

PHILIPPINES – TAXES ON DISTILLED SPIRITS

(DS396/DS403)

**REPLIES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS FOR THE PARTIES**

DECEMBER 8, 2010

11. (European Union, United States and the Philippines) The Panel has noted the explanation provided in the Philippines' first written submission, that "[f]ermentation is a biological process whereby sugars are converted into ethyl alcohol through the addition and action of yeast." Can the European Union, the United States and the Philippines explain whether the process of making ethanol (ethyl alcohol) for alcoholic beverages always involves the fermentation of sugar, irrespective of the raw material (for example, cane sugar, grains, potatoes, coconut, etc.) used for the preparation of that sugar?

1. Yes, the production of ethyl alcohol for alcoholic beverages always involves fermentation of sugar, irrespective of the raw material.

2. Distilled spirits may be made from any raw material that has a high concentration of natural sugars or contains other carbohydrates that can be converted to sugars.¹ The raw materials are processed through a combination of milling, pressing, and/or mashing to make the sugars in the raw material more available for alcohol production.² Following this initial processing, all raw materials are subject to fermentation using yeast. In this process, the simple sugars in the material react with the yeast to create ethyl alcohol (ethanol). The fermented product is then ready for distillation into a "distilled spirit" product.³

16. (European Union, United States and the Philippines) In its first written submission, the Philippines has stated that "[t]he claims by the European Union and the United States in this dispute threaten a fundamental right enjoyed by each WTO Member: the right to determine its own tax policy. The claims thus have potentially significant ramifications that go far beyond the specific facts of this dispute. This case involves the right of a developing country WTO Member to impose a tax regime that is best suited to achieve the fiscal objectives set out in its Constitution in light of the administrative and enforcement constraints it faces with respect to tax collection." Can the Philippines identify specific provisions in the WTO covered agreements it invokes in support of its argument in paragraph 1 of its first written submission. Can the European Union and the United States comment on the Philippines' statement.

3. As stated by the Appellate Body in *Japan – Alcohol*,

Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*.⁴

¹ Exhibit US-12, p. 6.

² Exhibit US-12, p. 7.

³ Exhibit US-12, p. 8.

⁴ *Japan – Alcohol* (AB), p. 17 of the version printed from WordPerfect on 8 1/2 x 11 inch paper.

And further:

The *WTO Agreement* is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.⁵

4. In this dispute, the issue is that the Philippine tax system on distilled spirits imposes high, discriminatory taxes on imported distilled spirits compared to domestically produced distilled spirits, inconsistent with GATT Article III:2. While Members may determine their own tax policy, under the WTO Agreement, Members have committed not to impose tax measures inconsistent with their WTO obligations. The Philippines, like other Members, accepted this obligation when it acceded to the WTO.

18. (European Union and United States) In its oral statement before the Panel, the European Union has argued that, "[f]or each type of spirit [it has] illustrated: the commonality of end-uses, how they satisfy the same consumers' tastes and habits, the similarity of their properties, characteristics and nature, the comparable advertising campaigns, the identical physiological effects on human beings, the analogous legal regulations applying to them, the identical tariff classification, the largely similar systems of distribution and sale, the comparable pricing policies." For the purpose of its claims under Article III:2 of the GATT 1994, can the European Union clarify whether in its view the relevant categories of products on which the Panel should focus its analysis are "distilled spirits" as a whole, or rather specific types of distilled spirits such as "gin, brandy, rum, vodka, whisky or tequila", or some other classification. (For example, when considering the complainants' claims under Article III:2, first sentence, in order to determine "likeness" and whether imported products are being taxed in excess of domestic ones, should the Panel compare: (a) imported "distilled spirits" vis-à-vis domestic "distilled spirits"; or, (b) specific categories of imported products (such as gin, brandy, rum, vodka, whisky or tequila) vis-à-vis specific categories of domestic products (such as gin, brandy, rum, vodka, whisky or tequila)? Can the European Union refer in its responses to the language used in its panel request. Can the United States also comment on the same question.

5. As an initial matter, the United States would note that unlike prior distilled spirits disputes, where the measures at issue discriminated in favor of one particular type of domestic distilled spirit, the Philippine measures discriminate in favor of *all* types of domestic distilled

⁵ *Japan – Alcohol* (AB), p. 16 of the version printed from WordPerfect on 8 1/2 x 11 inch paper.

spirits⁶ produced from one of the favored local materials.

6. In the Philippines, both local and imported spirits display a considerable variety of characteristics. The Philippines produces white spirits (*e.g.*, vodka and gin) and brown spirits (*e.g.*, whiskey and brandy), and everything in between. Imported brands sold in the Philippines show the same range. In addition, the particular brands of each type of domestic spirit (*e.g.*, brandy) are very similar in appearance (physical characteristics and packaging) to their imported counterpart.

7. One approach the Panel may consider is to use comparisons of Philippine and imported brands of each type of spirit, in order to evaluate whether the measure itself – which covers all distilled spirits and simply discriminates on the basis of the raw material – is consistent with the Philippines’ obligations. On that basis, the Panel could draw the conclusion that domestic spirits of all types made from protected raw materials are not only “directly competitive or substitutable” with imported distilled spirits, but would indeed be “like products” with certain of their imported counterparts.

21. (European Union and United States) In its first written submission, the Philippines has argued that, because the term "like products" must be interpreted narrowly, "to the extent that there is any overlap in end-uses for non-sugar-based distilled spirits and sugar-based distilled spirits, this will be insufficient to overcome the clear differences in physical characteristics". Can the European Union and the United States comment on the Philippines' argument.

8. As WTO panels and the Appellate Body have noted in other disputes, “physical characteristics” is among the factors relevant for the “like product” analysis. For example, the panel in *Japan – Alcohol* stated: “In the view of the Panel, the term ‘like products’ suggests that for two products to fall under this category they must share, apart from commonality of end-uses, essentially the same physical characteristics.”⁷ But even in that dispute, the products found to be “like” (vodka and shochu, which concerned a variety of different raw materials) were not identical.⁸ Sharing “essentially” the same physical characteristics does not mean the competing products must be exactly the same to be “like”.

⁶ Distilled spirits are defined by the Philippines measure itself, which states:

“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. Exhibit US-2, p. 3.

⁷ *Japan – Alcohol* (Panel), para. 6.22.

⁸ *Japan – Alcohol* (Panel), para. 6.23. *See also*, *Japan – Alcohol* (Panel), para. 6.23, noting that a difference in physical characteristics (alcohol strength) “did not preclude a finding of likeness.”

9. As such, it is not correct to assert, as the Philippines has, that a difference in physical characteristics would prevent Philippine and imported products from being “like products.”

10. Such a conclusion would be particularly problematic in this dispute. The substitutability of products – whether “like” or “directly competitive or substitutable” – depends on several different factors, and the determination must be made on a case-by-case basis.⁹ Depending on the measures in question and the relevant market, different factors may be more or less important.

11. In this regard, it is important to note that Philippine distilled spirits producers use a process that specifically minimizes any difference in characteristics – including physical characteristics – that would be apparent to a consumer. As such, the Philippine producers’ approach would only appear to emphasize the high degree of competition between domestic and imported brandies, whiskies, gins, etc.

23. *(European Union and United States) In its first written submission, and commenting on the panel report on Japan – Alcoholic Beverages II, the Philippines has argued that “the presence of only one physical difference is enough to disqualify products from being considered ‘like’ for the purposes of Article III:2, first sentence.” Can the European Union and the United States comment on the Philippines’ argument.*

12. In *Japan – Alcohol*, the panel found that two products differentiated by Japan’s regulations (vodka and shochu) were “like.”¹⁰ The same panel noted that differences in physical characteristics – such as alcohol content – “did not preclude a finding of likeness.”¹¹ Thus, the Philippines goes too far to rely on *Japan – Alcohol* to conclude that one physical difference between Philippine products and imported products would be sufficient to determine that Philippine distilled spirits are not “like” imported distilled spirits.

13. Moreover, as noted in the response to Question 21, Philippine manufacturers produce distilled spirits with methods and processes designed to minimize the differences among distilled spirits produced with different raw materials and to emphasize the similarities between their products and imported products.¹² The final products are explicitly presented as comparable to imported products. The descriptions of Ginebra San Miguel products in Exhibit US-22 are particularly relevant in this regard. Ginebra San Miguel Premium Gin is described as “top of the class gin made from Extra neutral Alcohol. With an exquisite blend of botanicals, flavors of

⁹ *Japan – Alcohol* (AB), p. 20-21, 25.

¹⁰ *Japan – Alcohol* (Panel), para. 6.23.

¹¹ *Japan – Alcohol* (Panel), para. 6.23.

¹² See, Philippines First Written Submission, para. 119, stating that Philippine whiskey producers take neutral spirit and “add the relevant flavourings and ingredients to generate the taste of whiskey.”

juniper berries splashed with a tang of delectable citrus. . .” More tellingly, the lower priced Ginebra San Miguel brand (“the Philippines’ first and leading gin”) is described as a “dutch type gin made from selected spirits and botanical extracts. The predominant flavor emanates from juniper berries that are imported from Europe.”¹³

14. In this context, where Philippine producers produce and market their domestic products to compete with international brands, a single physical difference should not disqualify two whiskies or two vodkas from being “like.”

30. (European Union and United States) In its first written submission, and with respect to consumers' tastes and habits, the Philippines has argued that, if products "are in different market segments, there will be relevant differences in respect of consumers' tastes and habits in each market segment sufficient to render the products unlike". Can the European Union and the United States comment on the Philippines' argument.

15. Philippine producers market distilled spirits to emphasize the similarity of their domestic brands and international brands, and annual reports from Philippine producers emphasize the competitiveness of Philippine products internationally.¹⁴ The notion that imported brands belong in a different market segment based on income is inconsistent with such marketing and product placement. In addition, the Philippines itself acknowledges that affordability is not an issue for all Filipinos. Thus, the Philippines’ arguments do not establish that imported distilled spirits are not like or directly competitive or substitutable with domestic products.

16. The Philippines’ arguments are also of concern in the assumptions about consumers’ perceptions of products related to affordability of the products. Affordability relates to price, which is the mechanism for the discrimination under the Philippines’ measures. In other words, the Philippines is seeking to rely on the element that is the source of discrimination – price – to determine the Panel’s conclusion on like product and directly competitive or substitutable.

31. (The Philippines, European Union and United States) In its third party submission, Australia suggests that "present facts appear to indicate that the use of cane sugar instead of other inputs in the creation of alcohol does not materially alter consumer perception; rather consumer perception appears to be most affected by the addition of flavouring and the fact that the end products are marketed as brandy, gin, vodka or rum." Can the Philippines, the European Union and the United States comment on Australia's statement.

17. Australia’s comments are consistent with the facts: consumers can see the labels of

¹³ Exhibit US-22.

¹⁴ See, e.g., Exhibit US-22, Exhibit US-30, Exhibit EU-64, Exhibit EU-21, and Exhibit EU-85.

products, and they can smell and taste the contents.¹⁵ Their purchasing decisions will be affected by what they can see, smell, and taste.

18. By contrast, different raw materials are all similarly fermented to produce ethyl alcohol, and then distilled to make the distilled spirit product. In the Philippines, local raw materials (sugar) are used to make different spirits – brandies, whiskies, and the like – which the Philippine producers manufacture specifically to be similar to other brandies and whiskies. Consumers can see and taste these final products (whiskies, brandies), which are the basis for their perception. They do not see and taste the raw materials that were fermented into ethyl alcohol, only then to be distilled by the producer to make a final “distilled spirit” product.

33. *(European Union and United States) In its first written submission, the Philippines has argued that domestic spirits made from designated raw materials and imported spirits made from other materials do not compete in the same market segment. The Philippines suggests that "[a] huge gap separates the prices of non-sugar-based spirits and sugar-based spirits, and this gap results from market forces, not the excise tax." Can the European Union and the United States comment on the Philippines' argument.*

19. The Philippine statement is consistent with its approach of viewing all Philippine products as one affordable “type” and all imported products as one expensive “type.” But this is not accurate. It is apparent from the pictures of the products sold in the Philippines that consumers do not buy products marked as “generic imported spirit” or “generic domestic spirit.” Consumers buy whiskey, or brandy, or gin; and consumers have imported and domestic choices for an extensive range of spirits in the scope of HS 2208.

20. It is also not accurate to claim that any price differences between imported and domestic products (such as those due to costs of import and other market factors) are such as to result in different “market segments” and that there is no competition between such “segments.” And the Philippines is incorrect to suggest that the excise tax does not result in price differences.

21. In the response to Question 53 from the Panel, the United States has provided some data on retail prices and taxes from the Philippines. As these data demonstrate, both imported and domestic brands are available at different price points. And for at least one imported product (SKYY vodka), the excise tax is the only reason that the imported product is more expensive to consumers than local Gilbey’s 1857 vodka.

34. *(European Union and United States) In its first written submission, the Philippines has referred to the panel report on Dominican Republic – Import and Sale of Cigarettes, in the sense that "market segmentation based on price" should be considered as a relevant criterion in determining likeness under Article III:2, first sentence. Do the*

¹⁵ See Exhibits US-30, 34, 36, 38.

European Union and the United States consider that the reasoning of that panel has a bearing on the current case? If not, why not?

22. The Panel in the dispute *Dominican Republic – Import and Sale of Cigarettes* noted that the “like product” imported and domestic cigarette brands competed based on price, and also noted other characteristics important for its determination on “like product”. It stated,

From the available evidence, the Panel is satisfied that both imported and domestic cigarettes have similar physical properties, are made from similar materials, and have a similar presentation; they have the same end-use (i.e. they are smoked by consumers); and they are classified under the same tariff heading 2402.20.00. Available evidence presented by the parties also indicates that, within the general product description, cigarettes are presented to consumers distinguished by brands. Under the identification of these brands, and within specific price segments, cigarettes compete against each other and are interchangeable for consumers (that is, consumers may switch from one brand to another).¹⁶

23. The reasoning of that panel reinforces that the determination on “like product” or “directly competitive or substitutable” under Article III:2 of GATT 1994 in this dispute should not be made on a single factor, but on several appropriate factors relevant for the market and the measure in question. The Panel’s analysis in this dispute should be guided by the goods themselves, and their presentation to Philippine consumers. There is no division between imports and Philippine products on price that could justify a conclusion other than that Philippine and imported brands of vodka, gin, whiskey, etc., are simply “vodka,” “gin,” and “whiskey” from the point of view of a consumer in a store or restaurant. Both imports and domestic products are available at different price points, and in fact there are overlaps in price (*see* responses to Question 53). Moreover, the fact that a consumer may choose to consume whiskey, vodka, gin, rum, or other distilled spirit less frequently in order to purchase a more expensive brand only emphasizes that the consumer prefers the more expensive brand and thus there is competition between the brands.

24. In conclusion, the panel’s reasoning in *Dominican Republic – Import and Sale of Cigarettes*, is consistent with the appropriate conclusion here, that Philippine and imported brands are “like” and “directly competitive or substitutable.”

35. ***(The Philippines, European Union and United States) In its first written submission, the Philippines has suggested that the existence of market segmentation between different types of spirits "reflects the existence of at least two different groups of 'consumers' in the Philippines, each with a different set of tastes, habits, perceptions and behaviour". In the view of the Philippines, the European Union and the United***

¹⁶ *Dominican Republic – Import and Sale of Cigarettes* (Panel), para. 7.165.

States, does this segmentation into "at least two different groups of consumers" relate to a distinction between spirits made from designated raw materials and spirits made from other materials? Does the market segmentation relate to price differentiation?

25. As noted in the response to Question 30, above, the Philippines asserts that its market is divided into segments based on affordability, that is, price. In the quotation in this question, the Philippines refers specifically to groups of consumers who compose such segments. But it does not follow from differences in price that there are differences in tastes, habits, perceptions and behavior that may form the basis for different market segments determining “like product” or directly competitive or substitutable for the purposes of Article III:2 of the GATT 1994.

26. Indeed, it would significantly reduce the effectiveness of Article III:2 if the significant effect of a Member’s measure on the price of a product at issue could prevent the domestic and imported versions of such products from being “like” or “directly competitive or substitutable.”

27. Even assuming for the sake of argument that there are two distinguishable segments of consumer groups in the Philippines, that would not lead to the conclusion that domestic and imported spirits are not “like” or “directly competitive or substitutable.” For consumers who compose the market segment where imported products are affordable (even if a very small segment, as asserted by the Philippines in its First Written Submission), Philippine and imported distilled spirits would be substitutes. Plus, consumers who might not purchase more expensive spirits on a regular basis, might still do so for special occasions.

36. (The Philippines, European Union and United States) In its first written submission, the Philippines has suggested the existence of two distinct groups of consumers depending on their purchasing power. The Philippines has argued that "the purchasing power of the vast majority of Philippine consumers is very low" and that "the tastes and habits of consumers are objectively determined and limited by the amount of disposable income available to be spent on alcohol consumption." In the view of the Philippines, the European Union and the United States, would it be possible for the Panel to make a meaningful market analysis (including of cross-price elasticities) of the Philippines' distilled spirits market as a whole, or should the Panel rather undertake "at least" two separate market analysis for each of the market segments?

28. As the United States notes in its responses to Questions 30 and 34, the Philippines approach regarding market segmentation would mean that measures affecting price – including the Philippines’ discriminatory taxes on distilled spirits – could lead to a segmentation in the market that would make the imported and domestic products at issue less likely to be substitutes.

29. For the purposes of this dispute, no such segmentation is necessary or appropriate. The Panel may conduct a meaningful analysis, including cross-price elasticity, without dividing the Philippines market into separate segments depending on affordability of spirits.

41. (The Philippines, European Union and United States) In this dispute, the parties have referred to the language of HS heading 2208 and its subheadings. The Philippines has also referred to the text of the HS Explanatory Notes to heading 2208. Can the Philippines, the European Union and the United States confirm whether they are referring to HS 2007.

30. The United States confirms that it refers to HS 2007 in its comments on the Harmonized System and its application. The HS 2007 is the most recently implemented international nomenclature.

42. (The Philippines, European Union and United States) The full text of the HS Explanatory Notes to heading 2208 has been provided by the Philippines in exhibit PH-46. The Panel notes that these Explanatory Notes contain inter alia a definition of "spirits" as being beverages to which "flavouring" has not been added. Can the Philippines, the European Union and the United States explain whether in their view such definition should have any bearing on the Panel's likeness analysis between the products at issue in this dispute.

31. The Explanatory Note provided by the Philippines describes three categories of beverages within the general spirits heading HS 2208. Category A, cited in the question, includes "spirits" to which no flavouring has been added. Other products typically thought of as spirits are defined under Category B (liqueurs and cordials) and Category C (other spirituous beverages).

32. The Explanatory Notes are the official interpretation of the Harmonized System at the International Level (World Customs Organization). They are not dispositive or legally binding, but may provide commentary on the scope of each heading of the HTSUS and U.S. Customs and Border Protection routinely consults relevant Explanatory Notes.¹⁷ They are consulted, along with other information available, to classify goods imported into the United States.

33. The classification of different spirits made from sugar or other typical Philippine raw materials is described in the response to Question 43, below. These classifications are detailed, and vary from product to product (e.g., classification of gin depends on its primary flavoring; "brandy" may be classified as an "imitation" brandy if not made from fruit). As such, while the Explanatory Note provides some guidance, the detailed factual information about the physical characteristics of the good itself is more critical to classification. Moreover, as noted above, the narrow "spirits" definition cited in the question is just one subset of what is covered under HS 2208, and excludes the vodkas, whiskies, and other products typically considered spirits. For the purposes of the "like product" and "directly competitive or substitutable" inquiries under Article III:2 of the GATT 1994, the physical characteristics of the products themselves and consumers perceptions of them are more important than formal HS classification or guidance thereon.

¹⁷ T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

43. ***(The Philippines, European Union and United States) In its first written submission, the European Union has stated that all distilled spirits "fall within heading 2208 of the [Harmonized System (HS)]" and that "[t]he raw material used for the production of the different types of spirits is mostly irrelevant." In turn, in its first written submission, the Philippines has argued that the Harmonized System (HS) makes distinctions between the different types of spirits and that distilled spirits are classified in the HS "on the basis of the raw materials used in their production". The Philippines has added that its own Tariff and Customs Code (TCC) "distinguishes between each category of distilled spirits [by using] individual categories for each of the non-sugar based distilled spirits [and] a separate category for sugar-based liquors." Can the Philippines, the European Union and the United States identify the tariff subheading or subheadings under which they would classify imported sugar-based gin, sugar-based brandy, sugar-based vodka, sugar-based whisky, and sugar-based tequila, and explain why. Additionally, please identify the tariff subheading under which each of the parties would classify these same types of spirits if, instead of sugar, they were based on any of the other raw materials designated in Section 141(a) of the Philippines' National Internal Revenue Code (nipa, coconut, cassava, camote or buri palm).***

34. Classification under the HTS of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). Spirits, including gin, brandy, vodka, whiskey, and tequila, are classified under heading 2208, HTSUS.

35. With respect to the products described in the question, more detailed information would be required about the products to provide a definitive tariff classification. However, based on the information provided, U.S. Customs and Border Protection would classify the products using the following approach. This classification analysis would be the same for spirits produced from distilled nipa, coconut (*i.e.* Tuba), cassava, *camote*, or buri palm.

- *Gin.* Where a spirit product incorporating distilled cane sugar derives its main characteristic flavor from juniper berries, it would be classified under subheading 2208.50, HTSUS, which provides for gin. A spirit produced from distilled sugar cane and labeled as gin that does not derive its main characteristic flavor from juniper berries likely would be classified under subheading 2208.90.7500, HTSUS, as other spirits.
- *Brandy.* A spirit produced from distilled sugar cane and labeled as brandy likely would be classified under subheading 2208.90.7100, HTSUS, which provides for imitations of brandy and other spirituous beverages. It would not fit the scope of brandy subheadings 2208.90.1200 through 2208.90.4000, HTSUS because it is not a distillate from the fermented juice, mash, or wine of fruit, or from the residue thereof.
- *Vodka.* A spirit produced from distilled sugar cane and labeled as vodka likely would be classified under subheading 2208.60, HTSUS, as vodka. Vodka is specifically provided for under subheading 2208.60, HTSUS. Vodka is characterized in EN 22.08 and

commercially for the absence of secondary constituents (esters, aldehydes, acids, higher alcohols, etc.) which give spirits their peculiar individual flavors and aromas. Provided that the ethyl alcohol produced by distilling sugar cane meets this description, it would fall under subheading 2208.60, HTSUS. This would especially be the case if the alcohol is further treated with activated charcoal or carbon. Classification beyond the six-digit level depends on the size of the container in which the product is imported and the vodka's value.

- *Whiskey.* A spirit produced from distilled sugar cane and labeled as whiskey likely would be classified under subheading 2208.90.7500, HTSUS, as “other spirits”. The product does not fit the scope of whiskey subheading 2208.30, HTSUS. However, if the alcohol derived from sugar is blended with whiskey derived from grain, it may be classified as a type of whiskey under subheading 2208.30, HTSUS.
 - *Tequila.* A spirit produced from distilled sugar cane and labeled as tequila likely would be classified under subheading 2208.90.7500, HTSUS, as other spirits. Tequila is not provided for at the six-digit level. Accordingly, it is classified under subheading 2208.90, HTSUS, which provides for “other” spirits, liqueurs, and other spirituous beverages. This particular product is not covered by tequila subheading 2208.90.50, HTSUS because tequila is an alcoholic distillate from a fermented mash derived principally from the Agave Tequilana Wever (“blue” variety), not sugar cane.
48. ***(European Union and United States) In its first written submission, and referring to the Appellate Body's report on US – Cotton Yarn, the Philippines has argued that "products can only be regarded as 'directly competitive' if the 'degree of proximity' in the competitive relationship between the sugar-based and non-sugar-based products is such that they could be considered to be in 'complete, absolute, or exact' competition with one another. Thus the relationship described in Article III:2, second sentence is one that requires a very high degree of proximity". Can the European Union and the United States comment on the Philippines' argument.***

36. The *US – Cotton Yarn* dispute concerned the application of a safeguard under the Agreement on Textiles and Clothing, not Article III:2 of the GATT 1994, and the facts concerned are not analogous to those at issue with regard to the Philippines market. Furthermore, *US – Cotton Yarn* does not stand for the proposition cited by the Philippines. In *US – Cotton Yarn*, the Appellate Body considered whether or not yarn manufactured by vertically integrated producers should be included in the scope of the definition of domestic industry, along with yarn manufactured by other producers. There was no question that the *yarns* produced by both sets of producers were like products.¹⁸

37. Even so, in its discussion, the Appellate Body made some comments about how to analyze competition among products that may be useful here. In this dispute, the Philippines has

¹⁸ *US – Cotton Yarn (AB)*, para. 89.

suggested that imported products and domestic products are segmented into different markets, and do not compete. In *US – Cotton Yarn*, the Appellate Body discussed competition between yarn sold in the marketplace and yarn made by vertically integrated producers that never entered the marketplace. In spite of the differences in distribution, the yarns were nonetheless competitive. The Appellate Body stated:

According to the ordinary meaning of the term “competitive”, two products are in a competitive relationship if they are commercially interchangeable, or if they offer alternative ways of satisfying the same consumer demand in the marketplace. “Competitive” is a characteristic attached to a product and denotes the *capacity* of a product to compete both in a current or a future situation. The word “competitive” must be distinguished from the words “competing” or “being in actual competition”. It has a wider connotation than “actually competing” and includes also the notion of a potential to compete. It is not necessary that two products be competing, or that they be in actual competition with each other, in the marketplace at a given moment in order for those products to be regarded as competitive. Indeed, products which are competitive may not be actually competing with each other in the marketplace at a given moment for a variety of reasons, such as regulatory restrictions or producers' decisions. Thus, a static view is incorrect, for it leads to the same products being regarded as competitive at one moment in time, and not so the next, depending upon whether or not they are in the marketplace.

38. Thus, in that dispute the Appellate Body recognized the importance of examining the products themselves, taking into account how the constraints of the market in question may reduce actual competition among the products. Similarly, in Article III:2 disputes regarding distilled spirits, panels have stated that latent or possible competition should be considered. The fact that two products do not actually compete at a particular time does not preclude those products from being substitutes.¹⁹ Along these lines, *Mexico – Soft Drinks* presents another approach to assessing substitutability of products, in that case focused on the different types of sweeteners used to produce beverages. In that dispute, the Panel found beet sugar and cane sugar to be “like products” and cane sugar and high-fructose corn syrup to be “directly competitive or substitutable” under Article III:2.²⁰ Cane sugar was the favored raw material under Mexico’s measure, and the raw materials, indirectly, were subject to the discriminatory tax regime on beverages produced from these raw materials.

39. Accordingly, panels have emphasized factors related to the products themselves, and their uses, in determining what is “directly competitive or substitutable,” focusing on whether

¹⁹ *Korea – Alcohol (AB)*, p. 33.

²⁰ *Mexico – Soft Drinks (Panel)*, para. 8.36, 8.78.

products are alternative ways of satisfying a particular need or taste.²¹ By this measure, products could have apparent differences and be “directly competitive or substitutable.”

40. Finally, panels and the Appellate Body have consistently stated that products that are “directly competitive or substitutable” in Article III:2 is a *broader* set of products than those that are “like products” under the first sentence of that paragraph. As noted, the products in *US – Cotton Yarn* were “like”, so it would be curious to impose a requirement of very high proximity or very strong similarity to meet the “directly competitive or substitutable” test that would result in products that are “like” under Article III:2 failing to meet the requirement to be “directly competitive or substitutable” under the same paragraph.

41. In this dispute, there is no need to reach the boundaries of “directly competitive or substitutable.” Three WTO panels have already found distilled spirits of different types to be “directly competitive or substitutable” in disputes concerning discriminatory excise taxes. The Panel should reach the same conclusion here.

49. *(European Union and United States) What is the view of the European Union and the United States on the Philippines' argument, that, given the gap in purchasing power in the different segments in the Philippines' domestic market, lower-priced domestic spirits made from designated raw materials do not offer, and will not offer for the foreseeable future, "an alternative way of satisfying the same consumer demand in the marketplace" as that offered by higher-priced imported spirits?*

42. The Philippines’ argument confuses two points: (1) what consumers will purchase in the future, and (2) what consumers would view as substitutes. The second question is the focus for “like product” and “directly competitive or substitutable.”

43. Past panels have made it clear that the obligations of Article III:2 of the GATT 1994 apply even to potential competition.²² Even if most imports would remain out of reach for most Filipinos on a day-to-day basis, that would not entitle the government of the Philippines to continue to distort the market with discriminatory excise taxes.

44. The question is how Filipinos would consider different brands if even more expensive brands were affordable. Even the Philippines’ own submission acknowledges that some Filipinos – even if a minority – can afford more expensive spirits. It is not accurate to jump from the statement that few consumers can afford expensive spirits to conclude that *no* Filipinos can afford these products. For the consumers who can afford more costly spirits, do they view a Philippine whiskey and an imported brandy as alternative ways of satisfying the same need or taste? As the results of the Euromonitor survey bear out, the imported and domestic products are

²¹ *Korea – Alcohol (AB)*, paras. 114-115, cited in *US – Cotton Yarn (AB)*, para. 91.

²² *Korea – Alcohol (AB)*, p. 33.

used for similar purposes and in similar settings.²³ The data show that they do, in fact, offer alternative ways to satisfy consumer demand for distilled spirits.

51. *(European Union, United States and the Philippines) In its third party submission, Australia submits that "[i]n addition to considering whether particular types of spirits (i.e. domestic vodka compared with imported vodka, etc.) are 'directly competitive or substitutable', ... the broad scope of the application of the term under the second sentence of Article III:2 might also lend itself to consideration of whether all distilled spirits (or larger groups thereof) are 'directly competitive or substitutable'." Can the European Union, the United States and the Philippines comment on Australia's statement.*

45. Several other WTO panels have appropriately found that different types of distilled spirits are directly competitive or substitutable. Similar findings are appropriate in this dispute.

46. The Philippine measures discriminate through the mechanism of local raw materials. Unlike other distilled spirits disputes, where a panel was faced with assessing whether the local product (e.g., pisco) was a substitute for the range of imports, here, the local product appears to consumers essentially the same as the imported product (see, e.g. Exhibits US-34 and US-36, depicting product labels). The set of imported products and the set of domestic products include all types of distilled spirits – from the clearest vodka to the darkest whiskey.

47. Due to the peculiarities of the Philippine market, product-by-product comparisons are the most straightforward way to compare imported and domestic brands. Other panels have found gin to be directly competitive with vodka – in this dispute, the question is in some respects even simpler, since both imported and domestic products are the same types (e.g., brandy, gin, etc.).

48. The United States detailed in section B.1 of its first written submission the similarities among imported and domestic products in the Philippines, including with respect to physical characteristics, channels of distribution, end uses, price substitutability, and HS classification. These similarities demonstrate that Philippine distilled spirits are “directly competitive or substitutable” with domestic distilled spirits.²⁴

53. *(The Philippines and the United States) In its first written submission, the European Union has argued that any comparison of the current prices of the spirits marketed in the Philippines "should be done ... keeping in mind that the actual price of imported spirits is, in all evidence, significantly influenced by the very measures at dispute..."*

²³ Exhibit US-41, p. 21-22.

²⁴ U.S. First Written Submission, para. 66. In addition, as noted in the U.S. First Written Submission, “While all distilled spirits at issue – imported and domestic – are directly competitive or substitutable, the similarities between imported and domestic brands of the same type (e.g., whiskey, vodka, etc.) are even greater with almost the same physical characteristics and similar packaging. As such, these products are ‘like’ domestic products . . .” U.S. First Written Submission, para. 90.

Can the United States and the Philippines comment on the European Union's argument.

49. Excise taxes are one part of the price of a product, and as such matter in an analysis of consumer choices. In the Philippines, they are a very significant part – particularly for imported brands compared to domestic brands.

50. The price information provided by the Philippines in Exhibit PH-19 demonstrates the significance of the tax burden on imported distilled spirits in the Philippines. It is particularly noticeable when comparing the tax burden as a percent of the net retail price for local and imported spirits of the same type (see table below). For example, using the price and tax information from PH-19 (amended), the relative tax burdens on local brand Gilbeys 1857 vodka and imported SKYY vodka are 2.9 percent and 76.1 percent, respectively. Before the excise tax is applied, the price of the imported brand is actually *lower* than the local brand – it is the excise tax itself that creates the ultimate price differential that makes the imported brand more expensive than the local brand. That price differential is then compounded by the application of the 12 percent VAT, which is applied to the both the price of the bottle plus the excise tax.²⁵

²⁵ We note that the revision of Philippines Exhibit 19 appears to have removed, without explanation, several entries for local spirits that were included in the original version. For that reason, we used some examples from the earlier version in preparing this table. Most notably, the amended exhibit now includes information for only a single local brandy, whereas the original PH-19 provided information on 22 local brands of brandy. Also, while Plymouth English Gin was included in the original PH-19, it was omitted without explanation from the revised version.

Calculating Tax Burdens for Local versus Imported Spirits Using PH-19 (Price Survey)										
Type	Brand	Origin	ml	Proof	Avg Retail	12% VAT	Excise Tax Rate	Excise Tax Amount	Net Retail Price	Tax Burden as % of Net Retail Price
Brandy	Napoleon VSOP*	Domestic	750 ml	72	211.9	22.7	13.59	7.34	181.86	4.0%
	Gran Matador Gran Reserva*	Domestic	700 ml	72	192.14	20.59	13.59	6.85	164.7	4.2%
	Alfonso I Solera	Imported	700 ml	72	268.93	28.81	146.97	74.07	166.05	44.6%
	Reserva1877 Brandy	Imported	700 ml	76	298	31.93	146.97	78.19	187.88	41.6%
Whiskey	White Castle 5 yrs	Domestic	700 ml	80	143.83	15.41	13.59	7.61	120.81	6.3%
	Embassy Whiskey	Domestic	700 ml	72	152.92	16.38	13.59	6.85	129.69	5.3%
	Sea Grams Crown n7 Whiskey	Imported	750 ml	80	650	69.64	293.93	176.36	404	43.7%
	Jim Beam White	Imported	750 ml	80	794	85.07	293.93	176.36	532.57	33.1%
Gin	Britannia London Dry Gin	Domestic	700 ml	90	138	14.79	13.59	8.56	114.65	7.5%
	Plymouth English Gin*	Imported	700 ml	82.4	517.5	55.45	293.93	169.54	292.51	58.0%
Rum	Paradise Mango Rum	Domestic	700 ml	32	395.32	42.36	13.59	3.04	349.92	0.9%
	Tandua 1854 Rhum	Domestic	700 ml	80	207.69	22.25	13.59	7.61	177.83	4.3%
	Malibu Coconut Rum	Imported	750 ml	42	555.47	59.51	293.93	92.59	403.37	23.0%
	Myers Rum Original Dark	Imported	750 ml	80	632.5	67.77	293.93	176.36	388.37	45.4%
Tequila	El Hombre Tequila Gold	Domestic	700 ml	80	241.84	25.91	13.59	7.61	208.32	3.7%
	Mojitos Tequila - Gold	Domestic	700 ml	72	229.46	24.59	13.59	6.85	198.02	3.5%
	Jose Cuervo Classico	Imported	700ml	76	582.25	62.38	293.93	156.37	363.5	43.0%
	Jose Cuervo Gold	Imported	1000ml	76	786.83	84.3	293.93	223.39	479.14	46.6%
Vodka	Gilbey's 1857 Vodka	Domestic	700ml	80	298	31.93	13.59	7.61	258.46	2.9%
	Antonov Vodka	Domestic	700ml	80	100.26	10.74	13.59	7.61	81.91	9.3%
	Absolut Vodka - Citron	Imported	750ml	80	624.33	66.89	293.93	176.36	381.08	46.3%
	SKYY VODKA	Imported	750ml	80	457	48.96	293.93	176.36	231.68	76.1%

* Price information was missing or removed in the amended version of PH-19, so original version of PH-19 was used.

54. *(The Philippines and the United States) In its first written submission, the European Union has argued that "[i]n reality in the Philippines there exist no real gap in the price line of products: there is only a continuum of prices from very cheap brands to very expensive ones. Many local products tend to be on the lower part of this priceline, and many imported product tend to be on the upper part". The European Union has added that, however, "there are several and important overlaps. [S]ome Filipino brands are sold at higher prices than some imported brands." Can the United States and the Philippines comment on the European Union's argument.*

51. The European Union is correct that there is a continuum of prices. Although imported brands are often more expensive, there is a range of prices for imports and a range of prices for domestic brands. Moreover, there are overlaps where imported and domestic brands are similar in price – in fact, as noted in the response to Question 53, in at least one case the excise tax is the only reason the imported brand is more expensive.

52. In addition, it is useful to recall that each purchase is just one point on that continuum –

the fact that some imported brands are very expensive is not likely to be of interest to a consumer deciding between more comparably priced domestic and imported spirits.

55. (European Union and United States) What is the view of the European Union and the United States on the Philippines' argument, that in the Philippines "non-sugar-based distilled spirits and sugar-based spirits are sold through distribution channels that are almost entirely different... "?

53. The Philippines' assertion that domestic distilled spirits are sold in almost entirely different distribution channels from imported distilled spirits is contrary to the significant evidence presented by the United States and the European Union. Evidence in the form of pictures of actual stores, restaurants/bars, and menus from the Philippines affirm that Philippine and imported brands are sold side by side, without any apparent differentiation.²⁶

54. The main theme of the Philippine argument is that cheaper domestic spirits are sold in smaller, local sari sari stores. But recall that almost all spirits sold *anywhere* in the Philippines (about 97.5%)²⁷ are domestic brands; it makes sense that they would dominate the shelves throughout the Philippines and particularly so in smaller stores with less inventory.

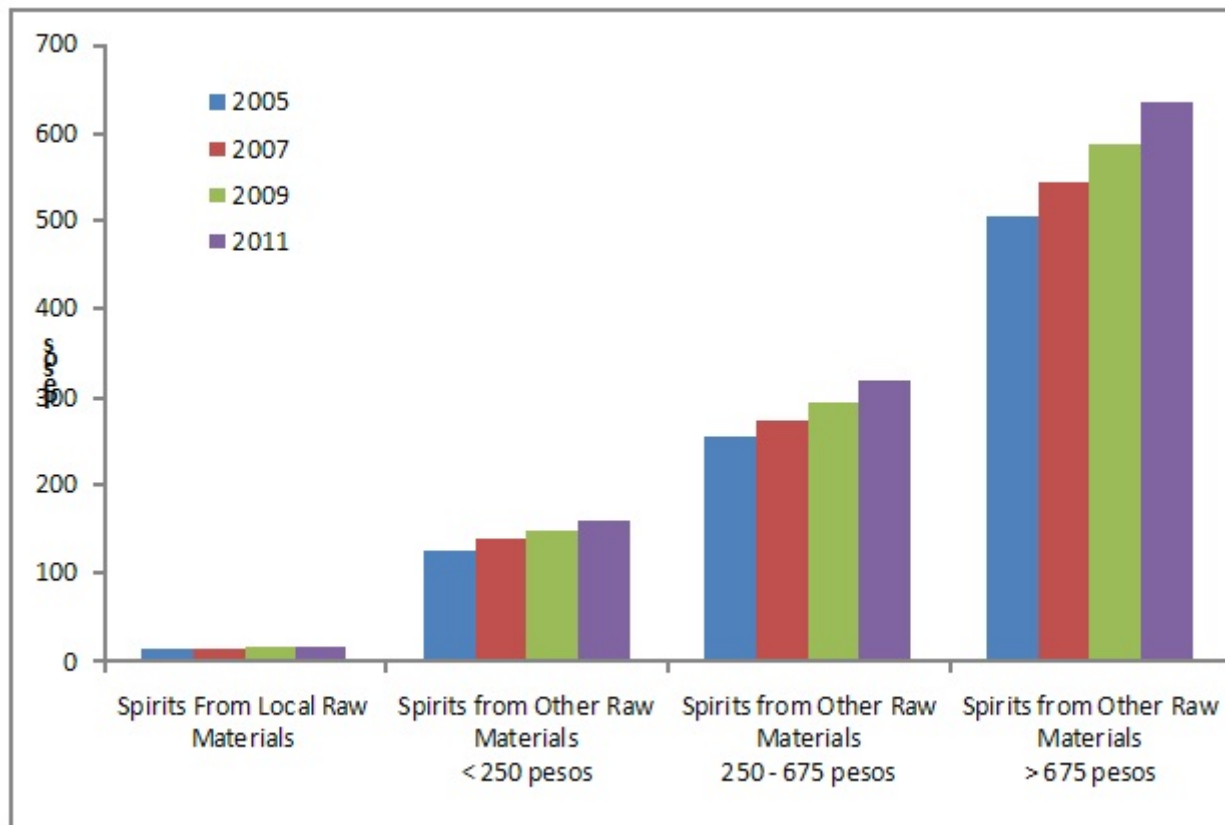
55. Channels of distribution is just one factor concerning whether two sets of goods are substitutes. In the Philippine market, because of the extreme dominance of Philippine domestic brands, it makes sense to focus on where the 2.5% of the market composed of imports is sold to understand whether they are in competition with domestic brands. And indeed, as the evidence from the United States and the Philippines bears out, the domestic brands are sold as “brandies” and “vodkas” – not “local” products.

56. (European Union and United States) What is the view of the European Union and the United States on the Philippines' argument that "the concept of de minimis for the purposes of Article III:2, second sentence, is defined by the extent to which the tax burden affects the competition of products in the market in question [and that if] the taxation rate has little or no impact on consumer choice, it will be deemed to be de minimis."

56. “De minimis” for the purposes of Article III:2 of GATT 1994 concerns the size of the tax differential, and here the tax differential is anything but *de minimis*. The rate on products of the Philippines made from typical local raw materials currently is only 13.56 pesos/proof liter, while the tax rates on all other spirits are many times higher – from around ten times higher to around forty times higher (see the chart below reprinted from the U.S. First Submission).

²⁶ Exhibits US-30, 31, 38.

²⁷ Exhibit US-41, page 12.



57. These differentials are substantially greater than the differentials previous panels have found to be more than *de minimis* in other disputes concerning discriminatory taxes on distilled spirits. In *Japan – Alcohol*, for example, the Japanese shochu was taxed at a little less than 2/3 of the tax on vodka.²⁸ If the Philippines applied a similar differential, the local tax of 13.56 pesos/proof liter would compare to a 20.39 pesos/proof liter for the imported products.²⁹ Instead, the minimum tax on products not made from local raw materials is 146.97 pesos/proof liter.

58. Moreover, the second sentence of Article III:2 of the GATT 1994 does not have a “trade effects” requirement. Assessment of a measure under that article, whether first or second sentence, concerns the substitutability of the imported and domestic products, and the tax rates applied. These provisions obligate WTO Members not to favor their own products. As panels have recognized, consumer choices can be sticky and slow to change, or that it might otherwise be difficult to measure how imported products would compete in the *counterfactual* absence of the discriminatory taxation.³⁰

²⁸ *Japan – Alcohol (Panel)*, para. 6.24. See U.S. First Written Submission, FN 88.

²⁹ 13.59 * 3/2

³⁰ *Korea – Alcohol (AB)*, p. 33. See also, *Japan – Alcohol (Panel)*, para. 6.31.

59. In short, the Philippine argument that a measure must affect trade for it to meet the *de minimis* requirement of the second sentence of Article III:2 is incorrect. In fact, it would read Article III:2 backwards by saying one looks first to trade effects before ascertaining if there is a difference in tax treatment. Instead, under Article III:2 one looks to the tax treatment. Any trade effects would flow from ensuring that the internal taxes do not discriminate against imported goods.

57. (European Union and United States) What is the view of the European Union and the United States on the Philippines' argument that *de minimis* is a relative concept and that an assessment of what is more than *de minimis* ought to be based on the relative tax burden of the products being compared, which should be calculated based on the average tax/price ratio applied to these products?

60. Any way that one looks at the Philippine measures, the tax difference is more than *de minimis*. The Philippines measures themselves define, on the one hand, a category of distilled spirits made from typical local raw materials that is subject to a very low tax rate. On the other hand, the measures define a category of all other spirits subject to a much higher tax burden.

61. As discussed in the response to Question 56, the Philippine approach is backwards. The question is what is the difference between the tax rates. Even the Philippines in the passage cited in the question concedes that the tax on imported distilled spirits is almost double the tax on domestic distilled spirits. Yet the Philippines claims that this is *de minimis*.

62. Also, comparing the general group of “imports” compared to “domestics” on an “average” basis, as the Philippines does, can obscure much of the discrimination taking place. The table below shows price and tax information on the Philippines from another source, the Abrenica and Ducanes Report (Exhibit PH-49), for nine imported and 14 domestic spirits.

1	2	3	4	5	6	7	8	9
Brand	Type	Origin	Net retail price	Excise Tax Rate/PL	Excise Amount	VAT(%)	Retail Price	%Excise Tax Rate
<i>Alfonso 1 Solera Brandy</i>	<i>Imported</i>	<i>Brandy</i>	<i>121.76</i>	<i>146.97</i>	<i>74.07</i>	<i>23.5</i>	<i>219.33</i>	<i>60.8%</i>
<i>Fundador Solera</i>	<i>Imported</i>	<i>Brandy</i>	<i>242.17</i>	<i>146.97</i>	<i>74.07</i>	<i>37.95</i>	<i>354.19</i>	<i>30.6%</i>
<i>Hennessy Very Special Cognac</i>	<i>Imported</i>	<i>Brandy</i>	<i>1120.38</i>	<i>587.87</i>	<i>296.29</i>	<i>170</i>	<i>1586.67</i>	<i>26.4%</i>
<i>Emperador Solera</i>	<i>Local</i>	<i>Brandy</i>	<i>51.58</i>	<i>13.59</i>	<i>7.34</i>	<i>7.07</i>	<i>65.99</i>	<i>14.2%</i>
<i>Gran Matador Solera</i>	<i>Local</i>	<i>Brandy</i>	<i>50.62</i>	<i>13.59</i>	<i>6.18</i>	<i>6.82</i>	<i>63.62</i>	<i>12.2%</i>
<i>Napoleon VSOP</i>	<i>Local</i>	<i>Brandy</i>	<i>185</i>	<i>13.59</i>	<i>7.34</i>	<i>23.08</i>	<i>215.42</i>	<i>4.0%</i>
<i>Bombay Sapphire Distilled London Gin</i>	<i>Imported</i>	<i>Gin</i>	<i>535.34</i>	<i>293.93</i>	<i>148.14</i>	<i>82.02</i>	<i>765.5</i>	<i>27.7%</i>
<i>Gordon's Special London Dry Gin</i>	<i>Imported</i>	<i>Gin</i>	<i>521.47</i>	<i>146.97</i>	<i>74.07</i>	<i>71.46</i>	<i>667</i>	<i>14.2%</i>
<i>Ginebra San Miguel</i>	<i>Local</i>	<i>Gin</i>	<i>43.66</i>	<i>13.59</i>	<i>7.61</i>	<i>6.15</i>	<i>57.42</i>	<i>17.4%</i>
<i>London Premium Dry Gin</i>	<i>Local</i>	<i>Gin</i>	<i>60.67</i>	<i>13.59</i>	<i>8.56</i>	<i>8.31</i>	<i>77.54</i>	<i>14.1%</i>
<i>The Bar Lemon & Lime Gin</i>	<i>Local</i>	<i>Gin</i>	<i>52.31</i>	<i>13.59</i>	<i>4.81</i>	<i>6.86</i>	<i>63.98</i>	<i>9.2%</i>
<i>Gilbey's Special Dry Gin</i>	<i>Local</i>	<i>Gin</i>	<i>110.58</i>	<i>13.59</i>	<i>7.13</i>	<i>14.13</i>	<i>131.84</i>	<i>6.4%</i>
<i>Bacardi Gold</i>	<i>Imported</i>	<i>Rum</i>	<i>420.29</i>	<i>13.59</i>	<i>6.85</i>	<i>51.26</i>	<i>478.4</i>	<i>1.6%</i>
<i>Tanduay Rhum ESQ</i>	<i>Local</i>	<i>Rum</i>	<i>36.56</i>	<i>13.59</i>	<i>6.63</i>	<i>5.18</i>	<i>48.37</i>	<i>18.1%</i>
<i>Absolut Vodka-Blue</i>	<i>Imported</i>	<i>Vodka</i>	<i>375.04</i>	<i>293.93</i>	<i>148.14</i>	<i>62.78</i>	<i>585.96</i>	<i>39.5%</i>
<i>Cossack Vodka</i>	<i>Local</i>	<i>Vodka</i>	<i>46.68</i>	<i>13.59</i>	<i>7.61</i>	<i>6.51</i>	<i>60.8</i>	<i>16.3%</i>
<i>Antonov Vodka</i>	<i>Local</i>	<i>Vodka</i>	<i>78.26</i>	<i>13.59</i>	<i>7.61</i>	<i>10.3</i>	<i>96.17</i>	<i>9.7%</i>
<i>The Bar Orange Vodka</i>	<i>Local</i>	<i>Vodka</i>	<i>52.31</i>	<i>13.59</i>	<i>4.81</i>	<i>6.86</i>	<i>63.98</i>	<i>9.2%</i>
<i>Toska Vodka</i>	<i>Local</i>	<i>Vodka</i>	<i>94.26</i>	<i>13.59</i>	<i>7.61</i>	<i>12.23</i>	<i>114.1</i>	<i>8.1%</i>
<i>Jack Daniel's Tennessee Sour Mash Whiskey</i>	<i>Imported</i>	<i>Whisky</i>	<i>478.71</i>	<i>587.87</i>	<i>296.29</i>	<i>93</i>	<i>868</i>	<i>61.9%</i>
<i>Johnnie Walker Black Label Old Scotch</i>	<i>Imported</i>	<i>Whisky</i>	<i>825.47</i>	<i>293.93</i>	<i>148.14</i>	<i>116.83</i>	<i>1090.44</i>	<i>17.9%</i>
<i>White Castle Calibre 69 Whisky</i>	<i>Local</i>	<i>Whisky</i>	<i>56.99</i>	<i>13.59</i>	<i>6.56</i>	<i>7.63</i>	<i>71.18</i>	<i>11.5%</i>
<i>St. George Premium Whisky</i>	<i>Local</i>	<i>Whisky</i>	<i>108.32</i>	<i>13.59</i>	<i>6.66</i>	<i>13.8</i>	<i>128.78</i>	<i>6.1%</i>

63. Using this data to calculate the tax burden as a percent of the net retail price (dividing column 6 by column 4 in the table above) reveals that the highest burden faced by an imported spirit in the sample is almost 62 percent (Jack Daniel's Tennessee Sour Mash Whiskey), while the highest tax burden faced by a domestic spirit in the sample was 18 percent (Tanduay Rhum ESQ). These figures are lost in a simple average.

64. Comparing the average tax burdens for *all* imported versus domestic spirits also masks tax discrimination among the same types of spirits. The case of brandy is especially revealing. The sample brandies in the Abrenica study includes imported brand Alfonso 1 Solera Brandy and local brand Napoleon VSOP. The net retail price for imported Alfonso brandy is significantly cheaper than the local Napoleon VSOP (121.76 pesos versus 185 pesos). However, the excise tax amount on Alfonso brandy is *more than ten times* the amount charged on local Napoleon, such that the actual retail prices are similar, though the price of the imported brand is now higher.

61. ***(European Union, United States and the Philippines) In its first written submission, the Philippines has argued that "[the] statements of certain individuals in the Philippines Congress and Government alleging the WTO-incompatibility of the excise tax regime... are simply the personal opinions of such individuals and do not reflect the official position of the legislative branch of the Philippines Government... The official view of the Government of the Republic remains as stated in this submission." In the Philippines' view, what value, if any, should be accorded to the statements made by Philippines' officials on the measures at issue and, most particularly, with respect to the issue of the alleged protective intent of the measure? Could the European Union and the United States comment on the value, if any, that should be accorded by WTO panels to the statements made by a Member's officials on measures at issue in a dispute and, most particularly, with respect to the alleged protective nature of the measure?***

65. A government official's statement whether a measure is WTO-consistent or WTO-inconsistent does not mean that the measure is or is not in violation of a Member's WTO commitments. That determination needs to be made on the basis of all of the relevant evidence.

66. At the same time, a statement by a government official may be useful support for the conclusion drawn from an analysis of a measure's design and architecture.

67. Here, the protective effect of the measures is apparent from examining the obvious features of their design and architecture – the separation of spirits based on use of local types of raw materials, the extreme difference in tax rates. The statements by the government officials merely corroborate and reinforce the conclusion based on an objective examination of the measure. Moreover, the statements may be more relevant given that they are from entities – the Department of Finance, the Department of Trade and Industry – familiar with the details of the measures at issue.