Before the World Trade Organization

Panel Proceedings

Canada – Measures Governing the Sale of Wine

(DS537)

Oral Statement of Australia at the First Substantive Meeting with the Parties

Geneva, 18 July 2019
Table of Contents

TABLE OF CASES .......................................................................................................................... 2
THE CONTEXT OF THIS DISPUTE ................................................................................................. 4
KEY ISSUES OF FACT .................................................................................................................... 7
  Federal excise exemption ........................................................................................................... 7
  Ontario wine basic tax ............................................................................................................... 7
  Ontario grocery measures ....................................................................................................... 8
  Quebec grocery measures ....................................................................................................... 8
  Nova Scotia reduced mark-up under the Emerging Wine Regions (EWR) policy ............. 9
LEGAL TESTS AND APPLICATION TO RELEVANT FACTS ....................................................... 11
  GATT Article III:2 ...................................................................................................................... 11
  Application to federal excise measure and Ontario wine basic tax ........................................ 12
  Interaction between GATT Article III:2 and GATT Article III:4 ........................................... 14
  GATT Article III:4 ...................................................................................................................... 14
  Application to Ontario and Quebec grocery measures ............................................................ 17
  Relationship between GATT Article III and GATT Article XVII .......................................... 20
  Application of legal test to Nova Scotia mark-up ................................................................. 24
MEASURES AT ISSUE ARE NOT JUSTIFIED UNDER GATT ARTICLE XXIV .................. 24
CONCLUSION .................................................................................................................................... 25
### Table of cases

<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Short Title</td>
<td>Full Case Title and Citation</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-----------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>

*Canada – Measures Governing the Sale of Wine (DS537)*

Oral Statement of Australia at the First Substantive Meeting with the Parties
The context of this dispute

(H E Ms Frances Lisson, Australia’s Ambassador to the WTO):

1. Mr Chair, members of the Panel, colleagues from capitals and Geneva-based missions, and Secretariat staff – good morning.

2. Australia’s oral statement will be divided as follows. I will highlight key contextual elements, while my colleague Mr Ravi Kewalram will address factual and legal issues relevant to this dispute.

3. We are mindful that you will have read our submission and, for the sake of efficiency, will not look to repeat the points we have made there. Naturally, for the record, we note that we stand by the claims and arguments we have made in our written submission.

4. The Panel will have noted that measures with respect to British Columbia that had been part of the panel request was settled just after the Panel’s composition earlier this year, which we warmly welcomed. Australia has consequently not made any claims or arguments with respect to measures in British Columbia.

5. Mr Chair and members of the Panel, Australia is strongly committed to the promotion of global trade and the rules-based system. We have demonstrated this strong commitment through our conduct and action over many years. We take our trade obligations seriously, and expect other WTO Members to do the same. We also recognise the central importance of the WTO dispute settlement system in providing the certainty and stability that underpins the global trade system, by holding Members to account.

6. Australia greatly values its economic and broader relationship with Canada. We work closely together on a range of multilateral trade issues, both in the WTO and other international fora. We continue to work closely also on current challenges facing the dispute settlement system itself.

7. Australia does not engage in the dispute settlement system frivolously, or without careful consideration as to whether the action it takes would be fruitful. Indeed, Australia last initiated proceedings as a complainant under the WTO Dispute Settlement Understanding in 2003.
8. Consequently, we do not come here today lightly – we have been left with no other option to address our concerns.

9. As you are all well aware, it is a cornerstone principle of the multilateral trading system that a Member must not discriminate against importing producers and products to benefit its local industries and products. It is this "national treatment" obligation, enshrined in Article III of GATT 1994, which lies at the heart of this dispute.

10. As Australia's submission very clearly demonstrates, Canada has failed to meet this most basic of obligations.

11. This is not a “David versus Goliath” battle as Canada seeks to portray. Such a characterisation is nothing more than a convenient backdrop to Canada's unsubstantiated and unjustified attempts to revive a trade effects test in Article III of GATT 1994.

12. Canada’s attempts to imply our wine sales to Canada somehow demonstrate there are no breaches of its WTO obligations are similarly disingenuous. We are proud of our world-class, competitive wine industry. We are also glad that Canadian consumers do sometimes choose Australian wine - when given that choice.

13. Australia is not, as Canada would have you believe, seeking to stop legitimate regulation of wine. Nor is Australia challenging Canada's right to support small-scale wine producers, or its right to support fledgling wine industries. However, where such direct or indirect support is given, it must be in a manner consistent with the obligations in the covered agreements, including the national treatment obligation.

14. This case simply seeks to hold Canada to the national treatment obligation in Article III of GATT 1994.

15. I would also like to make a few points about Canada's defence of the measures at issue, which are also troubling at the systemic level.

16. Canada starts from the position that elements of the respective legal standards for Article III.2 and Article III.4 of the GATT 1994 are unsettled and "deserve closer scrutiny". Canada then
invites the Panel to depart from interpretations of these provisions, which have developed from a long line of GATT and WTO cases, without any rationale to support such a departure.

17. Canada puts forward new and novel legal tests which, when assessed against the relevant provisions, have no legal basis.

18. Such unorthodox theories proposed by Canada, if accepted by the Panel, would introduce significant uncertainty and instability to one of the core pillars of the multilateral trading system. It would cast doubt on the examination and interpretation of the national treatment obligation by previous panels and the Appellate Body, with ramifications far beyond this dispute.

19. Canada’s arguments are attempts to circumvent its obligations because it has no other credible arguments given the facts Australia has presented. In factual terms, the Canadian measures challenged in this dispute are, in some instances, similar to measures it has itself successfully challenged previously.

20. Similarly concerning on a systemic level is Canada’s attempt to use GATT Article XVII to excise the relevant activities of the Nova Scotia Liquor Corporation from Canada’s obligations under GATT Article III.

21. Australia is not claiming, and has not claimed, that the existence of the NSLC is in itself a breach. However, as our submission makes clear and we will further elaborate in this statement, Australia is challenging a specific pricing policy implemented by an entity which serves – via legislative mandate - as the industry regulator in the province of Nova Scotia.

22. In Australia’s opinion, rather than addressing the issues in dispute, Canada has advanced a series of arguments that disregard the consistent interpretation and application of the national treatment obligation over many decades. Furthermore, Canada’s arguments find no support from the terms of Article III of GATT 1994 when interpreted in accordance with the customary rules of interpretation of public international law as required by Article 3.2 of the WTO Dispute Settlement Understanding.

23. Mr Chair, members of the Panel, as my colleague will explain in more detail, Canada has failed to make out any proper defence to justify the consistency of the challenged measures with
Canada – Measures Governing the Sale of Wine
(DS537)

Oral Statement of Australia at the
First Substantive Meeting with the Parties

its WTO commitments. These measures are quite clearly inconsistent with Canada's most basic obligations.

24. I will now give the floor to my colleague to elaborate further.

(Mr Ravi Kewalram, Assistant Secretary, Department of Foreign Affairs and Trade, Canberra):

25. Thank you Ambassador Lisson and good morning Mr Chair, members of the Panel, and colleagues. As our Ambassador has foreshadowed, I will be addressing key factual and legal issues arising in this dispute.

Key issues of fact

26. I begin by noting that Canada has explicitly, or implicitly, accepted many of the facts identified in Australia’s first written submission. Let’s look through them.

Federal excise exemption

27. In relation to the federal excise, Canada notes “the excise duty is considered an internal tax or charge that is applied to wine packaged in Canada”\(^1\) and offers no rebuttal of any of Australia’s arguments on indirect taxation. It does not contest that Australian bulk wine is “like” Canadian bulk wine.\(^2\) Nor does it refute the fact that the Canadian Excise Act taxes Australian bulk wine “in excess” of Canadian bulk wine used in a 100% Canadian packaged product.\(^3\)

Ontario wine basic tax

28. Canada offers no rebuttal to Australia’s detailed arguments establishing that, under the Ontario wine basic tax, Ontario bulk wine enjoys a 13% tax advantage over its non-Ontario competitors, including all Australian bulk wine.\(^4\)

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\(^1\) Canada’s First Written Submission, para. 307.
\(^2\) Canada’s First Written Submission, para. 146.
\(^3\) See Canada’s First Written Submission, paras 95 and 311.
\(^4\) Australia notes that the Wine Basic Tax Amendment Bill (Exhibit AUS-43) has been passed and received Royal Assent on 29 May 2019. See, AGRPPA, s. 27 as amended, Exhibit AUS-96.
Ontario grocery measures

29. Canada does not contest that Australian bottled wine and Ontario bottled wine are "like" products, or that the Ontario grocery measures are a law or regulation within the scope of Article III:4.

30. It is not contested that the “quality assurance” criterion captures only wine that comes from statutory appellation of origin regimes that certify, in the aggregate, less than 50 million litres of wine annually. Canada does not contest that no Australian wine can qualify under this criterion, whereas Ontario wine does qualify. This is because Australia’s appellation of origin regime certifies more than the threshold in the criterion. Canada also does not contest that no Australian wine can qualify under the small country production criterion, while, again, all like domestic wine qualifies under this criterion and this is because Australia produces more wine than the threshold in the country production criterion, whereas Canada’s production falls within the threshold. The consequences of these facts are that like Australian wines are excluded from sales in grocery stores holding restricted authorizations, or are subject to shelf-space restrictions in grocery stores holding unrestricted authorizations.

31. The evidence also demonstrates that the vast majority of wineries in Ontario are in fact small or mid-size producers.5

32. With respect to the wine boutique aspect of the measures, Canada does not contest that bottled Australian wine is excluded from these grocery store outlets.

Quebec grocery measures

33. Turning to Quebec grocery measures, Canada does not contest that the Quebec small-scale producer measures are a law or regulation within the scope of Article III:4. Canada also does not contest that imported bottled wine and Quebec bottled wine are "like".

34. However, Canada asserts that with respect to the Quebec measures, Australia has selected a “like products” comparator that is not based on competitive relationships.6 Canada does not

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5 Canada’s First Written Submission, paras. 7, 22. See also Exhibit CAN-2.
6 Canada’s First Written Submission, para. 199.
provide any evidence to support this assertion. In Australia’s view, bottled wine is the appropriate comparator for the purposes of assessing less favourable treatment under this measure because it specifically regulates the retail sale of bottled wine in grocery stores, which are the only products sold in those stores.

35. In Quebec, the legal framework governing bulk wine, whether imported or of Quebec origin, is separate from that applying to bottled wine.7

36. Canada does not contest that the Quebec measures draw a de jure distinction between qualifying Quebec bottled wines and imported bottled wines. Nor does Canada contest that under the measure, bottled Quebec wine produced by small-scale winemakers in Quebec can sell their wines in grocery and convenience stores, while wine bottled in other countries cannot be sold in grocery and convenience stores. Canada also admits that Quebec wines qualifying under the measure are not subject to the SAQ mark-up and acknowledges that the vast majority of winemakers in Quebec are small-scale producers who produce wine under the small-scale production permit.8

Nova Scotia reduced mark-up under the Emerging Wine Regions (EWR) policy

37. Turning to Nova Scotia reduced mark-up under the Emerging Wine Regions policy, Canada does not contest that all domestic Nova Scotia wine is afforded a 43% mark-up under the EWR Policy. Australia has also demonstrated on the facts that virtually all Australian wine exported to Nova Scotia does not qualify for this reduced mark-up under the Policy. It is subject to a much higher mark-up of 140%. None of Canada’s arguments with respect to Article III:2 or III:4 rebut this.

38. Canada falsely claims that Australia has acknowledged that 8% of total Australian wine production would be eligible under the policy9, when in fact, Australia simply highlighted in its

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7 See Quebec Bottling Regulation, Exhibit AUS-28 and Quebec Grocery Permit Regulation, AUS-29, ss. 5 and 6.

8 Exhibit CAN-13, Canada’s First Written Submission.

9 Canada’s First Written Submission, paras. 266-267.
submission that 92% of all wine produced in Australia is from regions that produce more than 50,000 hectolitres (HL) annually, regardless of the political boundaries of those regions.  

39. But we go on to explain in our First Written Submission that, as the EWR Policy requires that the total annual production within the political boundaries (state, province or equivalent) of the region must be less than 50,000HL, only two regions in the state of Queensland could qualify. This is because Queensland is the only state that produces less than 50,000HL annually. Queensland's total annual wine production in 2018 was 536,789 litres. This is far less than Nova Scotia's annual wine production. As Queensland exports barely any wine to Canada, virtually all Australian wine in the Nova Scotian market would not be granted the reduced mark-up. Canada's claims that substantially more Australian wine qualifies under the EWR Policy than Canadian wine is incorrect. This significant error means that Canada's arguments throughout its submission on Nova Scotia are fundamentally flawed.

40. Australia reiterates that, contrary to Canada's suggestion, Australia is not required to show "actual effects" on the market of the EWR Policy to establish less favourable treatment under Article III:4. However, we have submitted evidence that shows that since adoption of the EWR Policy, Nova Scotian wines have increased their market share over foreign competitors. Canada fails to address this evidence.

41. To us, Canada seems to argue that the focus of the analysis must solely be on imported products. I will come to the applicable legal test under Article III:4 separately but at this point Australia submits that the relevant factual analysis would need to be concerned with the competitive relationship between imported and domestic products. The evidence we have placed before the Panel confirms that the reduced mark-up afforded to Nova Scotian wines through the EWR Policy provides domestic Nova Scotian wine a competitive advantage over imported products and nothing Canada has said provides an effective rebuttal to this.

10 Australia's First Written Submission, paras. 289-290.
11 Australia's First Written Submission, para. 289. Exhibit AUS-84.
12 Exhibit AUS-84.
13 Australia's wine production by state and region, Exhibit AUS-84.
14 Australia's First Written Submission, para. 289. Exhibit AUS-95.
15 Australia's First Written Submission, paras. 309-310.
Legal tests and application to relevant facts

42. So now I turn to the key legal issues in this dispute, particularly the correct interpretation and application of GATT Article III:2 and GATT Article III:4.

GATT Article III:2

43. With respect to GATT Article III:2, Canada mischaracterises the legal test for GATT Article III.2, first sentence through a series of comments and inferences.

44. Canada seeks to effectively incorporate new text into the first sentence of Article III:2, based on the general principle in Article III.1, the interpretive note in Ad Article III and the second sentence of Article III:2. Canada then concludes, even after accepting that several disputes have taken a contrary approach - that any excess tax should not always result in a finding of violation.

45. Rather, Canada asserts that Australia must show that the measures it has challenged have an “economic impact” on the conditions of competition. It frames “economic impact” in terms of a “trade effects” analysis. Although Canada acknowledges that “the case law to date has shown that Article III.2 is concerned with protecting expectations of an equal competitive relationship and not with trade effects per se”, it asks the Panel to ignore this jurisprudence, stating that there is nothing preventing the Panel “from examining the actual effects of a measure under Article III.2”.

46. Having pressed this course of action on the Panel, Canada then makes much of Australia’s “failure” to satisfy the trade effects test it had set. As observed by the United States in its third party submission, “Canada invents a test out of thin air, and then chides Australia” for not satisfying it.

16 Canada’s First Written Submission, para. 130 onwards
17 Canada’s First Written Submission, para. 309.
18 Canada’s First Written Submission, para. 310.
19 Canada’s First Written Submission, para. 310.
20 Canada’s First Written Submission, paras 318 – 319.
21 United States Third Party Submission, para. 9.
Canada – Measures Governing the Sale of Wine  
(DS537)  

Oral Statement of Australia at the  
First Substantive Meeting with the Parties

47. Australia submits that the Panel should reject Canada’s invitation to apply a trade effects test to determine consistency with the first sentence of Article III:2. That test was categorically rejected by GATT panels and then by the Appellate Body. Indeed, the irrelevance of the trade effects test has been underscored since the earliest Appellate Body jurisprudence in Japan – Alcoholic Beverages II where the Appellate Body stated: "The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a ‘trade effects test’." The Appellate Body also emphasised that:

"It is irrelevant that the “trade effects” of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products".

48. Rather than the test put forward by Canada, the correct test for inconsistency with the first sentence of Article III:2 has three elements. First, as a threshold issue, the measure must qualify as an internal tax or charge that applies “directly or indirectly” to imported and domestic products. Second, the complainant must show that imported and domestic products are “like”. Third, it must show that imported products are taxed “in excess” of like domestic products.

49. Australia recalls that the Appellate Body, in its report in Japan – Alcoholic Beverages II, stressed that the third element is to be strictly applied: “[e]ven the smallest amount of ‘excess’” taxation will be considered “too much”. There is no de minimis standard.

Application to federal excise measure and Ontario wine basic tax

50. So let’s apply this to the federal excise measure and Ontario wine basic tax. If the complainant succeeds in establishing each of the three elements (internal tax / charge, like, in excess) to the satisfaction of the panel, there will be a prima facie case of inconsistency with the first sentence of Article III:2 and it will stand unless rebutted by the respondent.

22 GATT Panel Reports, US – Superfund, para. 5.1.9; US – Malt Beverages, para. 5.6.
23 Australia’s First Written Submission, paras. 112-113.
51. Canada has failed to rebut Australia’s case with respect to the federal excise measure and the Ontario wine basic tax.

52. To the contrary, and as I outlined earlier with respect to the facts Canada has not contested, the three elements required are clearly met. The crux of Canada’s argument, with respect to the federal excise measure, is that Australia has “failed to demonstrate that there has been any economic impact on competitive opportunities for bulk wine”.  

53. Similarly, Canada offers no rebuttal to Australia’s detailed arguments establishing that, under the Ontario wine basic tax, Ontario bulk wine enjoys a 13% tax advantage over its non-Ontario competitors, including all Australian bulk wine. Instead, it takes aim at Australia’s purportedly “narrow” reading of Article III:2, first sentence and again asserts that Australia “did not examine the overall context in which the Wine Basic Tax operates and failed to provide evidence of any economic impact on competitive opportunities for Australian, or other imported, bulk wine”. 

54. It then proceeds to argue that the measures only affect a very limited portion of the Canadian market, that imports of Australian bulk wine have increased despite the measures, and that a significant proportion of Ontario wine is subject to the same higher tax rate as applied to Australian wine.

55. These are all distractions without any relevance to the central question of whether imported products are taxed in excess of like domestic products. Australia has clearly shown they are – at the federal level and in Ontario. Both measures are therefore clearly inconsistent with the first sentence of Article III:2.

27 Canada’s First Written Submission, para. 307.
28 Australia notes that the Wine Basic Tax Amendment Bill (Exhibit AUS-43) has been passed and received Royal Assent on 29 May 2019. See, ACGRPPA, s. 27 as amended, Exhibit AUS-96.
29 Canada’s First Written Submission, para. 332
30 Canada’s First Written Submission, paras. 311 and 333.
31 Canada’s First Written Submission, paras. 312-313, 334-335.
Interaction between GATT Article III:2 and GATT Article III:4

56. I turn now to the interaction between GATT Article III:2 and GATT Article III:4. In its First Written Submission, Canada takes issue with Australia’s purported characterisation of the relationship between Articles III:2 and III:4 and argues that Article III:2 and III:4 do not have “overlapping subject matter scope”. In Canada’s view, there is a strict demarcation in the subject matter of Article III:2 and III:4. Fiscal measures are subject to Article III:2. Regulatory measures are subject to Article III:4. Canada further argues that measures containing both fiscal and administrative aspects can be subject to both, “but the same aspect of that measure cannot be subject to both obligations at the same time”.

57. Frankly, we find this argument confusing and without clear justification or objective. It is not always possible to classify measures as fiscal or non-fiscal. The Appellate Body has recognised this.

58. However, the key for the Panel, in our view, is that this dispute does not need to resolve this question. Australia’s claims are framed in the alternative. This is because we recognise that a measure may be characterised in multiple ways (i.e. either a measure which has fiscal implications, or non-fiscal implications). Thus, if the Panel finds the federal excise measure inconsistent with Article III:2, the Panel has the discretion to choose to exercise judicial economy on the Article III:4 claim. If it does, this issue does not arise.

GATT Article III:4

59. Just as it encourages the Panel to indulge in an interpretive frolic and create out of thin air a new test for Article III:2, Canada repeats this approach with respect to Article III:4. Again, it does so without any justification based on the terms of Article III:4 or previous jurisprudence.

60. Canada asks the Panel to require the complainant to demonstrate actual effects in the market in order to establish less favourable treatment has been afforded to imported wine as compared to the like domestic wine.

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32 Canada’s First Written Submission, para. 121.
33 Canada’s First Written Submission, para. 123.
35 See e.g. Canada’s First Written Submission, paras. 154, 180, 208.
61. After seeking to impose a new legal standard for Article III.4, Canada goes on to conflate the "like product" at issue where it suits Canada to do so. For example, Canada does this in relation to Ontario wine boutiques, where it seeks to argue that imported wine is sold as ICB wine, when in fact ICB wine is made and bottled in Ontario by Ontario manufacturers with specific local wine content requirements. Canada also seeks to mischaracterise the like product in respect of Australia's claims on measures in Quebec, conflating bulk wine with bottled wine.

62. Canada's defence falters once again on the legal standard in Article III.4 of the GATT 1994 when it attempts to argue that because domestic wines from other Canadian provinces cannot access the advantages in question, the measures do not fall foul of Article III.4.

63. In Australia’s submission, it is well-established that a measure will be inconsistent with Article III:4 if: 36

   (i) the imported and domestic products at issue are "like products";

   (ii) the measure is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the products at issue; and

   (iii) the treatment accorded to imported products is "less favourable" than that accorded to the like domestic products.

64. The "no less favourable treatment" element of Article III:4 has been consistently interpreted to require "effective equality of opportunities for imported products to compete with like domestic products".37

65. So the panel's task is "first and foremost" to discern the implications of a contested measure for the equality of competitive conditions in the market from the design, structure and expected operation of the measure.38 This is the approach that Australia has followed for each of its Article III:4 claims.

36 Appellate Body Reports, EC – Seal Products, para. 5.99; Thailand – Cigarettes (Philippines), para. 127; Korea – Various Measures on Beef, para. 133.
38 Appellate Body Report, Thailand - Cigarettes (Philippines), paras. 128-130.
66. The Appellate Body has consistently held that a finding of less favourable treatment does not require evidence of the *actual effects* of a measure in the market.\(^{39}\) Because this obligation is about equal competitive opportunities, past panels have found that a measure "can be found to be inconsistent with Article III:4 because of its potential discriminatory impact on imported products."\(^{40}\)

67. Canada incorrectly sets out the legal test for "less favourable treatment" by arguing that Australia must demonstrate that there has been an actual alteration in the conditions of competition to the detriment of imported products\(^{41}\), i.e. evidence of actual trade effects. As I have already said, this proposition has been rejected by the Appellate Body. Canada's assertions throughout its submission that Australia has not made out a *prima facie* case because Australia has not demonstrated actual effects of the measure should be rejected.

68. Mere facts on the market share imports and domestic wines have, and the sales access imported wines have in other sales channels, do not *per se* mean that the measures have not modified the conditions of competition between imported and domestic products. For example, if imports have increased in a market, this does not preclude a finding that the conditions of competition have been affected because imports could have increased more absent the measure.\(^{42}\) Canada consistently fails to explain the relevance of many of the facts it puts forward with respect to the legal test of less favourable treatment.\(^{43}\)

69. Canada also mischaracterises Australia's assessment of "less favourable treatment". It alleges that Australia has argued that the mere existence of a regulatory distinction among groups of like products is sufficient to found a violation.\(^{44}\) Nowhere in its submission has Australia made this argument. Rather, Australia correctly focuses on whether the measures, including any sort of regulatory distinctions drawn by the measures, modify the conditions of competition to the detriment of Australian wine. That is the question before the Panel. The Panel is not required to

\(^{39}\) Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 129.

\(^{40}\) See Panel Report, *Canada – Autos*, para. 10.78, referring to Panel Report, *US – Section 337*, paras. 5.11 and 5.13.

\(^{41}\) Canada's First Written Submission, paras. 180, 210, 265.

\(^{42}\) Panel Report, *Dominican Republic – Cigarettes*, para. 7.192.

\(^{43}\) See e.g. Panel Report, *India – Solar Cells*, para. 7.97.

\(^{44}\) Canada's First Written Submission, paras. 172-177.
engage in a hypothetical debate about whether regulatory distinctions violate Article III:4 in order to resolve this dispute.

70. Past panels have found that where a Member provides more favourable treatment to a subset of domestic products e.g. within a particular region, it is not defensible to argue that there has been no breach of Article III because all other domestic products, within the Member’s jurisdiction but outside the particular region, are treated the same as imported products.\textsuperscript{45} If this approach was not accepted, countries could easily avoid Article III disciplines by applying protectionist policies at the regional level to products from a particular region. Canada's attempts to re-run this argument throughout its submission\textsuperscript{46} should be recognised for what they are and rejected by the Panel.

\textbf{Application to Ontario and Quebec grocery measures}

71. We now turn to the application to Ontario and Quebec grocery measures. Before addressing Canada's arguments in relation to the application of GATT Article III:4 to the Ontario and Quebec grocery measures, I would like to make some preliminary points.

72. Throughout its submission, Canada argues that the measures at issue are aimed at assisting small winemakers. As Ambassador Lisson said at the outset, Australia does not take issue with the promotion and support of small producers. However, WTO Members must not pursue those aims through measures that are inconsistent with WTO obligations, for example by seeking to protect domestic industries to the detriment of imported goods.

73. In Australia's view, the strategy that Canada employs is to cast the measures in a broader context in an attempt to divert attention from the discriminatory advantages that the measures at issue give to domestic wine as compared to imported wine. Many of the arguments raised by Canada go to this strategy, but they do not rebut Australia's \textit{prima facie} case.


\textsuperscript{46} Canada's First Written Submission, paras. 174, 206, 291-293.
Ontario grocery measures

74. We now turn to Ontario grocery measures. Instead of focusing on the Ontario grocery measures as a whole, Canada improperly focuses only on the small winery criterion, arguing that based on this criteria, Australian wine is granted "equal access". Canada fails to address Australia's legal arguments on the other criteria.

75. Simply asserting that the measures afford "equal access" without engaging with the facts on record and Australia's detailed arguments in this regard (which I will not repeat here) is not sufficient to rebut Australia's prima facie case. Canada provides no information on why the "quality assurance" criterion has been designed to limit eligibility to only wine from small appellation of origin regimes. Mid-sized wineries could be from countries with appellation of origin regimes that certify less or more than the threshold in the criteria (50 million litres annually). Wines of equivalent quality standards could also be from countries with appellation of origin regimes that certify more or less than the threshold. Furthermore, Canada provides no information on the rationale behind the design of the country production criterion which restricts eligibility to wine from countries that produce small amounts of wine (less than 150 million litres of wine annually). The amount of wine produced by a country does not say anything about the size of the producers within a country.

76. Canada's arguments with respect to access to LCBO outlets, Australia's market share in the grocery and LCBO channels, the limited space on grocery store shelves, and the amount of wine sold overall do not preclude a finding by the Panel of less favourable treatment. None of these arguments negate Australia's prima facie case of inconsistency, and Canada fails to explain how they do. Canada's arguments about Australia's Wine Export Grants program is also irrelevant to the assessment of whether the Ontario measures accord less favourable treatment.

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47 See e.g. Appellate Body Report, US – Tuna II (Mexico), para. 7.280 in which the Appellate Body rejected the Panel's segmented analysis of the measure and considered that the Panel should have conducted a holistic assessment of the various labelling conditions.

48 Canada's First Written Submission, paras. 170, 183, 189.

49 See e.g. Panel Report, Thailand – Cigarettes (Philippines), para. 7.747.
77. Contrary to Canada's suggestion, Australia's claim is not founded on "mere supposition" but a detailed analysis of the design, structure and expected operation of the Ontario grocery measures. Canada criticises Australia for not providing data on the "actual alteration" of conditions of competition, but this is simply not required.

**Wine boutiques**

78. Canada's assertion that Australia has not explained why the wine boutiques aspect of the Ontario measures violate Article III:4 is false. This is readily apparent from Australia's arguments in its submission. Canada simply fails to address those arguments. Instead, Canada makes a poorly reasoned argument about imported bulk wine being included in bottled ICB wine. This is illogical, as ICB wine is an Ontario-made bottled wine. ICB wine is blended and bottled in Ontario by Ontario manufacturers with specific local wine content requirements.

**Quebec grocery measures**

79. Turning to the Quebec grocery measures: applying the facts to the correct legal standard for "less favourable treatment", Australia has made a *prime facie* case that the measures modify the conditions of competition because they provide advantages to wine bottled in Quebec, through direct access to grocery and convenience store outlets that are not granted to like Australian bottled wine. None of the arguments Canada has advanced in its submission rebut this.

80. It is not legally relevant that the measures only capture a small portion of wine sold in Quebec or that small-scale wineries have a small share of the market in Quebec. There is no *de minimis* standard for the "less favourable treatment" test. The concept of a *de minimis standard* has already been rejected by past panels and has no basis in the text of Article III:4.

81. It is also not relevant that imported wine has a dominant share of the market as this does not, in and of itself, prove anything about the measure at issue. The mere fact that imported wine

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50 Canada's First Written Submission, para. 180.
51 Australia's First Written Submission, paras. 239-242.
52 Canada's First Written Submission, paras. 204-205.
53 See e.g. Panel Report, *India – Solar Cells*, para. 7.97; *China – Publications and Audiovisual Products*, para. 7.1537.
54 Canada's First Written Submission, para. 205.
enjoys a particular level of market share and access in a retail channel not governed by the measure does not negate the less favourable treatment that the measure provides to imported wine as compared to domestic Quebec wine in the grocery store channel, which is the retail channel this measure regulates.

82. Contrary to Canada's position, Australia does not need to demonstrate that the measure has actually affected competitive conditions in the market. The fact that Australia has not provided evidence of actual effects of the measure does not mean that Australia has not made out a *prima facie* case of "less favourable treatment".

83. Finally, as I have previously noted, Canada's argument that non-Quebec Canadian wine is also treated in the same way as imported wine is no defence to the consistency of the measure.

**Relationship between GATT Article III and GATT Article XVII**

84. I turn now to the relationship between GATT Article III and GATT Article XVII. Canada accepts that certain measures relating to the operation of STEs may be subject to Article III of the GATT. It also accepts that when an STE acts to perform a government function, or exercise governmental authority, these actions may be subject to various disciplines.

85. However, Canada argues that Article III of the GATT does not apply to the NSLC mark-ups, including the reduced mark-up under the Emerging Wine Region Policy (EWR Policy). Australia understands that the crux of Canada's argument appears to be that since the NSLC is a state trading enterprise and the NSLC mark-up is a "retail activity", any challenge to the EWR Policy can only be brought under Article XVII and not under Article III of the GATT.

86. Canada argues that if every practice undertaken by an STE were subject to Article III, there would be no need for Article XVII. Australia has not made this argument, and the Panel does not need to consider the general applicability of Article III to STEs. Australia is challenging a specific measure, the reduced mark-up afforded to local wines under the EWR Policy, adopted by the NSLC. The question for the Panel is whether, on the particular facts in this dispute, the impugned

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55 Canada's First Written Submission, para. 208-209.
56 Canada’s First Written Submission, para. 237.
57 Canada’s First Written Submission, para. 243.
58 Canada's First Written Submission, para. 242.
measures fall within the scope of Article III:2 and/or III:4. Australia submits that the reduced mark-up under the EWR Policy is within the scope of those articles.

87. First, Australia highlights that the Government of Nova Scotia has chosen to regulate liquor within its jurisdiction to establish a regulatory framework under which it delegates to the NSLC exclusive authority to control the possession, sale, transportation and delivery of liquor in accordance with the Nova Scotia Liquor Control Act (NSLCA) and Regulations. The express purpose and intent of the NSLCA is to prohibit transactions in liquor "except under Government control."

88. The way in which the government exercises this control is through the NSLC. "Government control" is defined in the NSLCA as "the sale of liquor within the Province in accordance with this Act or the regulations, through the instrumentality of the Corporation..." The NSLCA provides that every provision of the Act and the regulations that deal with the importation, sale and disposition of liquor within Nova Scotia is through the instrumentality of the Corporation (i.e. the NSLC). This is the "means by which" such government control is made effective. This includes the setting of liquor pricing which is expressly provided for in the Act and Regulations.

89. The NSLC is a wholly government-owned entity acting as an agent of the Crown. It was established under the Act. It derives its legislative mandate and powers from the Act and Regulations. The Act also provides the NSLC with the power to make regulations with approval of the Governor in Council. The affairs of the NSLC are administered by a Board of Directors who are appointed by the Governor in Council, and one board Member is a Deputy Minister (a senior civil servant in the Nova Scotia Department of Finance and Treasury Board). The

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59 NSLCA, Exhibit AUS-14, s. 12.
60 NSLCA, Exhibit AUS-14, s. 137.
61 NSLCA, Exhibit AUS-14, s. 2.
62 NSLCA, Exhibit AUS-14, s. 137.
63 NSLCA, Exhibit AUS-14, s. 42(1) and NSLC Regulations, Exhibit AUS-59, s. 13(6)-(7).
64 NSLCA, Exhibit AUS-14, s. 4.
65 NSLCA, Exhibit AUS-14, ss. 4 and 12.
66 NSLCA, Exhibit AUS-14, s. 15. The NSLC Regulations have been adopted under s. 15 of the NSLCA, Exhibit AUS-59.
67 NSLCA, Exhibit AUS-14, s. 7.
Governor in Council is also responsible for appointing the President of the Board, who is the CEO of the NSLC. The President is accountable to the Minister.\textsuperscript{68}

90. The legislative mandate of the NSLC also demonstrates that the NSLC has responsibilities as a regulator and not simply a commercial operator in the business of buying and selling liquor. These include the promotion of social objectives regarding responsible drinking; the promotion of industrial or economic objectives regarding the beverage alcohol industry in the province; and the attainment of suitable financial revenues to government.\textsuperscript{69}

91. Second, Australia highlights that it is not challenging the existence of the NSLC as an import monopoly nor the NSLC's purchases or sales transactions involving imported wine.\textsuperscript{70} Australia is challenging the reduced mark-up under a specific pricing policy, the EWR Policy, adopted under the NSLC's legislative authority to set liquor prices, including retail mark-ups, in the province. The NSLC derives its express authority to set liquor pricing, including retail mark-ups, from the Act and the Regulations.\textsuperscript{71} The NSLC's mark-up policies are not simply a function of its commercial activities as retailer of liquor, but a function of its powers to set prices for liquor under the Act and Regulations.

92. Further, the NSLC liquor mark-ups are plainly not a product of commercial market forces. The corporation has a monopoly under the NSLCA on the purchase and retail sale of liquor. It sets all liquor prices, including retail mark-ups, for all retail outlets in the province.\textsuperscript{72} The NSLC's prices, including retail mark-ups, apply to all liquor sold in the province, whether domestic or imported. The mark-ups are a mandatory rate set by the NSLC. They are not the product of commercial negotiations between individual suppliers and the NSLC. Suppliers do not have access to any other retail channels where wine could be priced differently. Wine cannot be sold in the province without the application of the NSLC retail mark-up. These mark-ups are effectively mandatory charges applied on the retail sale of wine in Nova Scotia.

\textsuperscript{68} NSLCA, Exhibit AUS-14, s.7C.
\textsuperscript{69} NSLCA, Exhibit AUS-14, s. 4.
\textsuperscript{70} See Article XVII(1)(a) of the GATT 1994.
\textsuperscript{71} NSLCA, Exhibit AUS-14, s. 42(1), NSLC Regulations, Exhibit AUS-59, s. 13(6)-(7).
\textsuperscript{72} NSLC Regulations, Exhibit AUS-59, s. 13(6)-(7).
93. They are part and parcel of the government’s regulatory framework under which liquor can be sold in the province. As such, Australia submits that the application of retail mark-ups through NSLC policies are not simply the fulfilment of a commercial function. Rather, the NSLC is exercising its powers to set pricing as an instrument of the government.

94. Third, the reduced mark-up under the EWR Policy cannot be characterised as a mark-up that has been adopted as purely part of the NSLC’s commercial activities. There is evidence to demonstrate that the NSLC adopted the Policy, and the preferential mark-ups it provides through this policy to local producers, in pursuit of the NSLC’s public policy objective of promoting the local industry\(^ {73}\) under the NSLCA. The NSLC has publicly stated that it considers that its provision of preferential mark-ups to the local industry is part of its legislative mandate to support local industry.\(^ {74}\)

95. The NSLC expressly links the adoption of the EWR Policy as a pricing policy aimed at furthering its mandate to promote the development of the wine industry in Nova Scotia.\(^ {75}\) In the 2011-2012 Annual Report, the NSLC stated that it "introduced the emerging wine industry pricing policy" "as part of the Nova Scotia wine development strategy" "to help accelerate the growth of this rapidly developing industry."\(^ {76}\)

96. This evidence demonstrates that, contrary to Canada’s assertion, the EWR Policy, and the preferential mark-up it grants, is a pricing policy adopted in pursuit of public objectives, not commercial profit-making objectives.

97. Australia submits that in light of these facts, the reduced mark-up under the NSLC EWR Policy falls within the scope of Article III either as an internal government charge within the scope of Article III:2, or an internal regulation within the scope of Article III:4.

\(^{73}\) NSLCA, Exhibit AUS-14, s. 4(3)(b).

\(^{74}\) NSLCA Annual Report 2015-2016, Exhibit AUS-69, p. 10.


\(^{76}\) Exhibit AUS-68, p. 26.
Applying the legal test to Nova Scotia mark-up

98. Once the distraction of Canada’s argument with respect to Article XVII is peeled away, it is clear that the mark-up implemented by the NSLC under the EWR Policy is inconsistent with the first sentence of GATT Article III:2. As set out in Australia's First Written Submission, all domestic Nova Scotia wines are granted a lower mark-up under the EWR Policy as compared to Australian wine. The mark-up is an internal charge that applies directly to like imported and domestic products. The charge applied to the imported product is in excess of that on the like domestic product.

99. In the interest of time, just as we did not elaborate in this opening statement on the application of GATT Article III:4 to the federal excise exemption, we have not elaborated on the application of that article to the Nova Scotia mark-up. However, we are happy to do so if that would assist the Panel, and have done so for both measures in our First Written Submission.

Measures at issue are not justified under GATT Article XXIV

100. Finally, we turn to if the measures at issue are justified under GATT Article XXIV. Canada argues that if the Panel finds any of the challenged measures to be inconsistent with the provisions of the GATT 1994, those measures are justified under Article XXIV:5 of the GATT 1994. Canada points to the Comprehensive and Progressive Trans-Pacific Partnership Agreement ("CPTPP") as a free-trade area, consistent with Article XXIV:5, to which Australia and Canada are parties, to support its argument.

101. Canada argues that the CPTPP exempts measures related to the sale and distribution of wine from a challenge to a national treatment violation, and points to chapter 2, Annex 2-A of the CPTPP. However, Canada fails to mention that that Annex expressly states that "nothing in this Annex shall affect the rights and obligations of any Party under the WTO Agreement with respect to any measure listed in this Annex."

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77 Australia's First Written Submission, para. 288.
78 Australia's First Written Submission, para. 147 onward (Federal excise exemption); para. 295 onward (Nova Scotia reduced mark-up).
79 Canada's First Written Submission, para 339.
80 Canada's First Written Submission, paras 340, 344.
102. Further, in Turkey – Textiles, while the Appellate Body raised the possibility that Article XXIV:5 may provide justification for measures inconsistent with "certain other GATT provisions", this was only under certain conditions that the party claiming the benefit of the defence must demonstrate. Canada makes no attempt to engage with those conditions or provide arguments on how and why Article XXIV:5 justifies the measures. Canada simply makes a general assertion that the measures at issue are permitted under Article XXIV "by virtue of their being an essential element of the CPTPP." As Canada has raised this Article as a defence, it has the burden of demonstrating that the relevant requirements in Article XXIV have been met. Canada has not met this burden.

103. Finally, Australia highlights that the Appellate Body has cautioned against interpreting Article XXIV as a "broad defence for measures in FTAs that roll back on Members’ WTO rights and obligations." 84

104. Again in the interest of time, we have not elaborated on the many other reasons Canada’s arguments with respect to Article XXIV must fail, including on the basis of the text of the CPTPP itself. However, we would be pleased to do so if it would assist the Panel.

Conclusion

105. Mr Chair, members of the Panel. Key facts in this dispute have not been contested by Canada. The relevant legal tests have been established for, literally, decades. Canada has sought to raise previously discredited arguments about the application of the disciplines in GATT Articles III:2 and III:4. However, should these arguments raised by Canada be addressed as swiftly as deserved, it is Australia’s submission that Canada has clearly breached its obligations under GATT Articles III:2 and III:4, and we request the Panel to find accordingly.

83 Canada’s First Written Submission, para. 344.
84 Appellate Body Report, Peru – Agricultural Products, para. 5.116.