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Canada – Measures Governing the Sale of Wine

(DS537)

**Oral Statement of Australia at the Second Substantive Meeting with
the Parties**

Geneva, 3 December 2019

Table of Contents

TABLE OF CASES	2
I. THE CONTEXT OF THIS DISPUTE	4
II. ARTICLE III	5
A. Australia's claims under Article III of the GATT 1994.....	5
B. GATT Article III:2, first sentence and the tax measures.....	5
C. GATT Article III:4 – Less favourable treatment.....	8
III. ARTICLE XVII.....	12
IV. ARTICLE XXIV	16
V. CONCLUSION	20

Table of cases

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R , WT/DS142/R , adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, p. 3043
<i>Canada – Renewable Energy</i>	Appellate Body report, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R WT/DS426/AB/R , adopted 6 May 2013, DSR 2013:I, p. 7
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R , adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
<i>Canada – Provincial Liquor Boards (EEC)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies</i> , L/6304 , adopted 22 March 1988, BISD 35S/37
<i>Canada – Provincial Liquor Boards (US)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies</i> , DS17/R , adopted 18 February 1992, BISD 39S/27
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R , adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R , adopted 18 June 2014, DSR 2014:I, p. 7
<i>India – Solar Cells</i>	Panel Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/R and Add.1, adopted 14 October 2016, as modified by Appellate Body Report WT/DS456/AB/R, DSR 2016:IV, p. 1941
<i>Japan - Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R , WT/DS10/AB/R , WT/DS11/AB/R , adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Various Measures on Beef</i> , WT/DS161/AB/R , adopted 10 January 2001, DSR 2001:I, p. 5
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R , adopted 15 July 2011, DSR 2011:IV, p. 2203

Short Title	Full Case Title and Citation
<i>Turkey - Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R , adopted 19 November 1999, DSR 1999:VI, p. 2345
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R , adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW , adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Section 337 Tariff Act</i>	GATT Panel Report, <i>United States Section 337 of the Tariff Act of 1930</i> , L/6439 , adopted 7 November 1989, BISD 36S/345

I. THE CONTEXT OF THIS DISPUTE

1. Chair, members of the Panel, colleagues from capitals and Geneva-based missions, and Secretariat staff – good morning.
2. We understand you have read our second written submission. For the sake of efficiency, we will not summarise the arguments made there, which we continue to stand by. Accordingly, I want to make a brief comment by way of context before I begin.
3. Chair, members of the Panel, Australia and Canada share a deep commitment to the multilateral trading system. As founding members of the GATT and then the WTO, this commitment stretches back over several decades.
4. We have a shared belief in the importance of a well-functioning dispute settlement system.
5. Both of us are engaged extensively on WTO reform.
6. Consequently, on procedural issues at least, we trust the Panel will have noticed both disputing parties engaging in the dispute in a manner that is respectful of the system, the Panel, and each other.
7. For example, Australia would like to acknowledge with appreciation the Panel's and Canada's flexibility in accommodating a change to the date of this meeting.
8. This is the background against which Australia has brought this dispute. It has done so in good faith, and for a good cause, and with a good friend.
9. For that reason, we remain open to agreeing with Canada on a solution ahead of the formal conclusion of the dispute process, just as we were able to do with respect to British Columbia's discriminatory measures.
10. However, without such an agreement, we have no choice but to continue down the dispute path, given Canada is in clear violation of its obligations under Article III of the GATT 1994.
11. In the rest of my statement, I will be addressing the remaining points of contention on the correct interpretation and application of GATT Articles III:2, III:4, XVII and XXIV.

II. ARTICLE III

A. AUSTRALIA'S CLAIMS UNDER ARTICLE III OF THE GATT 1994

12. Both Australia and Canada have acknowledged the importance of Article III of the GATT 1994 as it expresses the obligation of national treatment. In its first written submission, Canada expressly agreed with Australia that Article III is a "cornerstone" of the GATT.¹

13. If that "cornerstone" is weakened, the integrity of the GATT will be challenged by the increased use of measures that protect domestic products from the competition of imported products.

14. Australia has demonstrated that its claims under Article III are grounded in the obligations contained in Article III:2, first sentence and Article III:4. Our claims respect the relationship between these obligations and their function in the legal matrix of Article III.

15. On the other hand, Canada's defence disregards the "structure and logic"² of Article III and would weaken it, if accepted by the Panel.

B. GATT ARTICLE III:2, FIRST SENTENCE AND THE TAX MEASURES

16. What does the phrase "in excess" in GATT Article III:2, first sentence mean?

17. That is what this dispute boils down to – with respect to the federal excise duty exemption and the Ontario wine basic tax.

18. To us, Article III:2, first sentence is a strict obligation.³ As the Appellate Body stated in *Japan – Alcoholic Beverages II*, "[e]ven the smallest amount of 'excess'" taxation will be considered "too much".⁴

19. In that context, I would like to make a comment about what we heard in Canada's opening statement, including a reference to "it's just a little bit of difference". I want to put on the record,

¹ Canada's first written submission, para. 108.

² Canada's first written submission, para. 110.

³ Australia's response to Panel question No. 2, para. 29.

⁴ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 23.

paragraphs 48 and 55 of Australia's first written submission, which highlights that in the federal instance there is 'an accelerator', the difference will keep growing by inflation.

20. Canada argues this interpretation leads to a "mechanical" outcome.⁵ It urges instead there should be only a presumption that the "excess" of tax has afforded protection to domestic production that would be "susceptible to rebuttal by the respondent".⁶

21. Before I outline why we disagree with Canada, I want to note briefly that there is no disagreement on the facts here. In both instances, i.e. federal excise tax and Ontario wine basic tax, it's plain for all to see, there is a legislated differential internal tax applied to imported products as compared to like domestic products.

22. Canada attempts to defend these blatantly discriminatory measures by arguing that, in effect, Australia and the third parties are relying on the Appellate Body report in *Japan – Alcoholic Beverages II* as precedent which cannot be departed from.⁷

23. However, we do not argue what Canada suggests we do. Article IX:2 of the Marrakesh Agreement puts the authoritative interpretation of the WTO Agreements in the hands of Members – not Panels nor the Appellate Body.

24. So for this reason, I want to be clear: Australia's position is not based on a notion of precedent. Australia's position is based on the terms of Article III and its logic and underlying principles. The soundness of our interpretative approach has been affirmed over many years of dispute settlement.

25. Canada also attempts to dismiss the argument that "read[ing] the principle ... in Article III:1 into Article III:2, first sentence ... would render the reference to Article III:1 in Article III:2, second sentence, redundant or *inutile*".⁸

26. In doing so, Canada fails to take proper account of the context for Article III:2, first sentence.

⁵ Canada's first written submission, para. 141.

⁶ Canada's first written submission, para. 142; Canada's opening statement at first meeting of the Panel, para. 14.

⁷ Canada's second written submission, para. 5.

⁸ Canada's second written submission, para. 5.

27. Canada purports to base its arguments on the contextual relationship between Article III:1 and Article III:2, first sentence. However, Canada does not address the immediate context of Article III:2, first sentence, which is the second sentence of Article III:2.

28. In this regard, it is important to recall that the second sentence must be read with the *Ad Article* that relates to it.⁹ The *Ad Article* brings the concepts of "directly competitive or substitutable products" and "not similarly taxed" into play in the second sentence.

29. As Australia highlighted in its second written submission, Canada's proffered interpretation of the first sentence would blur the distinction between "like products" in the first sentence and "directly competitive or substitutable products" in the second sentence.¹⁰

30. Canada's proffered interpretation would also blur the distinction between "in excess" in the first sentence and "not similarly taxed" in the second sentence.

31. Had the drafters of Article III:2 intended that both the first and second sentences would allow *de minimis* differential burdens, they would have used "not similarly taxed" in relation to both sentences.

32. Canada would import the concept of *de minimis* into the first sentence by ending the strict application of the words "in excess".

33. Australia recalls that the Appellate Body warned in *Japan – Alcoholic Beverages II* that "[t]o interpret 'in excess of' and 'not similarly taxed' identically would deny any distinction between the first and second sentences of Article III:2".¹¹

34. We see the Appellate Body's analysis as consistent with the text of the Agreement – and frankly, that analysis is much more credible than the analysis which Canada is providing in an attempt to defend its indefensible measures.

⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 24.

¹⁰ Australia's second written submission, para. 31.

¹¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27.

35. In sum, Canada's flawed contextual interpretation of Article III:2, first sentence does not accord with the second sentence of Article III:2 and impermissibly damages the operation of GATT Article III:2 as a whole.

C. GATT ARTICLE III:4 – LESS FAVOURABLE TREATMENT

36. I turn now to Australia's claims under Article III:4 of the GATT 1994, and Australia observes a distinct narrowing of the focus of issues that remain in contention between the Parties.

37. It appears that the Parties agree the legal standard for "treatment less favourable" under Article III:4 of the GATT 1994 is whether a measure modifies the conditions of competition to the detriment of imported products.¹²

38. Further, the Parties agree that the analysis must focus on the "design, structure and expected operation" of the measures at issue.¹³

39. This is precisely the basis upon which Australia has clearly set out its case in respect of all the relevant measures. And yet, in its attempted rebuttal of Australia's case, Canada fails to engage with the facts and evidence set out by Australia in this context.

40. Canada instead argues that its measures have been in place for a period of time sufficient for it to have "actual detectable effects" and points vaguely to Australia's healthy market share as "evidence" of the lack of discriminatory effect.¹⁴

41. By pointing to such evidence, it appears to Australia, that Canada is conflating evidence of "effects on conditions of competition" with "trade effects".

¹² Canada's first written submission, para. 151; Australia's first written submission, para. 188; Appellate Body Report, *Korea – Various Measures on Beef*, para. 137; Appellate Body Report, *EC – Seal Products*, para. 5.101; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93; Appellate Body Report, *US – Clove Cigarettes*, para. 179.

¹³ Canada's first written submission, para. 178; Australia's first written submission, para. 189; Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 130.

¹⁴ Canada's first written submission, paras. 205, 211 and 215; Canada's second written submission, paras 62-63.

42. These are clearly different legal standards. Article III:4 of the GATT 1994 is concerned with the protection of equality of competitive opportunities rather than any particular volume of trade.¹⁵

43. With the correct legal standard in mind, and this issue came up also in Canada's statement this morning, we want to make clear that Australia takes no issue with the possibility that evidence of actual trade effects, including market share and trade flows may be relevant to a Panel's assessment. However, such evidence is clearly not to be considered determinative of the question before the Panel.¹⁶

44. Rather, the weight to be accorded to such evidence must take into account the robustness, reliability and demonstrated probative value of such evidence. Canada does not provide any explanation for why its references to market share should be given any weight by the Panel – in the context of the agreed legal standard.

45. Canada appears to take its "trade effects" arguments even further, by asserting that a WTO Member is required to demonstrate "detectable impacts on imports" and "a minimal potential market impact" in order to make out a claim under Article III:4 of the GATT 1994.¹⁷

46. Canada does not attempt to provide the Panel with a credible textual basis for this assertion, nor does it explain how this alleged *de minimis* standard of demonstrated "trade effects" can be reconciled with Canada's agreement that such effects are not elements of the legal standard under Article III:4. Australia submits that Canada's argument should be dismissed by the Panel as finding no basis in the text of the Agreement.

47. Finally, Canada attempts to argue that its discriminatory treatment of like products within one province can be cured by less favourable treatment of like Canadian domestic products outside of that province.

¹⁵ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16; Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135-136.

¹⁶ Australia's second written submission, para. 44.

¹⁷ Canada's first written submission, para. 219.

48. As a starting point, this form of argument raises serious systemic concerns, and in any case, is incorrect.

49. Canada seeks to justify its proposed approach through a series of misguided steps.

50. First, it sets out its "asymmetric impact" analysis, in which it argues that an assessment of "treatment no less favourable" "requires an examination of the overall impact of the challenged measures".¹⁸ This principle of "overall impact" or "overall burden" is one that Canada returns to throughout its submissions.

51. As Australia has explained, this standard is not supported by either the text of Article III:4 or prior jurisprudence.¹⁹

52. So, seemingly now acknowledging this, in its second written submission, Canada seeks to distinguish itself from a clear line of analogous jurisprudence by arguing that because certain prior cases related to *de jure* claims, then it must be that such reasoning does not apply to *de facto* claims.²⁰ However, it does not explain, either on the basis of the text, or prior reports, why this must be the case.

53. Any distinction between *de jure* and *de facto* claims is not sufficient to rule such prior findings irrelevant to the current matter. However, Australia agrees that the nature of the claim will have an impact on the nature of the analysis to be undertaken by a Panel.

54. For example in the case of *de jure* discrimination, it is likely that the "groups" of products for the purposes of a "treatment less favourable" comparative analysis will be set out by the express terms of the measure itself. The nature of a *de facto* claim, where a measure is origin-neutral on its face, is likely to differ in this respect.

¹⁸ See Canada's first written submission, para. 164.

¹⁹ See e.g., Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 220-221; Panel Reports, *Canada – Autos*, para. 10.87; *India – Solar Cells*, para.7.95; *Canada – Wheat Exports and Grain Imports*, para. 6.349; *US – Section 337 Tariff Act*, para 5.14; and *Argentina – Hides and Leather*, para. 11.260.

²⁰ Canada's second written submission, para. 27; and Canada's response to Panel question No. 42 (advance question No. 17), paras. 160-161.

55. In such a case, it is the Panel's task to undertake a case-by-case assessment to determine whether, notwithstanding the measure is "origin-neutral" on its face, its design, structure and expected operation is such that it is nonetheless protectionist.

56. As Australia has explained, the comparative "groups" of products for such an analysis should be identified through an examination of the particular facts of the case, including the particular market conditions, the products, and the measure at issue.

57. As Australia set out in our second written submission, in the matter before us, the treatment given to like products from the most-favoured sub-region is the relevant comparator in light of the "design, structure and expected operation" of the relevant measures at issue.²¹

58. Canada's assertion of a blanket "overall burden" or "asymmetric impact" standard would set the bar higher in cases of *de facto* discrimination than for *de jure* discrimination, with no justifiable basis for so doing.

59. In Australia's view, the same principle of assessment must apply in both cases.

60. That is, discriminating against domestic products from other sub-national regions cannot preclude a finding that a measure discriminates against like imported products in a manner inconsistent with Article III:4 of the GATT 1994.

61. On the basis of this principle, Australia observes that, even if the Panel accepts Canada's "overall burden" standard, it should not accept the related proposition that less favourable treatment may only arise where all imported like products are treated less favourably than all domestic like products.

62. Instead, such an assessment should consider the overall treatment of imported and domestic products to determine the comparative discriminatory impact on imported products.²²

²¹ Australia's second written submission, para. 53.

²² European Union's third party submission, para. 46.

63. In other words, even under Canada's asserted standard, the fact that preferential treatment is accorded by a province to the products of that province, that is not accorded to Australian imported like products should be sufficient for a finding of inconsistency with Article III:4 of the GATT 1994.

64. In summary, Australia has set out its case for a finding of inconsistency with Article III:4 with respect to the challenged measures, on the basis of the text of the provision, properly interpreted, and supported by a long line of prior reports.

65. Canada's efforts to evade its obligations through attempts to require evidence of "trade effects", including through the unsupported assertion of a *de minimis* standard, and its assertions that discriminatory treatment may be off-set by differential treatment of domestic like products, should be decisively dismissed by the Panel.

III. ARTICLE XVII

66. Similarly, in Australia's view, Canada's arguments about the application of Article XVII of the GATT 1994 to the Nova Scotia product mark-up for local producers ("**product mark-up**") applied pursuant to the Emerging Wine Regions Policy ("**EWR Policy**"), should be dismissed as a deeply flawed distraction.

67. Contrary to Canada's claims in their statements this morning, Australia would like to emphasise that we do not see it as necessary for the Panel in this dispute to decide whether each and every activity of any given state trading enterprise ("**STE**") is susceptible to challenge under Article III.

68. Rather, we are challenging a *specific* measure as being inconsistent with Article III.

69. To us, the question for the Panel to assess is whether, on the particular facts in this dispute, the Nova Scotia product mark-up falls within the scope of Article III:2,²³ first sentence, or alternatively that of Article III:4.²⁴ In answering this question, in Australia's view, it is not necessary for the Panel to determine whether or not the product mark-up also falls within the scope of Article XVII.

70. So, let's have a look at what is being done in Nova Scotia, by whom, and to what purpose.

71. The Nova Scotia Liquor Corporation ("NSLC") is wholly government-owned, acts as an agent of the Crown, and is closely controlled and overseen by its owner.²⁵ This includes its budget and strategic direction.²⁶

72. What is this creature of the Nova Scotian government up to?

73. By law, liquor cannot be sold in Nova Scotia other than at the NSLC prescribed prices, with the NSLC prescribed mark-up.²⁷ Thus, the product mark-up implements a Nova Scotian policy to promote local wines, applied by a statutory monopoly not just to its own retail sales, but mandated for the sales of all retailers in Nova Scotia through regulations made pursuant to the NSLC's legislative mandate. As the NSLC has a monopoly over the importation and distribution of liquor, suppliers have no opportunities to negotiate mark-up rates or supply liquor to the Nova Scotia market through other delivery channels.²⁸

74. The NSLC expressly links the adoption of the EWR Policy to its mandate to promote the development of the wine industry in Nova Scotia.²⁹

²³ Australia's first written submission, paras. 265-270; and Australia's second written submission, paras. 227-235.

²⁴ Australia's first written submission, paras 296-298; and Australia's second written submission, paras. 250-253.

²⁵ Australia's second written submission, para. 199.

²⁶ Australia's second written submission, paras. 196-202.

²⁷ Australia's second written submission, Part III.E.1, paras. 70-77.

²⁸ Australia's second written submission, para. 214; Australia's responses to panel question No. 11, para. 58; Australia's opening statement at the first meeting of the Panel, para. 92.

²⁹ For example: NSLC Annual Report 2009-2010, Exhibit AUS-67, p.48; NSLC Annual Report 2011-2012, Exhibit AUS-68, p. 26; and NSLC Annual Business Plan 2017-18, Exhibit AUS-61, p. 4. Australia's second written submission, para. 215.

75. In other words, it is precisely aiming to alter competitive conditions for the benefit of the Nova Scotian wine industry.³⁰

76. Canada argues, however, that the NSLC is not the Nova Scotian government. While it contests whether there would be such a breach even if the NSLC were not an STE,³¹ it argues that the actions of an STE are not governed by GATT Article III in respect of their commercial activities.

77. But put simply the NSLC product mark-up cannot be characterised as merely a commercial activity of a private enterprise acting at arms-length from the government.³²

78. Furthermore, Canada's arguments in relation to Article XVII are clearly wrong, and we turn to that now.

79. As Australia has already explained,³³ Article XVII does not preclude the simultaneous application of Article III to the actions of an STE. To do so would circumvent the purpose of the Parties' obligations under GATT Article III.

80. Now, we recall that paragraph 1(a) of Article XVII requires an STE to act consistently with the general principles of non-discriminatory treatment prescribed in the GATT.

81. Canada would have the Panel believe that a provision which, by its terms, mandates conformity with the general principles of non-discriminatory treatment was intended to remove the actions of an STE from scrutiny under the very provisions setting out those obligations.

82. Canada has asserted that recourse to the principle of effective treaty interpretation³⁴ means that Article III should not be interpreted in a way that would render Article XVII redundant.

³⁰ Australia's first written submission, paras. 102-110.

³¹ Canada's first written submission, Section IV.C.2, paras.249-293.

³² Australia's second written submission, paras. 203-218.

³³ Australia's response to Panel question No. 1(b), paras. 5-11; Australia's second written submission, para. 277.

³⁴ Canada's second written submission, paras. 78-87.

83. Australia agrees that the principle of effective treaty interpretation mandates an interpretation that gives meaning and effect to all the provisions of a treaty, and does not render any term *inutile*.³⁵

84. However, nothing in Australia's interpretive approach would render any element of Article XVII *inutile*.

85. It is perfectly reasonable and, indeed likely, that a given action of an STE could give rise to an inconsistency both with Article XVII, and with another provision of the GATT 1994. Indeed, such possibility is expressly contemplated by the *Ad Article* to Articles XI, XII, XIII, XIV and XVIII.³⁶

86. Canada's interpretation would undermine, rather than support, the objects and purposes of the GATT 1994 as reflected in Articles III and XVII.

87. Were Canada's arguments to be accepted, Article XVII – which is a provision included in the GATT 1994 to ensure WTO Members did not circumvent their non-discrimination obligations through the actions of STEs – would have become, in itself, a means of circumventing those obligations.

88. Such a reading would be the epitome of ineffective treaty interpretation.

89. Moreover, previous panels have accepted that the actions of STEs can be subject to Article III, and Canada itself has accepted that an STE could be subject to Article III of the GATT 1994.³⁷

90. Although Canada invokes the principle of effective treaty interpretation in this regard, in substance Canada is seeking to render Article XVII *lex specialis* to Article III, as a self-contained code applicable to the actions of STEs to the exclusion of other GATT 1994 obligations.

³⁵ Appellate Body report, *Canada – Renewable Energy*, para. 5.57; Appellate Body report, *United States – Gasoline*, p. 23.

³⁶ GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, para. 5.15; Australia's Response to Panel question No. 6, paras. 43-45.

³⁷ Canada's first written submission, para. 243.

91. It is wholly inappropriate to construe the provisions of the GATT 1994 in this fashion.³⁸

92. Furthermore, acceptance of Canada's submissions regarding the relationship between Article III and Article XVII would have profound systemic consequences for the application of the obligations of general non-discriminatory treatment to the regulatory actions of STEs.

93. Canada also asserts that the nature and particular characteristics of an STE "are simply not germane" to whether a particular STE practice is subject to Article III.³⁹ Instead, Canada recommends that the Panel focus on the activity itself, and whether that activity can be characterized as a governmental measure within the meaning of Article III.⁴⁰

94. In answer, Australia would like to emphasise that it has, to date, framed its arguments in terms of both the nature and characteristics of the NSLC,⁴¹ and the precise nature of the activity in question, namely the establishment of product mark-ups.⁴² In Australia's view, both elements are germane to a proper assessment of the legal character of the mark-up.

95. In summary, in Australia's view, nothing in Canada's submissions should dissuade the Panel from drawing the most logical and reasonable conclusion from the facts of this case, namely that the Nova Scotia product mark-up applied pursuant to the EWR Policy is an "internal tax" or "internal charge" for the purposes of Article III:2 first sentence of the GATT 1994, or, in the alternative, is a "law", "regulation" or "requirement" for the purposes of Article III:4.

IV. ARTICLE XXIV

96. Finally, Canada argues that, if the Panel rules its measures are inconsistent with Article III of the GATT 1994, the Panel should find those measures are justified by Article XXIV.⁴³

97. Australia submits that Canada's attempt to invoke Article XXIV as a defence for its inconsistent measures is without any legal merit. Let me enumerate the reasons why.

³⁸ See GATT Panel Report, *Canada – Provincial Liquor Boards (EEC)*, paras. 3.3, 4.26; GATT Panel Report, *Canada – Liquor Boards (US)*, para. 5.6.

³⁹ Canada's second written submission, para. 89.

⁴⁰ Canada's second written submission, para. 91.

⁴¹ Australia's second written submission, Part III.E.1 (a), paras. 196-202.

⁴² Australia's second written submission, Part III.E.1 (b), paras. 203-218.

⁴³ Canada's first written submission, para. 339.

98. The first flaw is at a basic, conceptual level.

99. Canada's WTO obligations to Australia, and to its other WTO partners, are governed by the WTO Agreement.

100. The Comprehensive and Progressive Trans-Pacific Partnership ("**CPTPP**") is not a subsequent agreement between Australia and Canada that seeks to negate those obligations. On the contrary, the CPTPP explicitly recognises that it is not seeking to affect those WTO obligations.⁴⁴

101. The second flaw in Canada's approach is also at the fundamental level and misconstrues the purpose of Article XXIV.

102. The purpose of Article XXIV is for WTO Members to liberalise trade amongst a subset of WTO Members, without breaching what would otherwise be an obligation, for example, to extend that liberalisation to other WTO Members.

103. It would completely destroy the delicate fabric of the WTO system were a Member allowed to circumvent its WTO obligations simply by agreeing a clause in a free trade agreement ("**FTA**") that specific WTO-inconsistent measures would not be challenged under that FTA.

104. So, let's turn to some other flaws in Canada's analysis.

105. Canada baldly asserts in its second written submission that a "strict" application of the conditions identified by the Appellate Body in *Turkey – Textiles* "would lead to an absurd situation wherein Article XXIV is rendered effectively *inutile* and would run contrary to the customary rules of treaty interpretation".⁴⁵

106. If I could borrow a word from Canada, it is absurd to suggest that Article XXIV would be rendered *inutile* if the Appellate Body's interpretation was applied.

⁴⁴ Comprehensive and Progressive Trans-Pacific Partnership Article 1 Annex 2-A to Chapter 2.

⁴⁵ Canada's second written submission, para. 125.

107. I recall that the Appellate Body in that decision found that the text of Article XXIV provides a defence for a measure that is inconsistent with other GATT provisions if two conditions are met:

First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of ...

Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.⁴⁶

108. Contrary to the first condition, Canada argues it is sufficient that a measure is "contemplated" by an FTA and not introduced on the formation of an FTA.⁴⁷ According to Canada, a measure "need not have been introduced by the FTA, but there must be a connection between the impugned measure and the FTA".⁴⁸

109. Applying this reasoning to the measures at issue in this dispute, Canada refers to the exemption of "the internal sale and distribution of wine and distilled spirits" in Canada from the CPTPP national treatment obligation.⁴⁹ Canada argues that the measures governing the internal sale and distribution of wine that existed when the CPTPP entered into force, such as the ones at issue in this dispute, are clearly "contemplated" by this exemption, establishing the required "connection" between the measures and the CPTPP.⁵⁰

110. Assuming for the sake of argument that Canada is correct on the issue of a "connection", which it is not, if the measures at issue are excluded from the scope of the CPTPP national treatment obligation, Australia does not see how they can have a "connection" to the CPTPP.

111. An exemption does not connect, it disconnects.

112. This highlights Canada's flawed reasoning in attempting to invoke Article XXIV, which Canada has attempted to obscure by arguing it is sufficient that a measure is "contemplated" by an FTA.

⁴⁶ Appellate Body Report, *Turkey – Textiles*, para. 58.

⁴⁷ Canada's opening statement at the first meeting of the Panel, para. 75; Canada's response to Panel question No. 25, para. 39; Canada's second written submission, para. 131.

⁴⁸ Canada's opening statement at the first meeting of the Panel, para. 75; Canada's second written submission, para. 131.

⁴⁹ Canada's second written submission, para. 131.

⁵⁰ Canada's second written submission, para. 131.

113. Canada is seeking to use Article XXIV as a defence for the federal and provincial measures which are in breach of Article III of the GATT 1994, but these measures were not introduced on the formation of the CPTPP and are not even connected with the CPTPP as I outlined earlier. Therefore, the measures must fall outside the scope of Article XXIV.

114. Canada addresses the second condition in the Appellate Body's analysis in *Turkey – Textiles* in Canada's second written submission, expressing the view that, "in the context of FTA negotiation and creation, no individual measure captured by a free trade agreement could be said to be, on its own, strictly necessary for the formation of the FTA".⁵¹

115. It now appears that Canada is now arguing that it is not the importance of a measure to the formation of an FTA that is key, but instead it is the importance attached by the Member to the measure in relation to it joining the FTA. On this point, Canada states in its second written submission that:

[T]he obligation or exemption at issue must have been deemed by the Member invoking Article XXIV to be of sufficient importance that its absence would have prevented that Member from entering into the FTA.⁵²

116. No matter what level of importance Canada attaches to the exemption in the CPTPP, the attempt to use it to invoke Article XXIV is flawed.

117. Article XXIV provides a defence for measures that breach the GATT 1994. The flaw in Canada's argument in this instance is that the exemption from challenge under the CPTPP to the measures does not breach the GATT 1994. As such, the exemption cannot be used to invoke Article XXIV.

118. Australia notes that the Panel has put a question to it on the second condition, asking for Australia's view on how a WTO Member can demonstrate that the formation of a customs union or FTA would be prevented if it were not allowed to introduce a measure.

⁵¹ Canada's second written submission, para. 139; Canada's opening statement at the first meeting of the Panel, para. 66.

⁵² Canada's second written submission, para. 140.

119. We look forward to answering that question. However, we note that in our view, and as outlined in our written submissions, Canada's arguments can be dealt with at the conceptual level. We do not believe the Panel should be expected to consider the "necessity" issue on the facts of this case.

V. CONCLUSION

120. Mr Chair, members of the Panel. You will note that this dispute has evolved into the application of WTO rules rather than being a dispute about the key facts to which those rules apply.

121. In the absence of disagreement over those key facts, such as the fact of the differential in federal excise tax, Canada is instead seeking to rely on arguments that previous WTO disputes have dismissed.

122. Alternatively, Canada is trying its luck with novel arguments, like its attempts to use the CPTPP to undermine its WTO obligations.

123. In conclusion, I note Australia is concerned on a systemic level by the arguments that Canada is making to defend its measures.

124. If the Panel were to accept these arguments, including the imposition of a trade effects test, (no matter what new name Canada gives it), long-standing principles at the heart of national treatment would be weakened.

125. The rationale for the free trade / customs union provision in GATT Article XXIV would be turned on its head.

126. And a provision designed to make sure WTO Members are not able to circumvent their obligations through the use of state trading enterprises would be used to circumvent Canada's GATT Article III obligations.

127. Frankly, Canada's purported defences sit uncomfortably with its reputation as a staunch supporter of the multilateral system.

128. Canada's defences, if accepted, would be systemically dangerous.

129. But most importantly, they are without legal merit.

130. And we request the Panel find accordingly.

131. Thank you, Mr Chair and members of the Panel.