In the World Trade Organization

Panel Proceedings

Canada – Measures governing the sale of wine

(DS537)

First integrated executive summary by Australia

Geneva, 19 August 2019
## CONTENTS

I. INTRODUCTION......................................................................................................... 1

II. MEASURES AT ISSUE............................................................................................ 1
   A. Federal – federal excise duty exemption................................................................. 1
   B. Ontario ................................................................................................................... 1
      i. Ontario wine basic tax............................................................................................ 1
      ii. Ontario grocery measures .................................................................................... 2
   C. Quebec grocery measures ....................................................................................... 3
   D. Nova Scotia – reduced product mark-ups for local wine producers ...................... 3

III. CANADA’S MEASURES BREACH ARTICLE III:2 OF THE GATT 1994............. 4
   A. The legal standard for Article III:2, first sentence of the GATT 1994.................. 4
   B. Applying the legal standard to the relevant measures............................................. 5
      i. Federal excise exemption breaches Article III:2, first sentence ....................... 5
      ii. Ontario wine basic tax breaches Article III:2, first sentence ............................ 6
      iii. The Nova Scotia reduced mark-up breaches Article III:2, first sentence ......... 7

IV. CANADA’S MEASURES BREACH ARTICLE III:4 OF THE GATT 1994........... 8
   A. The legal standard under Article III:4 of the GATT 1994 .................................. 8
   B. Applying the legal standard of Article III:4 to the relevant measures .................. 9
      i. The Ontario grocery measures breach Article III:4 of the GATT 1994 ............ 9
      ii. The Quebec grocery measures breach Article III:4 of the GATT 1994 .......... 11
      iii. The Nova Scotia reduced product mark-up breaches Article III:4 of the GATT 1994 ........................................................................................................... 12
      iv. The Federal excise exemption breaches Article III:4 of the GATT .......... 13

V. CANADA’S ARGUMENTS WITH RESPECT TO ARTICLE XVII OF THE GATT 1994 ARE INCORRECT .......................................................................................... 14

VI. MEASURES AT ISSUE ARE NOT JUSTIFIED UNDER ARTICLE XXIV OF THE GATT 1994 ........................................................................................................ 14

VII. CONCLUSION ....................................................................................................... 15
## GLOSSARY OF ABBREVIATIONS AND ACRONYMS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT 1994</td>
<td>The General Agreement on Tariffs and Trade 1994</td>
</tr>
<tr>
<td>ICB</td>
<td>International Canadian Blends (wine)</td>
</tr>
<tr>
<td>NSLC</td>
<td>Nova Scotia Liquor Corporation</td>
</tr>
<tr>
<td>SAQ</td>
<td>Société des alcools du Québec</td>
</tr>
<tr>
<td>VQA wine</td>
<td>Vintners Quality Alliance wine (Ontario)</td>
</tr>
<tr>
<td>WRS</td>
<td>Winery Retail Store</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>Marrakesh Agreement Establishing the World Trade Organization</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

1. Australia has brought this dispute because it is concerned that Canadian measures at the federal level and in three provinces give unfair competitive advantages to domestic wine inconsistent with Canada's national treatment obligations under the GATT 1994. Australia does not take issue with Canada's right to support small producers, or fledgling provincial wine industries. However, this must be done in a manner consistent with Canada's WTO obligations. The measures at issue seek to protect Canada's domestic wine industry from foreign wine imports, contrary to core national treatment obligations. Australia is a major wine producing and exporting country. Canada is an important export market for Australian wine, Australia's fourth largest.

2. The evidence and arguments set out by Australia in its submissions establish a prima facie case that Canada’s measures at the federal level, and in Ontario, Quebec and Nova Scotia, are inconsistent with Canada’s obligations under Articles III:2 and III:4 of the GATT 1994, as applicable.

II. MEASURES AT ISSUE

A. Federal – federal excise duty exemption

3. Canada imposes a federal excise duty on wine packaged in Canada under section 135 of the Federal Excise Act 2001. Section 135 of the Act is an origin-based, differential excise duty which discriminates de jure against imported bulk wine. Packaged wines containing inputs of non-Canadian origin (including blends using Australian bulk wine) are subject to duty under subsection 135(1) at the point of packaging. In contrast, wine made from 100% Canadian bulk wine, which is produced and packaged in Canada, attracts no duty whatsoever by virtue of an exemption under section 135(2)(a). ¹

4. This measure breaches Article III:2, first sentence of the GATT 1994, and in the alternative, Article III:4 of the GATT 1994.

B. Ontario

   i. Ontario wine basic tax

¹ Australia’s first written submission, para. 48.
5. The Ontario wine basic tax is imposed under section 27 of the Alcohol, Cannabis and Gaming Regulation and Public Protection Act, as amended, and is a component of a general "wine tax" levied by the Ontario government. It is calculated as a percentage of the retail price of wine and levied at the point of purchase in winery retail stores and wine boutiques. The wine basic tax is also an origin-based, differential tax which discriminates de jure against imported bulk wine. It formally distinguishes between "Ontario" and non-Ontario wine and applies lower rates of tax to wine composed of 100% Ontario bulk wine. Under current rates, 100% Ontario wines enjoy a 13% tax advantage over their competitors using non-Ontario wine as an input, including blends using Australian bulk wine.

6. This measure breaches Article III:2, first sentence of the GATT 1994.

ii. Ontario grocery measures

7. The Ontario grocery measures at issue, through restricted and unrestricted authorizations and wine boutiques, place conditions on the sale of wine in grocery stores in Ontario and regulate the type of wine that can be sold and displayed in grocery stores. These conditions favour domestic Ontario wines and exclude or limit imported wine from being displayed and sold in grocery stores.

8. Under restricted authorizations, grocery stores are restricted for the first three years to only selling single-origin wine (produced using grapes from a single country) that is produced by a "small winery" (as defined in Regulation 232/16); or "quality assurance wine" that is produced by a "mid-sized winery" (as defined in Regulation 232/16). "Quality assurance wine" is defined as wine that is designated as meeting the quality control standards of a statutory appellation of origin regime that certifies, in the aggregate, less than 50 million litres of wine annually.

9. Under unrestricted authorizations, at least 50% of the wine displayed in the grocery store must satisfy at least one of the following criteria: the wine is "quality assurance wine"; or is from a "small winery"; or is from a country that produces, in the aggregate, less than 150 million litres of wine annually from grapes grown in that country.

10. Under both types of authorization, grocery stores are required to have a sign indicating the availability of 100% Ontario wine (VQA wine), where VQA wine is sold.

---

2 Australia notes that the Wine Basic Tax Amendment Bill (Exhibit AUS-43) received Royal Assent on 29 May 2019. See ACGRPPA, s. 27 as amended, Exhibit AUS-96.
3 Australia’s first written submission, paras. 49-56.
4 Ibid. See Australia’s response to Panel question No. 49.
5 Australia’s first written submission, para. 68.
11. The measures also created a new category of "wine boutiques" for the sale of wine in grocery stores. Only Ontario VQA wines and wines made by an Ontario manufacturer with local content requirements can be sold in these outlets. Imported wine that is bottled outside of Ontario cannot be sold in these grocery store outlets. These grocery outlets are subject to mandatory shelf-display requirements and sales targets for the sale of Ontario VQA wines.


C. Quebec grocery measures

13. The Quebec measures provide Quebec small-scale wine producers with direct access to sell their own bottled wine in grocery and convenience stores, without going through the Société des alcools du Québec (SAQ) distribution system. Under the measures, Quebec wine producers can market and sell their own branded bottled wine direct to grocery and convenience stores and to SAQ outlets.

14. Imported wines made and bottled by foreign wine producers are not afforded this same access. Imported bottled wines cannot be sold in grocery and convenience stores and must go through the SAQ distribution system where they are subject to mark-ups and other fees in this system. Quebec also imposes a requirement that wine must be bottled in Quebec to be sold in grocery and convenience stores. These measures, therefore, exclude imported wines that are made and bottled by foreign wine producers from sale in grocery and convenience stores in Quebec.6

15. Under the measures, qualifying Quebec wines are allowed to by-pass the SAQ distribution system, and thereby avoid the fixed SAQ mark-ups.


D. Nova Scotia – reduced product mark-ups for local wine producers

17. The Nova Scotia measure provides a reduced product mark-up for wine that qualifies under the Emerging Wine Regions (EWR) Policy, through the Nova Scotia Liquor Corporation (NSLC).7 Under this policy, wines that are from an "emerging wine region" as defined in the EWR Policy are subject to a 43% mark-up, while other wines are subject to a 140% mark-up.

---

6 Australia’s first written submission, paras. 88-95.
7 Australia’s first written submission, paras. 96–110.
18. An "emerging wine region" is defined in the EWR Policy as a region whose total annual production of wine within the political boundaries of the region (state, province, or equivalent) does not exceed 50,000 HL annually. Based on this definition, Nova Scotia qualifies as an emerging wine region because it produces less than this amount of wine annually. Therefore, all wine from Nova Scotia can access a reduced 43% mark-up.

19. The NSLC has said that it introduced the EWR Policy to grow the Nova Scotia domestic wine industry as a result of a study that recommended a change in mark-up policy for local Nova Scotian wines. The EWR Policy has had precisely this effect, with Nova Scotia wine sales doubling in the period between 2008 and 2012, and in 2015 surpassing sales of imported wines from France, Chile and Australia.

20. This measure breaches Article III:2 of the GATT 1994, or in the alternative, Article III:4 of the GATT 1994.

III. CANADA'S MEASURES BREACH ARTICLE III:2 OF THE GATT 1994

A. The legal standard for Article III:2, first sentence of the GATT 1994

21. Australia has shown that the legal test for demonstrating a breach of Article III:2, first sentence is well-established in WTO jurisprudence and consists of three elements: (i) the threshold question of whether the measure at issue is an internal tax or other internal charge applied directly or indirectly to products; (ii) whether the imported and domestic products are "like" products; and (iii) whether imported products are taxed in excess of like domestic products. Therefore, in order to determine whether the challenged measure is consistent with Article III:2, first sentence a panel need only to consider whether these three elements have been established.
22. Australia has demonstrated that Canada is wrong in arguing that its manifestly discriminatory tax measures are permissible under Article III:2, first sentence, as long as they are "not applied so as to afford protection to domestic production". Canada’s approach is not supported by the text of Article III:2, properly interpreted, as confirmed by prior panel and Appellate Body reports. In particular, the Appellate Body in Japan – Alcoholic Beverages II clarified that Article III:2, first sentence is a specific application of the general obligation articulated in Article III:1 that internal measures should not be applied so as to afford protection to domestic production. If the three elements of Article III:2, first sentence are made out in relation to a measure, then "necessarily" that measure has been applied so as to afford protection to domestic production.

23. Canada also asserts, in multiple places, that Australia must show 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. Once again, Canada’s approach is not supported by the text of Article III:2, first sentence, properly interpreted, as confirmed by prior panel and Appellate Body reports. Australia submits that the Panel should dismiss Canada’s flawed interpretive arguments on this basis and apply the established proper legal test for Article III:2, first sentence, to each of the challenged measures, as set out below.

B. Applying the legal standard to the relevant measures

i. Federal excise exemption breaches Article III:2, first sentence

24. Returning to the elements of the legal test for demonstrating a breach of Article III:2, first sentence, the first element is satisfied because the Federal excise duty is an "internal tax" or "charge" within the scope of Article III:2, first sentence. Canada has accepted that the Federal excise duty is an "internal tax" or "charge" that is applied to wine packaged in Canada.

---

16 Canada’s first written submission, para. 138.
18 New Zealand’s third-party submission, para. 16 (original emphasis); New Zealand's opening statement at the first meeting of the Panel, para. 10.
20 See, for example, Canada’s first written submission, paras. 296 and 310.
21 Canada's first written submission, para. 307.
25. As to the second element concerning "like products", 22 "likeness" can be presumed without the need for a full analysis where a measure, such as the Federal excise duty, discriminates between products on the basis of origin. 23 Accordingly, it can be presumed for the Federal excise duty that Australian and Canadian bulk wines are "like products" under Article III:2, first sentence. 24 In its first written submission, Canada did not contest the issue of "likeness" in relation to "any of Australia's claims". 25

26. Under the third element, 26 Australia has established that the Federal *Excise Act* taxes Australian bulk wine "in excess" of Canadian bulk wine used in a 100% Canadian packaged product. 27 Canada does not refute this.

27. In sum, applying the correct legal test, Australia has established a *prima facie* case of inconsistency between the measure and Article III:2, first sentence, which Canada has not rebutted. 28

**ii. Ontario wine basic tax breaches Article III:2, first sentence**

28. Applying the correct legal test for demonstrating a breach of Article III:2, first sentence, the first element is established because the Ontario wine basic tax is an "internal tax" that is levied at the point of purchase in winery retail stores and wine boutiques. Canada does not contest this. As to the second element, Australia has established that Ontario bulk wine and Australian bulk wine are "like products". Canada does not contest this. 29

29. Under the third element, Australia has established that wine with 100% Ontario bulk wine input enjoys a 13% tax advantage over wines containing non-Ontario input. By Canada's own admission, "this tax differs depending on whether the bottle contains 100% Ontario wine or whether it is an ICB wine", which is a blended bottled wine containing foreign bulk wine input. 30

30. In sum, applying the correct legal test, Australia has established a *prima facie* case of inconsistency between the measure and Article III:2, first sentence, which Canada has not rebutted.

---

22 See Australia's first written submission, paras. 141-143.
23 Australia's first written submission, para. 128.
24 Australia's first written submission, para. 143.
25 Canada’s first written submission, para. 146.
26 See Australia's first written submission, paras. 144 and 145.
27 See Canada’s first written submission, paras. 95 and 311.
28 Australia's opening statement at the first meeting of the Panel, para. 51.
29 Canada's first written submission, para. 146; Canada's response to Panel question No. 43, para. 164.
30 Canada's first written submission, para. 328.
iii. The Nova Scotia reduced mark-up breaches Article III:2, first sentence

31. With respect to the first element of Article III:2, first sentence, the reduced mark-up under the EWR Policy is an "internal charge" within the scope of Article III:2. The mark-up is applied to wine by the NSLC under legislative authority. Under the EWR Policy, the retail price of the wine that a consumer pays must include the NSLC mandatory mark-up, and wine cannot be sold internally through the NSLC retail outlets without the application of the mark-up. The mark-up is therefore a pecuniary burden borne by the product and is triggered by an internal event, the internal retail sale of the wine.

32. This is similar to the analysis in Canada – Provincial Liquor Boards, where the GATT panel found that Article III:2 applied to mark-ups levied by provincial liquor boards in Canada "because they also constituted internal government charges borne by products".31

33. The NSLC is wholly-owned and controlled by the government. It is an agent of the Crown. Under this regulatory framework, the NSLC has a monopoly on the importation, distribution and sale of wine in Nova Scotia. The NSLC does not set liquor prices, including mark-ups, in the same way as a commercial retailer.32 It does so under legislative authority to set all liquor prices as part of its legislative powers to control the sale of liquor in Nova Scotia. The NSLC-set prices for liquor, including mark-ups, mandatorily apply across all retail channels for wine. Wine cannot be sold in the province without the application of the mark-up rates dictated by the NSLC.33 The NSLC mark-ups are, therefore, clearly not usual commercial activity. The mark-up is a mandatory, internal governmental charge that must be borne by wine if wine is to be sold in Nova Scotia.34

34. With respect to “likeness”, Australia has established based on evidence that imported Australian bottled wine and domestic Nova Scotia bottled wine are like products as they have similar physical characteristics, have the same end-uses, consumers consider them to be inter-changeable and they have the same tariff classification.35 Canada does not contest likeness.36

35. Finally, Australia has established that the like imported products are subject to a charge in excess of the like domestic products.37 As Nova Scotia qualifies as an emerging wine region under the EWR

---

31 Australia’s first written submission, para. 267.
32 See Australia's responses to Panel questions Nos. 1 and 11.
33 See Australia's first written submission, paras. 96, 97 and 269, Australia's responses to Panel questions Nos. 1 and 11.
34 Australia's opening statement at the first meeting of the Panel, paras. 91 and 92.
35 Australia's first written submission, paras. 271 – 283.
36 Canada's first written submission, para. 146.
37 Australia's first written submission, paras. 284-292.
Policy, domestic Nova Scotia wines qualify for the reduced retail mark-up of 43%. Based on the definition in the EWR Policy, only two Australian wine regions in the state of Queensland could qualify as emerging wine regions. All other Australian wine regions do not qualify.\(^{38}\) Queensland produces far less wine than Nova Scotia, and exports very limited amounts of wine to Canada.\(^{39}\)

36. Accordingly, virtually all Australian wine sold in the Nova Scotia market could not qualify for the 43% mark-up. Australian wine would be subject to a much higher 140% mark-up. The EWR Policy therefore discriminates against Australian wine by imposing a pecuniary burden on imported wines that is significantly "in excess" of that on like domestic products. Australian wine is subject to an internal charge in excess of that on like domestic wine contrary to Article III:2, first sentence of the GATT 1994.

IV. CANADA’S MEASURES BREACH ARTICLE III:4 OF THE GATT 1994

A. The legal standard under Article III:4 of the GATT 1994

37. The legal standard for Article III:4 is well-established. Three elements must be satisfied for a measure to violate Article III:4:\(^{40}\) (i) the imported and domestic products at issue must be "like"; (ii) the measure must be 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 must be "less favourable" than that accorded to the like domestic products.

38. 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".\(^{41}\) This element requires an examination of whether the measure modifies the conditions of competition to the detriment of the like imported products. A 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.\(^{42}\)

\(^{38}\) Australia's first written submission, paras. 289-299. Australia's opening statement at the first meeting with the Panel, para. 39.

\(^{39}\) Ibid.

\(^{40}\) Australia's first written submission, para. 181.

\(^{41}\) Australia's first written submission, para. 188. Appellate Body Reports, EC – Seal Products, para. 5.101 and US – Clove Cigarettes, para. 176.

\(^{42}\) Appellate Body Report, Thailand - Cigarettes (Philippines), paras. 128-130. Australia's first written submission, para. 189.
39. 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. Consistent with this interpretation, Australia is not required to show evidence of actual adverse trade effects in the market to show less favourable treatment.

40. In the context of measures applying to a particular region of a Member, previous panels have considered that Article III requires Members to afford imported products treatment no less favourable than that afforded to the most favoured domestic products within the territory of the Member. Accordingly, where the provincial measure at issue affords more favourable treatment to wine from that province, it is immaterial that wine from other Canadian provinces is treated the same as imported wine i.e., this does not preclude a finding that the provincial measure modifies the conditions of competition to the detriment of imported wine in that market.

41. Canada's regulatory framework governing the sale of liquor is implemented at a provincial level. In this context, the point is to favour wine from the province in which the measure is adopted. Canada cannot avoid its obligations under Article III by arguing that the provincial measures at issue accord wine from other Canadian provinces the same less favourable treatment as imported Australian wine. If this approach is accepted, a Member would easily be able to avoid its obligations under Article III by applying protectionist policies at a regional level of government in favour of products from a particular region.

B. Applying the legal standard of Article III:4 to the relevant measures

i. The Ontario grocery measures breach Article III:4 of the GATT 1994

42. Australia has established, and Canada does not contest, that Australian bottled wine and Ontario bottled wine are "like" products. Australia has established through evidence that Australian bottled wine and domestic Ontario bottled wine have similar physical characteristics, have the same end-uses, consumers consider them to be inter-changeable and they have the same tariff classification.
Ontario grocery measures are also a law or regulation within the scope of Article III:4.\textsuperscript{49} Canada does not contest this.

43. The Ontario grocery measures afford less favourable treatment to Australian bottled wine as compared to the like Ontario bottled wine. The Ontario grocery measures, through both wine boutiques and restricted and unrestricted authorizations, modify the conditions of competition in the Ontario market to the detriment of Australian wine by providing domestic Ontario wines preferential access to grocery store outlets while limiting Australian wines access to grocery store outlets.\textsuperscript{50}

44. Under the wine boutiques aspect of the measures, Australian wine bottled outside of Ontario is excluded from sales in wine boutiques. Only Ontario VQA wine and wine made by an Ontario manufacturer can be sold in these grocery outlets.\textsuperscript{51} This modifies the conditions of competition to the detriment of Australian bottled wine.

45. Under restricted authorizations, limiting wines that can be sold in grocery stores holding restricted authorizations to wine that is "quality assurance wine" (in addition to being from a "mid-size" winery) and wine from a "small winery", as defined in Regulation 232/16, excludes like Australian wines from access to these grocery stores. No Australian wine can qualify under the "quality assurance" criterion.\textsuperscript{52} The Liquor Control Board of Ontario has confirmed that Australia's appellation of origin regime could not qualify under this criterion.\textsuperscript{53} In contrast, like domestic Ontario wines can access these grocery store outlets under both the "small winery" criteria and the "quality assurance" criteria. This difference in access granted to domestic wines modifies the conditions of competition to the detriment of Australian wine.

46. With respect to unrestricted authorizations, limiting 50% of the shelf-space to wines that are from "small-wineries" or are "quality assurance wines", or are from small wine producing countries also favours domestic wine, and limits the display of Australian wine. No Australian wine can qualify under the "quality assurance wine" or the country production criteria, whereas domestic Ontario wine does qualify.\textsuperscript{54} Therefore, like domestic Ontario wines are not subject to any shelf-space restrictions in these outlets. The criteria through design, structure and expected operation limit Australian wines access to

\begin{itemize}
  \item \textsuperscript{49} Australia's first written submission, paras. 209 – 210.
  \item \textsuperscript{50} Australia's first written submission, paras. 211 – 243.
  \item \textsuperscript{51} Australia's first written submission, para. 239.
  \item \textsuperscript{52} Australia's first written submission, paras. 221 – 222.
  \item \textsuperscript{53} Australia's first written submission, para. 221.
  \item \textsuperscript{54} Australia's first written submission, paras. 229 – 235.
\end{itemize}
grocery shelf space, while permitting like domestic Ontario wine to have unrestricted access to shelf-space.

47. In sum, Australia has demonstrated that the Ontario grocery measures, through both the grocery store authorizations and the wine boutiques, operating separately and in combination, through their design, structure and expected operation, provide domestic Ontario wines with preferential access to grocery store outlets in Ontario while limiting like imported wines access to grocery store outlets. These measures therefore accord "less favourable" treatment to like imported wine in breach of Article III:4.

ii. The Quebec grocery measures breach Article III:4 of the GATT 1994

48. Australian bottled wine and domestic Quebec bottled wine are "like" products. As the Quebec grocery measures differentiate between imported bottled wine and qualifying Quebec wine based exclusively on the origin of the wine, these products can be presumed to be "like". 55

49. The Quebec grocery measures are a law, regulation or requirement affecting the internal sale, offering for sale, purchase and distribution of wine. 56 They are implemented through legislation and govern and regulate the distribution to and internal sale of wine in grocery and convenience stores in Quebec.

50. The Quebec grocery measures accord less favourable treatment to Australian bottled wine than that accorded to the like domestic Quebec bottled wine. 57 The Quebec measures permit only Quebec small-scale wine producers to distribute and sell their own bottled wines directly in grocery and convenience stores in Quebec. Like Australian bottled wine brands made by Australian winemakers are not granted this same access to grocery and convenience stores and instead are excluded from accessing these retail outlets. All like Australian bottled wines made by producers in Australia and imported into Quebec are prohibited from sales in the grocery and convenience store channel, and can only be sold in SAQ outlets.

51. The measures also allow qualifying domestic Quebec wines to by-pass the SAQ distribution system, and thereby avoid the fixed SAQ mark-up. This can be expected to afford competitive advantages to qualifying Quebec wine as Quebec producers have the ability to negotiate potentially lower mark-ups, with the resulting price advantages. 58

55 Australia's first written submission, paras. 246 – 247.
56 Australia's first written submission, paras. 249 – 250.
57 Australia's first written submission, paras. 251 – 261.
58 Australia's first written submission, paras. 258 – 261.
52. Australia has made a prima facie case that the Quebec 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.  It is not legally material 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.

iii. The Nova Scotia reduced product mark-up breaches Article III:4 of the GATT 1994

53. Australia’s primary contention is that the Nova Scotia measure is a discriminatory charge that violates Article III:2, first sentence of the GATT 1994. However, if the Panel finds the measure consistent with Article III:2 first sentence, Australia alternatively submits that the measure is inconsistent with Article III:4 of the GATT 1994.

54. Australia has established based on evidence, and Canada does not contest, that imported Australian bottled wine and domestic Nova Scotia bottled wine are like products. The reduced mark-up under the EWR Policy is a law, regulation or requirement within the scope of Article III:4. The NSLC has adopted the EWR Policy under legislative authority. The NSLC mark-ups, including under the EWR Policy, are mandatory retail mark-ups that are laid down generally and apply "across the board" to all liquor sold in the province, both domestic and imported. Wine cannot be sold in Nova Scotia without the application of the NSLC fixed retail mark-ups. As the mark-up is applied to the price of wine for internal retail sale through retail outlets, it directly "affects" the retail price of wine and consequentially the internal sale, offering for sale and the purchase of wine.

55. As Nova Scotia meets the emerging wine region criteria in the EWR Policy, all domestic wine from Nova Scotia qualifies for the reduced mark-up of 43% under the Policy. In contrast, the criterion in the EWR Policy in fact excludes virtually all Australian wine from qualifying for the reduced mark-up.

59 Australia’s first written submission, paras. 251-260.
60 Australia’s opening statement at the first meeting of the Panel, para. 80.
61 Australia's first written submission, paras. 271 – 283; Canada's first written submission, para. 146.
62 Australia's response to Panel question No. 11.
63 Australia's response to Panel question No. 11.
64 Australia’s first written submission, para. 297.
under the Policy. A reduced mark-up could allow a domestic wine to be more affordably priced than an imported wine that is subject to a higher mark-up. Basic economic principles dictate that as price has an impact on demand, domestic wine that is priced more affordably can be expected to be more competitive in the market, increase consumer demand and generate more sales of that wine.65

56. Accordingly, Australia has demonstrated that the design, structure and expected operation of the EWR Policy modifies the conditions of competition between the like products, affording less favourable treatment to imported wine in breach of Article III:4 of the GATT 1994.

iv. The Federal excise exemption breaches Article III:4 of the GATT

57. If the federal excise measure is found inconsistent with Article III:2, first sentence, the Panel has the discretion to exercise judicial economy with respect to Australia’s claim under Article III:4 since this is cast as an alternative. However, if the Panel finds the federal excise measure consistent with Article III:2, first sentence, Australia considers it should proceed to examine the Article III:4 claim.

58. Australia has established a strong prima facie case of Article III:4 inconsistency which has not been rebutted by Canada. As to the elements of the legal test for Article III:4, Canada does not contest that Australian and Canadian bulk wine are "like products", or that the measure is a law or regulation for the purpose of Article III:4. Further, Australia has established that the Federal excise exemption "affects" the purchase of Australian bulk wine inputs by conditioning the cost of use.67 The tax exemption provided by section 135(2)(a) of the Federal Excise Act is an economic incentive to produce 100% Canadian wine and therefore purchase and use Canadian bulk wine inputs. Tax exemptions and similar measures have been consistently found to create incentives and disincentives which "affect" the purchase and use of imported and domestic products.68

59. Australia has also established that the federal excise measure provides less favourable treatment to Australian bulk wine, compared to Canadian bulk wine, by modifying the conditions of competition to the detriment of the former.69 By taxing the use of Australian bulk wine while exempting the exclusive use of Canadian bulk wine, the federal excise exemption decreases the relative cost of using Canadian bulk wine inputs. This enhances its cost competitiveness. By indexing excise to the CPI, escalating incentives to use Canadian wine will operate as a long run stimulus on demand. Australia does not need

65 Ibid. para. 306.
66 Canada's first written submission, para. 146.
67 Australia's first written submission, paras. 153 – 156.
68 Australia's first written submission, para. 155.
69 Australia’s first written submission, paras. 157-165.
to show actual modification to the conditions of competition to meet the correct legal standard for Article III:4, as confirmed by prior panel and Appellate Body reports. 70

V. CANADA’S ARGUMENTS WITH RESPECT TO ARTICLE XVII OF THE GATT 1994 ARE INCORRECT

60. Australia has raised its claims with respect to the Nova Scotia measure under Article III of the GATT 1994. This will require consideration of whether the measure falls within the scope of Article III:2 or Article III:4 of the GATT 1994.

61. The question for the Panel is not whether Article XVII applies in the present case, or whether Article III applies to STEs more broadly. The question is whether, on the particular facts in this dispute, the impugned measure falls within the scope of Article III:2 and/or III:4. 71 Australia has established that the reduced mark-up under the EWR Policy is within the scope of those articles.

62. Australia is not challenging Canada’s right to establish the NSLC as an import monopoly nor the NSLC’s purchases or sales transactions of imported wine. What Australia is challenging is the reduced mark-up under the EWR Policy, adopted under the NSLC’s legislative authority to set liquor prices, including retail mark-ups, in the province. The NSLC is established under the Nova Scotia Liquor Control Act. It derives its legislative mandate and powers from that Act. This includes the express authority to set liquor pricing in the province of Nova Scotia.

63. The nature and characteristics of the NSLC demonstrate that it does not operate at arm's length from the Nova Scotia government. 72 The NSLC plainly does not operate like a private business in the retail sector, and the retail mark-ups set by the NSLC are very different to mark-ups set by private businesses. 73 These facts cannot be ignored and are relevant to the assessment of Article III of the GATT 1994 to the NSLC's conduct.

VI. MEASURES AT ISSUE ARE NOT JUSTIFIED UNDER ARTICLE XXIV OF THE GATT 1994

64. Canada’s defence under Article XXIV of the GATT 1994 must fail. Australia has established that Canada’s argument with respect to the Comprehensive and Progressive Trans-Pacific Partnership

70 Canada’s first written submission, paras. 325-327.
71 Australia’s opening statement at the first meeting of the Panel, para. 86.
72 Australia’s responses to Panel questions Nos. 1 and 11.
73 Australia’s responses to Panel questions Nos. 1 and 11.
Agreement (CPTPP) is fatally flawed, considering the Annex Canada relies on expressly states that "nothing in this Annex shall affect the rights or obligations of any Party under the WTO Agreement with respect to any measure listed in this Annex."\(^{74}\) This statement makes clear that the CPTPP Parties did not seek to shield measures listed in the Annex from challenge in the WTO. In other words, Canada’s arguments with respect to Article XXIV of the GATT 1994 fail on the basis of the text of the CPTPP itself. Moreover, in considering Canada’s assertions, Australia submits that the Panel should take heed of prior Appellate Body reports properly cautioning against using Article XXIV as a broad defence for measures that roll back on Members’ WTO rights and obligations.\(^ {75}\)

VII. CONCLUSION

65. For the foregoing reasons, Australia submits that Canada is in breach of its obligations under Articles III:2, first sentence and III:4 of the GATT 1994, and respectfully requests that the Panel find accordingly.

---


\(^{75}\) Australia’s opening statement at the first meeting of the Panel, para. 103, citing (fn. 84) Appellate Body Report, *Peru – Agricultural Products*, para. 5.116. See also Australia’s comments on Panel question No. 25 to Canada.