Before the World Trade Organization
Panel Proceedings

Canada – Measures Governing the Sale of Wine

(DS537)

Second Written Submission of Australia

[[Business Confidential Information redacted on pages 50, 51, 52, 53, 85, 91, 92]]

30 September 2019
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>2</td>
</tr>
<tr>
<td>LIST OF EXHIBITS</td>
<td>7</td>
</tr>
<tr>
<td>TABLE OF CASES</td>
<td>8</td>
</tr>
<tr>
<td>GLOSSARY OF ABBREVIATIONS AND ACRONYMS</td>
<td>12</td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>13</td>
</tr>
<tr>
<td>II. THE APPLICABLE LAW</td>
<td>15</td>
</tr>
<tr>
<td>A. Article III: the legal foundation of Australia’s claims</td>
<td>15</td>
</tr>
<tr>
<td>1. Article III - Equality of competitive conditions, not trade effects</td>
<td>15</td>
</tr>
<tr>
<td>2. Article III:1 – General principle</td>
<td>16</td>
</tr>
<tr>
<td>3. Article III:2, first sentence – The elements of the legal test</td>
<td>16</td>
</tr>
<tr>
<td>(a) Is the measure an internal tax or charge?</td>
<td>17</td>
</tr>
<tr>
<td>(b) Are the imported and domestic products &quot;like products&quot;?</td>
<td>18</td>
</tr>
<tr>
<td>(c) Are the imported products taxed or subjected to a charge &quot;in excess&quot; of the like domestic products?</td>
<td>18</td>
</tr>
<tr>
<td>4. Article III:4 - The elements of the legal test</td>
<td>22</td>
</tr>
<tr>
<td>(a) Are the imported and domestic products &quot;like products&quot;?</td>
<td>22</td>
</tr>
<tr>
<td>(b) Is the measure a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the products at issue?</td>
<td>23</td>
</tr>
<tr>
<td>(c) Is the treatment accorded to imported products &quot;less favourable&quot; than that accorded to the like domestic products?</td>
<td>23</td>
</tr>
<tr>
<td>i. Evidence of the actual effects of the measure in the market are not required to establish a <em>prima facie</em> case of less favourable treatment</td>
<td>24</td>
</tr>
<tr>
<td>ii. Approach to assessing less favourable treatment – modification of the conditions of competition in the relevant market</td>
<td>26</td>
</tr>
<tr>
<td>5. Article III:2 and Article III:4 – Measures may fall within the scope of both provisions</td>
<td>30</td>
</tr>
<tr>
<td>III. APPLYING THE LAW TO THE MEASURES AT ISSUE</td>
<td>34</td>
</tr>
<tr>
<td>A. Federal excise duty exemption</td>
<td>34</td>
</tr>
<tr>
<td>1. Australia has established that the Federal excise duty exemption breaches Article III:2, first sentence of the GATT 1994</td>
<td>34</td>
</tr>
<tr>
<td>(a) The Federal excise duty is an internal tax</td>
<td>35</td>
</tr>
<tr>
<td>(b) Australian bulk wine and Canadian bulk wine are &quot;like products&quot;</td>
<td>35</td>
</tr>
</tbody>
</table>
(c) Australian bulk wine is taxed "in excess" of Canadian bulk wine used in a 100% Canadian packaged product .................................................................................. 36

i. Evidence of the actual effects of the measure in the market are not required to establish imported products are taxed "in excess"........................................................................ 36

(d) Conclusion............................................................................................................... 38

2. In the alternative, Australia has established that the Federal excise duty exemption breaches Article III:4 of the GATT 1994 ............................................................................................................. 39

(a) Australian bulk wine and Canadian bulk wine are "like products" ......................... 39

(b) The Federal excise duty and excise exemption is a law or regulation which "affects" the use of Australian bulk wine ........................................................................ 39

i. The Federal excise duty and excise exemption is an internal law ........................... 39

ii. The Federal excise duty and excise exemption "affects" the use of Australian bulk wine ......................................................................................................................... 39

iii. Evidence of the actual effects of the measure in the market are not required to establish a law or regulation "affects" use ....................................................................... 41

(c) The Federal excise duty exemption accords "less favourable" treatment to Australian bulk wine than the treatment accorded to Canadian bulk wine used in a 100% Canadian packaged product .................................................................................. 41

(d) Conclusion............................................................................................................... 43

B. Ontario wine basic tax ..................................................................................................... 43

1. Australia has established that the Ontario wine basic tax breaches Article III:2, first sentence of the GATT 1994................................................................................................. 43

(a) The Ontario wine basic tax is an internal tax .......................................................... 45

(b) Australian bulk wine and Ontario bulk wine are "like products" ......................... 45

(c) Wine containing a non-Ontario bulk wine input, including Australian bulk wine, is taxed "in excess" of wine with a 100% Ontario bulk wine input .................................... 46

i. Evidence of the actual effects of the measure in the market are not required to establish imported products are taxed "in excess"........................................................... 46

(d) Conclusion............................................................................................................... 47

C. Ontario grocery measures ................................................................................................ 47

1. Australia has established that the Ontario grocery measures breach Article III:4 of the GATT 1994 ................................................................................................. 47

(a) Australian bottled wine and domestic Ontario bottled wine are "like products" .... 48

(b) The Ontario grocery measures is a law, regulation or requirement within the scope of Article III:4 of the GATT 1994 ............................................................................... 48

(c) The Ontario grocery measures accords "less favourable" treatment to Australian bottled wine than the treatment accorded to like domestic bottled wine ....... 48
i. Scope of like product comparators for no less favourable treatment assessment ...

ii. Australia has established that the Ontario grocery measures modify the conditions of competition for Australian bottled wine. 

iii. Canada's alleged policy rationale of the measures is not legally relevant to the assessment of less favourable treatment under the measures at issue. 

iv. The continuing access that Australian wines have to the LCBO retail channel is not relevant to the assessment of less favourable treatment under the measures at issue. 

v. Canada's argument that provided the measures afford equal treatment "overall" there is no violation of Article III:4 is flawed. 

vi. Wine boutiques. 

vii. There is evidence to demonstrate that the measures are actually altering the conditions of competition to the detriment of Australian wine. 

(d) Conclusion. 

D. Quebec grocery measures. 

1. Australia has established that the Quebec grocery measures breach Article III:4 of the GATT 1994. 

(a) Australia bottled wine and domestic Quebec bottled wine are "like products". 

(b) The Quebec grocery measures is a law, regulation or requirement within the scope of Article III:4 of the GATT 1994. 

(c) The Quebec grocery measures accord "less favourable" treatment to Australian bottled wine than the treatment accorded to like domestic bottled wine. 

i. Scope of like product comparators for no less favourable treatment assessment . 

ii. None of Canada's arguments rebut the conclusion that the Quebec grocery measures modify the conditions of competition to the detriment of like Australian wine. 

iii. Even if the scope of like products includes imported bulk wine, this does not affect the conclusion that the measures modify the conditions of competition to the detriment of like Australian wine. 

iv. Canada's argument that Australia has not made out a prima facie case for less favourable treatment should be rejected because Canada relies on an incorrect legal standard. 

v. Canada's alternative argument that the extent or degree of detrimental impact is de minimis should be rejected because Article III:4 is not subject to a de minimis standard. 

(d) Conclusion. 

E. Nova Scotia reduced mark-up for local producers. 

Canada – Measures Governing the Sale of Wine  
Australia’s Second Written Submission  
(DS537)  
30 September 2019

[[Business Confidential Information redacted on pages 50, 51, 52, 53, 85, 91, 92]]

(a) The nature and characteristics of the NSLC ............................................................ 70

(b) Retail mark-ups are set by the NSLC under legislative authority and are not merely a commercial activity .......................................................... 73

(c) The international law rules on state attribution, reflected in the ILC Articles, confirm that the NSLC mark-ups is conduct attributable to the Nova Scotia Government for which Canada is responsible under International Law ......................... 77

2. Australia has established that the Nova Scotia reduced mark-up for local producers breaches Article III:2, first sentence of the GATT 1994................................................................. 79

(a) Nova Scotia reduced mark-up for local producers is an internal tax or other charge.................................................................................................................. 79

(b) Australian bottled wine and domestic Nova Scotian bottled wine are "like products" .................................................................................................................. 82

(c) Australian bottled wine is taxed or charged "in excess" of like domestic bottled wine ................................................................................................. 82

i. Australia has established that Australian bottled wine is subject to a charge "in excess" of that on like domestic bottled wine ...................................................... 82

ii. Evidence of the actual effects of the measure in the market are not required to establish imported products are taxed or charged "in excess"............................... 84

(d) Conclusion ............................................................................................................... 85

3. In the alternative, Australia has established that the Nova Scotia reduced mark-up for local producers breaches Article III:4 of the GATT 1994................................. 86

(a) Australian bottled wine and domestic Nova Scotian bottled wine are "like products" .............................................................................................................. 86

(b) The Nova Scotia reduced mark-up for local producers is a law, regulation or requirement within the scope of Article III:4 of the GATT 1994 ................................. 86

(c) The Nova Scotia reduced mark-up for local producers accords "less favourable" treatment to Australian bottled wine than the treatment accorded to like domestic bottled wine .......................................................... 87

i. Like product comparators for less favourable treatment assessment ...................... 87

ii. Australia has established that the reduced mark-up under the EWR Policy modifies the conditions of competition to the detriment of Australian wine .......... 88

iii. The design, structure and expected operation of the EWR Policy supports a finding of less favourable treatment ......................................................... 90

iv. Evidence of the actual effects of the measure confirms that the measure has modified the conditions of competition to the detriment of Australian wine .......... 93

4. Canada’s arguments with respect to Article XVII are incorrect ................................ 94

(a) Relationship between Article III and Article XVII ................................................... 94
(b) The reduced mark-up under the EWR Policy is not within the scope of Article XVII:1 .................................................................................................................. 95

IV. MEASURES AT ISSUE CANNOT BE JUSTIFIED UNDER ARTICLE XXIV OF THE GATT 1994 ......................................................................................................................... 98

A. Canada fails to establish a defence under Article XXIV .................................................. 98

1. Canada uses the Comprehensive and Progressive Agreement for Trans-Pacific Partnership to invoke Article XXIV .................................................................................................................. 99

2. The Appellate Body's analysis of Article XXIV in Turkey - Textiles ......................... 100

3. Canada fails to distinguish Turkey - Textiles ........................................................................ 102

   (a) Canada's arguments on the "timeliness" criterion lack merit ..................................... 103

   (b) Canada's arguments on the "necessity" criterion lack merit ..................................... 104

4. Conclusion ..................................................................................................................... 106

V. CONCLUSION .................................................................................................................. 107
List of Exhibits

<table>
<thead>
<tr>
<th>Exhibit No.</th>
<th>Exhibit Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>AUS-108</td>
<td>Extract from Carolyn O'Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018</td>
</tr>
</tbody>
</table>
## 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>
**Short Title** | **Full Case Title and Citation**
--- | ---
<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
</table>
### Glossary of Abbreviations and Acronyms

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACGRPPA</td>
<td>Alcohol, Cannabis and Gaming Protection Act</td>
</tr>
<tr>
<td>CPTPP</td>
<td>Comprehensive and Progressive Trans-Pacific Partnership</td>
</tr>
<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
</tr>
<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
</tr>
<tr>
<td>EWR Policy</td>
<td>Emerging Wine Regions Policy</td>
</tr>
<tr>
<td>FEA</td>
<td>Federal Excise Act 2001</td>
</tr>
<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
</tr>
<tr>
<td>GATT 1994</td>
<td>The General Agreement on Tariffs and Trade, 1994</td>
</tr>
<tr>
<td>ICB</td>
<td>International Canadian Blend</td>
</tr>
<tr>
<td>ILC Articles</td>
<td>International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts</td>
</tr>
<tr>
<td>LCBO</td>
<td>Liquor Control Board of Ontario</td>
</tr>
<tr>
<td>NSLC</td>
<td>Nova Scotia Liquor Corporation</td>
</tr>
<tr>
<td>NSLCA</td>
<td>Nova Scotia Liquor Control Act</td>
</tr>
<tr>
<td>PAC</td>
<td>Premier’s Advisory Council on Government Assets (Ontario)</td>
</tr>
<tr>
<td>SAQ</td>
<td>Société de alcools du Québec</td>
</tr>
<tr>
<td>SCM Agreement</td>
<td>Subsidies and Countervailing Measures Agreement</td>
</tr>
<tr>
<td>STE</td>
<td>State Trading Enterprise</td>
</tr>
<tr>
<td>VQA wine</td>
<td>Vintners Quality Assurance Wine (Ontario)</td>
</tr>
<tr>
<td>WRS</td>
<td>Winery Retail Store (Ontario)</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>Marrakesh Agreement Establishing the World Trade Organization</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

1. This submission presents Australia’s rebuttal to the arguments advanced by Canada in its first written submission, at the first substantive meeting with the Parties, and in its answers to the Panel’s written questions after the first substantive meeting. It builds on Australia's earlier submissions, including the rebuttal of Canada's arguments contained in those submissions.

2. For the reasons set out in this submission, the Panel should find that Australia has established that Canada has violated the relevant provisions of the GATT 1994 in relation to each of the Federal and provincial measures at issue in this dispute. Moreover, for the reasons Australia sets out below, the Panel should also find that Canada has failed to provide any legal or factual basis to rebut Australia’s prima facie case in respect of any of the claims advanced.

3. The applicable law in this dispute traverses Article III of the GATT 1994, which elaborates on the fundamental principle of national treatment. The legal tests are well-established and their application to the measures at issue within the factual matrix of this case is straightforward.

4. Canada has responded with misinterpretations of the relevant provisions, novel legal tests that have no basis in the text of Article III, and invitations to the Panel to depart from interpretations developed by a lengthy line of panel and the Appellate Body reports, without justification. Canada does so in a flawed and unsuccessful attempt to evade its obligations under Article III of the GATT 1994.

5. Canada seeks to distract the Panel from the uncontested evidence that demonstrates the protectionist "design, structure and expected operation" of the measures at issue by presenting irrelevant material without clearly explaining its relevance to the legal tests. Canada’s strategy seeks to minimise the discriminatory competitive advantages that the measures at issue grant to domestic wine. However, its approach does nothing to rebut the clear facts of this case, as set out by Australia in its submissions.

6. Australia summarises below the reasons why the Panel should reject Canada’s erroneous legal and factual arguments.
7. First, Canada’s claims rely on an erroneous interpretation of Article III:2, first sentence and Article III:4. In Part II, Australia will identify the correct legal standards under Article III:2, first sentence, and Article III:4, which have been consistently applied by multiple panels and the Appellate Body in factual circumstances similar to those at issue in this dispute. Australia will explain that contrary to Canada’s contention:

- neither provision requires a complainant to demonstrate actual trade and/or economic impacts of a measure in order to establish a prima facie case of a breach;

- neither Article III:2, first sentence (in the context of the "in excess" element), nor Article III:4 (in the context of the "less favourable treatment" element) are subject to a de minimis standard;

- Article III:4 does not permit Canada to "offset" more favourable treatment of a sub-set of like domestic products (i.e. from a specific province) with less favourable treatment of other like domestic products (i.e. from outside of that province). Similarly, an examination of "less favourable treatment" does not rely on an "equal treatment overall" standard; and

- Article III:4 does not permit Canada to balance less favourable treatment arising under a measure against other pre-existing competitive opportunities in a market. In other words, the continued access that an imported product has to a pre-existing sales channel cannot "offset" the detrimental impact on competitive opportunities for imported products as a result of the measure at issue.

8. If the Panel rejects Canada’s erroneous interpretations and applies the correct legal standard to the largely uncontested facts at issue, it will reach the inevitable conclusion that Canada’s measures at issue breach its obligations under Article III. Australia sets this out in detail in Part III.

9. Finally, Australia explains why the Panel should dismiss Canada’s attempts to improperly apply Articles XVII and XXIV of GATT 1994 to evade its obligations under Article III. Specifically:
Australia explains in Part III.E.4 that contrary to Canada’s claims, Article XVII of the GATT 1994 does not exclude the application of Article III to the actions of a state trading enterprise. In every case, whether Article III is applicable to the measure at issue must be assessed by reference to all of the relevant factors, including the particular challenged action and the particular characteristics of the entity in question; and

• Australia explains in Part IV of its submission, that Canada’s attempt to invoke Article XXIV of GATT 1994 is misguided and meritless. Canada’s assertions are inconsistent with the text and object and purpose of Article XXIV and ignore the clear intention of the Parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) regarding the ongoing application of their rights and obligations under the WTO Agreement.

10. These and other errors of law that Australia will discuss in its submission should lead the Panel to reject Canada’s attempted rebuttal of Australia’s claims and to confirm that Australia has demonstrated that the measures at issue are in breach of Canada’s national treatment obligations under Article III of the GATT 1994.

II. THE APPLICABLE LAW

A. ARTICLE III: THE LEGAL FOUNDATION OF AUSTRALIA’S CLAIMS

1. Article III - Equality of competitive conditions, not trade effects

11. Article III of the GATT 1994 gives effect to the fundamental principle of "national treatment" in relation to internal taxes and regulatory measures. It prohibits the use of taxes and regulation by WTO Members to discriminate against imported products and protect domestic production. As stated by Australia, the Appellate Body has confirmed the purpose of Article III is to "avoid protectionism" in the use of internal taxes and regulatory measures and, to that end, it requires WTO Members to provide "equality of competitive conditions" between imported and domestic products.¹

¹ Appellate Body Report, Japan – Alcoholic Beverages II, p. 16. (footnote omitted); Australia's first written submission, paras. 112-113.
12. The Appellate Body emphasised in *Japan – Alcoholic Beverages II* that "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products".\(^2\) It reiterated this point in *Korea – Alcoholic Beverages*, stating "Article III is not concerned with trade volumes [and] [i]t is, therefore, not incumbent on a complaining party to prove that tax measures are capable of producing any particular trade effect".\(^3\)

2. **Article III:1 – General principle**

13. The purpose of Article III identified by the Appellate Body is given expression in Article III:1.\(^4\) The Appellate Body in *Japan – Alcoholic Beverages II* stated Article III:1 "articulates a general principle that internal measures should not be applied so as to afford protection to domestic production".\(^5\) This general principle serves "as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III".\(^6\)

3. **Article III:2, first sentence – The elements of the legal test**

14. Article III:2, first sentence of the GATT 1994 prohibits imported products being taxed, or subjected to an internal charge, in excess of like domestic products. It provides that:

   [t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or any other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

15. In *Japan – Alcoholic Beverages II*, the Appellate Body stated "Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III".\(^7\) Unlike the second sentence of Article III:2, the first sentence does not refer to Article III:1. The Appellate Body observed that this does not mean the general principle is inapplicable to Article III:2, first sentence.

\(^2\) Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16 (footnote omitted); Australia's first written submission, para. 112.

\(^3\) Appellate Body Report, *Korea – Alcoholic Beverages*, para. 153. (footnote omitted)

\(^4\) Australia's first written submission, para. 111.


\(^7\) Ibid.
but that the first sentence is a specific application of the general principle.\textsuperscript{8} In other words, if the elements of Article III:2, first sentence are made out in relation to a measure, then "necessarily\textsuperscript{9}" that measure has been applied "so as to afford protection to domestic production".\textsuperscript{10}

16. In its first written submission, Australia contended that the legal test for a breach of Article III:2, first sentence consists of the following three elements: (i) is the measure at issue an internal tax or other internal charge applied directly or indirectly to products; (ii) are the imported and domestic products "like" products; and (iii) are imported products taxed "in excess" of the like domestic products?\textsuperscript{11} Australia cited examples of Appellate Body and panel reports which had addressed this test.\textsuperscript{12}

\textbf{(a) Is the measure an internal tax or charge?}

17. Australia has explained, for a measure at issue to qualify as an "internal tax" or "charge", the obligation to pay the tax or charge must be linked to an "internal event", which is defined broadly as an event that occurs within a Member's territory after importation such as the use or sale of a product internally.\textsuperscript{13} There must also be a connection between the tax and the product at issue.\textsuperscript{14} On this point, Australia observed that Article III:2, first sentence not only disciplines "internal taxes" that directly affect products, but also "internal taxes" that indirectly affect products.\textsuperscript{15} Australia referred to the panel's observation in \textit{Mexico – Taxes on Soft Drinks} that "taxes directly imposed on finished products can indirectly affect the conditions of competition between imported and like domestic inputs and therefore come within the scope of Article III:2, first sentence".\textsuperscript{16} Canada accepts this interpretation of the first element.\textsuperscript{17}

\textsuperscript{8} Appellate Body Report, \textit{Japan – Alcoholic Beverages II}, p. 18; Australia's response to Panel question No. 2, para. 26.
\textsuperscript{9} New Zealand's third party submission, para. 16 (original emphasis); New Zealand's opening statement at the first meeting of the Panel, para. 10.
\textsuperscript{10} Australia's response to Panel question No. 2, para. 27.
\textsuperscript{11} Australia's first written submission, para. 121.
\textsuperscript{12} Australia's first written submission, fn. 242.
\textsuperscript{13} Australia's first written submission, paras. 123, 132 and 133.
\textsuperscript{14} Australia's first written submission, para. 124.
\textsuperscript{15} Australia's first written submission, para. 125.
\textsuperscript{16} Ibid.
\textsuperscript{17} Canada's first written submission, para. 131.
(b) Are the imported and domestic products "like products"?

18. In its first written submission, Australia recalled the Appellate Body's guidance on "likeness" under Article III:2, first sentence, as expressed in Philippines – Distilled Spirits, that it is "fundamentally, a determination about the nature and extent of a competitive relationship between and among imported and domestic products". The question of "likeness" has been assessed by panels and the Appellate Body against the following criteria as a framework to make a determination about the nature and extent of a competitive relationship between and among products on a case-by-case basis: (i) the products' properties, nature and quality (i.e. physical characteristics); (ii) the products' end uses (i.e. the extent to which products are capable of performing the same, or similar functions); (iii) consumer tastes and habits (i.e. consumers' perceptions and behaviours); and (iv) the products' tariff classification.

19. Australia also noted that in Japan – Alcoholic Beverages II, the Appellate Body had cautioned panels that the definition of "like products" should be narrowly construed in Article III:2, first sentence because of the "strict terms" of that provision.

20. Finally, Australia drew the Panel's attention to the findings of other panels that the analysis based on the criteria listed above is not required where the measure at issue discriminates between products solely on the basis of origin.

(c) Are the imported products taxed or subjected to a charge "in excess" of the like domestic products?

21. Both Canada and Australia appear to agree on the content, if not the application, of the interpretive guidance provided by the Appellate Body in Japan – Alcoholic Beverages II regarding the third element of an Article III:2, first sentence claim. As Canada stated in its first written submission:

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18 Australia's first written submission, para. 126; Appellate Body Report, Philippines – Distilled Spirits, paras. 119, 113 and 170.
20 Australia's first written submission, para. 127.
21 Australia's first written submission, para. 128.
In *Japan – Alcoholic Beverages II*, the Appellate Body expressed the view that, with respect to the first sentence of Article III:2, whenever imported products are subject to taxes in excess of those applied to like domestic products, this is deemed to "afford protection to domestic production".\(^{22}\)

22. Canada takes the contrary view to the Appellate Body (and Australia) on this point, which it rejects as a "mechanical or ipso facto" outcome\(^{23}\) that is driven by the Appellate Body's interpretation of the link between Article III:1 and Article III:2, first sentence. The Appellate Body has stated the link is based on Article III:2, first sentence being a specific "application of the general principle" expressed in Article III:1.\(^{24}\) As such, when Article III:2, first sentence is applied, the general principle in Article III:1 is being applied at the same time through Article III:2, first sentence.

23. Canada argues that, instead of a so-called "mechanical" outcome arising from the Appellate Body's interpretation, it should be a presumption that the "excess" of tax has afforded protection to domestic production, which "should at least be susceptible to rebuttal by the respondent".\(^{25}\) Canada contends that this would preserve the link between Article III:1 and Article III:2, first sentence.\(^{26}\)

24. This is the key point of contention between Australia and Canada on the interpretation of Article III:2, first sentence.

25. Canada has conceded that the Appellate Body's interpretation of Article III:2, first sentence has been "adopted in several disputes since *Japan – Alcoholic Beverages II*".\(^{27}\) Nonetheless, it invites the Panel to disregard these Appellate Body and panel reports. In doing so, Canada fails to provide a credible interpretive argument that demonstrates the Appellate Body and previous panels were in error.

26. The third parties have not supported Canada's position or found it to be credible. The United States in its third-party submission rejected Canada's flawed analysis and called on the Panel to not entertain "Canada's attempt to muddle the various provisions of Article III of the

\(^{22}\) Canada's first written submission, para. 140. (original emphasis) (footnote omitted)
\(^{23}\) Canada's first written submission, para. 140; Canada’s opening statement at first meeting of the Panel, para. 16.
\(^{25}\) Canada's first written submission, para. 142; Canada’s opening statement at first meeting of the Panel, para. 14.
\(^{26}\) Canada's first written submission, para. 143; Canada’s opening statement at first meeting of the Panel, para. 14.
\(^{27}\) Canada's first written submission, para. 141. (footnote omitted)
GATT 1994”. 28 The European Union in its third-party submission concluded that "Canada’s argument flies against well-established jurisprudence without providing any reasons showing that that jurisprudence should be changed". 29 In Argentina's oral statement at the first meeting of the Panel, it observed that "Canada's interpretation is neither consistent with a textual interpretation of the GATT 1994 nor has it been recognised by WTO jurisprudence". 30 Korea remarked in its oral statement that, "[m]indful of the jurisprudence pronounced by panels and the Appellate Body in prior disputes", it struggled "to see how the 'extent', 'degree' or 'size' of economic impact could be implicated in the discussion of a possible violation of Article III". 31

27. In its closing statement at the first meeting of the Panel, Canada sought to correct the "impression" it believed other parties were under that it was "trying to introduce a new element for a complainant to establish in making out its prima facie case with respect to Article III:2, first sentence". 32 Canada asserted it was:

merely suggesting that the interplay of Article III:2, first sentence and Article III:1 indicates that a respondent should be given an opportunity, once the complainant has made out its prima facie case that the measure at issue taxes imported products in excess, to show that the measure, in its effect, nevertheless does not afford protection to domestic production. 33

28. It is clear from Canada’s explanation of its position that it is trying to introduce a new element for a complainant to establish with respect to Article III:2, first sentence. This intent is evidenced by Canada's criticism of Australia for failing, in relation to the Federal excise duty measure, "to show how there has been any economic impact on competitive opportunities for Australian, or other imported, bulk wine". 34 Canada repeated this criticism in relation to Australia’s submission on the Ontario wine basic tax because it failed to offer "any evidence of even possible economic impact on the competitive opportunities for imported bulk wine in Ontario". 35 Canada appears to hold the view that Australia failed to satisfy a "new" element of Article III:2, first

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28 United States' third party submission, para. 10.
29 European Union's third party submission, para. 76.
30 Argentina's third party statement at the first meeting of the Panel, para. 5.
31 Korea's third party statement at the first meeting of the Panel, para. 6.
32 Canada's closing statement at the first meeting of the Panel, p. 2.
33 Canada's closing statement at the first meeting of the Panel, p. 2.
34 Canada's first written submission, para. 309.
35 Canada's first written submission, para. 335.
Canada – Measures Governing the Sale of Wine
Australia's Second Written Submission
(DS537)
30 September 2019
[[Business Confidential Information redacted on pages 50, 51, 52, 53, 85, 91, 92]]

sentence in establishing its case. Canada’s argument in this respect is entirely misguided because there is clearly no requirement for a complainant to establish such an element.

29. Rather than preserving the link between Article III:2, first sentence and Article III:1, Canada's flawed interpretation would distort that link by reading the concept of affording protection to domestic production into Article III:2, first sentence. Canada wants the Panel to read Article III:2, first sentence as follows:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or any other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products which results in protection being afforded to domestic production.

The Panel should reject Canada's invitation to do so. Australia recalls the Appellate Body’s statement in EC – Hormones that "[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used".36

30. If the Panel accepts Canada's argument, not only would the link between Article III:2, first sentence and Article III:1 be distorted, but the operation of Article III:2 itself would be upended. The "like product" analysis under Article III:2, first sentence would be affected. In this regard, Australia recalls the following statement by the Appellate Body in Japan – Alcoholic Beverages II:

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly.37

31. The reason for construing the definition of "like products" narrowly would be removed if Article III:2, first sentence is no longer interpreted as a strict obligation. The Appellate Body's "accordion of 'likeness'" would no longer "be narrowly squeezed", but "stretched".38 If it is

37 Appellate Body Report, Japan – Alcoholic Beverages II, pp. 19-20. (footnote omitted)
stretched, products that otherwise would have been within the scope of Article III:2, second sentence may instead be covered by Article III:2, first, sentence.

32. In sum, Australia has shown that Canada's arguments in relation to the third element of the legal test for a breach of Article III:2, first sentence lack merit. Accordingly, Australia submits that the Panel should apply the test as follows: (i) is the measure at issue an internal tax or other internal charge applied directly or indirectly to products; (ii) are the imported and domestic products "like" products; and (iii) recalling there is no de minimis standard, are the imported products taxed "in excess" of the like domestic products?

4. Article III:4 - The elements of the legal test

33. Article III:4 of the GATT 1994 provides inter alia:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

34. As set out in Australia's first written submission, the Appellate Body has clarified that there are three elements that must be satisfied to establish a violation of Article III:4: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue 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.39

(a) Are the imported and domestic products "like products"?

35. As Australia outlined in its first written submission, the four criteria to be applied to a case-by-case assessment of likeness under Article III:4 are the same criteria as those applied in the context of an assessment of Article III:2, which Australia has set out above at Part II.A.3(b) of this submission.40

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39 Appellate Body Reports, EC – Seal Products, para 5.99; Thailand – Cigarettes (Philippines), para. 127; and Korea – Various Measures on Beef, para. 133.
36. Canada has stated in its first written submission that it does not contest likeness for any of Australia's claims. However, as part of its "less favourable treatment" analysis in respect of Article III:4 of the GATT 1994, Canada argues that the scope of like products should expanded for some of the measures. Australia will address these arguments in the context of the "less favourable treatment" element for the relevant measures below.

(b) Is the measure a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the products at issue?

37. The Appellate Body has found that the word "affecting" in this element of Article III:4 has a "broad scope of application". It implies a measure that has "an effect on" and operates as a "link between identified types of government action ('laws, regulations and requirements') and specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')".

38. In Canada – Autos, the panel noted that the word "affecting" has been interpreted to cover "not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products". Relevantly, the Appellate Body has also found that measures that create incentives not to use imported products by definition affect their internal sale, offering for sale, purchase or use within the scope of Article III:4.

(c) Is the treatment accorded to imported products "less favourable" than that accorded to the like domestic products?

39. As set out in Australia's first written submission, this element requires an examination of whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products, that is, whether any "regulatory differences distort the conditions of trade of imported products with domestic products".41

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41 Canada's first written submission, para. 146.
43 Panel Report, India – Autos, para. 7.196.
45 Panel Report, Canada – Autos, para. 10.80.
competition to the detriment of imported products.\textsuperscript{47} A measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products.\textsuperscript{48}

40. Article III:4 prohibits both \textit{de jure} and \textit{de facto} discrimination. A measure may be \textit{de facto} inconsistent with Article III:4 even where it is, on its face, origin neutral. The fact that a measure may, on its face, apply equally to imported and domestic products does not necessarily mean that it accords equal competitive conditions to imported and domestic products.

41. A panel's task is to assess "[t]he implications of the contested measure for the equality of competitive conditions" in the relevant market\textsuperscript{49} that are discernible, first and foremost, from "the design, structure, and expected operation of the measure at issue."\textsuperscript{50} This is clearly the approach that Australia has followed in making out its \textit{prima facie} case for its Article III:4 claims.

i. Evidence of the actual effects of the measure in the market are not required to establish a \textit{prima facie} case of less favourable treatment

42. An assessment under Article III:4 does not require evidence of the actual effects of the measure in the market, as has been consistently emphasised by the Appellate Body.\textsuperscript{51} Moreover, the Appellate Body has said that "it is irrelevant that the trade effects of [a measure], as reflected in the volumes of imports, are insignificant or even non-existent".\textsuperscript{52} This is because "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."\textsuperscript{53}

43. The Appellate Body has held that "an analysis of less favourable treatment should not be anchored in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialize",\textsuperscript{54} but instead it should begin "with careful scrutiny of the measure,\

\textsuperscript{47} Appellate Body Report, \textit{Thailand – Cigarettes (Philippines)}, para. 128.
\textsuperscript{48} Appellate Body Report, \textit{Dominican Republic – Import and Sale of Cigarettes}, para. 93.
\textsuperscript{49} Appellate Body Report, \textit{Thailand – Cigarettes (Philippines)}, para. 130.
\textsuperscript{50} Appellate Body Report, \textit{Thailand – Cigarettes (Philippines)}, para. 134.
\textsuperscript{52} Appellate Body Report, \textit{Japan – Alcoholic Beverages II}, p. 16; See also Appellate Body Report, \textit{Korea – Alcoholic Beverages}, para. 119.
\textsuperscript{53} Appellate Body Report, \textit{Japan – Alcoholic Beverages II}, p. 16.
\textsuperscript{54} Appellate Body Report, \textit{Thailand – Cigarettes (Philippines)}, para. 134.
including consideration of the design, structure, and expected operation of the measure at issue.”

As the panel in US – Renewable Energy explained, "a complainant is not required to *quantify* the likelihood that a challenged measure will in fact have a detrimental impact on imported products in order to make a *prima facie* case of less favourable treatment.” Both GATT and WTO panels have explained that "a measure can be found to be inconsistent with Article III:4 because of its *potential* discriminatory impact on imported products”.

44. Australia is not arguing that evidence of the actual effects of the measure on a market cannot be taken into account by a panel in an assessment of less favourable treatment. Australia accepts that, where available, such evidence could be relevant to the assessment. However, such evidence is *not required* for a finding of less favourable treatment. Australia is thus not required to provide empirical evidence of a challenged measure's actual impact on the market, or to quantify the likelihood that the measure will in fact have a detrimental impact on imported products to make out a *prima facie* case under this element. Nor is such evidence, if provided, necessarily determinative on this point.

45. However, Canada goes beyond simply arguing that the Panel may take into account evidence of trade effects in an assessment of less favourable treatment, and argues that Australia has not made out a *prima facie* case because Australia has not provided evidence of the "actual effects" of the measure on the market. Canada thus attempts to introduce a trade effects test into the legal standard for Article III:4, but is unable to point to any interpretive basis for such an assertion in the text of Article III:4.

46. Moreover, Canada's arguments are contrary to consistent guidance from the Appellate Body. Canada attempts to rely on the Appellate Body report in Thailand – Cigarettes (Philippines) for the proposition that an assessment of less favourable treatment "may well involve — but does *not require* — an assessment of the contested measure in the light of evidence regarding the actual

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56 Panel Report, *US – Renewable Energy*, para. 7.247. (original emphasis) While this panel report is under appeal, the appeal does not relate to this finding.
58 See e.g. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.
effects of that measure in the market," but later misapplies this statement by arguing that Australia's approach "does not accord with the advice of the Appellate Body on the need for evidence of 'actual effects'." As the United States points out in its submission, the Appellate Body clearly stated that evidence of actual effects is not required. The fact that Canada's argument for trade effects relies only on a fundamental mischaracterization of Appellate Body guidance, goes to highlight the misguided nature of Canada's argument.

47. This incorrect legal test is applied throughout Canada's submission. With respect to the Quebec grocery measures, for instance, Canada takes issue with the fact that Australia has not adduced evidence of the measure's "actual effects," which according to them, does not "accord with the advice of the Appellate Body on the need for evidence of actual effects." In the context of the Ontario grocery measures, Canada argues that to make out a successful claim of violation Australia must show an "actual alteration" in the conditions of competition. This erroneous argument is repeated again for the Nova Scotia measure, where Canada asserts that Australia is required to demonstrate that the Emerging Wine Regions Policy "in its actual effect, accords less favourable treatment". Canada’s arguments are based on an incorrect characterisation of the appropriate legal standard, and should be rejected.

ii. Approach to assessing less favourable treatment – modification of the conditions of competition in the relevant market

48. As Australia has explained, in line with previous cases, the correct analysis turns on whether a measure, and any regulatory distinctions under the measure, modify the conditions of competition in the relevant market to the detriment of imported products. The legal standard is the same whether the measure discriminates de facto or de jure. The analysis should be undertaken on a case-by-case basis.

59 Canada's first written submission, para. 209; citing Appellate Body Report, Thailand – Cigarettes (Philippines), para. 134. (emphasis added)
61 United States' third party submission, para. 26.
63 Canada's first written submission, para. 180.
64 Canada's first written submission, para. 265.
Canada relies on the Appellate Body statement in *EC – Asbestos* that "[a] complaining Member must establish that the measure accords to the group of 'like' imported products less favourable treatment than it accords to the group of domestic products" to advance what Canada calls an "asymmetric impact analysis" approach to assessing less favourable treatment.\(^{65}\) Australia notes that this term does not appear in the text of the GATT 1994 or in WTO jurisprudence.

50. Canada asserts that based on the Appellate Body statement in *EC - Asbestos*, it would not be sufficient for a complainant to demonstrate that there may be some imported and some domestic like products that are not afforded equality of competitive conditions.\(^{66}\) Canada thus appears to take the view that inconsistency would only arise when treatment of all imported products is less favourable than the treatment of all domestic products. Under Canada's approach, it appears that a Member could provide "sub-groups" of domestic products with more favourable treatment without being obliged to afford that same favourable treatment to imported products.\(^{67}\) In other words, Canada's approach seems to assume that a measure could never modify the conditions of competition to the detriment of imported products if only some domestic products were afforded more favourable treatment.

51. As Australia has previously explained,\(^{68}\) while the Appellate Body in *EC - Asbestos* referred to the "group" of domestic products and "group" of imported products, the Appellate Body did not say anything about how to demarcate or how to compare those groups of products for the purposes of assessing less favourable treatment. Moreover, the Appellate Body in that case did not deal with the scenario in the present dispute, where the measures at issue are provincial measures operating in a provincial market and seeking to preference products originating from that province. Rather, the Appellate Body was simply making the point that something more was required than just drawing regulatory distinctions.\(^{69}\)

52. Ultimately, a determination of whether there is less favourable treatment requires an assessment of whether the measure modifies the conditions of competition. This depends on the

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\(^{66}\) Canada's first written submission, para. 161.

\(^{67}\) Canada's first written submission, para. 173.

\(^{68}\) Australia's responses to Panel question No. 3, para. 34.

\(^{69}\) Australia's responses to Panel question No. 3.
particular facts of the case, including the particular market conditions, the products, and the measure at issue.

53. There is no basis for Canada’s assertion that more favourable treatment granted to only a sub-group of domestic products could not modify the conditions of competition in a market to the detriment of imported products. Rather, the determination of the relevant "groups" of comparable products must be made on the basis of the facts of each case, including the design, structure and expected operation of the measure at issue. If a measure singles out a particular sub-class of domestic products for preferential treatment (e.g., provincial measures which seek to preference products of provincial origin in a provincial market), the competitive relationship it potentially affects for the purposes of Article III would be the relationship between the sub-class of domestic products and imported products. Thus, for the purpose of assessing consistency of a measure with the requirements in Article III:4, it is appropriate to use the treatment given to this most-favoured domestic product sub-class as the relevant comparator, because it is the competitiveness of this "group" of domestic products that the contested measure, by its design, structure and expected operation, seeks to favour.

54. Previous Appellate Body and panel findings indicate that it is not necessary for all imports to receive less favourable treatment in order for the "less favourable treatment" element of Article III:4 to be satisfied. Similarly, it is not necessary that all like domestic products must receive the more favourable treatment. In particular, prior reports have found that: a measure does not have to give rise to less favourable treatment to imported products in each and every case to be found to be less favourable; the possible absence of less favourable treatment in some cases does not detract from the fact that there might be less favourable treatment in other instances; and, a Member is not permitted to balance the more favourable treatment of like imported products in some cases against the less favourable treatment of imported products in other cases.

70 Appellate Body Report, US – FSC (Article 21.5 – EC), paras. 220-221; see also Panel Reports, EU – Energy Package, para. 7.1316, Canada – Autos, para. 10.87; and India - Solar Cells, para. 7.95.
55. In US – Gasoline, the panel rejected the arguments that the measure at issue was not inconsistent with Article III:4 because it treated imported and domestic products "equally overall". The panel in that case said that:

the argument that on average the treatment provided was equivalent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others.

The panel recalled that the panel in US – Section 337 Tariff Act had already found that:

the "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.

56. Similarly, the panel in India – Solar Cells observed the rejection by previous panels of arguments that less favourable treatment in some cases could be offset against more favourable treatment of imports in other cases. The panel in that dispute rejected arguments that the continued market access for some imports could offset the detrimental impact on competitive opportunities for other imports on the same basis.

57. Taking an analogous approach in the current matter, Australia submits that Article III does not permit a Member to "offset" more favourable treatment of a sub-set of like domestic products (e.g., from a specific province) with less favourable treatment of other like domestic products. Under Canada's approach, even where a provincial measure grants more favourable treatment to a sub-category of products (e.g. wine from Nova Scotia), the respondent can evade
the obligation under Article III by simply pointing to the fact that out-of-province wine is treated the same as imported wine (i.e. "less favourably" than other domestic like products). If this were accepted, a complainant would never be able to establish _de facto_ discrimination with respect to products at regional level, as the respondent could always defend itself on the basis that products from other regions were treated in the same, less favourable, way as imported products.

58. Canada's arguments would deprive the concept of _de facto_ discrimination of much utility and lead to great uncertainty regarding how less favourable treatment should be assessed when faced with measures that seek to preference sub-categories of domestic products. As New Zealand points out, Canada's proposed approach would "lead to the absurd conclusion where by the scope of protection afforded to imports under Article III would expand or shrink depending on whether the discrimination imposed is given effect to in a _de facto_ or _de jure_ manner."77

5. **Article III:2 and Article III:4 – Measures may fall within the scope of both provisions**

59. Australia has made claims under Article III:2, first sentence in relation to the Federal excise duty exemption and the Nova Scotia product mark-ups as fiscal measures. If the Panel does not uphold these primary claims, Australia has claimed in the alternative that the two measures separately breach Article III:4. Australia has argued that, while the structure of Article III "generally indicates that fiscal measures should be examined under Article III:2 and non-fiscal regulations under Article III:4, in practice, the measures which fall within the scope of each paragraph overlap."78

60. Canada took issue, in its first written submission, with Australia's characterisation of the relationship between Article III:2, first sentence and Article III:4.79 Canada argued that Australia's characterization "disregards the structure and logic of Article III and reflects a misunderstanding of the jurisprudence that has addressed this question".80 Canada asserted that the panel and

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77 New Zealand responses to Panel questions, para. 6.
78 Australia's first written submission, para. 115.
79 Canada's first written submission, paras. 110-124.
80 Canada's first written submission, para. 110.
Appellate Body reports relied upon by Australia "do not stand for the proposition" advanced by Australia.\textsuperscript{81} Canada is wrong.

61. Canada observed in relation to \textit{Thailand – Cigarettes (Philippines)} that the Appellate Body "made no findings on the simultaneous application of Articles III:2 and III:4 to the same measure".\textsuperscript{82} That is correct. However, the Appellate Body did acknowledge the possibility of the same measure being subject to both Article III:2 and Article III:4 in the following footnote:

\begin{quote}
We note that even if a measure at issue consisted solely of administrative requirements, we do not exclude the possibility that such requirements may have a bearing on the respective tax burdens on imported and like domestic products, and may therefore be subject to Article III:2. Although Thailand may be correct in stating that prior WTO reports have examined measures consisting of "administrative requirements relating to the sale of imported products" under Article III:4 … this does not in our view demonstrate that, if such requirements subject imported and like domestic products to internal taxes or other internal charges, the same measures, or certain aspects of the same measures, could not also be scrutinized under Article III:2.\textsuperscript{83}
\end{quote}

62. Although this observation by the Appellate Body deals with measures being considered first under Article III:4 and then under Article III:2, Australia submits there is nothing in the text of the two provisions that prevents a measure being considered first under Article III:2 and then under Article III:4. This view accords with the observation by the United States in its third-party submission that "[n]othing in the terms of the first sentence of Article III:2 of the GATT 1994 or Article III:4 of the GATT 1994 expressly provides that a particular measure – or a particular aspect of a particular measure – cannot be subject to the requirements of both provisions simultaneously".\textsuperscript{84}

63. Turning to \textit{Mexico – Taxes on Soft Drinks}, Canada stated that "the panel did not proceed from a belief that Articles III:2 and III:4 applied concurrently/simultaneously, but because it was concerned with providing the Appellate Body with an adequate basis to complete the analysis in case the Appellate Body disagreed with the panel".\textsuperscript{85} Irrespective of what the panel’s starting point

\begin{footnotes}
\item[81] Canada's first written submission, para. 115.
\item[82] Canada's first written submission, para. 118.
\item[83] Appellate Body Report, \textit{Thailand – Cigarettes (Philippines)}, fn. 144. (emphasis added)
\item[84] United States’ third party submission, para. 35.
\item[85] Canada's first written submission, para. 116.
\end{footnotes}
was, it does not provide a basis for disregarding the panel’s findings as Canada appears to suggest. In its thorough analysis, the panel found that the United States had demonstrated that the measures in question (taxes) breached both Article III:2, first sentence and Article III:4.\(^{86}\)

64. Canada asserted that "[t]here is also case law that directly contradicts Australia's argument"\(^{87}\) and referred to the following statement from the Appellate Body in *EC – Asbestos*:

[W]e recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the "general principle" in Article III:1.\(^{88}\)

65. Canada sought to downplay the Appellate Body's comment that "there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4" (which supports Australia's position) by stating that "it nevertheless recognized the clear demarcation in the subject-matter scope of Articles III:2 and III:4".\(^{89}\) In the extract provided by Canada, the Appellate Body was concerned principally about the consequences of "a significant difference in the product scope" between Article III:2 and Article III:4.

66. Canada failed to provide the following text from the relevant paragraph. The Appellate Body went on to "conclude that the product scope of Article III:4, although broader than the first sentence of Article III:2, is certainly not broader than the combined product scope of the two sentences of Article III:2 of the GATT 1994".\(^{90}\) It determined, therefore, that there was no "significant difference in the product scope" between the two provisions. The concern the Appellate Body expressed in the extract cited by Canada was clearly addressed later in the same paragraph.

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\(^{86}\) Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.59 (findings on Article III:2, first sentence) and para. 8.123 (findings on Article III:4).

\(^{87}\) Canada's first written submission, para. 121.

\(^{88}\) Appellate Body Report, *EC – Asbestos*, para. 99. (emphasis added); Canada's first written submission, para. 121.

\(^{89}\) Canada's first written submission, para. 122.

\(^{90}\) Appellate Body Report, *EC – Asbestos*, para. 99. (original emphasis)
Accordingly, there is no credibility to Canada's observation that "[i]f … the subject matter scopes of the two provisions overlapped in the manner suggested by Australia, the Appellate Body's concern would be misplaced because fiscal measures would be challengeable under either provision". The observation itself is misplaced because it does not take into account the Appellate Body's conclusion that there is no significant difference between the product scope of Article III:2 and Article III:4.

In light of this analysis, Australia contends that there is nothing in the extract from EC – Asbestos cited by Canada, which "directly contradicts Australia's argument".

Australia reiterates, there is nothing in the text of either Article III:2, first sentence or Article III:4 that prevents a measure falling within the scope of both provisions. One measure could be considered first under Article III:4 and then under Article III:2, first sentence and this order could be reversed for another measure. There is work to do for both provisions no matter the order in which they are applied.

In sum, Australia submits that Canada has failed to establish that the text of either Article III:2, first sentence or Article III:4 prevents Australia making claims in the alternative relating to the Federal excise duty exemption and the Nova Scotia product mark-ups.

To conclude, Australia recalls that, in both its first written submission and opening statement at the first meeting of the Panel, it highlighted that the Panel may exercise judicial economy on the Article III:4 claims if it finds the Federal excise duty exemption and the Nova Scotia product mark-ups breach Article III:2, first sentence. The Panel would then not have to resolve the issue as to whether the same measure can fall within the scope of both Article III:2, first sentence and Article III:4.

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91 Canada's first written submission, para. 122.
92 Australia's first written submission, para. 116; Australia’s opening statement at the first meeting of the Panel, para. 58.
III. APPLYING THE LAW TO THE MEASURES AT ISSUE

A. FEDERAL EXCISE DUTY EXEMPTION

1. Australia has established that the Federal excise duty exemption breaches Article III:2, first sentence of the GATT 1994

72. The measure at issue under this claim is the Federal excise duty exemption for 100% Canadian packaged wine, which is provided for under the Federal Excise Act 2001 (FEA). Australia dealt at length with the operation of the measure in its first written submission, the key points of which are recapped below.

73. Wine "packaged" in Canada, including blended wine for beverage consumption, is levied under s. 135(1) of the FEA. As bulk wine, including imported bulk wine, destined for retail sale must be packaged for sale in the Canadian market, it effectively attracts duty under s. 135(1) at the point of packaging. Applicable rates of duty are set out in Schedule 6 of the FEA. Since 2017, these rates have been indexed to the Consumer Price Index and increased annually. As at May 2019, wine containing more than 7% per litre absolute alcohol was levied at C$0.653/litre.

74. Under s. 135(2)(a) of the FEA, packaged wine "produced in Canada and composed wholly of agricultural or plant product grown in Canada" is exempt from duty. For blended wines, the final packaged product must be made wholly from Canadian product to qualify for the exemption. Blended wines containing Australian bulk wine, or any packaged wine containing inputs of non-Canadian origin, are subject to duty under s. 135(1) at the point of packaging in Canada.

75. Canada has not challenged Australia's analysis of the measure at issue.

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93 Australia's first written submission, paras. 42-48.
94 FEA, Exhibit AUS-34, s. 2.
97 See Canada's first written submission, paras. 92-95.
Canada – Measures Governing the Sale of Wine
Australia's Second Written Submission
30 September 2019
[[Business Confidential Information redacted on pages 50, 51, 52, 53, 85, 91, 92]]

(a) The Federal excise duty is an internal tax

76. Canada does not contest that the FEA excise duty is an "internal tax" or "charge" within the scope of Article III:2, first sentence, that is applied to wine packaged in Canada.\(^98\)

77. Australia has established the obligation to pay the duty is linked to an internal event: the packaging of wine in Canada.\(^99\) The trigger for the duty being levied is the presence of imported bulk wine in the packaged wine. The duty is levied directly on the packaged wine, not on the inputs. In this regard, Australia refers again to the panel's observation in *Mexico – Taxes on Soft Drinks* that "taxes directly imposed on finished products can indirectly affect the conditions of competition between imported and like domestic inputs and therefore come within the scope of Article III:2, first sentence".\(^100\) This observation supports Australia's contention that imported bulk wine, including Australian wine, is indirectly subject to the duty. Canadian bulk wine that is blended with imported bulk wine in packaged wine is also indirectly subject to the duty. However, when Canadian bulk wine is not blended with imported bulk wine in packaged wine, it benefits from the duty exemption under s. 135(2)(a) of the FEA. There is no circumstance under which imported bulk wine, including Australian wine, can benefit from the exemption.

(b) Australian bulk wine and Canadian bulk wine are "like products"

78. Australia has demonstrated that Australian bulk wine and Canadian bulk wine are "like products" as required by Article III:2, first sentence.\(^101\) Canada does not contest this fact.\(^102\)

79. As noted above, a full likeness analysis is not necessary if the measure at issue discriminates between products solely on the basis of origin.\(^103\) In such a case, "likeness" of products subject to the measure can be presumed. Section 135 of the FEA is squarely within this category of measure as it discriminates on an origin basis in levying excise duty on packaged wine. Duty is levied on packaged wine if it contains imported bulk wine. Duty is not levied on packaged wine if it contains only Canadian bulk wine.

\(^98\) Canada's first written submission, para. 307; see also Australia's first written submission, paras. 132-140.
\(^99\) Australia's first written submission, para. 134.
\(^100\) Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.44 (footnote omitted); see Australia's first written submission, paras. 125 and 136.
\(^101\) Australia's first written submission, paras. 141-143.
\(^102\) Canada's first written submission, para. 146.
\(^103\) See para. 20 of this submission.
(c) Australian bulk wine is taxed "in excess" of Canadian bulk wine used in a 100% Canadian packaged product

80. Canada does not dispute that Australian bulk wine is indirectly subject to duty under s. 135(1) of the FEA when it is used as an input in packaged wine and that Canadian bulk wine is indirectly exempted from duty if it is not blended with imported bulk wine in packaged wine. The operation of the measure in this way satisfies the third element of the test for Article III:2, first sentence: the imported product is taxed (indirectly) in excess of the like domestic product. In Australia’s view, the Panel may finish with its consideration of this element here.

i. Evidence of the actual effects of the measure in the market are not required to establish imported products are taxed "in excess"

81. Canada attempts to leverage on what Australia has shown to be a misconceived and flawed interpretation of Article III:2, first sentence to downplay the excise duty exemption by stating that it is only available to "a very limited portion of the Canadian wine market" and "claimed for approximately 10% of the wine sold in the Canadian market". In so doing, Canada invites the Panel to dismiss Australia's "narrow approach" of comparing tax rates in favour of an "analysis [that] extends beyond mere comparison of nominal tax rates and is focused on the economic impact of a measure on competitive opportunities". As Australia sets out in Part II.A.3(c) of this submission, Canada does so through an interpretation that is not supported by the text of the Agreement, and is contrary to the consistent approach taken by prior WTO jurisprudence.

82. Canada submits that "similar to the approach taken under Article III:4, there is nothing that prevents a panel from examining the actual effects of a measure under Article III:2, and evidence of those effects, or its absence, is relevant in determining whether the measure, in fact affords protection". The Panel is not required to undertake the trade effects analysis sought by Canada. First, GATT panels and then the Appellate Body rejected the test because it has no basis in

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104 Canada's first written submission, para. 311.
105 Ibid. (footnote omitted)
106 Canada's first written submission, para. 309. (footnote omitted)
107 Canada's first written submission, para. 310. (footnote omitted)
109 Australia’s first written submission, paras. 112-113; Australia’s opening statement at the first meeting of the Panel, para. 47.
Article III.2, first sentence. The irrelevance of the trade effects test was underscored by the Appellate Body in Japan – Alcoholic Beverages II. In its report, the Appellate Body stated that "[t]he prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test'".110

83. In support of its assertion regarding trade effects, Canada calls in aid the following statement from the Appellate Body Report in Thailand – Cigarettes (Philippines):111

This analysis need not be based on empirical evidence as to the actual effects of the measure at issue in the internal market of the Member concerned. Of course, nothing precludes a panel from taking such evidence of actual effects into account.112

This statement is irrelevant to the Panel's analysis under Article III:2, first sentence. It relates to Article III:4, as Canada acknowledged.113 Canada's answer to Panel question No. 17 does attempt to offer the following justification for its application to an analysis under Article III:2, first sentence:

Canada is not arguing that the analytical framework used in Article III:4, per se, should be used to assess the consistency of a measure under Article III:2, first sentence. At the same time, Canada sees a strong conceptual link between the articulation of the legal standard for the less favourable treatment element in Article III:4 and the legal standard in Article III:2, first sentence, in part because the Appellate Body itself recognised that link. In Japan – Alcoholic Beverages II, the Appellate Body stated that "Article III obliges Members of the WTO to provide equality of competitive conditions". It also stated that "Article III […] protects the equal competitive relationship between imported and domestic products". Clearly, the Appellate Body sees Article III as a whole through the lens of competitive conditions. Canada agrees with the Appellate Body in this respect.114

84. In its answer, Canada seeks to avoid the charge that it is reading words into Article III:2, first sentence by protesting that "[it] is not arguing that the analytical framework used in Article III:4, per se, should be used to assess the consistency of a measure under Article III:2, first sentence". Canada tries a different tack by asserting that it sees "a strong conceptual link between

111 See Canada's first written submission, fn. 331.
112 Appellate Body Report, Thailand – Cigarettes (Philippines), para. 129.
113 See Canada's first written submission, fn. 331.
114 Canada's response to Panel question No. 17, para. 3. (footnotes omitted)
the articulation of the legal standard for the less favourable treatment element in Article III:4 and the legal standard in Article III:2, first sentence". Australia submits that such a "conceptual link" can exist only if Canada's misconceived and flawed interpretation of Article III:2, first sentence is accepted.

85. In light of Australia's rebuttal of Canada's arguments, Australia submits that Canada's criticism of Australia for failing "to show how there has been any economic impact on competitive opportunities for Australian, or other imported, bulk wine" is without any merit.\textsuperscript{115} Canada has stated that "Australia's failure in this regard is, in effect, asking the Panel to perform the analysis that Australia itself has failed to do".\textsuperscript{116} To be clear, Canada is asking the Panel to perform an analysis the Panel is not required to do.

86. It follows that Canada's statements, such as "there has been no discernible economic impact on competitive opportunities for imported bulk wine since the introduction of the measure in 2006"\textsuperscript{117} and that "since the measure was introduced in 2006, the volume of bulk wine imports into Canada has risen by over 40\%",\textsuperscript{118} are irrelevant to the Panel's analysis under Article III:2, first sentence. Accordingly, Australia submits that the Panel should reject Canada's request that it "determine that a violation of the first sentence of Article III:2 cannot be established in the absence of any evidence of impact on competitive opportunities for imported products".\textsuperscript{119}

(d) Conclusion

87. In sum, applying the three elements of the correct legal test and not Canada's misconceived trade effects test, Australia has established a \textit{prima facie} case of inconsistency between the measure at issue and Article III:2, first sentence, which Canada has not rebutted.

\textsuperscript{115} Canada's first written submission, para. 309.
\textsuperscript{116} Canada's first written submission, para. 315.
\textsuperscript{117} Canada's first written submission, para. 310.
\textsuperscript{118} Canada's first written submission, para. 312. (footnote omitted)
\textsuperscript{119} Canada's first written submission, para. 319. (original emphasis)
2. In the alternative, Australia has established that the Federal excise duty exemption breaches Article III:4 of the GATT 1994

88. Australia has submitted as a claim, in the alternative, that if the Panel were to find that the Federal excise exemption provided for under s. 135(2)(a) of the FEA did not breach Article III:2, first sentence, then it breached Article III:4.\textsuperscript{120}

\begin{itemize}
  \item[(a)] Australian bulk wine and Canadian bulk wine are "like products"
  \item[(b)] The Federal excise duty and excise exemption is a law or regulation which "affects" the use of Australian bulk wine
\end{itemize}

89. As identified at Part III.A.1(b) of this submission, Australia has established, and Canada has not contested, that Australian bulk wine and Canadian bulk wine are "like products" within the scope of Article III:2, first sentence.\textsuperscript{121} On the same basis, Australia has established the products are "like" for the purposes of Article III:4 of the GATT 1994.

90. Australia has shown that the second element of Article III:4 is satisfied in relation to the Federal excise duty exemption.\textsuperscript{122}

\begin{itemize}
  \item[i.] The Federal excise duty and excise exemption is an internal law
  \item[ii.] The Federal excise duty and excise exemption "affects" the use of Australian bulk wine
\end{itemize}

91. Both the imposition of the Federal excise duty and excise exemption are regulated by s. 135 of the FEA, which is a provision of a Canadian government statute and clearly qualifies as an "internal law" for the purposes of Article III:4.\textsuperscript{123} This is uncontested by Canada.

92. Canada does contest that the Federal excise duty exemption "affects" the use of imported bulk wine for the purposes of Article III:4.\textsuperscript{124} Such an assertion cannot be reconciled with the facts

\textsuperscript{120} Australia's first written submission, para. 147.
\textsuperscript{121} See Australia's first written submission, para. 150; response to Panel question No. 43, para. 81; Canada's first written submission, para. 146.
\textsuperscript{122} Australia's first written submission, paras. 151-156.
\textsuperscript{123} Australia's first written submission, para. 152.
\textsuperscript{124} Canada's first written submission, para. 322.
in this case, as applied to the correct legal standard which Australia set out in its first written submission and recapped in Part II.A.4(b) of this submission.

93. Australia notes in its first written submission, the Appellate Body stated in *US - FSC (Article 21.5 – EC)* that "the word 'affecting' operates as a link between identified types of government action (laws, regulations and requirements') and specific transactions, activities and uses relating to products in the marketplace ('internal sale, offering for sale, purchase, transportation, distribution or use')." Canada acknowledges that Australia is correct on this point.

94. The Federal excise duty exemption at issue is contingent on the exclusive use of Canadian bulk wine inputs, while no such benefit accrues if any imported bulk wine is used in a packaged product. This fact is uncontested. The exemption clearly conditions the cost of using imported bulk wine, that is, bottled wine using imported bulk wine will attract higher excise duty than bottled wine which does not use imported wine. This fact is also uncontested. The differential effect on costs becomes a factor in the use of imported bulk wine. That is, the measure creates a disincentive to use imported bulk wine over domestic bulk wine. This is what it is designed to do.

95. On this factual basis, there is a clear "link" between the excise exemption under s. 135(2)(a) of the FEA and the use of imported bulk wine, including Australian wine. In fact, as Australia identified in its first written submission, this link has been recognised by prior panels and the Appellate Body in disputes relating to similar measures to those at issue here. In those disputes, "[t]he effects of tax exemptions and similar measures on the activities regulated by Article III have … consistently [been] found to create incentives and disincentives which 'affect' the purchase and use of imported and domestic products".

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126 Canada's first written submission, para. 322.
127 Australia's first written submission, para. 154.
128 Australia's first written submission, para. 153.
iii. Evidence of the actual effects of the measure in the market are not required to establish a law or regulation "affects" use.

96. Canada's disagreement then is not founded in the relevant facts, but rather is contingent on its flawed interpretation of Article III:4 that invites the Panel to apply some form of "trade effects" test. Canada has invented this test for the second element of Article III:4 as it did with respect to Australia's claim under Article III:2, first sentence.

97. Having invented the test, Canada then accuses Australia of failing to demonstrate that the excise measure "has had any effect on the use or purchase of imported bulk wine". Canada argues that "[t]he decision to use imported bulk wine is a decision that is made independent of whether or not the finished bottle of wine is subject to the excise duty or not" and that "[t]he evidence clearly supports this finding". Canada contends that "the economic data suggests that it is clearly not the measure which affects the internal use or purchase of imported bulk wine, nor does the measure create an incentive or disincentive to use or purchase such products".

98. Once again, Canada is asking the Panel to ignore the findings of earlier Appellate Body and panel reports and to apply a test of Canada's own invention. As Australia has demonstrated, this test has no basis in the text of Article III:4, properly interpreted, and the Panel should disregard it.

(c) The Federal excise duty exemption accords "less favourable" treatment to Australian bulk wine than the treatment accorded to Canadian bulk wine used in a 100% Canadian packaged product.

99. Australia has demonstrated that the third element of Article III:4 is satisfied in relation to the Federal excise duty exemption. The measure accords "less favourable" treatment to imported bulk wine than to Canadian bulk wine which is the like domestic product.

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130 Canada's first written submission, para. 322.
131 See Part III.A.1(c)i of this submission.
132 Canada's first written submission, para. 324. (original emphasis)
133 Canada's first written submission, para. 323.
134 Ibid. (original emphasis)
135 Australia's first written submission, paras. 157-165.
100. Australia based its analysis of the excise duty exemption under this element on the text of Article III:4 of the GATT 1994 and the interpretative guidance provided by panel and Appellate Body Reports that "have consistently emphasised that the obligation to afford imported products 'treatment no less favourable' than like domestic products requires 'effective equality of opportunities' rather than securing a particular volume of trade". An analysis must establish whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products, that is, whether any "regulatory differences distort the conditions of competition to the detriment of imported products." The Appellate Body held in Thailand – Cigarettes (Philippines) that an analysis of this element should begin with careful scrutiny of the measure, including its "design, structure, and expected operation".

101. In line with this guidance from the Appellate Body, Australia examined the "design, structure, and expected operation" of the excise measure in its first written submission. As noted above, the measure discriminates on an origin basis in levying excise duty on packaged wine containing imported bulk wine. Duty is levied on packaged wine if it contains imported bulk wine and it is not levied on packaged wine if it contains only Canadian bulk wine. By taxing packaged wine when imported bulk wine is used and exempting packaged wine when only Canadian bulk wine is used, the Federal excise measure increases the relative cost of using imported bulk wine inputs. In doing so, the measure modifies the conditions of competition to the detriment of imported bulk wine. Australia has noted that where a tax measure distinguishes on the basis of origin and gives preferential tax treatment to domestic products, as the Federal excise measure does, the structure of the measure itself indicates that imported products are treated less favourably.

102. Canada asserts that Australia has not demonstrated that the conditions of competition have been modified to the detriment of imported bulk wine by the Federal excise measure. It has

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136 Australia's first written submission, para. 157 (footnote omitted); see fn. 329 in Australia's first written submission: Appellate Body Reports, EC – Seal Products, para. 5.101 and US – Clove Cigarettes, para. 176.
137 Appellate Body Report, Thailand – Cigarettes (Philippines), para. 128.
138 Appellate Body Report, Thailand – Cigarettes (Philippines), para. 130.
139 Australia's first written submission, paras. 159-164.
140 See III.A.2(b)ii, para. 94 of this submission.
141 Australia's first written submission, para. 163.
142 Australia's first written submission, para. 158.
143 Canada's first written submission, para. 325.
stated that "Canadian wine producers continue to import bulk wine in increasingly higher numbers and Canadian consumers continue to purchase finished products composed of such imported bulk wine". As it attempted to do in relation to the second element of the test, Canada is seeking with this line of argument to introduce a trade effects test into the third element. Again, as Australia explains at Part II.A.4(c)i of this submission, the Panel should reject Canada's argument as it is contrary to consistent Appellate Body guidance and lacks any interpretive basis in the text of Article III:4.

(d) Conclusion

103. In sum, applying the three elements of the correct legal test Australia has established a prima facie case of inconsistency between the measure at issue and Article III:4, which Canada has not rebutted.

B. ONTARIO WINE BASIC TAX

1. Australia has established that the Ontario wine basic tax breaches Article III:2, first sentence of the GATT 1994

104. The measure at issue under this claim is the Ontario wine basic tax which is imposed under s. 27 of the Alcohol, Cannabis and Gaming Regulation and Public Protection Act (ACGRPPA). Australia addressed the operation of the measure at length in its first written submission and recaps the key points below.

105. The wine basic tax applies only to purchases in Ontario from winery retail stores (WRS) or "wine boutiques" within authorized grocery stores. WRS outlets are a network of 500 privately owned stores, which are either on-site stores (located at wineries) or off-site stores (located away from wineries). The licences (authorizations) are held by manufacturers of Ontario wine and permit manufacturers to sell wine in the off-site outlets only if it is "made by" the manufacturer holding the authorization. This requires the manufacturer to undertake one "significant winemaking step" with respect to each bottle of wine produced, which includes blending. A WRS

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144 Canada's first written submission, para. 325. (footnote omitted)
145 See ACGRPPA, Exhibit AUS-20.
146 Australia's first written submission, paras. 30 and 49-56.
can relocate inside a grocery store and become a "wine boutique", which must operate in accordance with a specific regulatory regime.\textsuperscript{147}

106. The wine basic tax is calculated as a percentage of the retail price of wine and then included in the final price paid at the point of sale. Differential rates apply depending on product origin. For tax purposes, the ACGRPPA distinguishes between "Ontario" and non-Ontario wine. "Ontario" wine is made from 100% Ontario-grown produce, while non-Ontario wine is blended and must contain a minimum of 25% of wine made from Ontario-grown produce. Australia provided the following table showing current applicable rates of wine basic tax, and the final scheduled increment, in its answer to Panel question No. 49:

<table>
<thead>
<tr>
<th>Effective date (when the sale or distribution of the wine is made)</th>
<th>Wine basic tax (per cent of retail price of wine)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Ontario</td>
</tr>
<tr>
<td>At winery retail store</td>
<td>At wine boutique (boutique operator's wine)</td>
</tr>
<tr>
<td>From April 1, 2019 to December 31, 2019</td>
<td>6.1</td>
</tr>
<tr>
<td>From January 1, 2020</td>
<td>6.1</td>
</tr>
</tbody>
</table>

107. The table clearly highlights the discriminatory structure and impact of the wine basic tax. Ontario wine benefits currently from a 13% tax advantage over non-Ontario wine, which incorporates imported bulk wine, including Australian wine. By definition, imported bulk wine is composed of non-Ontario ingredients and therefore will always trigger the application of a higher level of wine basic tax to a blended wine that contains it. However, a non-Ontario blended wine will contain a minimum of 25% of bulk wine made from Ontario-grown produce, which will also be subject indirectly to the higher rate of wine basic tax. Ontario bulk wine will be indirectly subject to the lower wine basic tax rate when it is purchased as a 100% Ontario product.

108. Canada has not challenged Australia's analysis of this measure.\textsuperscript{148}

\textsuperscript{147} See Australia's first written submission, paras. 76-84.
\textsuperscript{148} See Canada's first written submission, paras. 99-107 and 328.
The Ontario wine basic tax is an internal tax

Australia submits, and Canada does not contest, that the Ontario wine basic tax is an "internal tax" within the scope of Article III:2, first sentence. The obligation to pay the duty is linked to an internal event: the retail sale of wine in WRS outlets and "wine boutiques" in Ontario. The wine basic tax does not apply directly to bulk wine, which is an input into the bottled wine that is subject to the tax at the point of sale. Australia again recalls the panel's observation in Mexico – Taxes on Soft Drinks that "taxes directly imposed on finished products can indirectly affect the conditions of competition between imported and like domestic inputs and therefore come within the scope of Article III:2, first sentence". As noted above, Ontario bulk wine that is blended with imported bulk wine in bottled wine is also indirectly subject to the higher rate of tax. However, Ontario bulk wine will be indirectly subject to the lower rate of wine basic tax when it is purchased as a 100% Ontario product. There is no circumstance under which imported bulk wine, including Australian wine, can benefit from the lower rate of wine basic tax.

Australian bulk wine and Ontario bulk wine are "like products"

Canada does not contest Australia’s claim that Australian bulk wine and Ontario bulk wine are "like products" as required by Article III:2, first sentence. Canada agrees with Australia that as the measure at issue discriminates between products solely on the basis of origin, likeness may be presumed and a full likeness analysis is not required. Specifically, s. 27 of the ACGRPPA applies differential taxes on wine purchased from WRS or wine boutiques depending on whether the finished product qualifies as "Ontario" wine or "non-Ontario" wine. On this basis, the measure discriminates purely on the basis of origin to determine eligibility for preferential tax treatment.

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149 See Australia's first written submission, paras. 168-172.
150 Australia's first written submission, paras. 168-169.
151 Panel Report, Mexico – Taxes on Soft Drinks, para. 8.44 (footnote omitted); see Australia's first written submission, paras. 125 and 170.
152 Australia's first written submission, para. 172.
153 Australia's first written submission, paras. 173-175. In its answer to Panel question No. 43, Canada states that "because the distinctions drawn by the Ontario Basic Wine Tax are based solely on origin, the Panel can presume likeness and does not need to engage in a detailed like product analysis." Canada's response to Panel question No. 43, para. 164. (footnote omitted)
(c) Wine containing a non-Ontario bulk wine input, including Australian bulk wine, is taxed "in excess" of wine with a 100% Ontario bulk wine input

111. Australia has shown that Australian bulk wine is indirectly subject to a higher rate of Ontario wine basic tax than Ontario bulk wine when the latter is purchased as a 100% Ontario product. This satisfies the third element of the test for Article III:2, first sentence: the imported product is taxed (indirectly) in excess of the like domestic product. Canada concedes the Ontario wine basic tax "differs depending on whether the bottle contains 100% Ontario wine or whether it is an ICB [International and Canadian blend] wine".\(^{154}\) In Australia’s view, the Panel may finish with its consideration of this element at this point.

   i. Evidence of the actual effects of the measure in the market are not required to establish imported products are taxed "in excess"

112. Canada again deploys its flawed interpretation of Article III:2, first sentence to assert that the Ontario wine basic tax is consistent with that provision because it does not have an economic impact on competitive opportunities for imported bulk wine. Australia has dealt above with this argument at length and demonstrated why it should be rejected by the Panel.\(^{155}\)

113. Australia has shown above\(^{156}\) that the Panel is not required to undertake the trade effects analysis sought by Canada. Accordingly, the Panel does not need to take account of statements such as the following by Canada in its analysis under Article III:2, first sentence: "imports of bulk wine into Ontario have increased, making Ontario an increasingly lucrative market for imported bulk wine";\(^ {157}\) "Australia was the largest source of imported bulk wine for Ontario by both value and volume in 2018, continuing a longstanding trend";\(^ {158}\) and "it is clear that there has been no impact on the decision of wine producers in Ontario to import bulk wine for the purposes of blending, bottling and selling it as ICB wine in these retail channels".\(^ {159}\)

\(^{154}\) Canada's first written submission, para. 328. (footnote omitted)
\(^{155}\) See Part II.A.3(c) of this submission.
\(^{156}\) Ibid.
\(^{157}\) Canada's first written submission, para. 334. (footnote omitted)
\(^{158}\) Ibid. (footnotes omitted)
\(^{159}\) Canada's first written submission, para. 335.
(d) Conclusion

114. In sum, applying the three elements of the correct legal test and not Canada's misconceived and flawed interpretation of Article III:2, first sentence with its trade effects test, Australia has established a *prima facie* case of inconsistency between the measure at issue and Article III:2, first sentence, which Canada has not rebutted.

C. Ontario Grocery Measures

1. Australia has established that the Ontario grocery measures breach Article III:4 of the GATT 1994

115. The Ontario grocery measures at issue, through restricted and unrestricted authorizations and wine boutiques, regulate the sale and display of wine in grocery stores in Ontario. Australia has explained the operation of these measures in detail in its first written submission. Australia briefly recaps key features below.

116. 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.

117. 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.

118. 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.

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160 Australia's first written submission, paras. 57-87.
161 Australia's first written submission, para. 68.
162 Australia's first written submission, paras. 71-72.
163 Australia's first written submission, para. 73.
119. The measures also created a new category of "wine boutiques" for the sale of wine in grocery stores.\textsuperscript{164} Only Ontario VQA wines and wines made by an Ontario manufacturer with local content requirements can be sold in these grocery 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.

\textbf{(a) Australian bottled wine and domestic Ontario bottled wine are "like products"}

120. It is uncontested between the Parties that Australian bottled wine and Ontario bottled wine are like products for the purposes of Article III:4 of the GATT 1994.\textsuperscript{165}

\textbf{(b) The Ontario grocery measures is a law, regulation or requirement within the scope of Article III:4 of the GATT 1994}

121. It is also uncontested between the Parties that the Ontario grocery measures are laws, regulations or requirements that affect the internal sale, offering for sale, purchase and distribution of imported wine in Ontario for the purposes of Article III:4 of the GATT 1994.\textsuperscript{166}

\textbf{(c) The Ontario grocery measures accords "less favourable" treatment to Australian bottled wine than the treatment accorded to like domestic bottled wine}

\textbf{i. Scope of like product comparators for no less favourable treatment assessment}

122. Australia has correctly identified the "groups" of products for the purposes of the no less favourable treatment assessment as bottled Ontario wine and bottled Australian wine. Canada appears to agree with Australia that with respect to imported products, the relevant "group" is imported Australian bottled wine. However, with respect to the domestic products, Canada asserts that the relevant "group" is all Canadian bottled wine.\textsuperscript{167}

\textsuperscript{164} Australia's first written submission, paras. 76-84.
\textsuperscript{165} Canada's first written submission, para. 146; Australia's first written submission, paras. 196-208.
\textsuperscript{166} Australia's first written submission, paras. 209-210. Canada makes no rebuttal arguments on this point in its first written submission.
\textsuperscript{167} Canada's responses to Panel question No. 43, para. 167.
123. As Australia clarified in Part II.A.4(c)ii, the determination of the relevant "groups" of comparable products must be made on the basis of the facts of each case, including the relevant market, the relevant products and the "design structure and expected operation" of the measure at issue. In Australia's view, it is appropriate to categorise the domestic products at issue in this case as Ontario bottled wine because the measures are adopted at the provincial level in Ontario, operate only in the Ontario market, and in fact afford more favourable treatment to Ontario wine. By way of example, the wine boutiques aspects of the measures are designed such that only Ontario wines can be sold in these grocery outlets (no other domestic bottled wine would qualify for sale in these outlets), and grocery stores are only required to have a sign advertising the availability of Ontario VQA, and not other non-Ontario Canadian wine.

124. Moreover, the evidence on the record regarding the operation of the Ontario market demonstrates that Ontario wine makes up the vast majority of domestic wine in the Ontario market.\(^{168}\) Non-Ontario Canadian wine has a relatively insignificant share of the Ontario market in the Liquor Control Board of Ontario (LCBO) channel as compared to Ontario wine.\(^{169}\) In the grocery retail channel, which is the retail channel at issue, LCBO statistics evidence that non-Ontario Canadian wine has no market share at all.\(^{170}\) That is, all Canadian wine in this retail channel is Ontario wine, and in particular Ontario VQA wine.\(^{171}\) Therefore, the Ontario retail market domestic wine is synonymous with Ontario wine. Accordingly, Australia's characterisation of the domestic products at issue as Ontario bottled wine is appropriate in light of the facts of this case.

125. Alternatively, even if the product scope were, incorrectly, expanded to include non-Ontario Canadian wine, this would not alter Australia's conclusion that the measures modify the conditions

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\(^{169}\) In the LCBO channel, LCBO statistics demonstrate that the vast majority of Canadian wine is from Ontario. There is very little non-Ontario Canadian wine sold in Ontario: see e.g. LCBO Annual Report 2017-2018, Exhibit AUS-53, p. 57, (LCBO 2017-2018 Annual Report), which provides that of the total Canadian wine by volume, Ontario wine represented 49,770,774 litres out of 50,376,518 litres (i.e. Ontario wine represented about 98.80% of the total Canadian wine sold in Ontario); see also LCBO Annual Report 2016-2017, Exhibit AUS-54, p. 100.

\(^{170}\) In the grocery channel, according to 2018 LCBO statistics, non-Ontario Canadian wine had zero market share in grocery stores outlets in Ontario, i.e. according to these statistics all non-imported wine sold in grocery store outlets in the Ontario market is from Ontario: see Grocery Update November 2018, Exhibit AUS-52 p. 4, Carolyn O’Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018, Exhibit AUS-55, p. 3.

\(^{171}\) Ibid.
of competition to the detriment of imported wine vis-à-vis domestic wine.\textsuperscript{172} The majority of domestic wine in the Ontario market is from Ontario (see paragraph above), and so even if other Canadian wine is included in the scope, the majority of domestic wine sold in the province (in the form of Ontario wine) would receive the favourable treatment as compared to imported wine. This is borne out by the fact that, according to LCBO statistics, all of the "domestic" wine sold in grocery stores outlets is in fact Ontario wine.\textsuperscript{173}

ii. \textbf{Australia has established that the Ontario grocery measures modify the conditions of competition for Australian bottled wine}

126. Australia has established that the Ontario grocery measures modify the conditions of competition to the detriment of Australian bottled wine.

127. Before discussing the application of the legal standard to the facts, Australia highlights the following uncontested facts based on the evidence on the record:

- \textbf{[[xx,xxx.xx]] wine producers in Ontario are small wineries ([[xx,xxx.xx]]) under Regulation 232/16. [[xx,xxx.xx]] wine producers in Ontario are either small or mid-size wineries ([[xx,xxx.xx]]). Only [[xx,xxx.xx]] wineries in Ontario would be too large to qualify under the small or mid-size criteria.}\textsuperscript{174}

- Small Australian wine producers sell most of their wine domestically, they do not export much of their wine. Therefore most Australian wine imports in the Ontario market will not be from small wineries, but rather are likely to be from larger wine producers.\textsuperscript{175}

- The "quality assurance" criterion excludes all Australian wine from qualifying (which thus also excludes wines from mid-size Australian producers from qualifying for sales in

\textsuperscript{172} See e.g. Appellate Body Report, \textit{US – Clove Cigarettes}, para. 200, where the Appellate Body noted that given the relatively low share of domestic flavoured cigarettes in the US market the inclusion of domestically produced flavoured cigarettes in the comparison would not have altered the panel's ultimate conclusion that the group of like domestic products essentially consisted of menthol cigarettes.

\textsuperscript{173} Grocery Update November 2018, Exhibit AUS-52 p. 4; Carolyn O’Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018, Exhibit AUS-55, p. 3.

\textsuperscript{174} Canada's responses to Panel question No. 28. (contains BCI)

\textsuperscript{175} Australia’s first written submission, para. 225; Wine Australia, Small Winemaker Production and Sales Survey Report 2016-2017, November 2017, Exhibit AUS-88.
Canada – Measures Governing the Sale of Wine

Australia’s Second Written Submission

30 September 2019

[[Business Confidential Information redacted on pages 50, 51, 52, 53, 85, 91, 92]]

grocery stores with restricted authorizations). That is, no Australian wine is eligible to qualify under the "quality assurance" criterion.176

- The only wines that have in fact qualified under the "quality assurance" criterion to date are Ontario VQA wines.177

- No Australian wine can qualify under the small country production criterion. All Canadian wine can qualify under this criterion.178

128. Firstly, Australia highlights that an assessment of less favourable treatment with respect to the Ontario grocery measures must be undertaken holistically to determine whether all of the criteria for accessing grocery store outlets, taken together, adversely modify the conditions of competition for Australian bottled wine in the Ontario market.179 In assessing the regulatory distinctions arising under the measures, it would not be the correct analytical approach to compare only product categories within those regulatory distinctions. For example, it would not be correct to limit the comparison to treatment of domestic wine from small wineries as compared to imported wine from small wineries under the small winery criterion or compare treatment for domestic mid-sized wineries as compared to imported mid-size wineries under the mid-size winery criterion. Such a segmented analysis would be incorrect, as the measures should be considered as a whole to assess whether they modify the conditions of competition to the detriment of the group of like imported products (in this case Australian bottled wine).180

129. Turning to the measures at issue, the restricted authorizations measures restrict eligibility for sale in grocery outlets to wines from "small and mid-size" wineries. [[xx,xxx.xx]] of the wine producers in the Ontario market are in fact "small" or "mid-size",181 and Ontario's VQA system is such that Ontario VQA wines qualify under "quality assurance" criterion.182 These are in fact the only wines that have qualified under this latter criterion.183 By design, the measures create

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176 Australia's first written submission, paras. 221-222.
177 Canada's responses to Panel question No. 26, para. 57.
178 Australia’s first written submission, para. 231.
179 See e.g. Appellate Body Report, US-Tuna II (Mexico) (Article 21.5 – Mexico), para. 7.280.
180 Ibid. Australia also notes that neither party makes a claim that the "likeness" of the wine is affected by the size of the wine producer.
181 Canada's response to Panel question No. 28, para. 64. (contains BCI)
182 Australia's first written submission, para. 223; Canada's response to Panel question No. 26, para. 57.
183 Canada's response to Panel question No. 26, para. 57.
opportunities for sale in grocery stores holding restricted authorizations to [[xx,xxx.xx]] from wine producers in Ontario as these producers are [[xx,xxx.xx]]. This not merely a happy coincidence, but is a product of the design of the measure, and its operation in the Ontario market.

130. In contrast, no Australian wine is eligible to qualify under the "quality assurance" criterion. This is not contested by Canada. The criterion excludes all Australian mid-size wineries from sales in grocery stores holding restricted authorizations. This means only wines from small Australian wine producers could qualify for sale, which would likely represent a far smaller percentage of the Australian wines exported to Ontario. This is a result of the design and operation of the measure, as it applies to Australian wine imports in the Ontario market.

131. In sum, the [[xx,xxx.xx]] wines from producers in Ontario are eligible to be accepted for sale in grocery stores holding restricted authorizations. In contrast, the measures do not afford imported Australian wines the same opportunity to be sold in these outlets. These are the implications of the design, structure and expected operation of the measure on competitive opportunities in the Ontario market. Clearly the ability to be selected for sale in a grocery outlet is a competitive advantage. If a wine cannot be selected because it does not meet a criterion, it cannot be sold. Compared to Ontario wine, Australian wine's opportunity to be selected by grocers and thus sold in these outlets is restricted because of the eligibility criteria. This difference in opportunity modifies the conditions of competition to the detriment of Australian wine.

132. Contrary to Canada's suggestion, Australia does not take issue with the "mere fact that some of Australia's larger producers, who make up a larger percentage of Australia's exports, may not gain access to the grocery store retail channel through this particular category [the small winery criterion]." This characterisation of Australia's argument is incorrect. Australia takes issue with the disparate impact that the eligibility criteria for accessing grocery stores (under both restricted and unrestricted authorizations) have on the opportunities for like Australian wines to be selected and thus sold in these stores as compared to Ontario wines. This disparate impact on competitive

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184 Australia's first written submission, paras. 221-222.
185 See Australia's first written submission, para. 225.
186 Canada's first written submission, para. 182.
opportunities for Australian wines is a result of the design, structure and expected operation of the measures in the market.

133. Canada hypothesises that a grocery store could, as a purely commercial decision, decide to exclusively sell small winery wines, and that Australian wines qualify under this criterion.187 However, this hypothesis does not change the reality that the design, structure and expected operation of the measure precludes that hypothetical grocer from choosing to sell Australian wines from any other size of producer e.g. a mid-size producer. On the other hand, that grocer could choose to sell wines from [[xx,xxx.xx]] Ontario producers in Ontario whether small or mid-size, apart from [[xx,xxx.xx]] producers which do not qualify.188 Moreover, Canada’s hypothesis completely fails to address at all Australia's arguments on the operation of the "quality assurance" criterion. As Australia has explained, Canada cannot cherry-pick and highlight aspects of its measure, or sub-sets of like products, in an attempt to justify its discriminatory measures. The correct approach requires an examination of how all the criteria, taken together, impact competitive opportunities for the group of imported Australian bottled wine, as compared to the group of domestic Ontario bottled wine.

134. Australia recalls that unrestricted authorizations guarantee that at least 50% of the shelf-space in these stores must be dedicated to wines from either a "small winery", "quality assurance wine" or wine from a country that produces less than 150 million litres of wine annually. As Australia has described in this submission, Australian wine is excluded from eligibility to access more favourable treatment under both the "quality assurance" and small wine production country criteria. Only Australian wines from small wineries could qualify for this access. In contrast, all Ontario wines are eligible to qualify for this favourable access. Contrary to Canada's suggestion, Australia does not assert that the Ontario measures violate Article III:4 "by not permitting all wines to access grocery stores under all possible categories."189 Australia takes issue with the more favourable access that the criteria afford, on the whole, to Ontario wine as compared to Australian wine.

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187 Canada's first written submission, para. 182.
188 See Canada's response to Panel question No. 28, paras. 63-64. (contains BCI)
189 Canada's first written submission, para. 187.
135. The impact of the design, structure and expected operation of the eligibility criteria is that Ontario wine is not subject to any shelf-space restrictions. For example, a grocer could choose to stock 100% Ontario wine from any size producer. In contrast, the measures prevent a grocer from making this same choice with respect to Australian wines. Grocers must devote a guaranteed 50% shelf-space to wines that meet the eligibility criteria (from which most Australian wine is precluded from qualifying). Ontario wines therefore do not need to compete against all wines in the market for access to this shelf space, they simply need to compete for selection with other wines meeting these criteria. The majority of Australian wines, on the other hand, will have to compete against all other wines in the market for selection by grocers for at most 50% of the available shelf-space.

136. To be clear, Australia does not take issue with the fact that the measures draw regulatory distinctions based on the size of the producer, *per se*. What Australia takes issue with is that the regulatory distinctions at issue, taken together, by their design, structure and expected operation in the Ontario market, provide greater opportunities to Ontario wines to be sold in grocery stores as compared to Australian wine (for the reasons already described in Australia's first written submission and the paragraphs above). For those reasons, the regulatory distinctions do not accord equal competitive opportunities to imported bottled wines as compared to Ontario bottled wines.

137. Canada's arguments on the grocery authorizations appear to be premised on the fact that because the regulatory distinctions drawn by the measures are facially origin neutral, this must equate to equal competitive conditions between imported and domestic wine. However, the assessment of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the measure for the equality of competitive conditions in the market. Australia has explained how and why the measures, despite appearing origin neutral, do not offer equal opportunities to Australian wines as compared to domestic wine.

138. Canada also implies that because the measures do not operate to completely or effectively exclude Australian wines access to the grocery channel, Australia's arguments are unfounded. However, Article III:4 is about equality of competitive opportunities. Competitive opportunities can be affected in many different ways aside from a complete exclusion of access.

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190 See e.g. Canada's first written submission, para. 179.
191 Canada's first written submission, para. 183.
139. Canada asserts that the "expected operation" of the measure is reflected in the recommendations of the Premier’s Advisory Council on Government Assets (PAC) report and quotes a particular passage of the PAC report. In Australia's view, this statement does not reveal the "expected operation" of the measures. This is simply a general statement made before any changes to Ontario's system had been adopted about how any changes to Ontario's previous regulatory system should be handled.

   iii. **Canada's alleged policy rationale of the measures is not legally relevant to the assessment of less favourable treatment under the measures at issue**

140. One of Canada's responses in its first written submission appears to rest on the policy rationale of certain measures at issue. Canada asserts that Ontario’s grocery store measures reflect a legitimate, WTO-consistent policy choice to preserve space on grocery store shelves for wines from small wineries.

141. The Appellate Body has found that a determination that a measure modifies the conditions of competition to the detriment of imported products is sufficient to find a breach of Article III:4 without further enquiry into the regulatory objectives of the measure. For example, the panel in *EU – Energy Package* considered that once it had found that the measure modified the conditions of competition, it was irrelevant that the ultimate goal allegedly pursued by the measure was to achieve "greater" equality of competitive opportunities.

142. In addition, in the context of *de facto* discrimination the Appellate Body has rejected the proposition that, for the purposes of Article III:4 of the GATT 1994, a panel is required to examine whether any detrimental impact on competitive opportunities for like imported products stems from a legitimate regulatory distinction.

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192 Canada's first written submission, para. 181.
193 Canada's first written submission, para. 170.
194 Appellate Body Reports, *EC - Seal Products*, paras. 5.90 and 5.117; see also Appellate Body Reports, *US - Clove Cigarettes*, para. 179 and fn 372 to para. 179; *Thailand - Cigarettes (Philippines)*, para. 128; and *Korea - Various Measures on Beef*, para. 137.
196 Appellate Body, *EC – Seal Products*, para. 5.117.
143. Canada itself correctly recognises that it is not necessary to assess the legitimacy of a regulatory distinction or the policy rationale in assessing less favourable treatment. In light of this, Australia fails to see the relevance of Canada's assertion that the measures were allegedly intended to provide access to small or mid-size wineries. Such an assertion does nothing to rebut Australia's clear demonstration that the measures have modified the conditions of competition to the detriment of imported products. If the Panel accepts Australia’s submissions in this regard, this is all that is required for the Panel to make a finding of less favourable treatment. In other words, even if the Panel accepts Canada's characterisation of the policy objectives of the Ontario grocery measures, in line with prior Appellate Body reports, this would not alter a finding that the measures modify the conditions of competition to the detriment of Australian wine and is, therefore, inconsistent with Article III:4 of the GATT 1994.

iv. **The continuing access that Australian wines have to the LCBO retail channel is not relevant to the assessment of less favourable treatment under the measures at issue**

144. Canada asserts at various points in its submission that Australian wines are obtainable in the LCBO retail channel and have a significant market share. Australia notes that Ontario wines also have access to the LCBO retail channel and evidently do well in this channel – for example, according to LCBO statistics in 2016 Ontario wines had a 30% share.

145. Australia's challenge does not relate to access to LCBO retail outlets, but rather to the access to the grocery retail channel which is governed by the measures at issue in this dispute. Canada has not explained why the fact that Australian wine has access to the LCBO outlets is legally relevant to the assessment of less favourable treatment under the measures at issue.

146. The mere fact that Australia continues to have access to a retail channel not regulated by the measures at issue, says nothing, in and of itself, about whether the grocery measures afford less favourable treatment to Australian wine. The continued access that Australian wines have to the pre-existing LCBO channel cannot offset the detrimental impact on competitive opportunities.

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197 Canada's responses to Panel question No. 20, paras. 11-12.
198 See e.g. Canada's first written submission, paras. 170 and 183.
199 Shari Mogk-Edwards, Wine at LCBO, 3 October 2016, Exhibit AUS-82.
for Australian wines in the grocery sales channel.\footnote{See e.g. Panel Report, \textit{India – Solar Cells}, fn. 263.} There is no legal basis for this type of argument. Canada's argument implies that the existing market share Australian wine has in the LCBO can somehow counterbalance any less favourable access that Australian wines are afforded in the grocery channel as compared to domestic wine under the measures. This argument is not supported by the text of Article III:4 or previous WTO cases\footnote{See e.g. Panel Report, \textit{US – Gasoline}, para. 6.14.} and should be rejected. Australia observes that this approach, where discriminatory treatment can be "offset", seems to be a re-occurring theme throughout Canada's legal arguments.

\textbf{v. Canada's argument that provided the measures afford equal treatment "overall" there is no violation of Article III:4 is flawed}

147. Canada argues that a failure to accord the most favourable treatment to all imports is not a violation of Article III:4 of the GATT 1994 if the "overall treatment" in the market accorded to domestic and imported like products is equal.\footnote{Canada's first written submission, paras. 172 -174.}

148. Specifically, Canada argues that to the extent the Ontario measures treat "certain Canadian wines differently than others, the measures extend the same treatment to imported like products."\footnote{Canada's first written submission, para. 174.} This argument implies that a measure affording more favourable access to some domestic wines can be permissible where certain other Canadian wines are treated in the same less favourable way as imported wine.\footnote{Canada's first written submission, para. 174.}

149. This argument appears to be another way of Canada asserting its flawed "asymmetrical impact analysis" argument. As Australia clarified in Part II.A.4(c)ii, Canada should not be permitted to offset the fact that it provides more favourable treatment to some domestic products with the fact that other domestic products are granted the same less favourable treatment as imported products. This type of assessment has no legal basis in the text or previous cases, would create uncertainty, and significantly undermine the objective of Article III:4.

150. Canada's argument in this respect is similar to one already rejected by the panel in \textit{US – Gasoline}. In that case, the panel rejected arguments that the measure at issue was not inconsistent

\footnotesize{\textsuperscript{200} See e.g. Panel Report, \textit{India – Solar Cells}, fn. 263. \textsuperscript{201} See e.g. Panel Report, \textit{US – Gasoline}, para. 6.14. \textsuperscript{202} Canada's first written submission, paras. 172 -174. \textsuperscript{203} Canada's first written submission, para. 174. \textsuperscript{204} Canada's first written submission, para. 174.}
with Article III:4 because it treated imported and domestic products "equally overall".\textsuperscript{205} The panel in that case, in rejecting this argument, said that:

the argument that on average the treatment provided was equivalent amounted to arguing that less favourable treatment in one instance could be offset provided that there was correspondingly more favourable treatment in another. This amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others.\textsuperscript{206}

151. For the same reasons, Canada’s arguments should be rejected by the Panel in this dispute. It is very clear that the relevant assessment under Article III:4 is not whether imported and some domestic products are treated "equally" under a measure or whether the "balance of competitive opportunities" in the market is preserved.\textsuperscript{207} The correct legal standard is whether the measure at issue modifies the conditions of competition to the detriment of imported products.

vi. Wine boutiques

152. Canada asserts that Australia has not explained why the wine boutiques aspects of the Ontario grocery measures violate Article III:4.\textsuperscript{208} This is not correct. It is clear from Australia's first written submission that Australia has identified the difference in treatment between the like imported and domestic products in relation to this aspect of the measures and explained how and why this amounts to less favourable treatment of Australian wine.\textsuperscript{209} Canada simply fails to engage with Australia's arguments or make any attempt at rebuttal.

153. Australia has explained that Australian bottled wine is not permitted to be sold in grocery outlets through wine boutiques whereas under the new measures Ontario bottled wines can be sold in these outlets, including a much broader assortment of domestic Ontario wines than could previously be sold in the WRS channel.\textsuperscript{210} Canada does not contest that Australian bottled wine cannot be sold in these outlets. Australia has explained that allowing Ontario bottled wines access to additional grocery store outlets that Australian bottled wines cannot access denies Australian

\begin{itemize}
\item \textsuperscript{206} Ibid.
\item \textsuperscript{207} Canada's first written submission, para. 174.
\item \textsuperscript{208} Canada's first written submission, para. 192.
\item \textsuperscript{209} See Australia's first written submission, paras. 76-84 and paras. 239-243.
\item \textsuperscript{210} Ibid.
\end{itemize}
154. Instead, Canada appears to suggest that because ICB wine is sold through these outlets, this channel is a lucrative sales channel for imported wine that would not exist absent the measure. While Canada's arguments are not clear, Canada seems to imply that the sale of ICB wine through this channel somehow negates or offsets the exclusion of Australian bottled wine from these grocery outlets. Australia notes that ICB wine is a bottled wine that is made and bottled in Ontario by Ontario manufacturers with specific local wine content requirements. It is not clear how sales of ICB wine could negate the more favourable access provided to Ontario bottled wines in wine boutiques as compared to Australian bottled wines, and Canada fails to explain this.

155. To the extent that Canada's argument is premised on imported bulk wine being included in the scope of like products comparators, Australia has not made claims with respect to imported bulk Australian wine in respect of this particular measure. Moreover, Canada has not expressly argued that bulk wine should be included in the product scope and neither party has put forward any evidence to undertake an assessment of whether "bottled" and "bulk" wine are "like". The product that is sold to consumers in wine boutiques is bottled wine, therefore this is the relevant product for the purpose of the Article III:4 analysis in relation this measure.

156. However, even if bulk wine was included in the product scope, this would not alter the conclusion that the wine boutiques aspect of the measures modifies the conditions of competition to the detriment of imported wine. The only way that Australian bulk wine could be sold through this channel would be as ICB wine, which must be blended with at least 25% Ontario content, so every bottled of ICB wine includes a portion of Ontario wine. All Australian wine bottled outside Ontario is excluded from this channel. Ontario wines can access this channel, whether as bottled Ontario wine or in bulk as an ICB wine.

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211 Australia's first written submission, paras. 240-242.
212 Canada's first written submission, para. 194.
213 Australia's first written submission, paras. 24, 30.
214 See e.g. in Canada's responses to Panel question No. 43 Canada does not expressly state this.
215 See e.g. Australia's first written submission, paras. 24, 30 and 77.
157. The measures also mandate that at least 50% of the wines on display must be Ontario VQA wine (which by definition cannot include imported bulk wine content), and mandatory sales targets for Ontario VQA wines (at least 20% of wine sold must be Ontario VQA wine and the boutique must have a goal to achieve at least 25% of wine sold is VQA wine).²¹⁶

158. Accordingly, even if bulk wine is included in scope, the measures evidently dis-incentivise the sale of wine in these stores that include imported bulk wine, and provide greater access to Ontario wines both bulk and bottled. Accordingly, the measures modify the conditions of competition for both Australian bottled wine (which cannot be sold in these outlets) and Australian bulk wine as compared to Ontario bottled and bulk wine.

vii. There is evidence to demonstrate that the measures are actually altering the conditions of competition to the detriment of Australian wine

159. As Australia has clarified at Part II.A.4(c)i of this submission, an assessment of whether a measure modifies the conditions of competition does not require evidence of actual trade effects. However, such evidence, where available, may be relevant.

160. While the measures have not been in place for a lengthy period, as Australia set out in its first written submission²¹⁷ evidence demonstrates that the measures are in fact skewing sales in favour of Ontario VQA wine in the grocery sales channel as compared to imported wine. According to LCBO statistics, in the year 2017-2018, Ontario VQA wines accounted for almost half (49%) of all wine sales in grocery stores. In contrast, Ontario VQA wines had a mere 7% share in the LCBO retail channel.²¹⁸ Ontario wine accounted for half of all grocer wine sales as compared to a quarter at LCBO retail.²¹⁹ The hugely disproportionate share that Ontario VQA wines enjoy in the grocery sales channel demonstrates that the measures are having a favourable effect on the sales of Ontario VQA wines in the grocery sales channel, and are driving sales of Ontario VQA wine at the expense of imported wine. This is confirmed by LCBO statistics on the growth rates of wine, which reveal that in 2017-2018 Ontario VQA wines experienced the highest rate of growth of all wine in the Ontario market, and the majority of this was in the grocery channel.

²¹⁶ See Australia's first written submission, para. 81.
²¹⁷ Australia's first written submission, paras. 86-87 and 238.
²¹⁸ Carolyn O'Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018, Exhibit AUS-55.
²¹⁹ Carolyn O'Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018, Exhibit AUS-55.
(7.7%), as compared to imported wines (for "new world", 1.1% and for European wines 0.8% in the grocery channel). 220

161. Canada attempts to support its arguments by stating that Australian wine performs well in the grocery store channel with a higher market share in grocery stores than in the LCBO 221 and criticises Australia for not supplying any data. 222 However, Canada fails to acknowledge the data already on the record that demonstrates that Ontario VQA wines, of all wines by origin, have by far the single greatest share in grocery of all wines in grocery stores, much higher than their share in the LCBO. 223 Ontario VQA wines evidently perform extremely well; significantly better than any other origin in grocery stores. These statistics reveal that the measures have had the effect of boosting sales for Ontario wine in grocery stores as compared to Australian wine. Canada does not dispute these statistics. Canada simply fails to engage with them because they do not suit Canada’s narrative.

(d) Conclusion

162. In sum, applying the correct legal standard for Article III:4, Australia has established a prima facie case that the Ontario grocery measures are inconsistent with Article III:4. Canada has not rebutted Australia’s case.

D. QUEBEC GROCERY MEASURES

1. Australia has established that the Quebec grocery measures breach Article III:4 of the GATT 1994

163. Australia has explained in detail the operation of the Quebec grocery measures at issue in its first written submission. 224 Australia recaps the key features below.

164. The Quebec measures establish a de jure distinction in treatment between Quebec wines and imported wines. 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

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220 Extract from Carolyn O'Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018, Exhibit AUS-108.
221 Canada's first written submission, para. 188.
222 Canada's first written submission, para. 180.
223 Carolyn O'Grady-Gold, LCBO Sales Trends and Insights Presentation, 2018, Exhibit AUS-55.
224 Australia's first written submission, paras. 88-95.
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.

165. Imported wines made and bottled by foreign wine producers are not afforded this same access under the measures. 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.225

166. Under the measures, qualifying Quebec wines are also allowed to by-pass the SAQ distribution system, and thereby avoid the fixed SAQ mark-ups.226

(a) Australia bottled wine and domestic Quebec bottled wine are "like products"

167. It is uncontested between the Parties that Australian bottled wine and Quebec bottled wine are like products for the purposes of Article III:4 of the GATT 1994.227

(b) The Quebec grocery measures is a law, regulation or requirement within the scope of Article III:4 of the GATT 1994

168. It is uncontested between the Parties that the Quebec grocery measures are laws, regulations or requirements that affect the internal sale, offering for sale, purchase and distribution of imported wine in Quebec for the purposes of Article III:4 of the GATT 1994.228

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225 Australia's first written submission, paras. 88-95.
226 See, Australia's response to Panel question No. 9; Canada does not contest that small-scale Quebec wines are exempt from the SAQ mark-up: see Canada's first written submission, para. 50.
227 Canada's first written submission, para. 146.
228 Canada's first written submission, para. 200.
(c) **The Quebec grocery measures accord "less favourable" treatment to Australian bottled wine than the treatment accorded to like domestic bottled wine**

i. **Scope of like product comparators for no less favourable treatment assessment**

169. In respect of this claim, Australia has appropriately characterised the products at issue for the purposes of the less favourable treatment assessment as bottled Australian wine and bottled domestic Quebec wine. In Australia's view, the scope of the products at issue must logically be determined by reference to the products that the measures regulate. In this case, the Quebec grocery sales measures at issue govern the retail sale of wine in grocery and convenience stores. Bottled wine is the product that is sold in these retail outlets.

170. Canada does not contest that the products Australia has identified (bottled Australian and bottled Quebec wines) are within the scope of the products to be compared and are like products. Rather, it is Australia's understanding that what Canada essentially seeks to do is to expand the scope of the like products to also include imported bulk wine.\(^{229}\) Canada appears to assert that imported bulk wine is a "like" product as it is in a competitive relationship with Quebec bottled wine that is sold directly to grocery stores as it appears on grocery store shelves.\(^{230}\) Canada provides no further argumentation or evidence this point.

171. In Australia's view, Canada's approach is divorced from the operation of the measures at issue. In Quebec, the legal framework governing bulk wine is a separate pre-existing regime.\(^{231}\) In the absence of further evidence and argumentation on Canada's part, it is unclear why this regime would be relevant to the scope of like products for the purpose of Australia's claim, which is with respect to treatment afforded under measures that permit Quebec winemakers to sell their own bottled wine in grocery and convenience stores.

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\(^{229}\) Canada's responses to Panel question No. 43, para. 166.

\(^{230}\) Ibid.

\(^{231}\) See Australia's first written submission, para. 34; Bottling Regulation, Exhibit AUS-28; Grocery Permit Regulations, Exhibit AUS-29, ss. 5 and 6.
ii. None of Canada's arguments rebut the conclusion that the Quebec grocery measures modify the conditions of competition to the detriment of like Australian wine.

172. Australia has established that the Quebec measures modify the conditions of competition to the detriment of like Australian bottled wine. The measures at issue *de jure* discriminate in favour of small-scale wine producers in Québec, by permitting them to market and sell their own branded bottled domestic wines directly to grocery and convenience stores. In contrast, like Australian wine made and bottled by Australian wine producers cannot be sold in these sales outlets.

173. Canada does not dispute this difference in treatment between bottled Quebec wine and like Australian wine under the measures. Instead Canada attempts to divert attention from this differential treatment by highlighting various factors, including: that the Quebec measures affect only a "tiny fraction" of wine sold in Quebec, pertain to only a limited number of grocery stores in Quebec; the market presence of Quebec small-scale producer wines in grocery and convenience stores is limited; that Australian bulk wine bottled in Quebec enjoys a certain percentage of the grocery and convenience store market in Quebec; and, that imported wines have a dominant share of the SAQ network.

174. In Australia's view, none of these points are relevant to, or change the conclusion that the measures afford less favourable treatment to like Australian bottled wine. Canada has not adequately explained the legal relevance of these factors to the assessment of less favourable treatment. Under the measures, Quebec wines have access to grocery sales outlets that bottled Australian wines do not have access to. This is a competitive advantage that is only available to Quebec wines, and is never available to like Australian bottled wine. Quebec wines can also by-pass the SAQ distribution system, thereby avoiding the SAQ mark-up. This competitive advantage is also only available to Quebec wines not Australian bottled wines. None of the factors Canada raises in its submission address the simple fact that more favourable access is granted by the measures to Quebec bottled wines.

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232 Australia's first written submission, paras. 251-263.
234 Canada's first written submission, paras. 205, 213-215.
175. Canada's arguments imply that Article III:4 could permit Members to pursue measures that discriminate against imported products if those measures address perceived competitive disadvantages faced by domestic products (e.g., where the domestic producers are small and production capacity is small and size of the domestic industry is small relative to imports\textsuperscript{235}), or where the measures neutralise perceived competitive advantages of imported products in existing market conditions. However, this approach does not find support in Article III:4, and if accepted would seriously undermine the disciplines in Article III:4. Contrary to Canada's argument, Article III:4 is concerned with avoiding the modification of competitive conditions between imported and domestic products in a market, therefore it prevents Members from interfering with existing market conditions in favour of domestic producers.

176. Canada seeks to highlight that the conditions on the sale of Australian wine in Quebec are the same as the conditions on the sale of wine from other Canadian provinces\textsuperscript{236}. Such arguments have no legal basis in the text of the Agreement, have already been properly rejected in previous cases, and should be rejected in this case.\textsuperscript{237} While Canada raises this point, Canada does not elaborate on how or why this is relevant to the less favourable treatment assessment. This is not surprising given Canada appears to agree that it would not be relevant. In particular, Canada implicitly accepts that where a measure applies a \textit{de jure} distinction between imported and domestic products, as the Quebec measure does, the fact that the treatment of wine from other Canadian provinces is the same as that for like Australian wine would not affect Australia's conclusion.\textsuperscript{238}

iii. Even if the scope of like products includes imported bulk wine, this does not affect the conclusion that the measures modify the conditions of competition to the detriment of like Australian wine

177. Even if the Panel were to accept Canada's flawed argument that the product scope for the purposes of the less favourable treatment assessment should be expanded to include imported bulk wine, the conclusion that the Quebec grocery measures afford less favourable treatment to Australian wine does not change.

\textsuperscript{235} See e.g. Canada's responses to Panel question No. 33; Canada's first written submission, para. 204.

\textsuperscript{236} Canada's first written submission, paras. 206-207.


\textsuperscript{238} Canada's response to Panel question No. 42, para. 160.
178. Bulk wine in Quebec, whether imported or domestic, is regulated under a separate pre-existing regime that governs its bottling and sale. Under this regime, holders of a wine makers permit in Quebec are permitted to bottle wine in Quebec and sell it (via the SAQ) to grocery stores under their own exclusive proprietary brands. Under Quebec regulations, in addition to small-scale Quebec producer wines, the wines that a grocer can sell are limited to the following:

- wines bottled in Quebec bearing the mark of origin of the SAQ, provided that there are not more than 8 brand-sizes; and
- subject to section 3, "table wines" bottled in Quebec under exclusive brand names.

179. A "table wine" is defined as "a wine designated under the name of its country of origin but that may not be designated under the name of a place or geographic area that is reserved according to the conditions set out in the legislation of the country where the wine is produced". Section 3 of the regulations provide that a proprietary brand is one whose ownership and use belong exclusively to the holder of a wine maker's permit (the bottler) or the SAQ, or whose ownership and exclusive use have been assigned only between holders of wine maker's permits issued the SAQ Act.

180. In other words, it is Australia's understanding that under this regime, the wine must be bottled in Quebec by a Quebec permit holder under their own private brand. While the wine can include imported (or domestic) bulk wine content, the wine must be bottled in Quebec and marketed and sold under the Quebec permit holder's own brand, and must be distributed via the SAQ. This is an entirely different kind of treatment than that afforded to small-scale Quebec wines under the Quebec grocery sales measures at issue.

181. Under the Quebec grocery measures, small-scale Quebec winemakers are permitted to sell their own bottled and branded wines directly to grocery and convenience stores. Therefore, contrary to the position that existed before the introduction of Bill 88, Quebec winemakers are now permitted to sell their own bottled wines, marketed under their own winery brands, to grocery

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239 See Australia's first written submission, paras. 34, 88; Grocery Permit Regulations, Exhibit AUS-29.
240 Grocery Permit Regulations, Exhibit AUS-29, ss. 2(2)-(3).
241 Grocery Permit Regulations, Exhibit AUS-29, s. 1.
242 Grocery Permit Regulations, Exhibit AUS-29, s. 3.
and convenience stores. This treatment is only granted to Quebec wines. Therefore, Australian wines bottled in Australia by Australian winemakers under their own brands and imported to Quebec cannot be sold in grocery and convenience stores. Such an Australian bottled wine can only be sold in SAQ outlets in Quebec, where the SAQ mark-up applies. Evidently the ability to sell a bottle of wine in a grocery outlet is a competitive advantage. The Quebec grocery sales measures afford this sales opportunity to only Quebec bottled wines, while excluding like Australian bottled wine. This modifies the conditions of competition to the detriment of like Australian wines.

182. Canada appears to imply that a pre-existing type of restricted access available to imported and domestic bulk wine bottled in Quebec under the bottlers' proprietary brand labels, and the presence in grocery stores of Australian wine imported in bulk, bottled in Quebec and sold under Quebec bottlers' proprietary brands negates the more favourable access granted to Quebec bottled wines under the Quebec grocery sales measures. In Australia's view, existing access for imported and domestic bulk wine bottled in Quebec by Quebec bottling companies cannot negate the more favourable treatment accorded by the measures at issue to only Quebec producers' bottled wine. This is akin to arguing that pre-existing access for certain imported products in the Quebec market could somehow offset the more favourable access the measures at issue grant to domestic Quebec wines vis-à-vis Australian bottled wines.

183. This attempt to offset discriminatory treatment is a common theme in Canada’s approach to a number of claims across this dispute. Canada does not clearly explain the legal basis or cite any WTO cases to support this proposition. In Australia's view, this approach is not supported by the text of Article III:4 or prior panel or Appellate Body reports and therefore, should be rejected by the Panel.

iv. Canada's argument that Australia has not made out a *prima facie* case for less favourable treatment should be rejected because Canada relies on an incorrect legal standard.

184. Canada asserts that Australia has not made out a *prima facie* case of less favourable treatment of Australian wine because Australia has not offered any evidence or data demonstrating

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243 See Australia's first written submission, para. 88.
that the "actual effects" of the measure have modified the conditions of competition in the market.\footnote{Canada's first written submission, paras. 209-210.} Canada also alleges that Australia's arguments about the "expectations" of the measure is not grounded in fact or law.\footnote{Canada's first written submission, paras. 208-210.} As Australia explained in Part II.A.4(c)i of this submission, Canada's arguments here are based on the application of an incorrect legal standard. Article III is concerned with protecting expectations of equal competitive relationships rather than the actual trade effects of a particular measure.\footnote{See Australia's first written submission, paras. 111-113; Appellate Body Reports, \textit{Japan – Alcoholic Beverages II}, p. 16; \textit{Canada – Periodicals}, p. 15; \textit{Korea – Alcoholic Beverages}, para. 120; and \textit{EC – Seal Products}, para. 5.82.} As the Appellate Body has said, an assessment of less favourable treatment "should not be anchored in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialize."\footnote{See Part II.A.4(c)i of this submission.}

185. A complainant is not required to provide evidence of actual trade effects or quantify the likelihood that a challenged measure will in fact have a detrimental impact on imported products to make out a \textit{prima facie} case under this element.\footnote{See Part II.A.4(c)i of this submission.} Yet, this is precisely what Canada argues was required of Australia in making this argument. Canada criticises Australia for not providing evidence of the "actual effects" of the measure and that Australia has framed its claim around expected advantages arising from the measure.\footnote{Canada's first written submission, para. 210.} As Canada's argument relies on an incorrect legal standard, it must be rejected.

\begin{itemize}
\item[v.] Canada's alternative argument that the extent or degree of detrimental impact is \textit{de minimis} should be rejected because Article III:4 is not subject to a \textit{de minimis} standard
\end{itemize}

186. Canada has argued that "if the Panel determines that no evidence of the actual effects of a measure in the market is required", the Panel should alternatively find that the less favourable treatment element of Article III:4 is subject to a \textit{de minimis} standard.\footnote{Canada's first written submission, para. 216.}

187. Canada's argument for a \textit{de minimis} standard as part of the less favourable treatment element is not supported by either the text of Article III:4 or previous jurisprudence interpreting Article III:4. The text of Article III:4 refers to "treatment no less favourable", it does not refer to a
minimum threshold or degree of less favourable treatment. As previous cases have emphasised, Article III:4 is not about expectations of any particular trade volumes, it is about expectations of equal opportunities to compete in the market. There is no minimum degree of detrimental impact required for a finding of less favourable treatment.

188. Previous panels have clearly stated that the less favourable treatment test is not subject to a *de minimis* standard. Canada now attempts to re-run arguments about the legal standard under Article III:4 that have been previously rejected. The panel in *China – Publications and Audiovisual Products* rejected the complainant's argument "that a lack of 'significant' alteration in the conditions of competition would mean that [the respondent] has fulfilled its obligation to treat the imported products no less favourably than the like domestic products". The panel said that "the phrase 'treatment no less favourable' is not qualified by a *de minimis* standard" and, "[a]ccordingly, any less favourable treatment of imported products … is contrary to the obligation in Article III:4, provided such treatment modifies the conditions of competition to the detriment of imported products".

189. Canada asks the Panel to depart from previous jurisprudence without any compelling reasons as to why the Panel should do so. Australia asks the Panel to find that there is no *de minimis* standard, and accordingly, that Canada's argument on this basis must fail.

(d) Conclusion

190. Applying the correct legal test for Article III:4, Australia has established a *prima facie* case that the Quebec grocery measures are inconsistent with Article III:4 of the GATT 1994. Canada has not rebutted Australia's case.

E. NOVA SCOTIA REDUCED MARK-UP FOR LOCAL PRODUCERS

191. Australia has explained the operation of this measure in detail in its first written submission, and recaps key features in the following paragraphs.

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251 Panel Reports, *China – Publications and Audiovisual Products*, para. 7.1537; *India – Solar Cells*, para. 7.97; *Canada – Wheat Exports and Grain Imports*, fn. 281; and *Thailand – Cigarettes (Philippines)*, para. 7.731.
253 Australia's first written submission, paras. 96-110.
192. 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). 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.

193. 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 hectolitres (HL) annually.\textsuperscript{254} Based on this definition, Nova Scotia qualifies as an emerging wine region because it produces less than this amount of wine annually.\textsuperscript{255} Therefore, all Nova Scotian wine is eligible for the reduced 43% mark-up, and is in fact granted this reduced mark-up.

194. 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.\textsuperscript{256}

1. **Nova Scotia mark-ups are within scope of Article III of the GATT 1994**

195. The nature and characteristics of the NSLC and the mandate and powers it is granted under legislation with respect to liquor sales in the province of Nova Scotia confirm that the NSLC's mark-ups are within the scope of Article III of the GATT 1994.

   (a) **The nature and characteristics of the NSLC**

196. The NSLC is a wholly government-owned entity acting as an agent of the Crown. It is governed by the *Liquor Control Act* (NSLCA) and derives is legislative mandate and powers from that Act.\textsuperscript{257} Contrary to Canada's characterisation of the NSLC as an enterprise operating at arms-length from the government in all respects,\textsuperscript{258} the NSLCA, which governs the NSLC, shows that the government retains a significant degree of control and oversight over the operations of the NSLC.

\textsuperscript{254} Canada’s first written submission, para. 87.
\textsuperscript{255} Australia's first written submission, para. 291.
\textsuperscript{256} Australia’s first written submission, paras. 102 and 103.
\textsuperscript{257} NSLCA, Exhibit AUS-14.
\textsuperscript{258} See e.g. Canada's first written submission, para. 226; Canada's responses to Panel question No. 39.
197. In response to Panel question 39, Canada alleges that prior to the restructure of the Nova Scotia Liquor Commission into the NSLC, the *Liquor Control Act* imposed a higher degree of oversight by the Executive Council (Cabinet), the Minister and Commissioners, and lists various features that the Commission previously had. However, Australia notes that some of these same features that Canada highlights as characteristics of government control under the prior arrangement remain in the current *Liquor Control Act* under which the NSLC is continued as a Crown Corporation, including the following:

- the NSLC requires approval of the Minister to grant a permit for the sale of liquor to it by a brewer, distiller or vintner (s. 63(1));
- checking and auditing of the NSLC's receipts at least every month by the Minister of Finance or a person designated by him (s. 26); and
- designation by the Department of Finance of the bank accounts the NSLC uses (s. 19(3)).

198. Therefore, Canada's assertion that the NSLC is no longer subject to a higher degree of oversight by the Government appears to be inconsistent with the legislation that governs the NSLC. Canada has not contested the application of this legislation to the NSLC.

199. Australia notes that in addition to the above features, the NSLCA also contains numerous other provisions demonstrating the oversight and control of the Government over the NSLC including the following:

- the Governor in Council appoints the Board of Directors, one of whom is a Deputy Minister, and the Chair of the Board (s. 7);
- the Governor in Council appoints the President of the NSLC, who is the CEO and may exercise any powers conferred on him or her by the Minister and is accountable to the Minister (s. 7C);

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259 Canada's responses to Panel question No. 39, para. 142.
260 See NSLCA, Exhibit AUS-14.
261 See NSLCA, Exhibit AUS-14.
• the NSLC needs the approval of the Governor in Council to lease or sell any land or buildings it owns and to acquire or lease any plant (s. 12(f) and s. (g));

• the NSLC must submit a budget, and reports of net profit forecasts to the Minister for approval at any time that the Minister prescribes, and must seek approval of the Minister for outlays and expenditure which are in excess of $50,000 over the approved budget (s. 20);

• the NSLC must submit its five-year strategic plan, its annual business plan and evaluations of its activities to the Minister for approval (s. 21-23);

• the NSLC needs approval of the Minister to borrow money, the Government may guarantee the loans of the NSLC and may advance funds to the NSLC out of the General Revenue Fund of the Province (s. 24);

• the NSLC must hand over any money collected on demand to the Minister of Finance and Treasury Board and after the money is handed over it shall form part of the General Revenue Fund (s. 27); and

• the NSLC cannot sue or be sued except with the consent of the Attorney General (s. 30).

200. All of these features reveal that the Government of Nova Scotia retains a high degree of control and oversight over the NSLC, including over its budget and strategic direction. Indeed, the NSLC depends on the Government for its operation. For example, if the Government refused to approve the NSLC's budgets, or borrowing, the NSLC would not be able to operate.

201. These provisions confirm that the NLSC is not like an ordinary government business enterprise (GBE) or private commercial business. Contrary to Canada's assertions, the Minister is not at arm's-length from the operational affairs of the Corporation. Rather, the NSLC depends on the Minister's approval to operate. Canada's argument that the NSLC is not the type of provincial liquor board examined in the previous trade dispute is not borne out, as the legislation

262 See Canada's first written submission, para. 228. For example, Canada asserts that a GBE can sue and be sued, however this fails to recognise that the NSLCA provides that the NSLC can only sue or be sued with the consent of the Attorney General.

263 Canada's response to Panel question No. 39.
governing the NSLC reveals that it retains similar features\textsuperscript{264} to the provincial liquor boards in the previous GATT cases \textit{Canada – Provincial Liquor Boards (EEC)} and \textit{Canada – Provincial Liquor Boards (US)}.

202. Furthermore, under the NSLCA, the NSLC clearly has a regulatory role that goes well beyond the commercial selling and buying of liquor. The NSLC has the power to make regulations, with the approval of the Governor in Council, which have the same force and effect of law as if enacted in the NSLCA (s. 15).\textsuperscript{265}

\textbf{(b) Retail mark-ups are set by the NSLC under legislative authority and are not merely a commercial activity}

203. The Government of Nova Scotia has enacted a regulatory regime under which it has delegated statutory authority to the NSLC to control the sale and distribution of liquor in Nova Scotia. This control over the sale of liquor includes the authority to set liquor prices of all liquor for sale in the province, including mark-ups.\textsuperscript{266}

204. Section 137 of the NSLCA sets out the purpose and intent of the Act to prohibit any transactions in liquor within Nova Scotia "except under Government control" which is made effective through the instrumentality of the NSLC:

\begin{quote}
The purpose and intent of this Act are to prohibit transactions in liquor which take place wholly within the Province \textit{except under Government control}, and every Section and provision of this Act and of the regulations dealing with the importation, sale and disposition of liquor within the Province \textit{through the instrumentality of a Corporation} and otherwise, provide the means by which such Government control shall be made effective...\textsuperscript{267}
\end{quote}

205. "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..."\textsuperscript{268}

Accordingly, this clearly establishes that the means by which the government exercises control

\textsuperscript{264} As discussed in paras. 197-199 of this submission.
\textsuperscript{265} NSLCA, Exhibit AUS-14, s. 15.
\textsuperscript{266} See Australia's responses to Panel questions No. 1 and 11; Australia's opening statement at the first meeting of the Panel, paras. 87-93.
\textsuperscript{267} NSLCA, Exhibit AUS-14, s. 137. (emphasis added)
\textsuperscript{268} NSLCA, Exhibit AUS-14, s. 2(f).
over liquor sales in Nova Scotia is through the NSLC. The Act grants authority to the NSLC to control liquor sales in the province on behalf of the Nova Scotian Government.

206. Section 4(3) of the NSLCA establishes the objectives of the NSLC, which includes: 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.

207. Section 12 of the NSLCA sets out the duties and powers of the NSLC. It provides, inter alia:

It shall be the duty of the Corporation and it shall have power to

(a) buy, import, have in its possession and sell liquor and merchandise for the purpose of this Act;

(b) control the possession, sale, transportation and delivery of liquor in accordance with this Act and the regulations;

…

(t) without in any way limiting or being limited by the foregoing clauses, generally do all such things as may be deemed necessary or advisable by the Corporation for the purpose of carrying into effect the purpose and intent of this Act or of the regulations.

208. Section 15 of the Act provides that the NSLC may make any regulations, with approval from the Governor in Council, that the NSLC deems necessary for carrying out the purpose and intent of the Act. These regulations have the force of law in Nova Scotia as if made under the Act.269 The NSLC Regulations are made under the power granted by this section of the Act.270

209. Section 42 of the Act permits the NSLC to prescribe by regulation the manner and prices that liquor may be sold in the province:

42(1) Subject to this Act, liquor may be sold in such manner and at such prices as the Corporation may by the regulations prescribe.

269 NSLCA, Exhibit AUS-14, s. 15.
270 NSLC Regulations, Exhibit AUS-59.
The NSLC’s ability to prescribe prices for all liquor sold in the province is set out in the NSLC Regulations:\textsuperscript{271}

13 (6) The prescribed prices for liquor under subsection 42(1) of the Act include prices determined by the Corporation in respect of all of the following:

(a) liquor sold at retail from Government stores and agency stores;

(b) liquor sold in the Province from other than Government stores or agency stores, including liquor sold directly by the producer of the liquor under a valid license or permit.

13 (7) The prescribed prices for liquor under subsection 42(1) of the Act are as follows:

(a) for liquor sold at retail from Government stores and agency stores, the prices set out in an official price list issued by the Corporation from time to time or as otherwise determined by the Corporation, and no store manager shall charge or receive any other price except on written instruction from the Corporation;

(b) for liquor sold in the Province from other than Government stores or agency stores, including liquor sold directly by a producer of liquor under a valid license or permit, the prices determined by the Corporation from time to time and communicated to the producers, and no producer of liquor shall charge or receive any other price except on written instruction from the Corporation.

(8) The prices in subsection (7) include, regardless of whether expressly stated, a retail mark-up sales allocation or similar charge, as determined by the Corporation.

The NSLC also derives its policy-making power from the Regulations (s. 39), which provides: “the Corporation may prescribe policy guidelines setting out details and procedures required for administration and operations carried out under the Act and these regulations.”\textsuperscript{272}

The Government of Nova Scotia has thus enacted a regulatory regime under which it vests in the NSLC the authority to control the sale and distribution of liquor in the province. The NSLC has authority to determine the manner in which liquor is sold and distributed in NSLC. Under this regime, the only way that liquor can be sold in the province is through the NSLC at the prices, including mark-ups, prescribed by the NSLC. Therefore, under this regime, wine cannot be sold

\textsuperscript{271} NSLC Regulations, Exhibit AUS-59.
\textsuperscript{272} Ibid.
without the application of the NSLC mark-ups. The NSLC's retail mark-ups are part and parcel of the government's regulatory framework under which liquor can be offered for retail sale in the province. These mark-ups are effectively mandatory charges applied on the retail sale of wine in Nova Scotia. 273

213. Canada’s attempt to characterise the NSLC's adoption of mark-ups as a commercial function cannot be reconciled with the statutory and regulatory regime set out above. That is, liquor prices, including mark-ups, in Nova Scotia are made by the NSLC acting under the authority of the Government of Nova Scotia. It is immaterial, that the specific liquor prices and mark-ups are not set out in the Regulations.

214. As Australia has explained in response to Panel questions,274 the NSLC mark-ups are very different to mark-ups set by commercial enterprises. Unlike commercial enterprises, the NSLC liquor mark-ups are plainly not a product of commercial market forces. The NSLC, under legislative authority, sets all liquor prices, including retail mark-ups, for all retail outlets in the province. Its retail mark-ups are laid down generally and apply "across the board" to all liquor sold in the province, both domestic and imported. Further, 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.

215. Australia has also explained275 that there is evidence that demonstrates that the NSLC adopted the EWR 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 industry276 under the NSLCA. The NSLC has publicly stated it considers that its provision of preferential mark-ups to the local industry is part of its legislative mandate to support local industry.277 The NSLC expressly links the adoption of the EWR Policy as a pricing policy aimed at furthering its mandate

273 See Australia's responses to Panel questions No. 1 and 11; Australia's opening statement at the first meeting of the Panel, paras. 87-93.
274 Australia's responses to Panel question No. 11; Australia's opening statement at the first meeting of the Panel, paras. 91-93.
275 Australia's opening statement at the first meeting of the Panel, para. 94-96; Australia's responses to Panel question No. 1, paras. 18-22.
276 NSLCA, Exhibit AUS-14, s. 4(3)(b).
to promote the development of the wine industry in Nova Scotia.\textsuperscript{278} 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."\textsuperscript{279}

216. 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 policy objectives, not commercial profit-making objectives.

217. Australia also notes that the NSLC's legislative mandate includes "the attainment of suitable financial revenues to government."\textsuperscript{280} All of the profit that the mark-ups generate is in pursuit of provincial revenue for the government to fund public services. The NSLC itself states "100% of [its] profit goes to the government to fund key services" and that the revenue is used to "finance essential public services."\textsuperscript{281}

218. In light of these circumstances, Australia submits that the NSLC mark-ups, and in particular the reduced mark-up under the EWR Policy, cannot be characterised as commercial activities of a private enterprise, but rather as actions attributable to the Nova Scotia Government. They are, therefore, within the scope of Article III of the GATT 1994.

\textbf{(c) The international law rules on state attribution, reflected in the ILC Articles, confirm that the NSLC mark-ups is conduct attributable to the Nova Scotia Government for which Canada is responsible under International Law}

219. The foregoing sections establish that the actions of the NSLC with respect to mark-ups are attributable to the Nova Scotia Government, and accordingly, Canada is responsible for the resulting breach of the Article III of the GATT 1994. The NSLCA establishes that the Government acts via the NSLC with respect to liquor sales, and this includes the NSLC mark-ups.

\textsuperscript{280} NSLCA, Exhibit AUS-14, s. 4.
220. As noted in Australia's response to Panel question No. 45, the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Act (ILC Articles) contain rules relating to the question of attribution of conduct to a State. Article 5 of the ILC Articles deals with attribution to a State of conduct of an entity where the entity is empowered by the law of the State to exercise elements of governmental authority. It provides:

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

221. The Appellate Body discussed Article 5 of the ILC Articles in *US – Anti Dumping Countervailing Duties (China)* in the context of interpreting "public body" under the SCM Agreement. While that context was different, the Appellate Body's observations on Article 5 may be useful to guide the analysis in this case.

222. The Appellate Body noted that *State ownership* of the entity in question, while not decisive, could "serve as evidence indicating…the delegation of governmental authority" in conjunction with other elements. The Appellate Body noted that in some cases, such as when a statute or other legal instrument expressly vested authority, the exercise could be more straightforward than in others. The Appellate Body also considered that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions."

223. In Australia's view, the factors the Appellate Body highlighted in *US – Anti Dumping Countervailing Duties (China)* are all present in the case of the NSLC's conduct with respect to the EWR Policy. As Australia has described above, the NSLC is wholly-owned by the Government; the Government exercises a high degree of control and oversight over the NSLC; the Government controls the sale of liquor in the province through the NSLC and the Government grants the NSLC the express authority in the NSLCA to control the sale of liquor in the province,

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282 Australia's response to Panel question No. 45.
including authority to set liquor prices and make regulations for any of the NSLC's functions under the Act.

224. As Australia explained in its response to Panel question No. 45, the conduct with respect to the reduced mark-up under the EWR Policy is attributable to Canada. The NSLC is expressly empowered under the NSLCA to exercise elements of governmental authority. The NSLC is empowered by that legislation to make regulations that have the force of law in Nova Scotia to carry out the purpose and intent of the NSLCA. It has been empowered by the NSLCA to control the possession, sale, transportation and delivery of liquor in accordance with the NSLCA and Regulations. The NSLC adopted the EWR Policy, and the preferential mark-ups under that Policy, as part of this legislative mandate to set liquor pricing to control the sale of liquor in Nova Scotia; to support local industry; and to attain suitable financial revenue for the government of Nova Scotia to fund public services.

225. The NSLC, in adopting mark-ups under the EWR Policy, is clearly exercising elements of the governmental authority granted to it by law. That conduct must be considered an act of Canada under international law.

2. Australia has established that the Nova Scotia reduced mark-up for local producers breaches Article III:2, first sentence of the GATT 1994

226. As Australia has noted in Part II.A.3 above, the legal test for a breach of Article III:2, first sentence consists of the following 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) imported and domestic products are "like" products; and (iii) whether imported products are taxed in excess of like domestic products.

(a) Nova Scotia reduced mark-up for local producers is an internal tax or other charge

227. Article III:2, first sentence covers both "internal taxes" and "other internal charges of any kind". In Argentina – Hides and Leather, the panel emphasised that Article III:2 covers "charges
286 Australia’s first written submission, para. 270.
287 Australia’s first written submission, para. 269.
288 Canada’s first written submission, para. 244.
289 See Part III.E.1 of this submission.
290 Ibid.
liquor prices, including mark-ups, as part of its delegated responsibilities under the NSLCA and Regulations in pursuit of its legislative mandate.

233. As Australia has outlined above, the NSLC does not act at arm's-length from the Government.291 The NSLC is a wholly government-owned, government-created, government-controlled entity, with a board of directors appointed by the Minister. The Government of Nova Scotia set the NSLC’s operating mandate, powers and duties by legislation. The Chair and the President of the NSLC are both appointed by the Governor in Council, and the President is accountable to the Minister and the Minister may grant powers directly to the President.292 The NSLCA expressly states that the NSLC is an "agent" of the Crown.293 Various provisions of the NSLC express that the Minister retains a significant degree of oversight over the NSLC.294 The NSLC even terms retail outlets established by the NSLC as "Government stores".295 These features confirm that the NSLC is a creature of the Nova Scotian Government, subject to its control, supervision and direction.

234. Canada argues that previous GATT panel jurisprudence,296 which considered that Canadian provincial liquor boards mark-ups would fall within the scope of Article III:4, is of little value because the structure of the NSLC has changed considerably since that GATT panel report.297 However, Canada's assertions ignore the provisions of the NSLC express that the Minister retains a significant degree of oversight over the NSLC, which, as explained above,298 reveal that despite the change from a commission to a corporation, the Government maintains significant control and supervision over the NSLC.

235. In these circumstances, Australia submits that the mark-up is an "internal charge" within the scope of Article III:2.

291 See Part III.E.1(a) of this submission.
292 NSLC, Exhibit AUS-14, s. 7C.
293 NSLC, Exhibit AUS-14, a. 4(2).
294 See e.g. Part III.E.1(a) of this submission.
295 NSLC, Exhibit AUS-14, s. 2 (g).
296 GATT Panel Report, Canada – Provincial Liquor Boards (US), para. 5.24; Australia's first written submission, para. 267.
297 Canada's first written submission, para. 254.
298 See paras. 197-198 of this submission.
(b) **Australian bottled wine and domestic Nova Scotian bottled wine are "like products"**

236. Australia has established that Australian bottled wine and domestic Nova Scotian bottled wine are "like" products. Canada does not contest that these products are "like", but contests the comparator Australia uses in its analysis, arguing that it should include all Canadian wine, rather than just Nova Scotia wine. Australia will address this argument below.

(c) **Australian bottled wine is taxed or charged "in excess" of like domestic bottled wine**

   i. **Australia has established that Australian bottled wine is subject to a charge "in excess" of that on like domestic bottled wine**

237. With respect to the assessment of whether imported products are taxed or subjected to a charge "in excess" of like domestic products, as Australia has explained earlier, the Appellate Body has stated that Article III:2, first sentence is not qualified by a *de minimis* standard and, consequently, "[e]ven the smallest amount of 'excess' taxation is "too much". In assessing a claim under Article III:2, the panel in *Argentina – Hides and Leather* explained that:

   The provisions of Article III:2, first sentence, are applicable to each and every import transaction. It is well established that the fact that some imported products receive more favourable tax treatment than like domestic products cannot successfully be invoked as justification for less favourable tax treatment of other imported products.

238. As Australia set out in its first written submission, the design of the EWR Policy is such that virtually all Australian wine production is excluded from qualifying for the reduced mark-up because it cannot meet the "emerging wine region" criterion in the Policy (a region can only qualify as an emerging region where the annual production of the political boundaries of the region is less than 299 Australia’s first written submission, paras. 271-283.
300 Canada’s first written submission, para. 146.
301 Canada’s first written submission, para. 291.
302 See Part III.E.3(c)i of this submission.
303 Australia’s first written submission, para. 130; Australia’s opening statement at the first meeting of the Panel, para. 49; Australia’s response to Panel question No. 2, para. 29.
than 50,000 HL).\textsuperscript{305} On the other hand, Nova Scotia qualifies as an emerging wine region under the Policy, and therefore all wines from Nova Scotia are eligible for the reduced mark-up of 43%.\textsuperscript{306}

239. This is confirmed by the factual evidence that shows that the vast majority of wines receiving the reduced mark-up in the Nova Scotia market are domestic Nova Scotian wines, and no Australian wines in the Nova Scotia market are receiving the reduced mark-up.\textsuperscript{307} Out of 164 wines that are receiving the reduced mark-up, only 2 are not from Nova Scotia (from Kent in the UK).\textsuperscript{308}

240. Canada submits that there are other "Nova Scotia wine products" that do not benefit from the EWR Policy.\textsuperscript{309} However, Canada acknowledges that the products referred to do not receive the benefit of the EWR Policy because they cannot be classified as being from Nova Scotia as they do not contain the required local content.\textsuperscript{310} Canada does not provide any further detail on the make-up of these products, aside from noting that five of them are fruit wines,\textsuperscript{311} nor does Canada provide a legal basis for why this submission has a material effect on the conclusions the Panel should draw from the facts as set out by Australia above.

241. Specifically, Australia has established that the EWR Policy discriminates against Australian wine by imposing a pecuniary burden on Australian wines that is significantly "in excess" of that on like domestic products. This is all that is required to establish a breach of Article III:2, first sentence.

242. Canada does not deny that Nova Scotia qualifies as an emerging wine region under the Policy or that the majority of wines in the Nova Scotia market that are receiving the reduced mark-up are from Nova Scotia. Rather, Canada attempts to defend itself on the basis that because non-Nova Scotian Canadian wines receive the same (higher) mark-up treatment as imported wine, this
negates the fact that Nova Scotian wines are provided a reduced mark-up. In Canada's view this means that there is no "excess" taxation of Australia's wine.

243. This is a familiar argument deployed by Canada repeatedly in this dispute and as Australia has clarified repeatedly in this submission, Canada's approach is untenable. Canada's argument is inconsistent with the approach of the panel in *US – Malt Beverages* that rejected precisely this type of argument.312 Nor is it consistent with the approach in *Argentina – Hides and Leather* set out above,313 which rejected the type of balancing approach that Canada seeks to advance here. Canada's approach essentially advocates that favourable "tax" treatment of a sub-group of domestic products can be offset against less favourable "tax" treatment of other sub-groups of domestic products in other instances, where imported products are also treated in the same less favourable way. In Australia's view, this approach is not supported by the text of Article III:2, first sentence or previous reports.

   ii. Evidence of the actual effects of the measure in the market are not required to establish imported products are taxed or charged "in excess"

244. In addition, as Canada has done for the other federal and Ontario taxation measures, Canada also deploys its misconceived and flawed interpretation of Article III:2, first sentence to assert that this Article is concerned with a measure's economic impact on competitive opportunities.314 Canada then criticises Australia for failing to demonstrate that there has been any economic impact on competitive opportunities for Australian wine as a result of the EWR Policy.315 Australia has dealt above with this argument at length and demonstrated why it must be rejected by the Panel.316 Contrary to Canada's submission, Australia is not required to provide evidence of trade effects to make out its claim.

245. For completeness, while Australia does not agree with Canada's submission that Australia is required to provide evidence of the economic impact, Australia will address Canada's comments on the evidence that Australia has put forward on the growth in sales and market share of

312 See Australia's first written submission, para. 118; GATT Panel Report, *US - Malt Beverages*, paras. 5.17 and 5.33.
313 See para. 237 of this submission.
314 Canada's first written submission, para. 296.
315 Ibid.
316 See Part II.A.3(c) of this submission.
Canada – Measures Governing the Sale of Wine
Australia's Second Written Submission
30 September 2019
[[Business Confidential Information redacted on pages 50, 51, 52, 53, 85, 91, 92]]

Nova Scotia wines since the introduction of the EWR Policy.\(^{317}\) Canada argues that this evidence is "not the same as demonstrating that there has been an economic impact on the competitive opportunities for Australian wine."\(^{318}\) Canada's reasoning for this proposition is that Australia has "long-enjoyed" success within Nova Scotia and the broader Canadian market, and is the [[xx,xxx.xx]] wine by volume within Nova Scotia.\(^{319}\)

246. In Australia's view, mere facts on the market share of Australian wine in the Nova Scotia market do not, in and of themselves, establish a causal connection between the measure and the effects on the market. 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.\(^{320}\) In contrast, Australia's evidence does indicate a causal link between the mark-up reduction that Nova Scotia wine receives under the EWR Policy and the growth in Nova Scotian wine sales.\(^{321}\) The NSLC publicly attributes the reduction in mark-up policy to an increase in Nova Scotia wine sales.\(^{322}\) The study on which the EWR Policy mark-up is based also linked the reduction in mark-up on local wines to an increase in sales and growth of the Nova Scotia wine industry.\(^{323}\) Therefore, Australia's evidence confirms that EWR Policy has modified market conditions in Nova Scotia in favour of domestic Nova Scotia wine, as compared to Australian wine.

(d) Conclusion

247. Applying the correct legal test under Article III:2, first sentence of the GATT 1994, Australia has established a *prima facie* case that the reduced mark-up under the EWR Policy is inconsistent with Article III:2, first sentence. Canada has not rebutted Australia's case.

\(^{317}\) Canada's first written submission, para. 297. (contains BCI)
\(^{318}\) Ibid.
\(^{319}\) Ibid.
\(^{320}\) Panel Report, *Dominican Republic – Cigarettes*, para. 7.192; Australia's opening statement at the first meeting of the Panel, para. 68.
\(^{321}\) See Australia's first written submission, paras. 106, 309-310; Committee on Public Accounts – NSLC, Exhibit AUS-73; As Nova Scotia wine industry grows, so does shelf space in stores, Exhibit AUS-72.
\(^{322}\) See Australia's first written submission, para. 106; Committee on Public Accounts – NSLC, Exhibit AUS-73.
\(^{323}\) NS Report 2006, Exhibit CAN-75 (BCI).
3. In the alternative, Australia has established that the Nova Scotia reduced mark-up for local producers breaches Article III:4 of the GATT 1994

248. Australia’s primary contention is that the product mark-ups are an internal charge within the scope of Article III:2, first sentence that violate that Article. However, if the Panel finds the Nova Scotia product mark-ups are not within scope of Article III:2 or are not inconsistent with Article III:2 first sentence, Australia alternatively submits that Canada has breached Article III:4 of the GATT 1994.324

(a) Australian bottled wine and domestic Nova Scotian bottled wine are "like products"

249. Australia has established that Australian bottled wines and domestic Nova Scotia bottled wine are "like".325 Canada does not contest this.326

(b) The Nova Scotia reduced mark-up for local producers is a law, regulation or requirement within the scope of Article III:4 of the GATT 1994

250. Previous reports have held that the scope of the phrase "laws, regulations and requirements" in Article III:4 of the GATT 1994 is broad.327 In Japan – Film, the panel considered that this phrase should be interpreted to encompass a "broad range of government action and action by private parties that may be assimilated to government action."328 The term "regulations" has been interpreted as including "mandatory rules applying across-the-board."329 Previous cases have also explained that a measure need not be mandatory and apply across the board as Article III:4 also applied to "requirements" which encompasses "commitments entered into on a voluntary basis by individual firms as a condition to obtaining an advantage."330

324 Australia’s first written submission, para. 295.
325 Australia's first written submission, para. 299.
326 Canada’s first written submission, para. 146.
327 See e.g. Panel Reports, Japan – Film, para. 10.376; US – Renewable Energy, para. 7.151.
328 Panel Report, Japan – Film, para. 10.376.
329 Panel Report, China – Publications and Audiovisual Products, para. 7.1448.
330 Panel Reports, China – Auto Parts, para. 7.240; and China – Publications and Audiovisual Products, para. 7.1448.
251. As Australia has previously explained, the NSLC has adopted the EWR Policy under legislative authority as part of its powers to set liquor pricing, including mark-ups. The NSLC also derives its policy-making ability from legislation. The NSLC sets all liquor prices, including retail mark-ups, for all retail outlets in the province. The mark-ups thus apply "across-the-board" to all wine sold in Nova Scotia, and are mandatory because wine cannot be sold in the province without the application of the NSLC retail mark-up. Furthermore, the EWR Policy provides an advantage in the form of a reduced-mark-up to only those wines that meet the definition in the Policy. Accordingly, the mark-ups are regulations or requirements within the scope of Article III:4.

252. As the mark-up is applied to the price of wine for internal retail sale through NSLC outlets it directly "affects" the retail price of wine and consequentially the internal sale, offering for sale and the purchase of wine.

253. Furthermore, the NSLC mark-ups, and specifically the reduced mark-up under the EWR Policy, are governmental for the same reasons that Australia has outlined with respect to Article III:2 above.

(c) The Nova Scotia reduced mark-up for local producers accords "less favourable" treatment to Australian bottled wine than the treatment accorded to like domestic bottled wine

i. Like product comparators for less favourable treatment assessment

254. Australia has appropriately identified the product comparators for the purposes of the less favourable treatment assessment as Australian bottled wine and Nova Scotia bottled wine. The reduced mark-up under the EWR Policy is adopted at a provincial level in Nova Scotia, operates only in the Nova Scotia market and in fact affords more favourable treatment to Nova Scotia wine. It is not contested that the reduced mark-up is in fact afforded to wines originating from

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331 See Part III.E.1(b) of this submission; Australia's first written submission, para. 296; Australia's response to Panel question No. 1; Australia's opening statement at the first meeting of the Panel, paras. 87-97.
332 NSLC Regulations, Exhibit AUS-59, s. 39.
333 NSLC Regulations, Exhibit AUS-59, s. 13(6)-(7).
334 See Australia's opening statement at the first meeting of the Panel, para. 92.
335 Australia's first written submission, para. 298.
336 See Part III.E.1 and paras. 230-233 of this submission.
Nova Scotia. In Australia's view, it is this more favourable treatment that must be afforded to Australian bottled wine. Australia observes that while Canada has stated that "in principle" the EWR Policy could apply to bulk wine, Canada has provided no explanation for how this would be the case when the mark-up is a retail mark-up and there is no evidence that it is in fact applied to bulk wine.

In any event, even if the product scope includes non-Nova Scotia Canadian wine, in Australia's view this does not alter Australia's conclusion that the measure modifies the conditions of competition to the detriment of like Australian wine. As Australia has explained repeatedly in this submission in response to the similar arguments made by Canada under other claims, the more favourable treatment provided to Nova Scotian wines cannot be offset simply by the fact that some non-Nova Scotian domestic wines are treated in the same less favourable way as like imported wines. This approach is not consistent with the text of the Agreement and is inconsistent with prior panel and Appellate Body reports.

As Australia has explained, if this approach were accepted a Member could seek to avoid Article III disciplines by applying protectionist policies at a regional level for products of a particular region. Whether a measure modifies the conditions of competition for the purposes of Article III:4 should be assessed based on all of the relevant evidence before the Panel. There is no reason why a measure could not modify the conditions of competition where only a sub-set of domestic products are treated more favourably. In this case Australia has made out a prima facie case that the measure does modify the conditions of competition to the detriment of Australian wine as Australia will detail below.

Australia has established that the reduced mark-up under the EWR Policy modifies the conditions of competition to the detriment of Australian wine

Canada submits that because Australia's claim is made on a de facto basis, Australia is required to demonstrate that the EWR Policy "in its actual effect" accords less favourable treatment

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337 See e.g. Canada's responses to Panel question No. 38(f) and (g).
338 See Part II.A.4(c)ii of this submission.
339 Canada's responses to Panel question No. 10.
340 See Part II.A.4(c)ii of this submission.
to imported wine than to domestic products. As Canada has done in its assessment of Australia's other claims under Article III:4, Canada again relies on the incorrect legal standard, and attempts to introduce a trade effects test into Article III:4. As Australia has explained in this submission, an assessment of "less favourable treatment" under Article III:4 does not require evidence of the actual effects of a measure on the market. Rather, this assessment requires an examination of whether the measure modifies the conditions of competition in the Nova Scotia market to the detriment of imported wine. This is to be assessed, first and foremost from the design, structure and expected operation of the measure.  

258. As Australia set out in its first written submission, the design of the EWR Policy (in limiting emerging regions to those regions where the annual production of wine within the political boundaries is less than 50,000 HL annually) is such that virtually all Australian wine is in fact excluded from qualifying for the reduced mark-up because it cannot meet the "emerging wine region" criterion in the Policy.  

259. On the other hand, Nova Scotia qualifies as an emerging wine region under the Policy, and therefore all wines from Nova Scotia are eligible for the reduced mark-up of 43%. Canada does not contest that that Nova Scotia qualifies as an emerging wine region under the Policy.  

260. That Australian wines receive different treatment to Nova Scotia wine is confirmed by the fact that no Australian wine currently sold in the Nova Scotia market receives the reduced mark-up, and thus would be subject to a higher 140% mark-up. In contrast, Canada has confirmed that 162 Nova Scotian wines receive the reduced mark-up. Only two imported wines (from Kent) are provided the reduced mark-up. Accordingly, the majority of wines in the Nova Scotia market that receive the reduced mark-up are from Nova Scotia.

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341 Canada's first written submission, para. 263.
342 See Part II.A.4(c) of this submission.
343 Appellate Body Reports, Korea – Various Measures on Beef, para. 137; EC – Seal Products, para. 5.101; Dominican Republic – Import and Sale of Cigarettes, para. 93; and US – Clove Cigarettes, para. 179.
345 Australia's first written submission, para. 289.
346 Australia's first written submission, para. 288.
347 Canada's responses to Panel question No. 38, para. 136.
348 Canada's responses to Panel questions No. 38.
349 Canada's responses to Panel question No. 38, para. 136.
261. As Australia has already pointed out, Canada's engagement with the application of the EWR Policy to Australia in Canada's first written submission is fundamentally flawed. Canada wrongly claims that Australia has acknowledged that 8% of total Australian wine production would be eligible under the policy, when in fact, Australia simply highlighted in its submission that 92% of all wine produced in Australia is from regions that produce more than 50,000 HL annually, regardless of the political boundaries of those regions.

262. As Australia explained in its first written submission, the EWR Policy requires that the total annual production within the political boundaries (state, province or equivalent) of the region must be less than 50,000 HL, only two regions in the state of Queensland could qualify. This is because Queensland is the only state that produces less than 50,000 HL annually. Queensland's total annual wine production in 2018 was 536,798 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 even be eligible for the reduced mark-up. Canada's claim that substantially more Australian wine qualifies under the EWR Policy than Canadian wine is obviously incorrect.

iii. The design, structure and expected operation of the EWR Policy supports a finding of less favourable treatment

263. Canada characterises the EWR Policy as a marketing policy designed to "promote better access for Nova Scotia consumers to wines from new regions at competitive prices" and indicates that the Policy sets out this design under the heading "purpose". However, there is evidence on the record that does not support this claim.

350 Australia's opening statement at the first meeting of the Panel, paras. 38-39.
351 Canada's first written submission, paras. 266-267.
352 Australia's first written submission, paras. 289-290.
353 Australia's first written submission, para. 289; Australia’s wine production by state and region, Exhibit AUS-84.
354 Australia’s wine production by state and region, Exhibit AUS-84.
355 Ibid.
356 Australia's first written submission, para. 289; Australian State & Territory Wine Exports to Canada, Exhibit AUS-95.
357 Canada's first written submission, para. 272.
264. Under the EWR Policy, a particular mark-up percentage has been selected: 43%. This is part of the design of the Policy. There is evidence before the panel that explains why the Policy was designed to afford this specific mark-up reduction, which is the essence of the Policy.

265. The NSLC explains that it adopted the EWR Policy following a study that indicated that it was "imperative for the NSLC to provide a better mark-up for Nova Scotia wine (made from a minimum 85% Nova Scotia grown grapes)" and noted that this study "show[ed] that without the assistance of the NSLC, via a change in the mark-up policy, the industry will continue to grow at a modest 4.33% per year". This study is now before the Panel. In response to questions from the Panel, Canada acknowledges that the NSLC developed the EWR Policy based on the study.

266. This study indicates that [xx,xxx.xx]. The study concludes that if [xx,xxx.xx] [xx,xxx.xx]

267. The study notes that applying the [xx,xxx.xx] Accordingly, the study recommends that [xx,xxx.xx]

268. Therefore the 43% mark-up was designed based on [xx,xxx.xx]
269. The NSLC acknowledges that it "implemented the report's recommendation of a mark-up reduction of 70%" and that as a result it "anticipated with this change in the mark-up policy will accelerate the growth of the Nova Scotia industry..." This demonstrates that the design of the mark-up was based around allowing Nova Scotia wines to be more competitively priced, and the expected operation of the NSLC's introduction of the EWR Policy was to allow Nova Scotia wines to be more competitive in the market to increase sales and market share and grow the Nova Scotia wine industry through a reduced mark-up.

270. The study, and the NSLC's statements about why it adopted the EWR Policy cannot be dismissed as mere statements by individual legislators about the subjective intent of the measure. The study's [xx,xxx.xx] is reflected in the EWR Policy. This therefore goes to the question of the design, structure and expected operation of the Policy, as expressed in the Policy itself. This is supported by the fact that Nova Scotia does qualify as emerging wine region, and the majority of wines on the market that are receiving the reduced mark-up are from Nova Scotia.

271. In Australia's view, this evidence, combined with the other evidence already on the record, supports a conclusion that the EWR Policy by design, structure and expected operation provides a competitive advantage to Nova Scotian wines in the form of a reduced mark-up, which is not afforded to like Australian wine.

272. In response to Canada's claim that if the EWR Policy was intended only to apply to domestic products, "it would not simply stand to reason that it excludes products from all other Canadian wine-regions," Australia submits that this is entirely consistent with Australia's

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367 Ibid.
369 See Canada's first written submission, para. 275.
370 Canada's first written submission, para. 277.
submission that the EWR Policy preferences wine of Nova Scotian origin only. As Australia has explained, this is a provincial measure that has been adopted in Nova Scotia in order to grow the local (i.e. Nova Scotian) wine industry and grow production and sales of Nova Scotia wine.

iv. Evidence of the actual effects of the measure confirms that the measure has modified the conditions of competition to the detriment of Australian wine

273. While it is not necessary to show actual effects of a contested measure to establish a violation of Article III:4, such evidence can assist with confirming the impact of a measure on competitive opportunities.

274. As Australia sets out in its first written submission, since the introduction of the EWR Policy, wine sales of the Nova Scotian wine have increased, and the Nova Scotian wine industry has grown. For example, the 2014-2015 NSLC Annual Report also highlights that sales of Nova Scotia wines had nearly doubled in the last five years and now "surpass[ed] those from France, Chile and Australia." As Australia discussed in Part III.E.2(c)ii above, Australia's evidence shows a causal link between the mark-up reduction that Nova Scotia wine receives under the EWR Policy to the growth in Nova Scotian wine sales. The NSLC publicly attributes the reduction in mark-up policy to an increase in Nova Scotia wine sales. The study on which the EWR Policy mark-up is based also linked the reduction in mark-up on local wines to an increase in sales and growth of the Nova Scotia wine industry. Therefore, the EWR Policy has had precisely the anticipated impact referred to by the NSLC, to grow the local industry and increase sales of Nova Scotia wine.

275. This confirms that the EWR Policy has modified the conditions of competition as between domestic Nova Scotian wine and Australian wine by providing Nova Scotian wines a competitive advantage with respect to price through the reduced mark-up that is not afforded to Australian wine. Like Australian wines have not had this same opportunity to increase sales through a more competitive price.

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371 Australia's first written submission, paras. 309-312.
4. Canada's arguments with respect to Article XVII are incorrect

Canada submits that Article III of the GATT 1994 does not apply to the NSLC mark-ups, including the reduced mark-up under the EWR Policy, but rather, Article XVII is applicable to the mark-ups. As a result, Canada argues that any challenge to the mark-up must be brought exclusively under Article XVII.

(a) Relationship between Article III and Article XVII

As Australia has already submitted, Article XVII of the GATT 1994 does not exclude the application of Article III of the GATT to the actions of a state trading enterprise (STE). There is nothing in the text of Article XVII to suggest this. Article XVII imposes obligations on Members with respect to specific activities of STEs, which are not applicable to private enterprises. This does not mean that with respect to conduct involving STEs, Article XVII exempts Members from other obligations in the GATT 1994, including Article III. In every case, whether Article III is applicable to the measure at issue needs to be assessed by reference to all of the relevant factors, including the particular challenged action and the particular characteristics of the entity in question.

As Australia explained in its response to Panel question No. 6, Australia also does not agree with Canada's views concerning the Ad note to Articles XI, XII, XIII, XIV and XVIII.

For the purposes of this dispute it is not necessary to consider whether every activity of a STE falls within Article III of the GATT 1994. Australia is challenging a specific measure, the reduced mark-up under the EWR Policy, as being inconsistent with Article III of the GATT 1994. The question for the Panel to assess is whether on the particular facts in this dispute, the impugned measure falls within the scope of Article III:2, first sentence or alternatively Article III:4 of the GATT 1994. In answering this question, in Australia’s view, it is not necessary for the Panel to make a finding with respect to whether or not the measure also falls within the scope of Article XVII.

373 Canada's first written submission, para. 239.
374 Australia’s responses to Panel question No. 1.
(b) The reduced mark-up under the EWR Policy is not within the scope of Article XVII:1

280. However, if the Panel disagrees with Australia on the relationship between Article III and Article XVII and proceeds to make findings relating to Article XVII, Canada's flawed legal arguments with respect to Article XVII:1 are quickly disposed of when applied in the context of the measure at issue. Canada’s arguments are premised on the assumption that the reduced mark-up under the EWR Policy actually falls within the scope of Article XVII and, therefore, cannot be the subject of a claim under Article III.375 Australia submits that Canada's argument is misguided, even accepting its flawed legal premise, because the reduced mark-up under the EWR Policy is not within the scope of Article XVII:1. Australia provides the following analysis in support of this submission.

281. Article XVII:1(a) and (b) provides as follows:

1.* (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

282. Article XVII:1 is not a broad obligation governing all conduct of a STE. It applies only in specific circumstances and governs specific activities of a STE and it serves to clarify that WTO Members cannot circumvent obligations even with respect to those activities. Article XVII:1(a) provides that a STE shall, in its "purchases or sales involving either imports or exports" act in a manner consistent with the general principles of non-discriminatory treatment...".

375 Canada’s first written submission, paras. 248-249.
Article XVII:1(b) further provides that STEs shall "make any such purchases or sales solely in accordance with commercial considerations…".

283. 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. Australia is challenging 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 applies mark-ups, including the reduced mark-up under the EWR Policy, to the retail price of wine sold within Nova Scotia through retail outlets to consumers. It is not contested that all liquor, whether domestic or imported, is subject to NSLC mark-ups.

284. While Canada makes general arguments about how the NSLC's retail mark-ups are a private sector commercial activity, it fails to show that reduced mark-up under the EWR Policy falls within the scope of Article XVII:1. Canada refers to the Ad Note in the context of Article XVII:4(b), which refers to "import mark-ups." However, the measure in question is not an import mark-up. It is a retail mark-up applicable to wines sold internally in Nova Scotia.

285. The Appellate Body interpreted Article XVII:1(a) and (b) in Canada – Wheat Exports and Grain Imports. It concluded subparagraph (a) "sets out an obligation of non-discrimination" that is clarified by subparagraph (b). The Appellate Body stated that "because both subparagraphs (a) and (b) define the scope of that non-discrimination obligation, we would expect that panels, in most if not all cases, would not be in a position to make any finding of violation of Article XVII:1 until they have properly interpreted and applied both provisions".

286. The "non-discrimination" obligation in sub-paragraph (a) applies to a STE's "purchases or sales involving either imports or exports". The nature of those transactions is clarified in sub-paragraph (b).

287. Canada disregarded the Appellate Body's analysis in Canada – Wheat Exports and Grain Imports in its first written submission when it stated that:

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376 Canada's first written submission para. 247.
377 Appellate Body Report, Canada – Wheat Exports and Grain Imports, para.100. (footnote omitted)
378 Appellate Body Report, Canada – Wheat Exports and Grain Imports, para.106. (footnote omitted) (emphasis added)
In respect of their purchase and sale decisions, under Article XVII, STEs are required to do two things: 1) act in a manner consistent with the general principle of non-discrimination; and 2) Make purchases and sales "solely in accordance with commercial considerations".³⁷⁹

This error vitiates Canada's analysis.³⁸⁰

288. Canada has failed to recognise that there are two discrete clauses in subparagraph (b), which establish separate requirements. The first clause requires a STE to make "any such purchases or sales solely in accordance with commercial considerations". The Appellate Body held that:

It is clear that the word "such" in this phrase must refer to the purchases and sales identified in subparagraph (a), namely the "purchases or sales [of STEs] involving either imports or exports". Thus, the word "such" in subparagraph (b) confirms the link between the two subparagraphs, and ties the content of subparagraph (b) back to subparagraph (a).³⁸¹

289. The second clause requires a STE to afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales. The Appellate Body observed in Canada – Wheat Exports and Grain Imports that the phrase "such purchases and sales" again "refers back to the activities identified in subparagraph (a), namely the purchases and sales of an STE involving imports or exports".³⁸²

290. The Appellate Body elaborated on the requirement under the second clause of subparagraph (b) as follows:

[T]he second clause of subparagraph (b) refers to purchases and sales transactions where: (i) one of the parties involved in the transaction is an STE; and (ii) the transaction involves imports to or exports from the Member maintaining the STE. Thus, the requirement to afford an adequate opportunity to compete for participation (i.e. taking part with others) in "such" purchases and sales (import or export transactions involving an STE) must refer to the opportunity to become the STE's counterpart in the transaction, not to an opportunity to replace the STE as a participant in the transaction. If it were otherwise, the transaction would no longer be the type of transaction

³⁷⁹ Canada's first written submission, para. 232.
³⁸⁰ See, e.g. Canada's first written submission, paras. 239, 241 and 243.
³⁸² Ibid. (emphasis added)
Accordingly, the second clause of subparagraph (b) requires the NSLC to give the enterprises of other WTO Members the opportunity to become its "counterpart" in the "purchases or sales" of wine to be imported into Nova Scotia.

291. However, entering into wine purchases or sales with enterprises from other WTO Members are not the relevant transactions in the present case. The relevant transactions are the retail sales of wine to consumers in Nova Scotia to which mark-ups have been applied, including the reduced mark-ups under the EWR Policy. It is abundantly clear that these transactions fall outside the scope of Article XVII:1.

292. Therefore, even if the Panel were to accept Canada’s view regarding the relationship between Article III and Article XVII, Australia submits it must also find that, on the facts of this dispute, Canada’s attempt to avoid review of the measure at issue through its misguided application of Article XVII must fail.

293. If the Panel agrees with Australia that the EWR Policy is not within the scope of Article XVII:1, Canada's argument that because the mark-up falls within the scope of Article XVII it cannot be the subject of a claim under Article III, falls away. As such, the Panel should proceed to assess the measure under Article III of the GATT 1994.

IV. MEASURES AT ISSUE CANNOT BE JUSTIFIED UNDER ARTICLE XXIV OF THE GATT 1994

A. CANADA FAILS TO ESTABLISH A DEFENCE UNDER ARTICLE XXIV

294. Canada has invoked Article XXIV of the GATT 1994 as a defence in the event that the measures at issue are found by the Panel to breach Article III of the GATT 1994. Article XXIV addresses the relationship between the obligations of WTO Members under the GATT 1994 and their obligations under agreements establishing customs unions and free trade areas. Article XXIV

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383 Appellate Body Report, Canada – Wheat Exports and Grain Imports, para. 157. (original emphasis)
384 Canada's first written submission, paras. 339 and 344.
may justify a measure under such an agreement that is inconsistent with other GATT provisions if
certain conditions are met. Given this outcome, Australia submits Article XXIV must be
rigorously interpreted and applied.\footnote{Australia's response to Panel question No. 46, para. 93.}

Australia recalls, in \textit{Peru – Agricultural Products}, the
Appellate Body adverted to the risk of Article XXIV being interpreted as "a broad defence for
measures in FTAs".\footnote{Appellate Body Report, \textit{Peru – Agricultural Products}, para. 5.116.}

295. As the party invoking an affirmative defence, Canada bears the burden of establishing that
defence.\footnote{Appellate Body Report, \textit{US – Wool Shirts and Blouses}, p. 16.} Australia will show that Canada has failed to meet that burden.

1. **Canada uses the Comprehensive and Progressive Agreement for Trans-Pacific
Partnership to invoke Article XXIV**

296. Canada uses the Comprehensive and Progressive Agreement for Trans-Pacific Partnership
(CPTPP)\footnote{Australia and Canada are parties to the CPTPP, which entered into force on 30 December 2018.} to invoke Article XXIV, in particular, Annex 2-A to Chapter 2.\footnote{Canada's first written submission, para. 340.} Chapter 2 deals with
national treatment and market access for goods. Article 2.3.1 incorporates Article III of the
GATT 1994 and its interpretative notes. Article 2.3.3 excludes measures set out in Annex 2-A
from the national treatment obligation in Article 2.3.1. Canada's list of measures in Annex 2-A
includes "1(f) the internal sale and distribution of wine and distilled spirits". Canada stated "[a]ll
of Canada's FTAs include reservations related to the internal sale and distribution of wine".\footnote{Canada's first written submission, para. 342.}

297. Canada fails to acknowledge the first paragraph of Annex 2-A which states "[f]or greater
certainty, 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".\footnote{Australia's opening statement at the first meeting of the Panel, para. 101; Australia’s comments on Panel question No. 25 to Canada, para. 73.} Although Canada is seeking to
avoid the application of its GATT 1994 obligations to the measures at issue in this dispute by
relying on the CPTPP, the statement in the first paragraph of Annex 2-A makes abundantly clear
the parties did not shield measures listed in the Annex from their WTO obligations
298. Australia asks the Panel to note the statement also plainly shows the parties did not undertake to refrain from bringing WTO disputes in relation to measures in the Annex.\textsuperscript{392} Australia recalls the Appellate Body stated in \textit{EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)} that "irrespective of the type of proceeding, if a WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it cannot be regarded as failing to act in good faith if it challenges that measure."\textsuperscript{393} This point goes to Canada's implication in its opening statement at the first meeting of the Panel that Australia had not acted properly in bringing this dispute because it "disregarded the fact that the CPTPP countries, including Australia, had agreed that Canadian measures relating to the internal sale and distribution of wine and distilled spirits would be exempted from the national treatment obligation in the CPTPP".\textsuperscript{394}

2. The Appellate Body's analysis of Article XXIV in \textit{Turkey – Textiles}

299. Australia submits that the Appellate Body's report in \textit{Turkey – Textiles} provides valuable guidance to the Panel in the interpretation and application of Article XXIV.

300. The Appellate Body highlighted the significance of Article XXIV:4 and Article XXIV:5, particularly, the chapeau of the latter provision.\textsuperscript{395} Article XXIV:4 and the chapeau to Article XXIV:5 follow:

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area …

301. The Appellate Body noted that the chapeau of Article XXIV:5 states "the provisions of the GATT 1994 'shall not prevent' the formation of a customs union".\textsuperscript{396} The Appellate Body

\textsuperscript{392} This point is also made in the European Union's third party submission, para. 202.

\textsuperscript{393} Appellate Body Reports, \textit{EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)}, para. 4.

\textsuperscript{394} Canada's opening statement at the first meeting of the Panel, para. 59.

\textsuperscript{395} Appellate Body Report, \textit{Turkey – Textiles}, paras. 43-44.

\textsuperscript{396} Appellate Body Report, \textit{Turkey – Textiles}, para. 45. (original emphasis)
interpreted this to mean "the provisions of the GATT 1994 shall not make impossible the formation of a customs union". The Appellate Body stated "the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible 'defence' to a finding of inconsistency".

The Appellate Body went on to observe that the chapeau states "the provisions of the GATT 1994 shall not prevent 'the formation of a customs union'". In the Appellate Body’s view, "[t]his wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.

Turning to Article XXIV:4, the Appellate Body concluded it "does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV". The Appellate Body opined Article III:4 requires the members of a customs union or free-trade area to strike a "balance": they "should facilitate trade within the customs union [or free-trade area], but … should not do so in a way that raises barriers to trade with third countries". The Appellate Body emphasised that "the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of … paragraph 4".

Having analysed the text and context of the chapeau of paragraph 5, the Appellate Body concluded Article XXIV may justify a measure that is inconsistent with certain other GATT provisions if two condition are satisfied:

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 …

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397 Appellate Body Report, Turkey – Textiles, para. 45. (footnote omitted) (original emphasis)
398 Ibid. (footnote omitted)
399 Appellate Body Report, Turkey – Textiles, para. 46. (original emphasis)
400 Ibid.
401 Appellate Body Report, Turkey – Textiles, para. 57.
402 Ibid. (original emphasis)
403 Ibid.
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.  

The Appellate Body emphasised that "both these conditions must be met to have the benefit of the defence under Article XXIV".  

3. **Canada fails to distinguish Turkey - Textiles**  

305. Canada has argued generally that the two conditions identified by the Appellate Body "should not be applied inflexibly in all circumstances" because circumstances can vary from FTA to FTA. In its answer to Panel question No. 25, Canada also argued that an "inflexible application" of the two conditions "would not align with the text of Article XXIV, nor the object and purpose of Article XXIV, which is to encourage WTO Members to lower trade barriers and to expand free trade".  

306. As Australia has stated, Canada's call for flexibility in the application of the conditions is driven by its inability to satisfy them. Canada's call for flexibility, in fact, would dilute the requirements of Article XXIV, risking it becoming "a broad defence for measures in FTAs".  

307. Accordingly, Australia submits that Canada's wish for flexibility in applying the conditions should be rejected by the Panel. Far from aligning with the text of Article XXIV, Canada invites the Panel to disregard that text and the Appellate Body's analysis of Article XXIV:4 and the chapeau to Article XXIV:5. It also asks the Panel to ignore the Appellate Body's clear statement referred to above that both conditions must be met to rely on the defence under Article XXIV.  

308. Apart from its general pleading against the "inflexible application" of the two conditions, Canada advances arguments in relation to each of the conditions. Canada refers to the first condition, which goes to the timing of the introduction of a measure, as the "timeliness"  

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404 Appellate Body Report, *Turkey – Textiles*, para. 58. Although *Turkey - Textiles* concerned a customs union, there is no textual basis in the chapeau of Article XXIV:5 for excluding free-trade areas from the scope of the Appellate Body's analysis.  

405 Appellate Body Report, *Turkey – Textiles*, para. 58. (original emphasis)  

406 Canada's opening statement at the first meeting of the Panel, para. 62.  

407 Canada's response to Panel question No. 25, para. 35.  

408 Australia's comments on Panel question No. 25 to Canada, para. 70.  

409 See para. 304304 of this submission.
103

criterion,\textsuperscript{410} and the second condition, which goes to a measure's link to the formation of a customs union or free trade area, as the "necessity" criterion.\textsuperscript{411}

(a) Canada's arguments on the "timeliness" criterion lack merit

309. On the "timeliness" criterion, Canada does not consider a Member has to demonstrate a measure was introduced on the formation of a customs union or free trade area.\textsuperscript{412} In Canada's view, the "proper question" is whether the measure is "contemplated" by the FTA.\textsuperscript{413} The measure "need not have been introduced by the FTA, but there must be a connection between the impugned measure and the FTA".\textsuperscript{414}

310. Canada has also contended that a strict application of the criterion would undermine the object and purpose of Article XXIV.\textsuperscript{415} Canada has expressed the object and purpose as being to increase trade between FTA parties and not to introduce new measures which restrict trade for non-FTA members.\textsuperscript{416} Canada argues that "consistent with the object and purpose underlying Article XXIV, [its] reservation does not raise any additional barriers to trade with respect to CPTPP members or non-members".\textsuperscript{417} Canada asserts that, where a measure does not impose new restrictions on trade with non-parties, the "timeliness" criterion has to be "read more flexibly".\textsuperscript{418}

311. Australia submits that Canada's arguments on "timeliness" lack substance and should be dismissed by the Panel. In Turkey – Textiles, the Appellate Body correctly identified the importance of the link between the introduction of a measure at issue and the formation of a free trade area. Given that Article XXIV can justify a measure which is inconsistent with other GATT provisions,\textsuperscript{419} allowing it to be applied to measures which were in existence prior to the conclusion of an FTA (such as the measures at issue in this dispute) but are "contemplated" in the FTA (to

\textsuperscript{410} Canada's response to Panel question No. 25, para. 36.
\textsuperscript{411} Canada's response to Panel question No. 25, para. 42.
\textsuperscript{412} Canada's opening statement at the first meeting of the Panel, para. 73; Canada’s response to Panel question No. 25, para. 37.
\textsuperscript{413} Canada's opening statement at the first meeting of the Panel, para. 75; Canada’s response to Panel question No. 25, para. 39.
\textsuperscript{414} Canada's opening statement at the first meeting of the Panel, para. 75.
\textsuperscript{415} Canada's opening statement at the first meeting of the Panel, para. 74; Canada’s response to Panel question No. 25, para. 38.
\textsuperscript{416} Canada's opening statement at the first meeting of the Panel, para. 74.
\textsuperscript{417} Canada's response to Panel question No. 25, para. 40.
\textsuperscript{418} Appellate Body Report, Turkey – Textiles, para. 46.

103
use Canada's nebulous term) would result in a significant and unwarranted increase in the availability of the defence.

312. Canada seeks to give some meaning to the term "contemplated" by stating "there must be a connection between the impugned measure and the FTA". In Australia's view, the "impugned" measures in this dispute do not satisfy the bare requirement of having a "connection" to the CPTPP. If, as Canada argues, the measures concern "the internal sale and distribution of wine" and, therefore, are excluded from the scope of the national treatment obligation in Article 2.3.1 of the CPTPP, then the measures do not have a "connection" to the CPTPP. It has been severed by the operation of Article 2.3.3 of the CPTPP.

313. Australia submits that Canada's arguments concerning the object and purpose of Article XXIV fail to take Article XXIV:4 properly into account. The Appellate Body opined in Turkey – Textiles that Article XXIV:4 requires the members of a customs union or free-trade area to strike a "balance": they "should facilitate trade within the customs union [or free-trade area], but … should not do so in a way that raises barriers to trade with third countries". Canada states that its "reservation does not raise any additional barriers to trade with respect to CPTPP members or non-members" and that may be so. However, it does not facilitate trade within the CPTPP area, which is the object and purpose of FTAs. If the measures at issue are not directed towards that end, Australia finds it difficult to understand why the "timeliness" criterion has to be "read more flexibly" as argued by Canada or, indeed, why the measures should benefit from the defence provided for by Article XXIV.

(b) Canada's arguments on the "necessity" criterion lack merit

314. Australia now turns to Canada's arguments on the "necessity" criterion. This is the second condition identified by the Appellate Body in Turkey-Textiles: a party must demonstrate that the formation of the customs union or free trade area would be prevented if it were not allowed to introduce the measure at issue.

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420 Appellate Body Report, Turkey – Textiles, para. 57.
421 See para. 310 of this submission; Canada’s response to Panel question No. 25, para. 40.
422 Ibid.
423 Australia's comments on Panel question No. 25 to Canada, para. 72.
315. Canada finds the Appellate Body's interpretation of the chapeau of Article XXIV:5, which underpins the second condition, to be "a very stringent and inflexible standard that is not appropriate in all circumstances".424

316. Canada calls on the panel report in US – Line Pipe in aid of its position.425 That case concerned the application of the Agreement on Safeguards and Article XIX of the GATT 1994. The complainant, Korea, was challenging the imposition of a safeguard measure (tariff rate quota) by the United States on imports of line pipe from Korea. It claimed the United States had violated the MFN principle contained in Articles I, XIII:1 and XIX of the GATT 1994 and Article 2.2 of the Safeguards Agreement by excluding Canada and Mexico from the line pipe safeguard measure. Article 802 of the North American Free Trade Agreement required the parties to exempt each other from safeguard measures under certain circumstances. The United States relied upon an Article XXIV defence in response to the MFN violation claim.

317. The panel distinguished the Appellate Body Report in Turkey – Textiles on the facts of that case as follows:

Clearly, if members of a customs union seek to introduce restrictive measures against imports from third countries, contrary to GATT 1994, it is entirely appropriate that they should be required to demonstrate the necessity of such measures. That being said, we are not at all convinced that an identical approach should be taken in cases where the alleged violation of GATT 1994 arises from the elimination of "duties and restrictive regulations of commerce" between parties to a free trade area, which is the very raison d'etre of any free trade area. 426

318. As a first point, this extract from the panel's report shows it can be distinguished from the present case because it deals with "the elimination of 'duties and restrictive regulations of commerce' [i.e. the application of safeguards measures] between parties to a free trade area".427 On the other hand, "restrictive regulations of commerce" are being maintained in the present case through the exemption of Canada's measures for "the internal sale and distribution of wine and distilled spirits" from the national treatment obligations in Article 2.3.1 of the CPTPP.

424 Canada's opening statement at the first meeting of the Panel, para. 64; Canada's response to Panel question No. 25, para. 42.
425 Canada's opening statement at the first meeting of the Panel, paras. 65-67.
427 Ibid.
319. Australia's second point is that Canada does not address the Appellate Body Report in US - Line Pipe. Korea appealed, *inter alia*, the panel's finding that the United States was entitled to rely on Article XXIV as a defence to Korea's MFN claim.

320. As it reversed a related finding of the panel,\(^{428}\) the Appellate Body did not find it necessary to address the question of whether an Article XXIV defence had been available to the United States.\(^{429}\) Nor was the Appellate Body required to make a determination on the question of the relationship between Article 2.2 of the Safeguards Agreement and Article XXIV. The Appellate Body went on to "modify the findings and conclusions of the Panel relating to these two questions contained in paragraphs 7.135 to 7.163 and in paragraph 8.2(10) of the Panel Report by declaring them *moot* and as having *no legal effect*."\(^{430}\) As such, Australia submits that any discussion and analysis linked to those findings and conclusions should be given limited, if any, interpretive value, including the panel's observations on the Appellate Body's interpretation of Article XXIV:4 and Article XXIV:5 stated at paragraph 7.148 of its report, which Canada relies upon.

321. Australia's third point goes to Canada's efforts to bolster its position on the "necessity" criterion by stating "it does not enter into FTAs that do not include reservations or other contingencies for measures governing the internal sale and distribution of wine and considers such provisions 'necessary' for the formation of the FTA."\(^{431}\) Canada also asserts that the measures are an "essential element"\(^{432}\) of the CPTPP. Australia submits that, given full weight, Canada's statements point to it not becoming a party to the CPTPP without the measures being listed in Annex 2-A. However, the statements do not demonstrate, as a consequence of Canada's non-participation, the CPTPP would not have been formed.\(^{433}\)

4. Conclusion

322. In sum, Australia submits Canada has not met its burden to establish a *prima facie* case that it can invoke Article XXIV as a defence in the event that the measures at issue are found by


\(^{430}\) Ibid. (emphasis added)

\(^{431}\) Canada's opening statement at the first meeting of the Panel, para. 71; Canada's first written submission, para. 342; Canada's response to Panel question No. 25, para. 46.

\(^{432}\) Canada's first written submission, para. 344.

\(^{433}\) Australia's comments on Panel question No. 25 to Canada, para. 71.
the Panel to breach Article III of the GATT 1994. If the Panel considers that Canada has established a *prima facie* case, then Australia submits it has rebutted that case.

**V. CONCLUSION**

323. For the reasons set out in this submission, Australia respectfully requests that the Panel find that:

- the Federal excise exemption is inconsistent with Article III:2, first sentence of the GATT 1994, or alternatively, Article III:4 of the GATT 1994;

- the Ontario wine basic tax is inconsistent with Article III:2, first sentence of the GATT 1994;

- the Ontario grocery measures, that permit the sale of wine in grocery stores under both restricted and unrestricted grocery authorizations and wine boutiques, are inconsistent with Article III:4 of the GATT 1994;

- the Quebec grocery measures are inconsistent with Article III:4 of the GATT 1994; and

- the Nova Scotia reduced product mark-up for local producers is inconsistent with Article III:2, first sentence of the GATT 1994, or alternatively Article III:4 of the GATT.

324. Australia requests that the Panel recommend to the Dispute Settlement Body that it request Canada bring its measures into conformity with its obligations under the GATT 1994.