Pennsylvania House of Representatives Liquor Control Committee
Public Hearing on House Bill 1512
Tuesday, September 10, 2019

Testimony of CJ Hélie on behalf of international wine and spirits trade associations representing Australia, Canada, the EU, Mexico, New Zealand, Scotland and the United Kingdom.

Thank you House Majority Chairman Pyle, Minority Chairman Deasy, Representative Topper and Committee Members.

My name is CJ Hélie and I am Executive Vice President of Spirits Canada, Canada’s only national trade association representing Canadian Spirits manufacturers, importers, marketers and exporters. However, I have the honor of appearing here today representing not only Spirits Canada but also Australia Grape & Wine, SpiritsEUROPE, FIVS (Fédération Internationale des Vins et Spiritueux), le Comité Européen des Entreprises Vins (CEEV), the National Tequila Chamber of Mexico, New Zealand Spirits, the Scotch Whisky Association, and the United Kingdom’s Wine & Spirits Trade Association.

We greatly welcome the opportunity to support Bill 1512 calling for the repeal of the Pennsylvania Liquor Control Board’s (PLCB) flexible pricing model.
At the outset, I would stress that as representatives of international wine and spirits trade associations located outside of the Commonwealth of Pennsylvania, we tread lightly in offering recommendations to foreign agencies or governments as it is they who are best able to determine the most appropriate rules to meet their communities' specific needs.

However, where such rules offend international trade rules or impair market access, we feel compelled to raise our concerns and intervene, and, hence, our presence here today.

Our commercial interest is clear, Pennsylvania is an important U.S. wine and spirits export market for the companies we represent. We are also strong vocal supporters of open and fair trade.

Pennsylvania is the largest of the American "control states" representing approximately 15% of total spirits sales across these 17 control jurisdictions, with these control states representing over 22% of the overall U.S. spirits market by volume. So, Pennsylvania is an important and valued market for us.

We also understand the State’s motivation in wishing to maximize state revenues from the sale and distribution of alcohol within its borders.

However, and the focus of our intervention and comments, is that such measures and policies must be consistent with international trade rules. A rules-based international trading system is at the very core of much of the peace and prosperity enjoyed by citizens of the world over these last many decades.

We note that the Government of the United States has formally and successfully challenged a number foreign measures related to the taxation of American-made alcoholic beverages under the GATT and WTO international agreements, including in the:
The United States was also a very active 3rd Party in the 1988 "Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies" and also successfully challenged a wide range of Canadian provincial and liquor board practices in the 1992 "Canada – Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies".

The point of listing these cases is that there is wealth of jurisprudence on the issue of liquor taxes and liquor board pricing policies, including measures directly parallel to the PLCB flexible pricing model. The legal tests are well established by these previous disputes.

First of all, the above noted 1992 Panel concluded that liquor board mark-ups are subject to GATT’s national treatment obligations (Article 111:2) because they are for the purposes of these agreements "internal taxes or other internal charges of any kind".

From an economic perspective, liquor board mark-ups are very similar to a liquor specific commodity tax and under international trade rules are treated as other governmental taxes or charges.

We also note that the Liquor Control Board of Ontario proposed adopting a flexible pricing model for wine and spirits in 2016. This proposal was cancelled prior to its implementation when the government of Ontario was provided with information that the measure would be inconsistent with Canada’s and Ontario’s international trade obligations.
In addition to the international trade concerns, public opinion polling in Ontario at the time showed:

- 65% of Ontario adults opposed the measure even if it increased LCBO dividend transfers to the provincial government; and
- 80% of Ontario adults believed that any price reduction the LCBO was able to negotiate from suppliers should be passed on to consumers by lower retail prices and NOT KEPT BY THE GOVERNMENT.

In the Province of British Columbia, the current Attorney General called such liquor board pricing policies “stealth” tax increases. He also said that “The most galling thing to me is that this was done secretly.”

Generally, people want, and we believe, they have the right, to know how much tax or mark-up is being applied on the bottle of wine or spirits they are buying.

And, under the WTO agreements such transparency is required for a state trading enterprise (STE) like the PLCB.

Under the WTO agreements, STEs are defined as governmental and non-governmental enterprises which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, over which they influence through their purchases or sales the level of imports or exports.

The PLCB constituted under state statute, “regulates the manufacturer, importation, sale, distribution and disposition of liquor, alcohol and malt or brewed beverages in the commonwealth.” By its own definition, and I don’t think anyone disputes the fact, the PLCB fits squarely within the definition of a state trading enterprise under international trade rules.

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1 CTV News Vancouver, June 4, 2015
2 CBC News, Natalie Clancy, May 5, 2017
3 Article XVII GATT 1994
4 https://www.lcb.pa.gov/About-Us/Pages/default.aspx
To be successful, companies and businesses involved in trade have to know as much as possible about the conditions of trade in the markets in which they operate (or are considering expanding to). It is therefore fundamentally important that regulations and policies are transparent, and none more so than relevant tax policies.

Under the current pricing system used by the PLCB, no one knows how much actual mark-up is being applied to any given product or product category. With this secrecy, how can anyone be assured that a local Pennsylvania whiskey made by a local manufacturer is not being provided a lower mark-up than a competing Canadian, Scotch, Irish or out-of-state American whisky?

Going back to the 1988 challenge of certain Canadian liquor board practices, the GATT Panel in that case specifically rejected arguments made by Canada that differential mark-ups whose primary purpose was revenue maximization by exploiting less price elastic demand for certain products were acceptable.

While such business practices might be considered normal for a private enterprise, they are not acceptable for a monopoly state trading enterprise. The margin and profit of the PLCB are a direct result of their preferential statutory market position and the PLCB cannot be viewed simply as “any other retailer”.

The national treatment and most-favoured nation obligations under the GATT and WTO agreements are at the very core of the international rules-based system.

In essence they mean that “like” and “directly competing and substitutable” products must be provided the best policy treatment afforded to a similar product.
Under these principles, a Scotch Whisky for example must be provided the best policy treatment provided a French cognac or Mexican Tequila, as these are all "like" products.

Similarly, an Australian or New Zealand wine must be provided the best policy treatment and lowest mark-up provided to a Californian or Oregon wine.

In fact, GATT Article 1:1 imposes an obligation to ensure like products receive **unconditionally and immediately** any advantage that has been granted to any product originating in any country.  

And, once again the international jurisprudence is clear, the fact that in some cases a liquor board also discriminates, i.e. applies to a higher mark-up, to some other American products does not exempt the state from these obligations. Foreign goods are entitled to the best policy treatment afforded to any domestic like product.

There is no *de minimis* standard at play, and any mark-up even slightly higher than the lowest applied to a domestic product would be deemed too high.

As a state trading enterprise, the PCLB is required to operate in a manner that it can demonstrate it is operating in a non-discriminatory manner.

In closing, I would reiterate that it is not our intention by our appearance here today to question the right of Pennsylvania to establish a monopoly importer, distributor, and/or retailer of wine or spirits in the state.

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5 Panel Report, Canada – Certain Measures Affecting the Automotive Industry, 2000, paragraph 10.23
We are instead simply requesting that the PLCB reinstate its historic practice of transparent, posted, standardized product mark-ups. The experience elsewhere is that such standardized product mark-up, consistent with international trade law, can be set at the rate sufficient to raise the revenue targets established for the Board.

Attached to our testimony is a short description of the various international wine and spirits trade associations in support of the repeal of the PLCB’s flexible pricing model, as well as a more detailed international trade law assessment of the measure.

Thank you and I would be pleased to answer any questions Members may have.
Trade Law Assessment Pennsylvania “Flexible Pricing” Model

Article 1:1 GATT

GATT Article I covers most-favoured-nation treatment and requires WTO Members to treat “like” (e.g. all spirit) imported products equally without regard to their origin.

Article 1:1 imposes an obligation to ensure that like products of all countries receive unconditionally and immediately any advantage that has been granted to any product originating in any country.

Specifically, under Article a Scotch Whisky must be provided the lowest PLCB mark-up applied on any Irish Whiskey, Mexican Tequila or Russian Vodka.

Article 11:4 GATT

Paragraph 11:4 prevents import monopolies like the PLCB from operating in a way that undermines the value of tariff concessions.

The PLCB’s flexible pricing policy by its very nature imposes a higher mark-up and profit margin on an imported spirits than on a domestic spirit, and thus provide a higher margin than would be available in the absence of its monopoly and thus would be contrary to Article 11:4 read in light of Article 31 of the Hanava Charter.

Article III:2 GATT

Article III covers national treatment and prohibits the imposition of internal taxes or other internal charges that discriminate against imported spirits in favor of “like” domestic products.

A 1992 GATT Panel concluded that liquor board mark-ups constitute internal government charges borne by products¹ and thus imports must be provided the best treatment and lowest mark-up applied on any “like” of “directly competing and substitutable” products.

We also note that a separate Panel² concluded that “even the smallest amount of excess was too much and the prohibition not to tax import products in excess of domestic like products had no de minimis condition”.

Article XVII, GATT

Article XVII is an anti-circumvention provision designed to prevent countries from using state trading enterprises (STEs) to avoid its obligations to provide non-discriminatory treatment.

In a number of GATT and WTO adjudications liquor boards established at the sub-national level have been confirmed as state trading enterprises under the agreements.

¹ GATT Panel Report – Canada – Import, Distribution, and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”.
² WTO Panel Report – Japan – Alcoholic Beverages
International Wine & Spirits Trade Associations Description

Australian Wine and Grape Inc. is the peak national grape & wine industry body of Australia and operates as a not-for-profit organization.

The CEEV – Comité Européen des Entreprises Vins was founded in 1960 and represents the wine companies in the industry and trade in the European Union. CEEV’s members produce and market the vast majority of quality European wines, both with and without a geographical indication, and account for over 90% of European wine exports.

FIVS is a global organisation designed to serve the wine, spirits, and beer sectors from around the world on public policy issues. Its members include producers, distributors, importers, exporters, and trade associations.

Mexico’s National Chamber for the Tequila Industry (CNIT), represents, promotes and defends the common interests of Mexico’s Tequila producers, as well as the category of Tequila on an international level, focused on the protection of the Appellation of Origin Tequila.

The Scotch Whisky Association (SWA) represents 95% of the Scotch Whisky industry including distillers, bottlers, blenders and brokers. As a trade association, we work to sustain Scotch Whisky’s place as the world’s leading high quality spirit drink and its long-term growth worldwide.

Spirits Canada is the national trade organization representing the interest of Canadian Spirits manufacturers, exporters and consumers.

SpiritsEUROPE proudly represents one of Europe’s most valuable agri-food export sectors and, with it, the interests of 31 associations of spirits producers as well as 9 leading multinational companies. Distilled spirits are as diverse as the EU itself, spanning 47 product categories and including a host of geographically-specific products that contribute to the culture of their regions (240 GIs).

Spirits New Zealand is the national trade organisation representing New Zealand’s leading producers, distributors, brand owners, importers and exporters of premium spirits and spirit-based drinks. We represent over 98% of spirit industry interests in New Zealand.

The WSTA represents over 300 companies producing, importing, exporting, transporting and selling wines and spirits in the United Kingdom. WSTA members range from major retailers, brand owners and wholesalers to fine wine and spirit specialists, logistics and bottling companies.