

PHILIPPINES – TAXES ON DISTILLED SPIRITS

(DS403)

**COMMENTS OF THE UNITED STATES OF AMERICA
ON THE PHILIPPINES' REPLIES TO THE PANEL'S QUESTIONS**

MARCH 3, 2011

Preliminary Note: The comments of the United States on the Philippines' Responses to the Panel's questions after the second meeting with the Panel are set out below. Where there is no comment, that does not mean the United States agrees with the Philippines' response. The United States considers that the issues in this dispute are clear at this stage in the proceedings, and the United States has not repeated points that have already been made before the Panel and has limited its comments in this submission to some specific points in response to the Philippines' most recent information.

65. *(The Philippines) The Panel notes that in the last amendment of the 1997 National Internal Revenue Code by Republic Act 9334 of 2004, a "new brand" of distilled spirits is defined as any "brand registered after the date of effectivity of [Republic Act] No. 8240", i.e., 1 January 1997. Please confirm whether, for the purpose of your submissions:*

(a) *Any references to "existing brands" are to those brands registered before 1 January 1997 and which have their classification for excise tax purposes (including net retail price and applicable tax) publicly available as annexes to certain Republic Acts and Revenue Regulations;*

(b) *Any references to "new brands" are to those brands registered after 1 January 1997 and which do not have their classification for excise tax purposes (including net retail price and applicable tax) publicly available.*

Please indicate whether the updated list of "new brands" has been published and, if so, provide a copy of the respective instrument.

66. *(The Philippines) The parties have explained that, under Philippines legislation, once a specific brand of spirit is classified under a given tax bracket under Section 141(a) or Section 141(b) of the Philippines National Revenue Code, as appropriate, that classification may not be revised other than through an Act of Congress. The Philippines has added that this means that if the price of a distilled spirit is subsequently increased, such spirit "would not be moved to the higher taxation tier" (Philippines' first written submission, paragraph 306). Please explain whether this also means that if the price of an imported distilled spirit decreases after the original classification, such spirit could likewise not be moved to a lower taxation tier under Section 141(b). However, if in such case it is possible to reclassify the spirit into a lower taxation tier, please identify the specific provisions that regulate the process of reclassification and explain the appropriate procedures. Explain the difference in this regard, if any, between "existing brands" and "new brands".*

67. *(The Philippines) The Philippines has stated that, in the case of the imported spirit Malibu and others, "[i]f the importers of these rums were to file the proper sworn declaration and excise tax return indicating that the raw materials used to produce these spirits are classified within Section 141(a), they would receive the tax treatment set out in that paragraph" (Philippines' first written submission, paragraph 174).*

Please explain the provisions and procedures that would allow the Philippines' Bureau of Internal Revenue (BIR) to review the tax treatment accorded to these other imported spirits.

Comment on Philippines' Response to Questions 65, 66, and 67

1. The Philippines' responses to Questions 65-67 simply underscore the lack of transparency and the inconsistencies in its tax system for distilled spirits, which appear only to serve to further disadvantage importers and reveal that the system is neither progressive nor easy to administer, as the Philippines has claimed. For example, as the Philippines confirms in its response to Question 66, if the price of a distilled spirit classified under Section 141(b) changes so that it should qualify for a different tax rate, it nonetheless remains in the old tax bracket.

2. In addition, as the Philippines noted during the second meeting with the Panel, it does not have a regular procedure for correcting mis-classifications regarding raw materials. Thus, although the Philippines has stated that Malibu Rum, made from sugar, can be correctly taxed, it seems to have no provision to do so under its laws. Even if the Philippines has an informal way to apply the correct tax, it is troubling that it does not have a transparent way to do so under its law.

68. *(The Philippines) Based on the information provided by the Philippines (in particular the Philippines' response to Panel question No. 60), the Panel understands that distilled spirits made from the designated raw materials and imported from countries where these materials are not "produced commercially" are not subject to the flat tax rate under Section 141(a) of the Philippines National Revenue Code, but are instead subject to one of the three higher tax rate brackets under Section 141(b). This would be so even if the designated raw material used to make such imported spirit came from a third country where the designated raw material is "produced commercially". The European Union has noted, for example, that "a vodka producer based in Poland would – even if it uses sugar cane and distils its products with the same methods followed by Filipino companies – still be subject to the higher tax rates applied under Section 141(b) of the NIRC." (European Union's second written submission, paragraph 16.) That same vodka, however, would pay the lower Section 141(a) tax if it was made in the Philippines from sugar cane imported from a third country where sugar cane is "produced commercially".*

(a) Please confirm whether the previous statements are correct.

(b) Please explain how would the Philippines classify a gin produced in Poland from cane-sugar based ethyl alcohol that is imported from Brazil.

(c) Please also comment on the scenarios suggested by the European Union in paragraphs 65 and 66 of its oral statement in the second meeting with the

parties.

69. *(The Philippines) According to the Philippines, the legal basis for the excise tax is Section 141 of the Philippines National Revenue Code, which states that "the tax shall attach to [the] substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirits, or transformed into any other substance either in the process of original production or by any subsequent process." In the case of distilled spirits made in the Philippines, please explain the following:*
- (a) How is the excise tax levied on the ethyl alcohol, whether imported or domestically-produced, that is used as a base for the production of domestic spirits, and in particular who pays for the tax and at what point is the tax paid?*
 - (b) How is the excise tax levied on imported distilled spirits that may be used in the production of domestic spirits?*
 - (c) Does the manufacturer of the final product also pay an excise tax on that final product?*
 - (d) Do the retailers pay an excise tax?*

Comment on Philippines' Response to Questions 68, and 69

3. The United States notes that, in response to Questions 68 and 69, the Philippines again draws attention to imports by Philippine producers of ethyl alcohol made from the raw materials favored under the Philippine measures. Two points are particularly relevant in this regard.

4. First, the Philippines' assertions regarding ethyl alcohol imports would seem to overstate their importance to domestic producers. For example, the SEC filing of GSM (Exhibit US-58) states:

The alcohol used in the Company's liquor products is distilled from molasses produced from sugarcane grown and milled in the Philippines. Generally, the Company purchases molasses from traders, which is then delivered to local distillers. After converting the molasses into alcohol, the distillers then deliver distilled alcohol back to the Company's facilities as part of the raw materials for liquor. The Company pays a processing fee for this distillation.

The Company acquires 60% of its total requirement from its wholly-owned subsidiary, Distileria Bago, Inc. It sources its remaining requirement from domestic and foreign open

markets.¹

5. Second, the fact that Philippine producers import ethyl alcohol does not change the discriminatory nature of its measures. The imported ethyl alcohol is used by *Philippine* producers to make the domestic products that compete unfairly against U.S., European, and other imported brands. The U.S. claims concern the absence of an even playing field for imported products in the Philippines, and the arguments concerning alternative sources for Philippine producers of favored raw materials simply attempt to confuse the issues. The competitive disadvantage accorded a U.S. product like Jim Beam whiskey against Philippine White Castle Whiskey is no less detrimental if the Philippine producer imports some of its ethyl alcohol – the discriminatory tax treatment remains the same.

6. Finally, the United States recalls that as the Philippines own laws and regulations make evident, its taxes on distilled spirits are applied on a brand-by-brand basis based on proof liter. It is unclear how the Philippines would collect a tax on the raw material – ethyl alcohol – consistent with this system.

7. As the United States has discussed in earlier submissions and at meetings with the Panel, despite the rationalizations offered by the Philippines, the only reasonable explanation for the structure of the Philippine measures and the more favorable treatment provided to products derived from the restricted list of raw materials is to afford protection to domestic production.

70. *(The Philippines) The European Union has stated that "No two whiskies sold in the world are identical with respect to the levels and combinations of various congeners. Each whisky has different levels of various congeners, just like each whisky has its own peculiarities with regard to smell, taste and colour, which derive from the fact that there might be some small differences with regard to raw materials, production or ageing." (European Union's second written submission, paragraph 65.) Please comment on this statement and explain whether the levels and combinations of various congeners can vary from type to type of whisky or whether they establish a clear distinction between spirits made from designated materials and spirits made from other materials.*

Comment on Philippines’ Response to Question 70

8. For two products to be “like” or “directly competitive or substitutable” under Article III:2 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), they are not required to be identical.² Subtle differences, or even differences that might not be subtle, may occur between like products. Accordingly, a U.S. bourbon whiskey made with corn may have a different flavor

¹ Exhibit US-58, p. 8.

² *Japan – Alcohol* (Panel), para. 6.23.

profile from a Scotch whisky made from grain. They are nonetheless both whiskies. For other products, such as vodkas – where the chief characteristic is that the product is distilled to the point where it is a “neutral spirit” – differences from product to product might be close to undetectable.

9. The Philippines’ response to Question 70 emphasizes the differences between products that result from different raw materials. But as the United States discussed in earlier U.S. submissions,³ the Philippine producers go to great lengths to make these differences as insignificant as possible. They do this through techniques such as adding flavors to mimic congeners in whisky or brandy, or adding juniper to neutral spirits from favored raw materials to mimic imported gins. Philippine producers also obscure the differences through the marketing and advertising of their products, whether the “dutch-type” Philippine gin from Ginebra San Miguel, the domestic Gran Matador Solera Gran reserva with “brandy concentrates from Spain,” or Cossack vodka in the “Russian tradition” from Tanduay.⁴ Accordingly, while the United States does not disagree that there may be differences between so-called “sugar based” and “non-sugar based” spirits, these differences do not mean Philippine products are not “like” imported products.

71. *(European Union, United States and the Philippines) In light of the evidence on the record, the Panel understands that the same outlets in the Philippines where imported spirits (including those made from raw materials other than cane sugar) are sold either for consumption on the premises (restaurants, bars, pubs, clubs, discotheques, hotels, etc.) or off the premises (stores or supermarkets) also offer domestic spirits, while the opposite is not always the case; that is, many establishments (especially, small retail stores) that offer domestic spirits, do not carry imported spirits. Is the Panel’s understanding correct?*

Comment on Philippines’ Response to Question 71

10. Contrary to the Philippines’ claims in its response to Question 71, the evidence does not support the Philippines’ assertion that imported spirits and domestic spirits are consumed in very distinct ways. For example, domestic brands and imported brands are both listed by name in samples of menus, which contradicts the Philippines’ assertion that local brands are consumed mainly as mixed drinks.⁵ Note also the chart submitted as Exhibit US- 46, showing preferences for consumption of spirits by type (whiskey, gin, etc.) for both imported and domestic brands among the consumers surveyed by Euromonitor. The graphs in this exhibit show that consumers

³ See, e.g., U.S. Second Written Submission, paras. 7, 21-22, 26.

⁴ Exhibits US-22, EU-46.

⁵ Exhibit US-31. Examples of domestic brands listed on menus include Gran Matador brandy, Tanduay rum, Mojitos tequila, Gilbey’s and GSM gin.

consume both imported and domestic brands in a variety of ways – straight, with ice, etc.⁶ Further, there are similarities between imported and domestic products within categories, such as the higher percentage consuming vodka and gin in mixed drinks, compared to whiskey and brandy.

11. Regarding the purported lack of imported brands in small sari sari shops, the United States recalls that *all* imported brands account for less than 3% of sales of distilled spirits in the Philippines and it would be surprising to find them in each corner shop.⁷ However, the copious pictures of markets on the record show that where imported brands are sold, they are side-by-side with domestic brands.⁸

72. *(The Philippines) Please provide an estimate of the proportion of the population that corresponds to each of the five groups of socio-economic classification of homes (A-B, C1, C2, D and E) identified in Appendix 1 of exhibit PH-22.*

12. The United States has one limited comment on the Philippines’ response to Question 72, regarding the methodology of the calculations. Columns F and G on page 11, which are the basis for its conclusions about purchasing power, were created by applying a completely uniform 1.2% to all Filipinos as the percentage of income spent on alcoholic beverages. The Philippines presents this 1.2% figure as the highest possible level of expenditure on alcoholic beverages. In reality there is undoubtedly a range of purchasing behaviors – some households may spend higher or lower amounts and some may purchase spirits once a month rather than once a week, for example – and columns F and G cannot credibly be presented as setting absolute boundaries.

74. *(The Philippines) With respect to the successive lists of net retail prices provided by the Philippines in exhibits PH-19 (original), PH-19 (amended) and PH-77, please indicate the outlets and dates where the price data was collected.*

75. *(The Philippines) In the list of net retail prices provided in exhibit PH-19 (amended), the Philippines explained that the reason to remove a number of products from the list was that "they could not be verified as of this corrigendum".*

(a) *If the survey to collect the prices was conducted in September 2010, can the Philippines explain why there was a need to subsequently verify this information.*

⁶ Exhibit US-46.

⁷ In its response to Question 76, the Philippines acknowledges that smaller shops (“tertiary accounts”) only sell “market leader brands” – which in the Philippines are all local products. *See*, Philippines’ Responses to Panel Questions, Feb. 24, 2011, p. 25.

⁸ *See, e.g.*, Exhibit US-30, US-42.

- (b) Please explain what does the Philippines mean when it has said in exhibit PH-19 (amended) that some brands were removed from the original price list because their price "is incorrect" or "because no price data was obtained".**
- (c) Were there any other reasons to remove brands, or remove or change prices from the list?**
- (d) Please provide a table indicating the brands that were removed from PH-19 (original) or from PH-19 (amended) and the reasons for removing each brand.**
- (e) Please provide a list of the brands included in PH-19 where the initial observed price was changed.**

Comment on Philippines' Response to Questions 74-75

13. The Philippines' responses to Questions 74 and 75 provide additional detail on the collection of price information included at Exhibit PH-19, as well as lengthy explanations for the multiple corrections to that exhibit. The reasons for the corrections vary considerably, from misplaced decimal places to incorrect categorizing of products.

14. The United States will not revisit the data in Exhibit PH-19, but notes its response to Question 73.⁹ Regardless of the source, the price information on distilled spirits sold in the Philippines does not support the Philippines' claims.

76. (The Philippines) The Philippines has stated that differences in raw materials would create consequent differences in the production costs, distribution, and marketing processes, which would be perceivable by the average consumer. (Philippines' second written submission, paragraphs 25, 26 and 37.) Please explain what kind of differences are caused by the use of different raw materials in:

(a) Production costs;

(b) Distribution; and,

(c) Marketing processes.

In each case, please explain how these differences would be perceptible to the average Philippines consumer.

77. (European Union, United States and the Philippines) With respect to domestically-

⁹ U.S. Responses to Panel Questions, Feb. 24, 2011, paras. 4-8.

produced gin, brandy and rum, can the Philippines indicate what is the approximate weight of the cost of the raw materials used in the production of the base spirit as a proportion of the final net retail price of distilled spirits in the Philippines market. With respect to their own production of gin, brandy and rum, can the European Union and the United States indicate the approximate weight of the cost of the raw materials used in the production of the base spirit as a proportion of the final net retail price of distilled spirits in their own markets.

Comment on Philippines’ Response to Question 76-77

15. The Philippines’ response attempts to link a particular process to each raw material. However, its discussion is incomplete: the raw material itself is not the primary driver of the production process, final product, or costs. (Even the Philippines concedes that raw materials only account for about 12-18% of the cost of its low-priced spirits.)¹⁰

16. First, molasses is not just a by-product left over from sugar production. Sugar molasses is a major raw material for virtually all distilled spirits in the Philippines and rums around the world; spirits producers must also ensure that the molasses meets their requirements (*e.g.*, the length of fermentation and specific yeasts used can affect the molasses). In addition, the Philippines’ claims that it is easy or fast to add flavors to sugar-based spirits to produce whiskey, brandy, or tequila do not stand up to scrutiny. As its own response confirms, such processes are specialized for the particular products Philippine producers want to create. For example, even if tequila is typically thought of as an agave product, in the Philippines producers have developed very specific processes to make “tequila-like” spirits. Development and use by these producers of “patented processes registered with the Intellectual Property Office”¹¹ suggest a sophisticated industry, not a low-cost, low-technology operation. There is no basis to conclude that distillation from sugar is necessarily easier than distillation from all other raw materials – the basic process is the same for all distilled spirits.¹²

17. Second, from the basic process for distillation for any raw material there are differences in how producers add to this basic process to manufacture different distilled spirits. Producers age products for different lengths of time, use different containers (oak barrels, copper pots), etc.,

¹⁰ Philippines’ Responses to Panel Questions, Feb. 24, 2011, p. 26.

¹¹ Philippines’ Responses to Panel Questions, Feb. 24, 2011, p. 21.

¹² See, U.S. Responses to Panel Questions, Dec. 8, 2010, para. 1 and Exhibit PH-28, “Although each spirit has a unique history, vodka, rum, tequila, gin, bourbon, whiskey and cordials are produced using similar methods. Variations occur in the raw materials and the stills used to create these potables, but the basic production process can be broken into six steps.” See also, Exhibit PH-27, “Brandies are easy to manufacture.”

use continuous or pot distillation, or add flavors to achieve a particular product.¹³ As a result, there are higher cost rums and lower cost rums (Tanduay 5 year and Tanduay Centennial), and higher cost brandies and lower cost brandies (Gran Matador Reserva and Gran Matador).

18. To the extent sugar is a convenient raw material for Philippine producers, that simply reflects that it is “readily available in the Philippines,” as acknowledged by the Philippines’ own response to Question 76. This only underscores the fact that the Philippine measures’ raw-material based distinction is not about any difference in the products, but about protecting domestic production.

19. Regarding the “distribution” and “marketing” sections of the Philippines’ response to Question 76, there is nothing to relate any purported differences between local and imported products to the inherent characteristics of the raw materials. Rather, the differences appear to relate to market demographics that have no direct relationship to the raw material used to produce a distilled spirit. If anything, they may relate to differences in price, but as discussed by the United States in earlier submissions,¹⁴ the Philippine measures distinguish taxes on distilled spirits based on use of local raw materials, not price, and “sugar based” versus “not sugar based” is not an appropriate proxy for price differences among spirits. Furthermore, it is notable that sari sari stores get inventory from larger supermarkets¹⁵ – in that way, even if an individual consumer might be more likely to buy a small quantity of spirits from the local shop, that consumer’s purchase originally came from the same supermarket that a higher-volume shopper might use.

20. Finally, the United States notes that the Philippines neglects to answer the key part of Question 76 from the Panel – whether consumers notice any of the differences resulting from use of raw materials. Certainly, consumers notice prices of products – but that only underscores that it is inappropriate for the Philippines to use “sugar based” as a proxy for low-cost. Regarding the products themselves, Philippine producers go to great lengths to obscure any lingering differences between imported and local products that result from the original raw material. The Philippines’ response suggests that Philippine consumers see “sugar based” and other spirits as comparable. As the Philippines concedes, Philippine whiskey is “reminiscent” of other whiskeys,¹⁶ and its tequila is “reminiscent” of agave tequila. With respect to gin, the Philippines notes specifically that the “sugar based products meet the needs of a majority of Filipino

¹³ See, U.S. Responses to Panel Questions, Feb. 24, 2011, para. 9-13.

¹⁴ See, e.g., U.S. Opening Statement at the Second Panel Meeting, para. 13.

¹⁵ Philippines’ Responses to Panel Questions, Feb. 24, 2011, p. 25.

¹⁶ Philippines’ Responses to Panel Questions, Feb. 24, 2011, p. 21-22.

consumers.”¹⁷ Plainly, the Philippine products are “like” and “directly competitive or substitutable” with imported products from the point of view of Philippine consumers.

78. *(European Union, United States and the Philippines) Does the text of the HS Explanatory Notes (HSEN) to heading 2208 provide guidance for determining whether the following specific types of spirits are associated with certain raw materials: gin, vodka and tequila? If it does, please point out to the relevant language in the HSEN.*
79. *(European Union, United States and the Philippines) The HS Explanatory Notes (HSEN) to heading 2208 refer to "Spirits obtained exclusively by distilling fermented products of the sugar cane..." Please explain the meaning of the word "exclusively" in this reference and whether it affects the scope of the product description under subheading 2208.40.*
80. *(European Union, United States and the Philippines) The HS Explanatory Notes (HSEN) to heading 2208 refers to "Spirits obtained exclusively by distilling fermented products of the sugar cane..." and separately also to "Vodka obtained by distilling fermented mash of agricultural origin... and sometimes further treated with activated charcoal or carbon." If sugar cane is a product of agricultural origin, please explain if vodka obtained by distilling a fermented mash of sugar cane and further treated with activated charcoal or carbon would fall under the second group of spirits instead of the first.*

Comment on Philippines' Response to Questions 78, 79, 80

21. Each of the Parties has provided information on its interpretation of the Harmonized Tariff System and its Explanatory Notes in response to the Questions 78-80 as well as Questions 41-43. The parties' responses reflect some differences, such as the Philippines' emphasis on raw material in classification of “sugar-based” vodka even if it is distilled to have the characteristics of vodka (and notwithstanding that its own product regulations for vodka have no raw-material related requirement).¹⁸

22. The United States notes that tariff classification is only one of several factors that may be relevant to the Panel's determination of whether imported distilled spirits are “like” or “directly competitive or substitutable” with domestic Philippine distilled spirits, and that there are limits to the usefulness of tariff classification and World Customs Organization explanatory notes in particular in interpretation of GATT commitments.¹⁹

¹⁷ Philippines' Responses to Panel Questions, Feb. 24, 2011, p. 23.

¹⁸ Exhibit US-23.

¹⁹ See, U.S. Responses to Panel Questions, Feb. 24, 2011, para. 15.

23. Panels have used several factors, including end uses, physical characteristics, channels of distribution, substitutability, and consumer tastes and habits to determine whether imported and domestic spirits are “like” or “directly competitive or substitutable.”²⁰ Neither tariff classification nor any other single factor is determinative in this case-by-case analysis, and the Panel may consider the full range of evidence in its assessment.

82. (The Philippines) Please clarify whether *Vino Kulafu* and *Vino Kung Fu* are subject to the excise tax for distilled spirits.

No comments.

86. (The Philippines) With respect to the consumer preference survey submitted as exhibit PH-49, please explain the criteria used by the authors of the study to select the 23 brands used in the survey.

No comments.

87. (The Philippines) In Table 2 of the survey submitted as exhibits EU-41 and US-41, *Generoso Brandy* from Alliance Global Group, *Añejo Rhum* from San Miguel Brewery and *Barcelona brandy* from London Birmingham Distillers Ltd are identified as some of the top selling brands in the Philippines. Please explain why these brands were not included in the survey submitted as exhibit PH-49.

Comment on Philippines’ Response to Question 87

24. The Philippines’ response to Question 87 disputes figures regarding current brand shares in the Philippines’ market, based on a “check” with local manufacturers. There is no indication of what this “check” entailed. The basis for the brand share information submitted by the United States in reports by Euromonitor is detailed in the U.S. response to Question 85, where the United States describes the many sources Euromonitor consults in preparing its market information. In some cases, discrepancies may appear, sometimes as a result of several sub-brands appearing as part of one brand.

88. (European Union, United States and the Philippines) Parties have identified *Ginebra San Miguel* as the gin most often sold in the Philippines. (See exhibit EU-15. See also, United States’ response to Panel question No. 23, para. 13; Philippines’ response to Panel question No. 35.) Can the Philippines identify with which of gin products included in the prices lists provided in exhibit PH-19 does *Ginebra San Miguel* corresponds. Can the European Union and the United States identify which of the gins made by *Ginebra San*

²⁰ See, U.S. First Written Submission, paras. 43 and 80.

Miguel do they regard as the gin most often sold in the Philippines.

Comment on Philippines' Response to Question 88

25. For clarity, the United States notes that several of the products listed in the Philippines' response to Question 88 are different sizes of the same product. There appear to be three types of Ginebra San Miguel Gin in the response: regular Ginebra San Miguel (in Frasco, Frasquito, Round, and Angelito sizes); GSM Blue (in 700 ml, 50 ml, and 1 L sizes) and Ginebra San Miguel Premium.²¹

89. *(The Philippines) Commenting on the consumer preference survey submitted as exhibit PH-49, the Philippines has stated that "even if excise taxes were removed altogether, thereby reducing prices for all spirits there would only be marginal change (approximately 2%) in [the] respective market shares [of imported and domestic spirits]." (Philippines' first written submission, paragraph 236.) Please clarify whether the 2 per cent figure the Philippines has alluded to is taken from the survey's conclusion that a complete removal of the excise taxes would result in the market share of imported products increasing from 9.4 per cent to 11.7 per cent (exhibit PH-49, p. 14).*

Comment on Philippines' Response to Question 89

26. Although the Philippines downplays the significance of the findings in Exhibit 49 regarding substitutability, it admits that the consumer preference survey in that exhibit showed some price substitutability between imported and domestic brands. In this result, that survey is consistent with the results of the Euromonitor survey, which also showed price substitutability even if imported brands were more expensive than domestic brands.²² In addition, even if the Philippines' assertions are correct that some of the likely increase in sales of imported products would result from overall increases in consumption, that nonetheless would be evidence of the effect of price on demand for these products.

27. The Philippines' response to Question 89 also repeats its error of confusing the question of whether Philippine and imported products are "like" or "directly competitive or substitutable" with the likelihood of actual purchases. As the United States has pointed out in other submissions, panels have been clear that even latent demand is important²³ and there is no need to show that more purchases of imported products will occur if the tax system changes.

²¹ See, Exhibit US-45 for pictures of GSM Blue and Ginebra San Miguel Premium and Exhibits US-60 and EU-22 for names of various sizes of Ginebra San Miguel gin.

²² U.S. First Written Submission, para. 64.

²³ See, U.S. Second Written Submission, para. 36, citing *Korea – Alcohol (AB)*, para. 114.

28. Indeed, consumer purchases are affected by many things, including affordability, taxes, and simple consumer preference. The concerns of the Appellate Body in *Chile – Alcohol* about analyzing evidence where the status quo is affected by a claimed discriminatory measure²⁴ are apt here – it is important to consider market information, and all information about the Philippines’ measures, in context. The fact that, in the Philippines, despite its long-standing tax policies and very low market share for imported products, both consumer surveys show substitutability between imported spirits and domestic spirits in response to changes in price supports the conclusion that these products are “like” and “directly competitive or substitutable.”

90. (European Union, United States and the Philippines) Referring to Tanduay Centennial Dark Rhum, the Philippines has expressed that this "product is a 'limited edition' rum produced exclusively to commemorate the Philippine Centennial celebration of independence: its cost reflects the elaborate packaging of a tinder box, and a scroll, and an additional 300 ml of liquor when compared to [other products and is further] not available off-the-shelf, but must be ordered directly from the manufacturer." Can the European Union and the United States comment on this statement and whether in their view Tanduay Centennial Dark Rhum is available in the Philippines market. Can the Philippines explain whether Tanduay Centennial Dark Rhum is available in the Philippines market.

Comment on Philippines’ Response to Question 90

29. The Philippines admits that a shop owner may display Tanduay Centennial Dark Rum, suggesting that the Philippines agrees with the United States that Tanduay is available in the Philippine market. The Philippines’ assertion that it is not “the norm” to display it is not relevant and appears contradicted by other evidence: Tanduay’s own SEC filings list it as one of that company’s “primary products.”²⁵

30. Indeed, more generally, the fact that the Philippines produces a distilled spirit that is mainly a collector’s item or specialty gift shows that Philippine products are not all “low cost” as the Philippines suggests.

91. (European Union, United States and the Philippines) Can the parties explain whether Napoleon VSOP brandy, Amoroso brandy, Paradise Mango rum and Gilbey's 1857 vodka are available in the Philippines market, including in outlets in the metropolitan area of Manila.

No comments.

²⁴ *Chile – Alcohol (Panel)*, paras. 7.20-7.25.

²⁵ Exhibit US-54, p. 5. See also, U.S. Responses to Panel Questions, Feb. 24, 2011, para. 35.