of the National Internal Revenue Code of 1997, As Amended. available at* http://www.lawphil.net/statutes/repacts/ra2004/ra_9334_2004.html (last visited 5 July 2010).

[160] It further stated that: "It is imperative, therefore, to amend RA 9334 to remove the manifest violation of the national treatment principle. It should not make any distinction between alcohol products made from materials that are obviously produced in tropical countries like the Philippine and those made from other materials. It should enforce a single tax structure for all alcohol products based on alcohol content rather than on raw material used. It is important that the tax rates applied to domestic and imported alcohol products be unified. Since imported alcohol products are more expensive on a per liter basis than domestic alcohol products, then the tax incidence on the former will naturally be higher, but the rate will remain uniform and non-discriminatory. For tobacco products, the same tax structure will be applied."

[161] *RP Defends Excise Tax on Distilled Spirits*, Manila Bulletin, 25 August 2009, http://www.allbusiness.com/government/international-organizations/12744852-1.html(last visited 5 July 2010).

[162] *See supra* note 160.

divided into different segments based on price, such that Philippine domestic products compete in a totally different market segment.[163]

The Philippines point out that it is not illegal to have a progressive excise tax scheme since all that the GATT requires is for both imported and local brands occupying the same price band to be taxed at the same rates.[164] The spokesperson of leading alcohol producers in the Philippines,[165] Olivia Limpe-Aw, stressed that they "are against the single tax rate because it will create a situation where luxury alcohol products cost[ing] by the thousands, will be taxed [at] the same [rate] as the lowly *tuba* made from coconuts or rhum from molasses. This is grossly unfair to low income consumers who can only afford low-priced spirits."[166] She asks: "should Kia, for instance, be taxed [at] the same [rate] as Mercedes Benz simply because they are both cars and serve the same purpose? Why, then, should tuba or rhum be taxed the same as Cognac, for example, simply because they are both made from alcohol?"[167]

In a nutshell, the Philippines claim that since domestic and imported distilled spirits are sold at different prices, imported "luxury" spirits being substantially more expensive than "lowly" local spirits, they are deemed to be targeting different market segments (i.e., imported spirits targeting the higher income groups while local spirits targeting the lower income groups) and should not be considered like or DCS products. Neither should they be taxed similarly.

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[163] *See supra* note 137.

[164] *See supra* note 160.

[165] Composed of Destileria Limtuaco & Co. Inc., Asian Alcohol Corp., Absolute Chemicals Corp., Tanduay Distillers, Consolidated Distillers of the Far East, Emperador Distillers Inc., Far East Alcohol Corp., Berbacs Distillery, Kool Distillery, Tarlac Distillery, and Alco Distillery and International Pharmaceuticals.

[166] *Alcohol Makers Slam Gov't Bias for EC*, People's Journal, 5, 11 August 2009; Industry representative Olivia Lim-Aw added that some foreign liquor brands are even sold cheaper than their local counterparts, indicating that the former enjoy a lower excise tax. She pointed out that a bottle of Alfonso brandy has a net retail price of Php 107.00 while the locally produced Napoleon brandy is sold at Php 113.00 per bottle. Furthermore, she claimed that local distillers paid Php 4 billion in excise taxes in 2008 as against the Php 36 million paid by distributors of foreign liquor brands.

[167] *Id.*; She further expressed concern over the domestic agricultural sector since it is closely tied to the local alcohol industry given that most local spirits secure their alcohol from molasses, a sugar by-product. The sugar industry produces about 900,000 metric tons of molasses annually, equivalent to about 480 million proof liters of alcohol—with an estimated value of Php 1.3 billion. Over 40,000 farmers, 500,000 farm and plant workers and about five million direct and indirect dependents rely on this sector for livelihood; *See also Big Liquor Firms Caution Gov't vs. EC Complaint,* Standard Today, B3, 11 August 2009.

This approach is hardly justifiable. Firstly, both local and imported brands are sold at a range of prices such that some imported brands are even priced less than domestic brands.[168] Secondly, if the Philippine excise tax regime indeed genuinely utilizes "price" as a factor in segmenting the market, as it claimed, then it makes no sense to initially differentiate products based on "raw materials used" and "place of production", as Section 141 does. Unless of course if we allow for the possibility that the Philippine excise tax regime actually discriminates based on "raw materials used" and "place of production" such that the proposed "market segmentation approach" based on price is but a mere afterthought to defend an otherwise untenable position. Thirdly, to use "price" in differentiating the Philippine domestic market (i.e. cheaper brands) from other markets (i.e. expensive brands) begs the question. This case precisely pertains to the Philippines' discriminatory excise tax regime's impact on price such that the high excise taxes imposed on imported distilled spirits resulted in higher prices for imported spirits vis-a-vis domestic spirits. For the Philippines to use discriminatory excise taxes and make local products cheaper then turn around and use the fact that consumers choose local products because of their lower prices, avoiding a finding of discriminatory taxation, allows it to have its cake and eat it too.

The Philippines' argument echoes the defendant's reasoning in *Korea.* Therein, Korea argued that its tax system could not be held discriminatory since, the products concerned were not DCS in the first place--the price of (diluted) soju being a small fraction of the price of the western drinks subject of that case.[169] Similar to Korea, the Philippines' argument assumes that price is the only factor that determines whether products are "like" or DCS, such that if two products belong to different price ranges, they will not be considered "like" or DCS. Indeed while selling price is a factor in determining whether products are "like" or DCS,[170] it is by no means the *only* factor, as the Philippines' arguments imply. In *Korea*, the Panel and the Appellate Body held the view that, despite the disparity in price, the domestic and imported products concerned were in a DCS relationship.

As demonstrated by the liquor tax cases (*Japan*, *Korea* and *Chile*), the ultimate arbiter of "likeness" or "DCS-ness" is the marketplace, thus: "[t]he context of the

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[168] *See supra* note 137 at paragraph 31.
[169] *See supra* note 34 at 218-219.
[170] *See supra* note 23 at 354.

competitive relationship is necessarily in the marketplace since this is the forum where consumers choose between different products."[171] This "marketplace approach" consolidates the different and disparate criteria in determining whether two products are "like" (i.e. physical characteristics, end use, price, channels of distribution, etc.) and allows them to be given their proper weight in a coherent analysis.[172] Hence, price alone cannot be used as the sole determining factor in determining whether two products are like or DCS.

The Philippines alleged that there is no sizable market for imported distilled spirits in the Philippines.[173] The Chairman of the Ways and Means Committee of the Philippine House of Representatives, Exequiel Javier, considered the case unfair since there is no sizable market for imported distilled spirits in the Philippines[174] and that imported spirits allegedly account for only two to five percent of the total market.[175] The Philippines also cite the income distribution in a Member state as affecting whether or not products are "like" or DCS.

This argument claims that since there is limited trade in imported distilled spirits in the Philippines, the effect, if any, of the alleged discriminatory excise tax regime is insignificant or even negligible. This argument lost sight of the fact that "it is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent,"[176] since "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[177] Hence, "a demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."[178] Moreover, the proposed "income distribution

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[171] *Korea – Taxes on Alcoholic Beverages*, at par. 114; Bronckers, *supra*note 60 at 18.

[172] *See supra* note 60 at 18.

[173] Jose Romero Salas of the Spanish Chamber of Commerce confirmed that EU Liquor brands do not have a big share of the market; *See note* 171.

[174] Jose Romero Salas of the Spanish Chamber of Commerce confirmed that EU Liquor brands do not have a big share of the market; *see* Dennis Gadil, *RP's WTO Case May Affect Tuna, Electronic Exports,* A1, Malaya, 19 August 2009, *available at* http://www.malaya.com.ph/aug19/busi3.htm (last visited 5 July 2010).

[175] *Id.*

[176] *Japan – Taxes on Alcoholic Beverage,*.

[177] *Id.*; *see also US—Taxes on Petroleum,* L/6175 - 34S/136, 17 June 1987.

[178] *US—Taxes on Petroleum,* L/6175 - 34S/136, 17 June 1987, par. 5.1.9.

approach" is in conflict with settled Panel and Appellate Body rulings in determining whether products are in a like or DCS relationship, said rulings rely on the goods themselves, (i.e., physical characteristics, tariff classification, uses, etc.) rather than the affordability of said goods.[179]

Finally, the Philippines cite the administrative difficulties in collecting taxes faced by a developing country like itself. It points out that as a developing country it has to rely on indirect (excise) taxes and could not administer an *ad valorem* tax system.[180] This argument taxes credulity. It appears that the present tax regime under Section 141, which entails a three-tiered process of analysis and evaluation, is administratively more cumbersome than a straight *ad valorem* system of taxation. Under Section 141, the Philippine tax authorities would first have to verify whether the raw materials used to produce a brand of distilled spirit is one of those enumerated therein, this step entails examining the "product literature, brochures, and other documentary proof and, if possible, [conduct] laboratory tests of the sample."[181] Thereafter, it would have to verify that the distilled spirit is produced in a country where the raw material is "commercially produced" in order to determine whether said product qualifies for preferential tax treatment under Section 141 (a).[182] If the product does not qualify under the above criteria, the taxing authority would then have to impose the tax based on the net retail price of the product as provided under Section 141 (b). This "three-tiered approach", which has long been in place, is more cumbersome than a simple *ad valorem* tax system. It is thus difficult to give credence to the defense that an *ad valorem* tax system, which incidentally has long been used for other alcoholic products (i.e., Sections 141 (b), 142 and 143), is more difficult to administer than the existing "three tiered" indirect tax system.

RIGHTING WRONGS: PROPOSED AMENDMENTS TO SECTION 141

Recently, several bills have been submitted by legislators in both houses of Congress proposing amendments to Section 141 intending to make said provision compliant with GATT requirements. Most notable among these proposed

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[179] *Supra* note 137, paragraph 35.
[180] *Id.*, at paragraph 38.
[181] *Id.*, at paragraph 44.
[182] *Id.*

legislations are House Bill No. 6079[183] and Senate Bill Nos. 2980[184] and 3190[185] which propose that Section 141 be amended to read as follows:

> Section 141. Distilled Spirits – On distilled spirits, there shall be collected, subject to the provisions of Section 133 of this Code, excise taxes in accordance with alcoholic content as follows:
>
> (a) 45% alcohol by volume and less—
>
> Year 1 – P30.00 per proof liter;
> Year 2 – P80.00 per proof liter;
> Year 3 – P150.00 per proof liter;
>
> Provided, that, on the fourth year and every year thereafter, the excise tax rates prescribed herein shall be adjusted to its present value using an appropriate price index for alcoholic drinks, as published by the National Statistics Office (NSO);
>
> (b) More than 45% alcohol by volume –P150.00 per proof liter
>
> Provided, that, on the fourth year after the effectivity of this Act and every year thereafter, the excise tax rates prescribed herein shall be adjusted to its present value using an appropriate price index for alcoholic drinks, as published by the National Statistics Office (NSO);

The respective explanatory notes accompanying the proposed bills expressed the intent to solve the issue of discriminatory treatment between imported and local distilled spirits and to replace the multi-tiered and complex tax structure governing said products with a unitary system of taxation.

It is immediately noticeable that these proposed measures, which are intended to modify the previous system of taxing distilled spirits, eliminated raw materials used, the origin of said raw materials, and net retail price, as the criteria in determining the excise tax to be imposed. The proposed measures instead chose to apply a flat excise tax rate based solely on the distilled spirits' alcoholic content. By using alcoholic content as criterion, it avoids unnecessary entanglement with

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[183] Introduced by Representatives Jocelyn S. Limkaichong, George P. Arnaiz and Pryde Henry A. Teves.

[184] Introduced by Senator Panfilo M. Lacson.

[185] *Id.*

the product's origin, raw materials, or price, thereby lessening the risk of *de facto* discrimination. The choice of 45% alcoholic content as the demarcation point between the two tax brackets is likewise sufficiently origin neutral.

It will be recalled that in *Chile*, the defendant adopted a scheme which distinguished between two categories of alcoholic beverages: below 39° (taxed at 27%) and above 39° (taxed at 47%). Incidentally, many western products had an alcoholic content of slightly more than 39° and were taxed at 47% while the Chilean pisco had an alcoholic content of less than 35° and was taxed at 27%. In contrast, the use of 45% alcoholic content in the proposed bills is sufficiently origin neutral in that majority of *both* domestic and imported distilled spirits are below the 45% alcoholic content threshold[186] and would hence be taxed at the lower rates.

A TRIAL BY PEERS: A LOOK AT THE WTO DISPUTE RESOLUTION PROCESS

Dispute settlement in the multilateral WTO trading system is administered by the Dispute Settlement Body ("DSB") which is composed of all WTO members. Under the WTO's dispute settlement process, parties must first attempt to resolve their differences through consultations, failure of which, a Panel of independent experts may be established to rule on the dispute.[187] The Panel consists of three to five experts from different countries who examines the evidence and issues a ruling in the form of a Report to the DSB.

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[186] Under Philippine Standards Administrative Order Nos. 558, 259 and 258 governing the manufacture of Philippine brandies, whiskies and vodkas, the minimum ethyl alcohol content shall be 32.5% by volume in brandies; not be less than 32.5% by volume in whiskies; and, 42.85%, 40.01% or 37.15% by volume (25, 30 or 35 degrees under proof) for vodkas. Under Annex II of EC Regulation No. 110/2008, the minimum alcoholic strength by volume shall be 36% for brandies; 40% for whiskies; 37.5% for rums; and 37.5% for vodkas.

[187] Article 4.3 of the DSU provides: "If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel."; *See also* note 59 at 269.

The Panel's ruling may be appealed to the Appellate Body ("AB") who has the power to reverse, modify or affirm Panel decisions.[188] The AB is composed of seven permanent members who serve four-year terms. An appeal is heard by three members of the AB who has the power to uphold, modify or reverse the Panel's legal findings and conclusions.[189] In deciding upon an appeal, the AB typically recommends that the offending member brings the offending measures into conformity with WTO norms. WTO dispute settlement rules further require a losing respondent to indicate what actions it plans to take to implement the AB's ruling.[190] If the losing party fails to implement the decision, the prevailing party is entitled to seek compensation or to resort to retaliation by suspending concessions previously made.[191] These concessions usually correspond to the same obligations found to be violated, (e.g., preferential tariff rates) although cross-retaliation is permitted in certain circumstances.[192] The AB's decisions are implemented and monitored by the DSB.[193]

Panel and AB decisions, even if adopted, are not binding precedents to future cases involving the same questions. As in other areas of international law, there is no rule of *stare decisis* in WTO dispute settlement.[194] Hence, neither the Panel nor the AB is obliged to adopt previous AB rulings even if the issues before them have consistently been decided in a particular way.[195] In practice, however, reference to precedent is common and prior decisions, which are well-reasoned and persuasive, play an important role in WTO dispute settlement.[196] For instance, in *Shrimp—Turtle*,[197] the AB chastised the Panel for failing to adopt its approach in *US—Gasoline*.[198] In *US—Sunset Reviews of Anti-Dumping Measures on Oil*

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[188] WORLD TRADE ORGANIZATION SECRETARIAT, A HANDBOOK ON WTO DISPUTE SETTLEMENT SYSTEM 274-275 (2004).

[189] World Trade Organization. *A Unique Contribution*, Understanding the WTO, *available at*http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited 5 July 2010).

[190] Article 21.3, DSU; *See also* note 185 at 89; note 59 at 269.

[191] Article 22.1, DSU.

[192] *See supra* note 59 at 348.

[193] *Id.* at 269.

[194] *Id.* at 91.

[195] *Id.*

[196] AMRITA NARLIKAR, THE WORLD TRADE ORGANIZATION: A VERY SHORT INTRODUCTION 94 (2005).

[197] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, par. 119.

[198] Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29.

Country Tubular Goods from Argentina[199], the AB explicitly stated that prior AB rulings have precedent effect upon panels.[200] It is submitted that, following the reasoning and ruling in *Japan*, *Korea* and *Chile* the panel reviewing *Philippines* will arrive at the same result.

Notwithstanding the breakdown of consultations and the commencement of Panel proceedings, parties are not precluded from pursuing efforts in finding a mutually agreeable solution.[201] In fact, Panels are required to regularly consult the parties and give them adequate opportunity to arrive at a mutually satisfactory solution.[202] Upon the request of the complaining party, the Panel may even suspend proceedings to achieve this purpose.[203] In one case, the parties reached a mutually agreed upon solution prior to the issuance of the interim report.[204] In another, they did so after the issuance of the interim report but prior to the issuance of the final report.[205] In still another case, the parties amicably settled after the issuance, but prior to the circulation, of the Panel report to all Members.[206] Furthermore, even during appeal, the appellant may withdraw the appeal at any time upon reaching a mutually agreed upon solution.[207]

Senate Bill Nos. 2980 and 3190 and House Bill No. 6079 filed during the Fourteenth Congress are steps in the right direction. These measures indicate the Philippines' sincerity in complying with its obligations and the possibility of

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[199] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, par. 118.

[200] *Id.* at par 118: "Thus it was appropriate for the panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusion in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same." In *Japan—Alcoholic Beverages II* the Appellate Body opined: "Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement."

[201] See *supra* note 59 at 93.

[202] Article 11, DSU.

[203] Article 12.12, DSU.

[204] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521.

[205] Panel Report, *European Communities – Trade Description of Scallops –Request by Canada*, WT/DS7/R, 5 August 1996, unadopted, DSR 1996:I, 89; Panel Report, *European Communities – Trade Description of Scallops – Requests by Peru and Chile*, WT/DS12/R, WT/DS14/R, 5 August 1996, unadopted, DSR 1996:I, 93.

[206] Panel Report, *European Communities – Measures Affecting Butter Products*, WT/DS72/R, 24 November 1999, unadopted.

[207] *See supra* note 59 at 93.

reaching an amicable solution to the dispute even before the Panel issues its findings. It also avoids the scenario of the Philippines being found remiss in its GATT commitments. As Robert Hudec pointed out, "governments regard it as unacceptable to have their patently innocent and sensible regulations branded as a 'violation' of the WTO agreements in any sense—including being branded as a violation of Article III".[208] Unfortunately these proposed measures failed to see the light of enactment as the Fourteenth Congress adjourned without these bills being signed into law. All is not lost however, since these bills may be re-filed and re-deliberated during the Fifteenth Congress, and hopefully be signed into law.

PROMISES ARE MADE TO BE BROKEN: THE ECONOMICS OF DISCRIMINATION

WTO disputes are essentially about broken promises. A dispute arises when a member state adopts a measure or takes an action which other member states consider to be in breach of WTO commitments.[209] In its 15-year existence, the Panel has issued 115 Reports, 77 of which, or around 67%, have been appealed to the AB.[210] Why do states persist on reneging upon their GATT commitments and delay compliance? A possible answer may be found in the very nature of the WTO dispute resolution system.

One feature which distinguishes WTO litigation from domestic litigation is the fact that settlements and rulings in the WTO are political in nature and result in "non zero-sum" payoffs.[211] In domestic litigation, settlements and judgements are satisfied by the payment of money. Thus, a (monetary) gain by one party corresponds to a (monetary) loss by the other, thereby achieving a "zero-sum" result.[212] Furthermore, absent a restraining order, a defendant who, pending the final outcome of a case, persists in doing an illegal act, will be called upon to compensate the complainant for all the damages it suffered during the pendency of the case.[213] Therefore, by continuing with the illegal act until a final judgement is

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[208] Donald Regan, *Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariffs and Trade A Tribute to Bob Hudec* 37(4) Journal of World Trade 737, 749 (2003).

[209] *See supra* note 59 at 91.

[210] World Trade Organization. *Statistics Dispute Settlement, available at* http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (last visited 6 July 2010).

[211] Andrew Guzman, *The Political Economy of Litigation and Settlement at the WTO* UC Berkeley Public Law Research Paper No. 98, 7 (2002), *available at* http://ssrn.com/abstract=335924 (last visited 6 July 2010) .

[212] *Id.*

[213] *Id.*

issued, the defendant increases the amount of damages it is liable to pay by an amount equivalent to the loss suffered by the complainant.[214]

WTO litigations do not have this "zero-sum" character. States generally do not settle their disputes by way of cash payments, neither do WTO rules require the losing party to pay any compensation to the prevailing party.[215] While a State which loses an appeal is expected to end the infringing practice, it is not liable for its past conduct.[216] Furthermore, while the prevailing party may impose economic sanctions if a losing party refuses to comply with the AB's ruling, such sanctions are prospective in nature and are intended only to ensure compliance, not to compensate for past losses.[217] Hence, the (monetary) value of withdrawn or suspended concessions can never be equivalent to, much less exceed, the (monetary) loss suffered as a result of the ongoing infringement, i.e., a "non zero-sum" result.[218]

This difference between domestic and inter-state litigation, whereby the "benefits" derived from violating WTO norms far outweigh the costs of compliance, explain why some member states choose to delay compliance with WTO obligations[219] or even to misuse domestic regulatory measures for protectionist purposes.[220] From the defendant's perspective, all else being equal, delay in compliance is desirable since dispute settlement rules not only allow the defendant to continue with its illegal acts during the pendency of the case, it also fails to penalize any damage caused by said misconduct.[221] This is inevitable especially "where the commercial interests of foreign states have little or no representation in the political life of the state enacting the measure."[222] It is unfortunate that by persisting in violating WTO rules, political leaders of the offending state continue to receive political and economic benefits from the

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[214] *Id.*
[215] *Id.* at 8.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.* at 16.
[220] Robert Hudec, *GATT/WTO Restraints on National Regulation : A Requiem for an 'Aim and Effects' Test* 32 International Lawyer 619, 620 (1998).
[221] *See supra* note 211 at 16.
[222] *Id.* at 2.

infringing activity, while the complainant continues to suffer harm without compensation.[223]

CONCLUSION

"Notwithstanding objections against possible limitations on national sovereignty, the WTO remains as the only viable structure for multilateral trading and the veritable forum for the development of international trade law. The alternative to WTO is isolation, stagnation, if not economic self-destruction. Duly enriched with original membership, keenly aware of the advantages and disadvantages of globalization with its on-line experience, and endowed with a vision of the future, the Philippines now straddles the crossroads of an international strategy for economic prosperity and stability in the new millennium."[224] Such were the words which sealed the Philippines' commitment to the WTO.[225] Thirteen years later, its fidelity to this unique institution is under trial.

The Philippines' excise tax regime on distilled spirits is evidently inconsistent with its GATT/WTO obligations. While it is unfortunate that the proposed bills seeking to make Philippine excise tax laws WTO-compliant failed to be signed into law, it is nevertheless a recognition by the Philippines that it has been remiss in its international commitments and an indication that it is exerting effort to correct this omission and be a responsible participant in the global economic order. Indeed, refusal to heed the call of other member states, particularly the EC and the US, to reform its excise tax regime, is not a viable option. It would compromise the internationalist economic principles the Philippines has adhered to for the past decade and make it a pariah in the world trading system, damaging its foreign commercial goodwill in the process and

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[223] *Id.* at 16.

[224] *Tanada v. Angara*, G.R. No. 118295, 2 May 1997, *available at* http://sc.judiciary.gov.ph/jurisprudence/1997/may1997/118295.htm(last visited 6 July 2010).

[225] *Tanada v. Angara* is the Philippine Supreme Court's decision on the constitutionality of the Philippines' accession to the WTO. The petitioners (Tanada, *et al*) argued that (1) the WTO requires the Philippines "to place nationals and products of member-countries on the same footing as Filipinos and local products" and (2) that the WTO "intrudes, limits and/or impairs" the constitutional powers of both Congress and the Supreme Court. They assailed the WTO Agreement for violating the mandate of the 1987 Constitution to "develop a self-reliant and independent national economy effectively controlled by Filipinos x x x (to) give preference to qualified Filipinos (and to) promote the preferential use of Filipino labor, domestic materials and locally produced goods." In a unanimous decision, the Supreme Court upheld the legality of the Philippine Senate's concurrence in the ratification of the WTO Agreement which paved the way for the Philippines' accession to the WTO on 1 January 1995 as an original member thereof.

tarnishing its image as a law abiding global citizen.[226] It would also permit the EC and the US to take retaliatory action in the form of trade sanctions.[227]

Philippines—Taxes on Distilled Spirits adds another chapter to the alcoholic beverages tax saga and continues the "like" and "DCS products" discourse started by *Japan*, *Korea* and *Chile*. In all these cases, domestic protection policies were subordinated to economic transparency and the defendants, Japan, Korea and Chile, were called to task for their trade distorting actions. While it is undeniable that the tariff binding system, MFN and NT principles have their share of flaws and shortcomings, it is equally undeniable that this inherent bias against, and concern with, domestic legislative and regulatory conduct is what made the GATT/WTO an effective trading system for the past 50 years. There is likewise no denying that these core pillars have successfully brought together into greater interaction economies of diverse backgrounds, sizes and importance for the benefit of all member states.[228]

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[226] *See supra* note 85 at 87; As Robert Hudec has pointed out, governments regard it as unacceptable to have their patently innocent and sensible regulations branded as a "violation" of the WTO agreements in any sense—including being branded as a violation of Article III, even if rescue under Article XX is possible; *see supra* note 205 at 749.

[227] The European Union is the Philippines' 4th largest trading partner, accounting for 12% of total trade in goods for a value of € 9 billion and is the 5th largest source of Philippine merchandise imports behind China, Japan the US and ASEAN countries. On the other hand, two-way merchandise trade between the US and the Philippines amounted to $12.6 billion in 2009. The Philippines ranks as the US' 30th-largest export market and 34th-largest supplier and is the fifth-largest beneficiary of the US Generalized System of Preferences program for developing countries. Philippine trade assistant secretary Jose Antonio Buencamino reported that the country may lose large orders of canned tuna and electronic products from European Union (EU) countries if the dispute before the World Trade Organization over the alleged discriminatory local taxation on liquor products drags on. He reported that retaliation is a likely EU option and canned tuna and electronic products are the most vulnerable targets; *see* Europa. *EU Requests WTO Panel Over Discriminatory Taxation of Distilled Spirits in the Philippines*, 11 December 2009, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1904 (last visited 6 July 2010); U.S. Department of State. *Background Note on the Philippines*, *available at* http://www.state.gov/r/pa/ei/bgn/2794.htm (last visited 6 July 2010); *See also supra*note 169.

[228] MACMILLAN, M. 'TRADE AND CULTURE: CONFLICTING DOMESTIC POLICIES AND INTERNATIONAL TRADE OBLIGATIONS' (1999) 9(5) Windsor Review of Legal and Social Issues 5, 28-29; BHUIYAN, *supra* note 21 above at 43; Matheny, *supra* note 60 above at 250.

APPENDIX A

DISTILLED SPIRITS COMPARATIVE TABLE

Distilled Spirits	Philippines	European Union	United States
Brandy	An alcoholic distillate obtained solely from the fermented juice of fresh, ripe and sound grapes. The distillation shall be carried out in such a way that the spirit possesses the natural volatile properties already present in grapes or formed during fermentation.[229] The minimum ethyl	Brandy or *Weinbrand* is a spirit drink: (i) Produced from wine spirit, whether or not wine distillate has been added, distilled at less than 94.8% vol., provided that the distillate does not exceed a maximum of 50% of the alcoholic content of the finished product. (ii) matured for at	An alcoholic distillate from the fermented juice, mash, or wine of fruit, or from the residue thereof, produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to the product, and bottled at not less than 80° proof.[233]

[229] § 2.1.1., Standards Administrative Order No. 558, series of 1978, Bureau of Standards, Department of Trade and Industry, Republic of the Philippines, available at <http://www.bfad.gov.ph/default.cfm?page_id=837> (last visited 6 July 2010).

	alcohol content in brandies shall be 32.5% by volume.[230]	least one year in oak receptacles or for at least six months in oak casks with a capacity of less than 1000 litres, (iii) containing a quantity of volatile substances equal to or exceeding 125 grams per hectolitre of 100% vol. alcohol, and derived exclusively from the distillation or redistillation of the raw materials used, (iv) having a maximum methanol content of 200 grams per hectolitre of 100% vol. alcohol.[231] The minimum alcoholic strength by volume shall be 36%.[232]	
Whisky	A spirit suitably aged in wood,	Whisky is a spirit drink produced	An alcoholic distillate from a

[233] Title 27, Part 5, Subpart C, Chapter 5.22 (d), Code of Federal Regulations, United States of America., available at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b60b705b2c7359324b725a17a5119140&rgn=div8&view=text&node=27:1.0.1.1.3.3.25.2&idno=27> (accessed 6 July 2010).

[230] *Id.*, § 4.1.

[231] Annex II, § 5(a)(i), EC Regulation No. 110/2008, 15 January 2008, available at http://www.mee.government.bg/ind/doc/LexUriServ.pdf (last visited 6 July 2010).

[232] *Id.*, at § 5(b).

	obtained from the distillation of a fermented mash of grain.[234] The ethyl alcohol content in whiskies shall not be less than 32.5% by volume.[235]	exclusively by: (i) Distillation of a mash made from malted cereals with or without whole grains of other cereals, which has been: saccharified by the diastase of the malt contained therein, with or without other natural enzymes, fermented by the action of yeast; (ii) one or more distillations at less than 94.8% vol. so that the distillate has an aroma and taste derived from the raw materials used, (iii) maturation of the final distillate for at least three years in wooden casks not exceeding 700 litres capacity. The final distillate, to which only water and plain caramel	fermented mash of grain produced at less than 190° proof in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to whisky, stored in oak containers (except that corn whisky need not be so stored), and bottled at not less than 80° proof, and also includes mixtures of such distillates for which no specific standards of identity are prescribed.[238]

[234] § 2.1.1., Standards Administrative Order No. 259, series of 1976.
[235] *Supra* note 233 at § 4.1.
[238] Title 27, Part 5, Subpart C, Chapter 5.22 (b), Code of Federal Regulations.

		(for colouring) may be added, retains its colour, aroma and taste derived from the production process referred to in points (i), (ii) and (iii).[236] The minimum alcoholic strength by volume of whisky shall be 40%.[237]	
Rum	Rum shall be the alcoholic distillate obtained solely from fermented juice or sugarcane, sugarcane molasses or other sugarcane by-products distilled at less than 190 US proof whether or not such proof is further reduced to not less than 60 proof prior to bottling, in such a manner that the distillate possesses the taste, aroma and characteristics generally attributed to rum and known to the trade as such and includes	Rum is: (i) a spirit drink produced exclusively by alcoholic fermentation and distillation, either from molasses or syrup produced in the manufacture of cane sugar or from sugar-cane juice itself and distilled at less than 96% vol. so that the distillate has the discernible specific organoleptic characteristics of rum, or (ii) a spirit drink produced exclusively by alcohol	An alcoholic distillate from the fermented juice of sugar cane, sugar cane syrup, sugar cane molasses, or other sugar cane by-products, produced at less than 190° proof in such manner that the distillate possesses the taste, aroma and characteristics generally attributed to rum, and bottled at not less than 80° proof; and also includes mixtures solely of such distillates.[242]

[236] Annex II, § 2(a), EC Regulation No. 110/2008, 15 January 2008.
[237] *Id.*, at § 2(b).

	mixtures solely of such distillates.[239]	fermentation and distillation of sugar-cane juice which has the aromatic characteristics specific to rum and a volatile substances content equal to or exceeding 225 grams per hectolitre of 100% vol. alcohol. This spirit may be placed on the market with the word 'agricultural' qualifying the sales denomination 'rum' accompanied by any of the geographical indications of the French Overseas Departments and the Autonomous Region of Madeira as registered in Annex III.[240] The minimum alcoholic strength by volume of rum shall be 37.5%.[241]	
Vodka	Vodka is the distilled liquor	Vodka is a spirit drink produced from	Vodka is a neutral spirits so distilled,

[242] Title 27, Part 5, Subpart C, Chapter 5.22 (f), Code of Federal Regulations.
[239] § 2.1.1., Standards Administrative Order No. 257, series of 1976.
[240] Annex II, Section 1(a), EC Regulation No. 110/2008, 15 January 2008.
[241] *Id.*, at § 1(b).

	obtained from neutral spirit filtered through activated carbon (charcoal) so as to render the product without distinctive character, aroma or taste.[243] Vodka shall be the distilled alcoholic beverage made from neutral spirit which may be obtained from fermented grain, potato, or any other source of fermentable carbohydrates in such a manner that the distillate is free from color and odor and possesses the characteristics generally attributed to vodka.[244] The ethyl alcohol content shall be 42.85%, 40.01% or 37.15% by volume (25, 30 or 35 degrees under proof).[245]	ethyl alcohol of agricultural origin obtained following fermentation with yeast from either: (i) potatoes and/or cereals, or (ii) other agricultural raw materials, Distilled and/or rectified so that the organoleptic characteristics of the raw materials used and by-products formed in fermentation are selectively reduced. This process may be followed by redistillation and/or treatment with appropriate processing aids, including treatment with activated charcoal, to give it special organoleptic characteristics.[246]	or so treated after distillation with charcoal or other materials, as to be without distinctive character, aroma, taste, or color.[248]

[243] § 2.1.1., Standards Administrative Order No. 258, series of 1976.
[244] *Id.*, at § 3.1.
[245] *Id.* at § 3.3.
[246] Annex II, § 15(a), EC Regulation No. 110/2008, 15 January 2008.

		The minimum alcoholic strength by volume of vodka shall be 37.5%.[247]	

APPENDIX B

ASEAN HARMONIZED TARIFF CODE

CHAPTER 22
BEVERAGES, SPIRITS AND VINEGAR

22.08 Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spirituous beverages.

2208.20 - Spirits obtained by distilling grape wine or grape marc:
2208.20.10 - - Brandy of an alcoholic strength by volume not exceeding 46% vol
2208.20.20 - - Brandy of an alcoholic strength by volume exceeding 46% vol
2208.20.30 - - Other, of an alcoholic strength by volume not exceeding 46% vol
2208.20.40 - - Other, of an alcoholic strength by volume exceeding 46% vol
2208.30 - Whiskies:
2208.30.10 - - Of an alcoholic strength by volume not exceeding 46% vol
2208.30.20 - - Of an alcoholic strength by volume exceeding 46% vol
2208.40 - Rum and tafia:
2208.40.10 - - Of an alcoholic strength by volume not exceeding 46% vol
2208.40.20 - - Of an alcoholic strength by volume exceeding 46% vol
2208.50 - Gin and Geneva:
2208.50.10 - - Of an alcoholic strength by volume not exceeding 46% vol
2208.50.20 - - Of an alcoholic strength by volume exceeding 46% vol
2208.60 - Vodka:
2208.60.10 - - Of an alcoholic strength by volume not exceeding 46% vol
2208.60.20 - - Of an alcoholic strength by volume exceeding 46% vol
2208.70 - Liqueurs and cordials:

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[248] Title 27, Part 5, Subpart C, Chapter 5.22 (a)(1), Code of Federal Regulations.
[247] *Id.* at § 15(b).

2208.70.10 - - Of an alcoholic strength by volume not exceeding 57% vol
2208.70.20 - - Of an alcoholic strength by volume exceeding 57% vol
2208.90 - Other:
2208.90.10 - - Medicated samsu of an alcoholic strength by volume not exceeding 40% vol
2208.90.20 - - Medicated samsu of an alcoholic strength by volume exceeding 40% vol
2208.90.30 - - Other samsu of an alcoholic strength by volume not exceeding 40% vol
2208.90.40 - - Other samsu of an alcoholic strength by volume exceeding 40% vol
2208.90.50 - - Arrack and pineapple spirit of an alcoholic strength by volume not exceeding 40% vol
2208.90.60 - - Arrack and pineapple spirit of an alcoholic strength by volume exceeding 40% vol
2208.90.70 - - Bitters and similar beverages of an alcoholic strength not exceeding 57% vol
2208.90.80 - - Bitters and similar beverages of an alcoholic strength exceeding 57% vol
2208.90.90 - - Other

APPENDIX C

EXCISE TAX REGIME OF NEIGHBOURING COUNTRIES

CONSUMPTION TAX ON IMPORTED GOODS OF THE PEOPLE'S REPUBLIC OF CHINA 2009[249]

Tariff Item	Article Description	Duty Rate	Remarks
2208	Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol.; spirits, liqueurs and other spirituous beverages:	20% + 1 RMB/Kg	
22082000 00	- Spirits obtained by distilling grape wine or grape marc	20% + 1 RMB/Kg	
22083000 00	- Whiskies	20% + 1	1 kg = 0.912 Litre

[249] China Customs Website: *2009 General Administration of Customs Notice No. 27* http://www.customs.gov.cn/publish/portal0/tab399/info172829.htm; *Customs Import and Export Tariff of the People's Republic of China 2008*, page 918.

		RMB/Kg	
22084000 00	- Rum and other spirit obtained by distilling fermented sugarcane products	20% + 1 RMB/Kg	
22085000 00	- Gin and geneva	20% + 1 RMB/Kg	
22086000 00	- Vodka	20% + 1 RMB/Kg	
22087000 00	- Liqueurs and cordials	20% + 1 RMB/Kg	
22089010 00	- Tequila, Mezcal	20% + 1 RMB/Kg	
22089090 10	Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol	5%	
22089090 20	Spirits by distilling potatoes	20% + 1 RMB/Kg	1 kg = 0.912 Litre
22089090 90	Other spirits and spirituous beverages	20% + 1 RMB/Kg	

EXCISE TAXES ON ALCOHOL PRODUCTS IN JAPAN[250]

Sparkling Alcohol Drinks (beers, etc): ¥200/liter

- Low Malt Beer (ratio of malt not less than 25% and less than 50%): ¥ 178.12/liter
- Low Malt Beer (ratio of malt less than 25%): ¥ 134.25/liter
- Others (except hop-base liquors): ¥ 80/liter

Fermented Liquor

[250] Ministry of Finance, Japan.

- Refined Sake: ¥ 120/liter
- Wine: ¥ 80/liter

Shochu, etc. (20% alcohol): ¥ 220/liter, plus ¥ 11/additional 1% alcohol

- Whisky, Brandy, Spirits (37% alcohol): ¥ 370/liter, plus ¥ 10/additional 1% alcohol

Miscellaneous Liquor (20% alcohol): ¥ 220/liter, plus ¥ 11/additional 1% alcohol

- Sake Compound: ¥ 100/liter
- Mirin: ¥ 20/liter
- Sweet Wine or Liqueur (12% alcohol): ¥ 120/liter, plus ¥ 10/additional 1% alcohol
- Powdered Liquor: ¥ 390/liter

EXCISE TAXES ON ALCOHOL PRODUCTS IN KOREA

Spirits (specified tax system): W57,000 per kiloliter (kl) (W600 is added for every additional
1% of alcohol content)

Other Liquor (ad valorem tax system)

(1)	Takju		5%
(2)	Yakju		30%
(3)	Beer		72%
(4)	Cheongju		30%
(5)	Fruit wine		30%
(6)	Distilled soju		72%
(7)	Diluted soju		72%
(8)	Whisky	72%	
(9)	Brandy		72%
(10)	General distilled spirits	72%	
(11)	Liqueur	72%	
(12)	Other liquors		

a. Liquors made by fermentation other than fermented liquors--30%

b. Liquors, except distilled liquor mixed with the fermented method and neutral spirits of distilled liquor – 72%

- 50% tax rate on above-mentioned tax rates is applied to traditional liquors which fall into the following categories:#
  - o Fermented liquors – up to 200kl when production is less than 500kl per year
  - o Distilled liquors—up to 100kl when production is less than 250kl per year

EXCISE TAXES ON ALCOHOL PRODUCTS IN VIETNAM

Liquor

a) of 20° proof or higher

From 1 January 2010 through 31 December 2012	45%	
From 1 January 2010-06-22		50%

b) of under 20° proof
25%

Beer

From 1 January 2010 through 31 December 2012		45%
From 1 January 2013	5	

EXCISE TAXES ON ALCOHOL PRODUCTS IN THAILAND

Products	**Ceiling Rate**		**Present Collection Rate**	
	Ad Valorem (%)	Specific Rate Baht/Liter of Pure Alcohol	Ad Valorem (%)	Specific Rate Baht/Liter of Pure Alcohol
1. Fermented Liquors				
1.1 Beer	60	100	60	100
1.2 Wine and Sparkling Wine	60	100	60	100
1.3 Local Fermented Liquor	60	100	25	70
1.4 Others	60	100	25	-

2. Distilled Spirits				
2.1 White Spirit	50	400	50	120
2.2 Compound spirit	50	400	50	300
2.3 Special blended spirit	50	400	50	400
2.4 Special spirit	50	400		
- Whisky			50	400
- Brandy			48	400
- Others			50	400
2.5 Absolute Alcohol	50	400		
- Used in Industry			2	Bt. 1 / liter
- Used in Medicine			0.1	Bt. 0.05 /liter
- Others			10	6.0