In the World Trade Organization
Panel Proceedings

CANADA—Measures Governing the Sale of Wine

(DS537)

Third Party Submission
by the European Union

Geneva, 28 June 2019
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<tr>
<td>ACGRPPA</td>
<td>Alcohol, Cannabis and Gaming Regulation and Public Protection Act</td>
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<td>Comprehensive and Progressive Trans Pacific Partnership</td>
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<td>Premier’s Advisory Council</td>
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<td>VAT</td>
<td>Value Added Tax</td>
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<td>VQA</td>
<td>Vintners Quality Alliance</td>
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<tr>
<td>WRS</td>
<td>Winery Retail Store</td>
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1. **INTRODUCTION**

1. The European Union exercises its right to participate in these proceedings as a third party because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the *General Agreement on Tariffs and Trade 1994* (GATT 1994).

2. Moreover, the EU is the first wine exporter to Canada. In the recent years, more than fifty per cent of wine imported into Canada came from the EU. The measures maintained by the Canadian Government and the Canadian provinces of Ontario, Quebec and Nova Scotia regarding the sale of wine may have a substantial impact on the sale and consequently on the importation of EU wine into Canada. The EU has, therefore, a concrete and substantial trade interest in the outcome of this dispute, which concerns the fundamental principle of national treatment enshrined in Article III of the GATT. Canada indeed will have to remedy any possible finding of inconsistency with the national treatment principle vis-à-vis Australian wine, in a way that is consistent with covered agreements and notably with the MFN principle. In practice, were the Panel to find that Canada has discriminated against Australian wine, Canada will have to remedy that illegality making sure that it will grant national treatment to any imported wine, regardless of its origin.

2. **GENERAL BACKGROUND AND LEGAL STANDARD**

3. The present dispute concerns a number of internal taxes and charges as well as some regulatory measures that Canada, either at the federal or at the provincial level, imposes on wine.

4. Australia alleges that those taxes and regulatory measures violate the disciplines of Article III of the GATT in different ways, and notably they are at odds with the first sentence of Article III:2 and/or Article III:4.

5. It is therefore appropriate to recall a few points drawn from the WTO jurisprudence that clarify how those provisions are interpreted and applied.

2.1. **DISCRIMINATION BETWEEN IMPORTED PRODUCTS AND LIKE DOMESTIC PRODUCTS: ARTICLE III:2, FIRST SENTENCE OF THE GATT 1994**

6. Article III:2, first sentence states that:
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 other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

7. Article III:2, first sentence, thus serves to prohibit the imposition of discriminatory internal taxes or other internal charges on imported versus like domestic products. Article III:2, first sentence, concerns circumstances where imported and like domestic products are subject "directly or indirectly" to internal taxes or other internal charges "of any kind". This language suggests that the provision applies to a broad range of measures.1

8. As articulated by the Appellate Body in Canada – Periodicals, the analysis of whether an internal tax or other internal charges are inconsistent with the first sentence of Article III:2 of the GATT 1994 requires a two-step test analysis: (i) whether imported and domestic products are like products; and (ii) whether the imported products are taxed "in excess of" the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence.2

9. With respect to (i), as recalled by the panel in Brazil – Taxation Measures:

the concept of "like products" is present in various provisions of the covered agreements. As stated by the Appellate Body, this concept is "a relative one that evokes the image of an accordion ... that stretches and squeezes in different places as different provisions of the WTO Agreement are applied"

... within the context of Article III:2, first sentence, the concept of like products must be construed narrowly based on the existence of a second sentence in Article III that deals with directly competitive or substitutable products. It has also stated that how narrowly the term "like products" is to be construed is a matter to be determined separately for each tax measure on a case-by-case basis, by examining relevant factors including those criteria mentioned in the Working Party Report on Border Tax Adjustments, namely: (i) the product's properties, nature and quality; (ii) the product's end-uses in a given market; and, (iii) consumers' tastes and habits that change from country to country. In addition to those three factors, a fourth relevant criterion in order to determine likeness is the tariff classification of the products at issue.3

10. However, in Argentina – Hides and Leather, in dealing with a claim under Article III:2 of the GATT 1994, the panel found that where a Member draws an origin-based distinction in respect of internal taxes, a comparison of specific

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1 Appellate Body Reports, Canada – Periodicals, p. 19, Brazil – Taxation, para 5.15.
2 Appellate Body Report, Canada – Periodicals, pp. 22-23.
3 Panel Report, Brazil - Taxation, paras. 7.121 and 7122. See also Appellate Body Report, Canada – Periodicals, p. 21. See also Appellate Body Report, Japan – Alcoholic Beverages II, p. 20.
products is not required and, consequently, it is not necessary to examine the
various likeness criteria. By the same token in *Indonesia – Autos*, the panel
examined certain tax exemptions provided by the various car programmes
under examination which were based on the country of manufacture of the
products; or on their level of local content; or on whether a motor vehicle was
a National Car and had complied with certain local content requirements or
had incorporated a certain percentage of "counter-purchased" parts and
components exported from Indonesia; or on the characteristics of the car
manufacturers. The panel noted that:

[B]ecause of the structure of the tax regime under examination,
any imported like products would necessarily be taxed in excess
of domestic like products ... The distinction between the
products, which results in different levels of taxation, is not
based on the products *per se*, but rather on such factors as the
nationality of the producer or the origin of the parts and
components contained in the product. As such, an imported
product identical in all respects to a domestic product, except
for its origin or the origin of its parts and components or other
factors not related to the product itself, would be subject to a
different level of taxation.

(...) Under the Indonesian car programmes the distinction between
the products for tax purposes is based on such factors as the
nationality of the producer or the origin of the parts and
components contained in the product. Appropriate hypotheticals
are therefore easily constructed. An imported motor vehicle
alike in all aspects relevant to a likeness determination would
be taxed at higher rate simply because of its origin or lack of
sufficient local content. Such vehicles certainly can exist (and,
as demonstrated above, do in fact exist). In our view, such an
origin-based distinction in respect of internal taxes suffices in
itself to violate Article III:2, without the need to demonstrate
the existence of actually traded like products.¹

11. In *Brazil – Taxation*, after having recalled the findings of the panel in
*Indonesia – Autos*, the panel recalled that:

panels have applied such a "presumption" of likeness with
respect to Articles III:2, III:4 and 1:1 of the GATT 1994.
According to this approach, "a complainant may establish
'likeness' by demonstrating that the measure at issue makes a
distinction based exclusively on the origin of the product".

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*China – Publications and Audiovisual Products*, para. 7.1446.
The Appellate Body, in the context of a dispute involving claims under the General Agreement on Trade in Services, has provided further clarification on the operation of such "presumption" of likeness by stating the following:

Once a complainant has made a prima facie case that a measure draws a distinction between services and service suppliers based exclusively on origin, the respondent may rebut this by demonstrating that origin is indeed not the exclusive basis for the distinction drawn by the measure between the services and service suppliers at issue. Alternatively, or in addition, a respondent may seek to rebut the prima facie case based on the presumption approach by introducing arguments and evidence relating to the criteria for determining "likeness" adapted to trade in services, as explained above, demonstrating that a certain factor affects the relevant criteria for establishing "likeness", and that it therefore has an impact on the competitive relationship between the services and service suppliers.\(^6\)

12. With respect to (ii), the terms "in excess of" have been interpreted to encompass even the slightest difference in the levels of taxation or tax burden imposed on imported and domestic products. Indeed, the Appellate Body has noted that, under Article III:2, first sentence "the prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a \textit{de minimis} standard" so even the smallest amount of "excess" is too much.\(^7\) In this respect, the purpose of Article III:2, first sentence, is to ensure "equality of competitive conditions between imported and like domestic products".\(^8\) Since Article III:2, first sentence, is concerned with the economic impact of internal taxes on the competitive opportunities of imported and like domestic products, "what must be compared are the tax burdens imposed on the taxed products".\(^9\)

13. The comparison of fiscal measures on imported and domestic products is not limited to the applicable tax rates, but must focus on the actual tax burden. Even equal tax rates may impose different tax burdens on the products in question, for example, when different methods of computing tax bases are employed, when further reductions or exemptions are conferred, or when input products are exempted from a tax imposed at the various stages of production even if the final product is not exempted from such tax. Should

\(^6\) Panel Report, \textit{Brazil - Taxation}, paras. 7.125 and 7.126.
\(^9\) Panel Report, \textit{Argentina – Hides and Leather}, para. 11.182.
imported goods be faced with heavier tax burden, the rule of national treatment is violated. In summary:

A determination of whether an infringement of Article III:2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.\(^\text{10}\)

14. Accordingly, the fact that some domestic products may be subject to the same nominal amount of tax but at a later point in time, while imported products have to pay that tax upfront, will limit the availability of cash flow for the purchasers of imported products resulting in a higher effective tax burden on imported products. The possibility for the purchaser of the imported product of claiming a tax credit does not eliminate that higher burden because, in as much as there is a time lag in between the accrual of the credit and its compensation with other tax liabilities, the value of the credit will depreciate over-time.\(^\text{11}\)

15. Moreover, the analysis as to whether imported products are subject to a heavier tax burden than like domestic products is applicable to each individual transaction. For example, in Argentina – Hides and Leather, the tax rate of 3% for imports as compared to corresponding tax rates of 2% or 4% for internal sales was found inconsistent with Article III:2, first sentence. Although the burden on imports was lower in some cases (3% vs 4%), it was higher in others (3% vs 2%). The panel concluded that Members are not permitted to "balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances".\(^\text{12}\)

16. In the same vein, the Appellate Body addressed the issue of "balancing more favourable treatment" in some instances against less favourable treatment in other instances under Article III:2, second sentence in Canada – Periodicals. The Appellate Body found that


\(^{11}\) Appellate Body Report, Brazil – Taxation, para. 5.39 and 5.40. See also Panel Report, Argentina - Hides and Leather, paras. 11.186 - 11.188 as well as Panel Report, Thailand – Cigarettes (Philippines), paras. 7.610-7.611..

\(^{12}\) Panel Report, Argentina – Hides and Leather, para. 11.260.
Following the reasoning of the Appellate Body in Japan – Alcoholic Beverages, dissimilar taxation of even some imported products as compared to directly competitive or substitutable domestic products is inconsistent with the provisions of the second sentence of Article III:2. In United States - Section 337, the panel 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.\(^\text{13}\)

17. It follows that under Article III:2, first and second sentence, as well as Article III:4 a Member cannot justify less favourable treatment of some imported products with the more favourable granted to some other imported products.

18. Moreover, if balancing more favourable tax treatment of like imported products in some instances against less favourable tax treatment of imported products in other instances is not allowed, a fortiori, the fact that in some instances domestic and imported products may be treated the same must also be irrelevant.

19. In Thailand – Cigarettes (Philippines), the Appellate Body confirmed that imposing legal requirements that result in tax liability on imported products when resellers do not satisfy prescribed conditions necessary to avoid that liability, but which never result in tax liability on like domestic products, is inconsistent with the requirements of Article III:2, first sentence.\(^\text{14}\) In particular, the Appellate Body observed that:

Thailand’s measure subjects resellers of imported cigarettes to VAT when they do not satisfy prescribed conditions for obtaining input tax credits necessary to achieve zero VAT liability. Whether such conditions are satisfied thus has a direct consequence for the amount of tax liability imposed on imported cigarettes. Conversely, a complete exemption from VAT ensures that there can never be any VAT liability for resellers in respect of their sales of domestic cigarettes. We therefore agree with the Panel that Thailand’s measure affects the respective tax liability imposed on imported and like domestic cigarettes, and accordingly reject Thailand’s claim that the measure consists solely of administrative requirements that are not subject to the disciplines of Article III:2, first sentence, of the GATT 1994.\(^\text{15}\)

\(^{13}\) Appellate Body Report, Canada – Periodicals, p. 29.
\(^{14}\) Appellate Body Report, Thailand – Cigarettes (Philippines), para. 118.
20. Of note, the Appellate Body observed in *Thailand – Cigarettes (Philippines)* that even if the discriminatory result in the level of taxation between domestic and imported products results from requirements which may also fall under Article III:4 of the GATT 1994, they may also be subject to the obligation under Article III:2 if they have a bearing on the respective tax burdens on imported and like domestic products.\(^{16}\)

21. In *Brazil – Taxation*, the Panel clarified the difference in the scope of application of paragraphs 2 and 4 of Article III:

"While Article III:2 prohibits tax discrimination between imported and domestic like products, Article III:4 … deal[s] with discrimination introduced through regulations. Specifically, Article III:4 prohibits regulatory discrimination between imported and like domestic products." \(^{17}\)

22. The Panel further noted that a measure can be subject to the disciplines both of Article III:2 and Article III:4: "It is well established that a single measure can be inconsistent with two or more provisions of Article III at the same time. This is because multiple features of a single measure may operate simultaneously. In such a situation, different aspects of the same measure could be considered to be covered by the disciplines of either or both Article III:2 and III:4." \(^{18}\)

23. The Appellate Body upheld this finding clarifying that some regulatory aspects of the measure may result in less favourable treatment for imported product in the form of a different tax burden, without this being an obstacle to the application of Article III:4 to those regulatory aspects (even when the different tax burden had already been found incompatible with Article III:2). \(^{19}\)

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\(^{16}\) Appellate Body Report, *Thailand – Cigarettes (Philippines)*, footnote 144 ("[E]ven 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 (Thailand’s appellant's submission, para. 69), 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. (See Panel Report, *Argentina – Hides and Leather*, para. 11.143 (finding that administrative measures concerning the pre-payment of tax "qualify as tax measures [that] fall to be assessed under Article III:2").")

\(^{17}\) Panel Report, *Brazil – Taxation*, para. 7.33.

\(^{18}\) Ibid. para 7.34

\(^{19}\) Appellate Body Report, *Brazil – Taxation*, paras. 5.51 – 5.53
24. Article III:2 has also been applied on taxes or charges indirectly affecting imported products in excess of domestic like product. In *Mexico – Taxes on Soft Drinks*, the Panel made findings on tax measures that were not directly imposed on sweeteners, but rather on soft drinks and syrups. The Panel nevertheless found that the imposition of a soft drink tax created a connection such that non-cane sugar sweeteners, such as beet sugar, could be regarded as being indirectly subject to the tax, because the tax was based solely on the nature of the sweetener used, and because the burden of the tax could be expected to fall, at least in part, on the products containing the sweetener, and thereby to fall on the sweetener. The panel found 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. Indeed, in a previous case the word 'indirectly' was considered to cover, inter alia, taxes that are imposed on inputs.  

25. In sum, WTO Members remain free "to administer and collect internal taxes as they see fit", so long as they do so in a non-discriminatory manner, "in conformity with Article III:2". When imported products are subject to a tax burden higher than that of domestic products, Article III:2, first sentence is breached.

2.2. **DISCRIMINATION BETWEEN IMPORTED PRODUCTS AND LIKE DOMESTIC PRODUCTS (NATIONAL TREATMENT) THROUGH REGULATORY MEASURES: ARTICLES III:4**

26. Article III:4 of the GATT 1994 states that:

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.

27. For a violation of Article III:4 to be established, three elements must be satisfied: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use";

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22 To recall, Article III:2 applies irrespective of the policy objective of the tax measure at issue (see Panel Report, *Argentina – Hides and Leather*, para. 11.144; and Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16).
and (iii) the imported products are accorded "less favourable" treatment than that accorded to like domestic products.23

28. With respect to (i), the Appellate Body in EC – Asbestos clarified, that just as like under Article III:2, also:

a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products ... the scope of 'like' in Article III:4 is broader than the scope of 'like' in Article III:2, first sentence. Nonetheless, we note, once more, that Article III:2 extends not only to 'like products', but also to products which are 'directly competitive or substitutable', and that Article III:4 extends only to 'like products'. In view of this different language ... we do 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."24

29. Moreover, in US – Clove Cigarettes, the Appellate Body ruled that its previous finding with respect to Article III:2 that actual competition does not need to take place in the whole market, but may be limited to a segment of the market when examining whether products are "directly competitive or substitutable", equally applies when assessing "likeness" under Article III:4.25

30. In EC – Asbestos, the Appellate Body also confirmed that the criteria listed in the Working Party on Border Tax Adjustments provide a framework for analysing the "likeness" of products on a case-by-case basis. However, those criteria are not treaty language and likeness could be demonstrated on the basis of other criteria.26

31. It is also well established in WTO jurisprudence that measures distinguishing between goods solely on the basis of national origin satisfy the "like product" requirement. For example, as the panel stated in Canada – Wheat:

23 Appellate Body Report, Korea – Various Measures on Beef, para. 133.
25 Appellate Body Report, US – Clove Cigarettes, paras. 142-143.
26 Appellate Body Report, EC – Asbestos, paras. 101-103
Where a difference in treatment between domestic and imported products is based exclusively on the products’ origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria – that is, the physical properties, end-uses and consumers’ taste and habits. Instead, it is sufficient for the purposes of satisfying the “like product” requirement, to demonstrate that there can or will be domestic and imported products that are like.27

32. Thus, where a Member draws an origin-based distinction, a comparison of specific products is not required and it is not necessary to examine the various likeness criteria – such as, their physical properties, end-uses and consumers’ tastes and habits.28 It is sufficient for the purpose of satisfying the “like product” test for a complaining party to demonstrate that there can or will be domestic and imported products that are "like".29

33. Panels have applied this reasoning to find that requirements to purchase and use domestic inputs rather than imported inputs satisfy the "like product" requirement. For example, in India – Autos, the panel found that an "indigenization" requirement for automobile manufacturers to purchase domestically produced auto parts satisfied the "like product" test, because "the only factor of distinction under the 'indigenization' condition between products which contribute to fulfilment of the condition and products which do not, is the origin of the product as either imported or domestic".30 Moreover, in US – COOL, which concerned a country-of-origin labelling requirement for certain meat products, the panel reflected that "in previous disputes, products that are distinguished solely on the basis of their origin were found to be like products within the meaning of Article III:4". The panel then noted that "the COOL measure distinguishes the products at issue according to the country in which the birth, raising and slaughtering of the animal from which meat is derived took place". On that basis, the panel concluded that it "need not engage in any further analysis to conclude that the products at issue in this dispute are 'like products'".31

34. Because the product scope of Article III:4 is broader than the first sentence of Article III:2, it follows that "if product likeness exists under Article III:2 of the

30 Panel Report, India – Autos, para. 7.174; see also, e.g., Panel Report, China – Auto Parts, paras 7.234 – 7.235.
GATT 1994, first sentence, product likeness will also exist under Article III:4 of the GATT 1994 for the same products at issue." 32 This reasoning logically holds also when likeness under Article III:2 has been determined by reference to an hypothetical like product, because the measure at issue makes a distinction based on the origin the product and not its intrinsic characteristics. 33

35. With respect to (ii) (i.e. the measure at issue constitutes a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"), the terms "all laws, regulations and requirements" have been interpreted as encompassing a broad range of governmental actions, as well as including requirements that an enterprise voluntarily accepts in order to obtain an advantage from the government. 34 The panel in India – Autos, referring to previous GATT reports, held that there are two distinct situations which would be characterised under the term "requirement": (1) obligations which an enterprise is "legally bound to carry out"; and (2) obligations which an enterprise "voluntarily accepts in order to obtain an advantage from the government". The panel also established that it is irrelevant whether a measure has actually been enforced, as it is merely its enforceability that matters. 35

36. Moreover, under GATT and WTO jurisprudence, the term "affecting" has consistently been defined broadly. In particular, it is well established that it "implies a measure that has 'an effect on' and this indicates a broad scope of application". 36 This term therefore goes beyond laws and regulations which directly govern the conditions of sale, use or purchase to cover also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products. This includes any measure capable of influencing a manufacturer's choice between the imported product and the

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32 Panel Report, Brazil – Taxation, para. 7.208.
33 Panel Report, Brazil – Taxation, paras.7.206-7.207.
35 Panel Report, India – Autos, paras 7.183 – 7.184. See also Panel Report, Canada – Autos, para. 10.73 (where "letters of undertaking" submitted by certain firms at the request of the Canadian Government were considered to be "requirements").
36 Panel Report, India – Autos, para. 7.196
like domestic product, there being no need to demonstrate that such choice is mandated or that such effects have actually been produced.\textsuperscript{37}

37. Panels and the Appellate Body have interpreted this criterion as applying to measures which require the purchase of domestically produced goods. For example, in \textit{US – FSC (Article 21.5 – EC)}, the Appellate Body held that a 50 percent "fair market value rule" (i.e., according certain tax benefits only to goods if domestic goods and labour account for at least 50 percent of their value) affected the internal sale of goods, because it "influence[d] the manufacturer's choice between like imported and domestic input products if it wishes to obtain the tax exemption".\textsuperscript{38} Similar import substitution or local content requirements have been found to affect the internal sale, purchase or use of imported products. In \textit{China – Auto Parts}, the Appellate Body found that a measure affording preferential tax treatment to automobiles composed of a certain threshold level of domestically produced auto parts affected the internal sale of such auto parts, because it "create[d] an incentive for manufacturers to limit their use of imported parts relative to domestic parts".\textsuperscript{39}

38. In summary, as the panel noted in \textit{Brazil – Taxation}:

... measures that create an incentive not to use imported products by definition affect their internal sale, offering for sale, purchase or use. Additionally, if the application of a measure can potentially "affect" trade in products and treat imported products less favourably than domestic products, that measure can be considered to be inconsistent on its face with the national treatment obligation, even if the challenged regulation is written in terms of requirements on firms (as opposed to requirements on products). For instance, the Appellate Body in \textit{China – Publications and Audiovisual Products} explained that restrictions imposed on investors, wholesalers, and manufacturers, as well as on points of sale and ports of entry, are inconsistent with Article III:4 of the GATT of 1994.\textsuperscript{40}


\textsuperscript{39} Appellate Body Report, \textit{China – Auto Parts}, para. 195 ("In addition, the measures at issue in this dispute impose administrative procedures, and associated delays, on automobile manufacturers using imported parts, which could be avoided entirely if a manufacturer were to use exclusively domestic auto parts").

\textsuperscript{40} Panel Report, \textit{Brazil – Taxation}, para. 7.193.
... a tax incentive such as an exemption, reduction or suspension in respect of a product can create an incentive to buy that product, in preference to a product that does not benefit from the exemption, suspension or reduction. Thus, this confirms that the requirements at issue affect the sale, offering for sale or purchase of products.41

39. With respect to (iii), (less favourable treatment) the Appellate Body has established that whether or not imported products are treated "less favourably" than like domestic products should be assessed by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.42

40. In other words, the benchmark for establishing "no less favourable treatment" is one of "effective equality of competitive conditions"43. Hence, Members have to ensure effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of products.44 Since the focus of the analysis under Article III:4, is on the equality of competitive opportunities for imported products and like domestic products it follows that Article III:4 does not require a demonstration of the actual trade effects of a specific measure.45 Moreover, because Article III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, a determination of whether imported products are treated less favorably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favorable" within the meaning of Article III:4.46

41. Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products, in the sense that it is the

41 Ibid. para. 7.197.
42 Appellate Body Report, Korea – Various Measures on Beef, para. 137.
43 Panel Report, Japan – Film, para. 10.379.
45 Appellate Body Report, EC-Seals Products, para. 5.82.
46 Appellate Body Report, EC-Seals Products, para. 5.101.
42. As clarified by the Appellate Body in Korea – Various Measures on Beef, different treatment of imported products does not necessarily lead to less favourable treatment. The measure at issue in that case established a dual retail distribution system for the sale of beef. Inter alia, imported beef was to be sold either in specialized stores selling only imported beef or, in the case of larger department stores, in separate sales. The Appellate Body first clarified that a formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Then, examining the facts of the case, the Appellate Body concluded that “the putting into legal effect of the dual retail system for beef meant, in direct practical effect, so far as imported beef was concerned, the sudden cutting off of access to the normal, that is, the previously existing, distribution outlets through which the domestic product continued to flow to consumers”. Therefore, “the treatment accorded to imported beef, as a consequence of the dual retail system established for beef by Korean law and regulation, is less favorable than the treatment given to like domestic beef”.

43. In EC – Asbestos the Appellate Body focussed its assessment on the group of imported products compared to that of a group of domestic products. It concluded 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 'like' domestic products. That however, does not mean that less favourable treatment arises only when all of the products in the group are treated less favourably.

44. At the same time, in paragraph 100 of the same Report, the Appellate Body indicated that:

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47 Appellate Body Report, EC-Seals Products, paras. 5.101 and 5.105.
50 Ibid., para. 148.
51 Appellate Body Report, EC – Asbestos, para. 100.
A Member may draw distinctions between products which have been found to be 'like', without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment than that accorded to the group of 'like' domestic products.  

45. Referring to the above quoted paragraph, in US – Cloves Cigarettes, the Appellate Body in interpreting Article 2.1 of the TBT Agreement clarified that:

Article 2.1 requires a panel dealing with a national treatment claim to compare, on the one hand, the treatment accorded under the technical regulation at issue to all like products imported from the complaining Member with, on the other hand, that accorded to all like domestic products. However, the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Article 2.1 does not preclude any regulatory distinctions between products that are found to be like, as long as treatment accorded to the group of imported products is no less favourable than that accorded to the group of like domestic products.

46. The EU considers that certain findings of the panels in US-Malt Beverages and Canada – Wheat Exports and Grain Imports, should be considered in the light of the above clarifications of the Appellate Body and the facts prevailing in those cases. In particular, the panels in those cases essentially rejected the contention that a Member, to shelter a measure from Article III, could invoke the fact that like domestic products from other domestic regions were treated the same way as (all) imported products and that, for this reason, both were accorded less favourable treatment than that accorded to the domestic products from the region whose measure was at stake. In their findings, those panels however overshot the objective by making the most favoured domestic product the commanding benchmark and expressly suggesting that Article III:4 of the GATT 1994 obliges an importing Member that treats some domestic products better than other domestic products to accord the better of these two treatments to the entirety group of the like imported products. It is one thing, and correct, to say that a Member breaches Article III:4 if it treats some domestic products more favourably than all imported like products. It is quite another thing, and incorrect, to suggest that this violation, always and as a matter of principle, stops only when all imported like products enjoy the more favourable treatment which only some of the

52 Appellate Body Report, EC – Asbestos, para. 100.
domestic like products receive. A correct assessment under Article III:4 must focus on a comparison of the treatment afforded to the entire group of domestic and entire group of like imported products. So, for instance, if a Member grants better treatment to some domestic products within the group but a similar subset of imported products enjoys the same treatment, that measure might not grant the imported product less favourable treatment.

47. In EC-Seals products, the Appellate Body further clarified its statement in paragraph 100 of its Report in EC – Asbestos as follows:

... merely highlighted that the term "treatment no less favourable" in Article III:4 has a more unfavourable connotation than the drawing of distinctions between imported and domestic like products. WTO Members are free to impose different regulatory regimes on imported and domestic products, provided that the treatment accorded to imported products is no less favourable than that accorded to like domestic products. Thus, Article III:4 does not require the identical treatment of imported and like domestic products, but rather the equality of competitive conditions between these like products. In this regard, neither formally identical, nor formally different, treatment of imported and like domestic products necessarily ensures equality of competitive opportunities for imported and domestic like products.54

... treatment no less favourable standard, under Article III:4, means something more than drawing regulatory distinctions between imported and like domestic products.

... the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, then the differential treatment will amount to treatment that is "less favourable" within the meaning of Article III:4.55

48. The Appellate Body further explained that the detrimental impact of a measure on competitive opportunities for like imported products is dispositive for the purposes of establishing a violation of Article III:456 and that, accordingly, it is not necessary to consider whether this detrimental impact derives exclusively from a legitimate regulatory distinction.57 Indeed, the fact that, under the GATT 1994, a Member's right to regulate is accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on

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54 Appellate Body Report, EC-Seals Products, para. 5.108 (underlined added).
55 Appellate Body Report, EC-Seals Products, para. 5.109 (underlined added).
56 Appellate Body Report, EC-Seals Products, para. 5.110.
57 Appellate Body Report, EC-Seals Products, para. 5.117.
competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.\textsuperscript{58}

Thus, Article III:4 permits regulatory distinctions to be drawn between products, provided that such distinctions do not modify the conditions of competition between imported and like domestic products. Hence, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products.\textsuperscript{59}

49. Finally, in \textit{US\textemdash COOL} the Appellate Body found that:

Finally, we note that the United States' argument is based on the proposition that the analysis of less favourable treatment under Article III:4 should include an inquiry into whether the detrimental impact of a measure on imports is unrelated to foreign origin, and can be explained by other factors that do not reflect discrimination, in this case, the fact that the amended COOL measure pursues consumer information objectives. However, we note that this argument is based upon a proposition that was expressly rejected by the Appellate Body in \textit{US\textemdash Clove Cigarettes}. In that dispute, the Appellate Body rejected the proposition that Article III:4 of the GATT 1994 includes consideration of whether the detrimental impact on imports is unrelated to the foreign origin of the product. Moreover, in \textit{EC\textemdash Seal Products}, the Appellate Body clarified that the analysis of whether a measure causes detrimental impact on competitive opportunities for like imported products under Article III:4 "does not involve an assessment of whether such detrimental impact stems exclusively from a legitimate regulatory distinction."\textsuperscript{60}

50. It follows from the above that when faced with a regulatory distinction, which is formally origin-neutral but sets out two different treatments for products thereby singling out two "like" products subcategories\textsuperscript{61}, a panel needs to assess the implications of the contested measure for the equality of competitive conditions between imported and like domestic products as entire groups, in order to understand if that distinction falls afoul of Article III:4 because it accords less favourable treatment to like imported products.

51. As clarified by the Appellate Body, in \textit{Thailand \textemdash Cigarettes (Philippines)} the analysis of whether imported products are accorded less favourable treatment

\begin{itemize}
\item \textsuperscript{58} Ibid., para. 5.125.
\item \textsuperscript{59} Ibid.; para. 5.116.
\item \textsuperscript{60} Appellate Body Report, \textit{US\textemdash COOL (Article 21.5 \textemdash Canada and Mexico)}, para. 5.358.
\item \textsuperscript{61} For instance a distinction between organic agricultural products and conventional agricultural products, or a distinction between low emission cars and highly pollutant cars, assuming for the sake of argument that those products are like under Article III:4.
\end{itemize}
requires a careful examination grounded in close scrutiny of the fundamental thrust and effect of the measure itself. That 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. Hence, potential effects are relevant as well. Of course, nothing precludes a panel from taking such evidence of actual effects into account. Furthermore, that analysis should not be anchored in an assessment of the degree of likelihood that an adverse impact on competitive conditions will materialize, but rather, it must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue.\textsuperscript{62}

52. If that analysis reveals that the design, structure, and expected operation of the apparently origin-neutral regulatory distinction introduced by a Member is such that the vast majority of the imported products fall within the category of products that receive the comparatively unfavourable treatment, whereas virtually all domestic products receive a better treatment, then these circumstances will almost certainly demonstrate that the measure has an asymmetrical impact between domestic and like imported products and therefore violates Article III:4.\textsuperscript{63}

53. Hence, the effects of the measure, actual or potential or more generally those that can be discerned from its design, structure and expected operation should be the focus of the panel analysis. In some cases, for instance when the measure has just been approved but not yet applied or it has been applied for a short period, a panel will not be able to base itself on the actual effects of the measures or those effects may not be meaningful (for instance, because the measure requires time to produce all of the effects it was designed for). Hence, by necessity in a similar situation a panel should also adopt a prospective view and consider whether the detrimental treatment for some of the imported products is just a transient occurrence, which arises because of a set of circumstances essentially external to the measure and possibly matching an adjustment cost which the domestic producers also face(d), or rather it is a negative trend specifically for imports and could even increase as time goes by.

\textsuperscript{62} Appellate Body, in \textit{Thailand – Cigarettes (Philippines)}, paras. 129 and 134.

\textsuperscript{63} Panel Report, \textit{EC- Seals Products}, para. 7.608.
54. As mentioned, the EU considers that a panel should focus on the group of imported products. Of course, to understand the implications of the measures on the competitive conditions of imported products a panel will often concentrate on the products of the complaining Member. The complaining member itself will have an interest and may have the data to demonstrate the implications of the measure mainly on its exports. Those implications more often than not represent a good proxy of the implications of the measure for the group of like imported products. However, it is still necessary to conclude that less favourable treatment of the group of like imported products is genuinely linked to the measure at issue.

55. It follows therefore that the kind of assessment a panel is called to perform in this situation is a complex one. Quantitative data about actual effects of the measures (if alleged by the parties) and the trends that can be gleaned from those effects will have to be considered but, as already mentioned, a panel cannot limit its appreciation to these considerations. A panel should apprehend the measure at issue also from a “qualitative” viewpoint, focusing indeed on its fundamental thrust. Any assessment of this type necessarily will not lead to a precise mathematical outcome. Rather it will be an exercise with a built in discretionary element or a certain margin of appreciation. Thus, there might be situations where, after looking into all the information before it, a panel may still be uncertain about whether or not the regulatory distinction affords less favourable treatment to the group of imported products (for instance because the subgroup of imported products that receive the less favourable treatment is broadly comparable to the subgroup of domestic products that are treated that way). In such a case, a panel should therefore conclude that the complaining party has not sufficiently made its case. Indeed, while it may be that the very raison d’être of introducing a regulatory distinction in a group of like products may be to alter the conditions of competition prevailing in a market at a given point in time, it must not be necessarily the case that any such alternation must have been designed or must be expected to operate to the detriment of imported products (or actually operate in such a way).

56. It should also be recalled that is well established in the WTO jurisprudence that different types of incentives to use domestic goods instead of imported good are incompatible with Article III:4.

57. The panel in China – Auto Parts concluded that the Chinese measures at issue – certain administrative procedures that only applied to imported products –
treated those products less favourably than like domestic products because they created a disincentive for manufacturers to use the imported products.  

Similarly, the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* stated that "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". Furthermore, the panel in *India – Autos* found that an indigenization requirement imposed by the Indian Government on car manufacturers modified the conditions of competition in the Indian market to the detriment of imported products and was, therefore, in violation of Article III:4 of the GATT 1994. The panel in *Argentina – Import Measures* found that "the achievement of a certain level of local content is required by the Argentine Government in order for economic operators to import and for them to obtain certain advantages" and that "[t]his necessarily results in a preference for the purchase and/or use of domestic over imported like products". In the specific context of taxation, the panel in *US – FSC (Article 21.5 – EC)* noted that the "foreign articles/labour limitation" in respect of US-produced goods afforded less favourable treatment, because the use of imported products by a manufacturer in the US could not contribute to the fulfilment of the foreign articles/labour limitation - a condition necessary to obtain a fiscal the advantage - whereas the use of domestic products could. The existence of other ways to obtain the same tax advantage did not change the fact that the foreign articles/labour limitation created an incentive to use domestic rather than imported goods. In sum, imposing requirements on operators to achieve directly or indirectly a particular level of domestic content runs contrary to Article III:4 of the GATT 1994.

58. But less favourable treatment of imported products can be the consequence of a wide variety of different measures. In *Brazil – Taxation Measures*, the panel

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64. Panel Report, China – Auto Parts, para. 7.270.


70. Article III:4 of the GATT 1994 may be breached in law or in fact (see GATT Panel Report, *Italy – Agricultural Machinery*, para. 12; and Appellate Body Report, *Canada – Autos*, para. 140 ("Article III:4 of the GATT 1994 covers both de jure and de facto inconsistency").
found that the purchase of domestic products allowed a reduction of administrative burden that comes with the procedure of offsetting the tax with other debits (or requesting compensation or reimbursement). It concluded that the incentive to avoid the administrative burden, by purchasing domestic intermediate products, modifies the conditions of competition between domestic and like imported products contrary to Article III:4.\textsuperscript{71} The Appellate Body confirmed that finding.\textsuperscript{72} In the same dispute, the panel also found that companies could reduce the amount of resources they were required to invest in R&D in Brazil by purchasing domestic products. That created an incentive to purchase domestic products altering the conditions of competition between domestic and like imported products, to the detriment of the imported products.\textsuperscript{73} Finally, it also found that the accreditation requirements companies had to comply with in order to benefit from some fiscal programmes, by restricting access to the tax incentives only to domestic products, resulted in less favourable treatment being accorded to imported products than to like domestic products.\textsuperscript{74}

3. **ANALYSIS OF THE LEGAL CLAIMS OF AUSTRALIA AND OF THE DEFENCE OF CANADA**

3.1. **THE FEDERAL EXCISE EXEMPTION**

3.1.1. **Claims by Australia under Article III:2**

59. **Australia** argues that Canada has breached Article III:2, first sentence of the GATT 1994, by imposing discriminatory excise duties on imported bulk wine. Together subsections 135(1) and 135(2)(a) of the FEA impose duties on packaged wine containing imported bulk wine inputs while exempting, in full, wines of 100% Canadian origin.

3.1.2. **Arguments of Canada under Article III:2**

60. **Canada** replies that the overall purpose of Article III is to ensure that measures are not applied to imported or domestic products so as to afford protection to domestic production and that this general principle informs the rest of Article III. Therefore, in order to preserve the link between Article III:2, first sentence and Article III:1, a responding party should be given an


\textsuperscript{72} Appellate Body Report, *Brazil – Taxation*, para. 5.60.


\textsuperscript{74} Ibid. paras. 7.221 – 7.225.
opportunity to rebut the presumption that taxing an imported product "in excess" of the like domestic product results in protection being afforded to domestic production.

61. Relying on evidence demonstrating that imported bulk wine sales have increased at an accelerating rate since the measure was introduced, in terms of both value and volume, Canada argues that Australia has failed to demonstrate both that the federal excise tax exemption has had any effect on the purchase or use of imported bulk wine and that the conditions of competition have been modified to the detriment of imported bulk wine.

3.1.3. Observations of the European Union under Article III:2

62. The EU underlines first of all that there seem to be neither any question nor any disagreement between the parties that the measures at issue is an internal tax within the meaning of Article III:2.

63. According to Subsection 134 of the Excise ACT 2001, titled “Imposition — bulk wine taken for use”:

(1) Duty is imposed on bulk wine that is taken for use at the rates set out in Schedule 6.

(2) Subject to sections 144 to 146, the duty is payable at the time the wine is taken for use and is payable by the person who is responsible for the wine at that time.

(3) Subsection (1) does not apply to (a) wine that is produced in Canada and composed wholly of agricultural or plant product grown in Canada;

64. According to Subsection 135 of the Excise ACT 2001, titled “Imposition — wine packaged in Canada”:

(1) Duty is imposed on wine that is packaged in Canada at the rates set out in Schedule 6.

Pursuant to Subsection 2 of the Excise ACT 2001: “alcohol means spirits or wine. (alcool) ... packaged means (b) in respect of alcohol, packaged (i) in a container of a capacity of not more than 100L that is ordinarily sold to consumers without the alcohol being repackaged, or (ii) in a marked special container; (emballé)... bulk, in respect of alcohol, means alcohol that is not packaged. (en vrac)"... take for use means (a) in respect of alcohol, to consume, analyze or destroy alcohol or to use alcohol for any purpose that results in a product other than alcohol".
(2) Subsection (1) does not apply to wine that is (a) produced in Canada and composed wholly of agricultural or plant product grown in Canada;

(3) The duty is imposed at the time the wine is packaged. It is also payable at that time unless the wine is entered into an excise warehouse immediately after packaging.

(4) The duty is payable by the person who is responsible for the wine immediately before it is packaged.

65. Moreover, according to Schedule 6 of the *Excise ACT 2001* tilted “Rates of Duty on Wine”, this rate varies according to the wine’s content of absolute ethyl alcohol by volume. This rate is never equal to zero. In particular:

... (c) in the case of wine that contains more than 7% of absolute ethyl alcohol by volume, per litre,

(i) $0.63, or

(ii) if the rate referred to in subparagraph (i) has been adjusted under subsection 135.1(2), the adjusted rate.

66. The EU is of the view that Australia has made a strong prima facie case that Canada, by exempting from the federal excise duty wine that is produced in Canada and composed wholly of agricultural or plant product grown in Canada, is violating Article III:2 of the GATT.

67. The federal excise duty is an indirect tax on wine, which is imposed when wine is packaged or otherwise taken for use. Subsection 135(2) of the *Excise ACT 2001* draws a distinction in the fiscal treatment of wine, exempting from the duty wine produced in Canada and composed wholly of agricultural or plant product grown in Canada, i.e. domestic wine. By definition, wine that is not produced in Canada is imported wine and it can never benefit from this exemption. Imported wine therefore is always subject to the excise duty, when it is taken for use or packaged in Canada. In short, the distinction between products for tax purposes is based on factors such as the place of production of the wine, and the origin of the agricultural or plant product used to produce the wine.

68. Since Canada draws an origin based distinction between wines for tax purposes, it is not necessary to examine the various likeness criteria identified by the case-law, and the Panel can assess the WTO compatibility of this
measure by reference to an hypothetical like product (which undoubtedly exists).

69. As regards the assessment of likeness, the EU considers that there is moreover no point in the present case in making a distinction between packaged and unpackaged wine (“bulk” wine). Even though the Excise ACT 2001 defines “bulk” and “packaged” differently, it is clear that the product at issue is the same, i.e. wine and that those definitions are based on the size or type of container in which the wine is put. Indeed, Subsection 2 of the Excise ACT 2001 defines “packaged” wine as wine, which is contained in a container of a capacity of not more than 100L that is ordinarily sold to consumers without being repackaged, or in a marked special container. “Bulk” wine is wine that is not “packaged”. Hence, “bulk” wine can become “packaged” by a simple re-packaging operation, and ordinarily must be re-packaged to be sold to consumers. In summary, any origin-based distinction between wine can translate easily in a distinction between domestic bulk wine and (hypothetical) like imported bulk wine or domestic packaged wine and (hypothetical) like imported packaged wine. By the same token, whether the distinction is a formal one (explicitly written in the legal instrument or following by necessary implication from the words used) or whether it is a de facto distinction is also irrelevant as regards the assessment of whether imported wine is like domestic wine. In any event, since Canada “is not contesting “likeness” with respect to any of Australia’s claims”\(^{77}\), the EU will not come back to this issue in the rest of its submissions.

70. Moreover, the EU believes that it is crystal-clear that imported wine is taxed “in excess of” domestic wine. As mentioned above the federal excise duty for wine is never equal to zero and imported wine always attracts an excise duty (of an amount that depends on the alcohol content) either at the moment it is taken for use from bulk or when it is packaged. By contrast, wine produced in Canada and composed wholly of agricultural or plant product grown in Canada, which is undoubtedly domestic wine, is exempted from that duty.

71. Excise duties are indirect taxes on products that are added to the price of the product when it is sold and therefore they are normally reflected in the final price. A difference in the rate applied to like imported and domestic products is

\(^{77}\) Canada, FWS para. 146.
by definition designed to alter the competitive relationship between those products.

72. The fact that, there may be Canadian wines that are subject to the excise duty because they are not composed wholly of agricultural or plant product grown in Canada does not change the fact that a tax advantage applies with regard to other domestic products and no similar treatment is ever available for like imported goods. Thus, the Excise ACT 2001 is at odds with Article III:2, first sentence, of the GATT 1994, since that provision "is applicable to each individual import transaction".\(^{78}\)

73. Thus, the design and structure of the Excise ACT 2001 is such that it automatically implies a tax burden on imported products "in excess of" the tax burden on like domestic products (in particular those produced in Canada and composed wholly of agricultural or plant product grown in Canada) as soon as the applicable duty rate is higher than zero. Now, any taxation of imported products in excess of like domestic products, regardless of the amount, is sufficient to establish a violation of Article III:2, first sentence. Therefore, the European Union is of the view that the Excise ACT 2001, by its design, structure and operation, is inconsistent with Article III:2 without the need to assess the different rates applicable to wine, depending on its alcohol content, which moreover vary over time.

74. Finally, with regards to Canada's main defence according to which the increase in imports of bulk wine would show both that the measure at issue has neither any effect on the purchase or use of imported bulk wine nor that the conditions of competition have been modified to the detriment of imported bulk wine, the EU considers that this line of argument should be rejected as a matter of law and fact.

75. First, this line of argument was already rejected by the Appellate Body in Japan Alcoholic Beverages II. The Appellate Body explained that:

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\(^{78}\) Panel Report, Argentina – Hides and Leather, para. 11.260.
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. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures "so as to afford protection". This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. The ordinary meaning of the words of Article III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the WTO Agreement, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are "like" and, second, whether the taxes applied to the imported products are "in excess of" those applied to the like domestic products. If the imported and domestic products are "like products", and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

76. Hence, in essence Canada’s argument flies against well-established jurisprudence without providing any reasons showing that that jurisprudence should be changed. Moreover, it reads into the first sentence of Article III:2 words that are not there and hence is at odds with the customary rules of treaty interpretation codified in the Vienna Convention.

77. Finally, it should also be recalled that a violation of Article III:2 depends neither on the demonstration of the concrete effects of the measure on the competitive relations between like products nor on a de minimis threshold, and that for a variety of good reasons. For instance, Canada denies the existence of any effects flowing from the measure pointing to the increase imports of bulk wine occurred in the recent past. However, that logically does not contradict the fact that imposing a heavier tax burden on imported products negatively affects the competitive position of those products vis-à-vis domestic like products. Moreover, the increase imports may be the consequence of different factors, notably the comparative advantage of other countries in terms of price, quality and so forth that may not be eliminated entirely by the discriminatory taxation. Finally, it would be virtually impossible for a

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complaining Member to demonstrate that - in the absence of that tax discrimination - imports would have fared even better in the Canadian market.

3.1.4. Alternative claim of Australia under Article III:4

78. In the alternative, Australia argues that Subsections 135(1) and 135(2)(a) of the Excise ACT 2001 are internal laws that detrimentally "affect" the purchase and use of Australian bulk wine inputs in the production of packaged wine products. By providing a tax incentive to use Canadian bulk wine, and corresponding tax disincentive to use Australian bulk wine, the federal excise measure alters the relative cost of purchasing and using bulk wine inputs. This confers a clear advantage on Canadian bulk wine to the detriment of Australian bulk wine.

3.1.5. Canada response to the alternative claims of Australia under Article III:4

79. Canada is of the view that Australia has failed to demonstrate that the federal excise duty exemption has had any economic impact on the competitive opportunities of imported wine. According to Canada, a presumption that taxation in excess is deemed to afford protection to domestic product should be rebuttable. The evidence in this case would show that the decision to use import 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. In any case Article III:4 does not apply to fiscal measures.

3.1.6. Observations of the European Union’s on Australia’s alternative claim under Article III:4

80. In this respect, the EU observes that Australia claim under Article III:4 is formulated in case “the Panel finds the federal excise exemption consistent with Article III:2, first sentence”. The EU considers that Australia has demonstrated that the federal excise exemption is not consistent with Article III:2 first sentence. Therefore, the Panel should not need to assess this claim.

81. In any event, the EU will formulate some remarks with regard to this alternative claim.

82. First, it manifest that the Excise ACT 2001 makes a distinction for tax purposes applicable to wine on the basis of the origin of the wine, and notably the place where the wine has been manufactured and the origin of its components agricultural or plant product (or input). When the packaged wine is produced in Canada and is composed wholly of agricultural or plant product
grown in Canada (i.e. it is a domestic product) then it is not subject to the excise duty. Imported wine by definition is not produced in Canada and (most likely) it will be composed of agricultural or plant product grown outside Canada. When that wine is packaged in Canada (regardless of whether or not it is blended with Canadian wine) it will attract the excise duty. Hence, the use of any imported wine in wine packaged in Canada will involve the imposition of the excise duty and conversely exclude the application of the exemption provided for by Subsection 135(2) of the Excise ACT 2001. Since the distinction in the tax treatment depends on the origin of the wine packaged, the Panel does not need to assess the various likeness criteria but it can carry out its analysis under Article III:4 on the basis of the existence of a hypothetical like product.

83. Second, the Excise ACT 2001 is a federal law affecting their internal sale, purchase, or use of wine. As already widely recalled, measures that create an incentive to purchase or use domestic products instead of imported like products, by definition affect the competitive position of imported products on the Member’s market. 80

84. In the present case, a concrete link exists between the condition for benefitting from the excise duty exemption and the internal sale, offering for sale, purchase, or use of wine in the Canadian market. Indeed, the application of the exemption in the internal sale of packaged wine depends on the fulfilment of the above conditions. The excise duty is moreover an indirect tax on products, so that a difference in the applicable rate has normally an immediate effect on the selling price. Since those conditions have the effect of restricting the tax exemption to wine produced in Canada with domestic input, they affect the competitive relationship between domestic and imported products to the advantage of products of Canadian origin, and notably the sale of Canadian wine made of 100% Canadian input. Furthermore, Subsection 135(2) of the Excise ACT 2001 also requires the purchase and/or use of domestic inputs that must be incorporated into the final packaged wine. Therefore, any Canadian wine producer will have a natural incentive to use and/or purchase domestic bulk wine as opposed to imported products since the use of the latter will attract the application of the full rate of the excise duty on the final product (packaged wine).

85. Third, as regards the existence of treatment less favourable, the conditions for benefitting of the excise duty result in less favourable treatment granted to imported products (including both packaged wine and bulk wine) than that accorded to like domestic products (including both inputs and final packaged wine).

86. The Appellate Body has established that the term "treatment no less favourable" requires effective equality of opportunities for imported products to compete with like domestic products and therefore a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. Moreover, for a measure to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products.\(^81\)

87. The excise duty exemption when applicable gives domestic like products a competitive advantage in the market over imported like products. As explained, compliance with the conditions for the application of the exemption is necessary in order for domestic wine to attract no excise duty when packaged in Canada compared to the duty applied on imported like products. Moreover, as recalled above, the excise duty is an indirect tax applied on products, so that a difference in the applicable rate has normally an immediate effect on the selling price. All other conditions being equal, wine consumers will have an incentive in acquiring wine, which carries no federal excise duty. Hence, the excise duty exemption necessarily implies a detrimental effect on the competitive conditions of imported wine and therefore alters the equality of competitive conditions between imported and like domestic products. There is no doubt that such a detrimental impact on imported products is genuinely linked to the measure at issue, since it is the direct consequence of the lower excise duty rate which applies when a wine producer complies with the conditions set out in Subsection 135(2) of the Excise ACT 2001.

88. It has also been recalled, that the Appellate Body and several panels have considered legal requirements giving an incentive (fiscal or of a different nature) to manufacturers to employ domestic products instead of like imported

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\(^81\) Appellate Body Report, EC – Seal Products, para. 5.101.
products to grant the latter class of input products a less favourable treatment within the meaning of Article III:4 of GATT 1994.

89. In the present case, by requiring the use of wine produced in Canada made solely with Canadian input ("composed wholly of agricultural or plant product grown in Canada"), the conditions set out in Subsection 135(2) of the Excise ACT also result in according less favourable treatment to unpackaged imported wine (bulk) than that accorded to like domestic inputs.

3.2. **The Ontario Wine Tax**

3.2.1. Australia’s claims under Article III:2

90. **Australia** recalls the PAC Report’s explanations according to which:

Wine produced in Ontario comprises three groups of products:

- Ontario Vintners Quality Alliance (VQA), a designation that signifies that they are made from 100% Ontario-grown grapes and adhere to certain standards;
- International-Canadian Blended (ICB), a blend of Ontario and imported wine that must have at least 25% Ontario grape content in each bottle; and
- 100% Ontario, wine that is produced using 100% local content but does not otherwise meet the standards of the VQA designation.

91. Australia also recalls that the LCBO, acting under the Ontario LCA, is responsible for importing liquor (including wine) into Ontario, transporting and selling domestic and imported spirits, wine and beer. The LCBO also establishes and operates retail liquor stores across Ontario. Hence, all imported wine, or wine from other Canadian provinces, must be imported through the LCBO.

92. Traditionally there were two main retail sale channels for wine in Ontario, 1) the government owned LCBO stores and; 2) a network of "Winery Retail Store" (WRS) outlets.

93. The WRS outlets, consists of a network of 500 privately owned wine retail stores, being 208 on-site stores (located at wineries) and 292 off-site stores (located away from wineries).

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82 Exhibit AUS-7.
83 PAC Report, Exhibit AUS-17, p. 7.
84 PAC Report, Exhibit AUS-17, p. 7.
94. All of the WRS licences (authorizations) are held by manufacturers of Ontario wine, and they allow manufacturers to sell wine in the off-site WRS outlets only if it is "made by" the manufacturer that holds the WRS authorization (except for a limited gift package exemption). Hence, imported bottled wine cannot be sold through the WRS network.

95. Indeed, according to the Liquor Control Act R.R.O. 1990, Regulation 717:

3. (1) ... a manufacturer of Ontario wine may establish government stores for the retail sale of wine made by the manufacturer ...

(2) In a store established under subsection (1), a manufacturer may sell only,

(a) wine made by the manufacturer; and

(b) subject to the approval of the Board, Ontario wine made by other manufacturers of Ontario wine as part of a gift or souvenir package that includes wine made by the manufacturer.

96. Moreover, according to Section 4(2) of the Liquor Control Act R.R.O. 1990, Regulation 717:

A manufacturer may sell only,

(a) Ontario wine produced from fruit grown in Ontario ...

(d) wine manufactured in accordance with the Wine Content and Labelling Act, 2000 ...

97. According to the Wine Content And Labelling Act, 2000 Ontario Regulation 659/00:

(2) A bottle of a wine that is manufactured by combining grapes grown in Ontario, grape product produced from such grapes, other domestic grapes or grape product with imported grapes or grape product shall consist of no less than ...

(b) 25 per cent of grapes grown in Ontario or grape product produced from such grapes to which no water has been added at any time, if the wine is packaged on or after September 1, 2010.

98. Australia underlines that it follows from the above provisions that in the WRS network a manufacturer can only sell wine made in Ontario (i) containing 100% Ontario grown produce (i.e. VQA wine or 100% Ontario); or (ii) wine...
manufactured in Ontario with at least 25% Ontario content (grapes grown in Ontario or grapes product from such grape – such as Ontario bulk wine – i.e. ICB wine). Hence, imported bottled wine cannot be sold through the WRS network.

99. Section 27(1) of the AGRPPA\textsuperscript{88} provides inter alia for a basic wine tax as follows:

   A purchaser who purchases from a winery retail store or an authorized grocery store wine that is Ontario wine ... shall pay a basic tax in respect of the purchase at the basic tax rate of 6.1 per cent of the retail price of the wine or wine cooler ...

100. If the wine is manufactured by the operator of the wine boutique located in the shopping area of the grocery store, the same purchase from a wine boutique is, according to Section 27(1.1) AGRPPA, subject to a basic tax rate of 11.1 per cent of the retail price as of April 1, 2019. A wine boutique is an off-site WRS outlet, which has been allowed to relocate into grocery stores

101. According to Section 27(2) AGRPPA “a purchaser who purchases from a winery retail store or an authorized grocery store wine that is not Ontario wine ... shall pay a basic tax in respect of the purchase” of 20.1 per cent of the retail price of the wine for purchases made on or after April 1, 2019. Pursuant to Section 27(2.1), if the wine is manufactured by the operator of the wine boutique located in the shopping area of the grocery store, the same purchase from a wine boutique will be taxed at a rate of 26.6 per cent of the retail price of the wine for purchases made on or after April 1, 2019.

102. Finally, Australia explains that according to the Liquor Licence Act, Ontario wine is:

   wine produced in Ontario from grapes, cherries, apples or other fruits grown in Ontario, the concentrated juice of those fruits or other agricultural products containing sugar or starch and includes Ontario wine to which is added herbs, water, honey, sugar or the distillate of Ontario wine or cereal grains grown in Ontario...in such proportion as is prescribed.\textsuperscript{89}

\textsuperscript{88} Exhibit AUS-20.

\textsuperscript{89} Exhibit AUS-21, section 1(a). Section 1 also makes clear that “in such proportion as is prescribed” means prescribed by the regulation made under the Liquor Licence Act.
103. According to the explanations provided on the internet site of the Government of Ontario, “For tax purposes, Ontario generally means that the wine is produced from 100 per cent Ontario-grown produce.”

104. Australia claims that the wine basic tax is an internal tax as it applies to the purchase of wine in the Canadian market at retail sale level; that it applies different rates on the purchase of wine in WRS outlets based on the location of production and origin of the ingredients; that a lower rate applies when the wine purchased is composed of 100% Ontario input (including notably bulk wine) and that accordingly the use of imported wine, as input in the wine sold to consumers through the WRS retail sale channel (ICB wine) will trigger the application of the higher tax rate. Therefore, imported bulk wine is indirectly subject to a tax burden in excess of domestic bulk wine in violation of Article III:2 of the GATT.

3.2.2. Canada’s arguments under Article III:2

105. Canada confirms that, Ontario applies a wine basic tax to owner-produced wines sold within Winery Retail Stores and Wine Boutiques that is paid at the time of purchase. This tax differs depending on whether the bottle contains 100% Ontario wine or whether it is an ICB wine. However, according to Canada, Australia did not examine the overall context in which the Wine Basic Tax operates and failed to provide evidence of any economic impact on competitive opportunities for Australian, or other imported, bulk wine imports into Ontario. The lower tax rate would apply to a small proportion of the wine sold in wine boutiques and Winery Retail Stores, whereas imports of bulk wine into Ontario have increased and this would prove that the measure has had no economic impact on the decisions of wine producers in Ontario to purchase imported bulk wine and that the competitive opportunities within these retail channels remains plentiful and lucrative for imported bulk wine.

3.2.3. Observations of the European Union on Australia claims under Article III:2

106. The EU shares Australia’s view that the Ontario wine basic tax is an internal tax and that it creates an origin based distinction for tax purposes between Ontario wine (domestic) and any imported wine. The Panel can therefore conduct its analysis based on a hypothetical like imported product.

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90 Exhibit AUS-40, p.5.
Moreover, the EU underlines that wine produced in Ontario from Ontario-grown produce (regardless of the specific proportion of Ontario-grown produce that is required pursuant to the Liquor Licence Act, be it 100% or lower), is subject to a tax rate that it is lower than the rate applied to non-Ontario wine when sold through the WRS retail outlets.

It follows that the use of imported bulk wine in certain proportion (i.e. when as a consequence of the use of import bulk wine the proportion of Ontario-grown produce falls below the level prescribed by the Liquor Licence Act) will trigger the application of the higher tax rate on the wine sold in the WRS retail outlets.

As a consequence, in keeping with the findings of the Panel in Mexico – Taxes on soft drinks, imported bulk wine can be considered as indirectly subject to a tax burden in excess of domestic like product when the imported bulk wine is contained in wine sold at the retail level through the WRS outlets.

In conclusion, the discriminatory tax treatment that Canada applies to imported wine through the wine basic tax appears to be contrary to Article III:2 of the GATT. The line of arguments that Canada develops to rebut Australia’s claims, which is essentially based on the lack of demonstration of concrete effects of the measure on the sale of Australian bulk wine, should be rejected for the same reasons explained above in relation to the federal excise duty exemption.

The EU would moreover observe that the same measure would also appear not to be consistent with Article III:4 of the GATT as it clearly gives an incentive to Ontario wine producers to limit the purchase of imported bulk wine to be used in the production of ICB wine to be sold through the WRS outlets, and rather use domestic products, in order not to lose the benefit of the lower tax rate on the sale of the wine they produce. However, Australia does not raise a claim under Article III:4 of the GATT with regard to the Ontario wine basic tax.

3.3. THE ONTARIO GROCERY MEASURES

3.3.1. Australia’s claims under Article III:4 as regards the Ontario grocery measures

Australia explains that in 2016 Ontario enacted new measures expanding the channels for the sale of wine in grocery stores by permitting the retail sale of wine in grocery stores in Ontario in up to 300 locations. This expansion of the retail sale in the grocery stores is regulated by the Ontario Regulation 232/16,
Sale of Liquor in Government Stores\(^9^1\). As it results from a public announcement from the Office of the Ontario Premier\(^9^2\) the new grocery measures would lead to:

- the issuance of up to 150 "grocery store authorizations": authorizing the sell imported and domestic wine under restricted and unrestricted beer and wine authorizations subject to certain conditions with respect to wine sales and display in grocery stores;

- the creation of up to 150 "wine boutiques" by authorizing existing WRS outlets to relocate from outside grocery stores to space within grocery stores and have a shared checkout.

113. Australia underlines that the grocery sales channel (retail in grocery stores and wine boutiques) has a competitive advantage over other wine retail channels because only the former can offer to consumers a one-stop shopping experience.

114. Australia stresses that the PAC Report recommended the issuance of a limited number of grocery store authorizations in order not to undermine the existing WRS network (which only sells domestic wine). Furthermore, the fact that the restricted authorization would become unrestricted after a few year, would have been designed to provide domestic wine with a head start over foreign competitors.\(^9^3\) At the same time, the creation of the wine boutiques would improve the attractiveness of the domestic wine sold in these outlets, both because they can move inside the grocery store and because they could broaden the assortment to sell wine of any Ontario producer.\(^9^4\) The higher share of the VQA wines in the grocery channel compared to the LCBO retail channel would confirm that, thanks to the grocery measures, domestic wine enjoys a competitive advantage over imported wine in the former channel.\(^9^5\)

115. Australia claims that both the grocery store authorizations and the wine boutiques limit Australian bottled wines’ access to the grocery store retail channel as compared to the favourable access to grocery stores afforded to like domestic wine.

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\(^9^1\) Exhibit AUS-41.

\(^9^2\) Exhibit AUS-45.

\(^9^3\) Australia FWS, paras. 60 and 65.

\(^9^4\) Australia FWS, para. 61.

\(^9^5\) Australia FWS, para. 87.
3.3.1.1 The grocery store authorizations

116. Section 9 of the Ontario Regulation 232/16, Sale of Liquor in Government Stores reads as follows:

The following classes of authorization are established in connection with the sale of beer and wine in grocery stores:

1. ...

2. Beer and wine authorization: a single authorization that permits the sale of beer and wine in a grocery store by the operator of the store.

3. Restricted beer and wine authorization: a beer and wine authorization that, for the first three years during which the operator sells wine under the authorization, has additional restrictions about the products that may be sold. After the three-year period has elapsed, the authorization becomes a beer and wine authorization.

117. Hence, there are two types of authorization the “restricted” and the “unrestricted”. Under either of them «if the operator sells VQA wines, the display area must contain one or more signs indicating the availability of VQA wines for sale»96.

118. As regards the restricted authorization, under Section 22 of the Ontario Regulation 232/16, Sale of Liquor in Government Stores:

22. (1) the following requirements apply to the sale of wine under a restricted beer and wine authorization held by the operator of a grocery store:

1. For the first three years during which the operator sells wine under the authorization, the operator is permitted to sell only,

   i. ..., 

   ii. wine that is produced by a small winery using grapes from a single country, and 

   iii. quality assurance wine produced using grapes from a single country by a winery that, at any time during the three-year period, is a mid-sized winery.

2. Despite paragraph 1, during that three-year period the operator is not permitted to sell wine (excluding cider) manufactured by a winery that is affiliated with another winery that is not a mid-sized or small winery at any time during the three-year period.

96 Exhibit AUS-41, section 24(2).
119. Section 1 of the *Ontario Regulation 232/16, Sale of Liquor in Government Stores* provides that:

“quality assurance wine” means wine (excluding cider) 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 (excluding cider) annually.

120. The LCBO assesses the eligibility of a certification regime for the "quality assurance wine" criteria under Regulation 232/16.

121. Under Section 43(2) of the *Ontario Regulation 232/16, Sale of Liquor in Government Stores* a manufacturer of wine is a small winery if both of the following criteria are satisfied:

1. In the most recent 12-month period for which data is available, the manufacturer’s worldwide sales did not exceed 200,000 litres of wine or, if the manufacturer has been selling wine for less than one year, its worldwide sales are not expected to exceed 200,000 litres of wine in the year.

2. Every affiliate of the manufacturer that manufactures wine is a small winery.

122. Under Section 43(1) of the *Ontario Regulation 232/16, Sale of Liquor in Government Stores* a manufacturer of wine is a mid-sized winery if all of the following criteria are satisfied:

1. In the most recent 12-month period for which data is available, the manufacturer’s worldwide sales did not exceed 4.5 million litres of wine or, if the manufacturer has been selling wine for less than one year, its worldwide sales are not expected to exceed 4.5 million litres of wine in the year.

2. Every affiliate of the manufacturer that manufactures wine is a mid-sized or small winery.

3. The manufacturer is not a small winery.

123. Hence, under the restricted authorization a grocery store operator is authorized to sell only “wine from small winery” and “quality assurance wine from a mid-sized winery”. Moreover, the grocery store operator must ensure that “at least 20 per cent of the containers of wine (excluding cider) on display in the store must contain wine manufactured by small wineries”.97

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97 Exhibit AUS-41, section 25(3).
124. As regards the unrestricted authorization, pursuant to Section 25(2) of the Ontario Regulation 232/16, Sale of Liquor in Government Stores the grocery store operator can sell wine subject to the following shelf-display conditions:

1. At least 10 per cent of the containers of wine (excluding cider) on display in the store must contain wine manufactured by small wineries.

2. At least 50 per cent of the containers of wine (excluding cider) on display in the store must contain wine that is produced using grapes from a single country and in respect of which at least one of the following criteria is satisfied:
   
i. The wine is quality assurance wine.

   ii. The wine was produced by a small winery.

   iii. The country where the grapes were grown produces, in the aggregate, less than 150 million litres of wine annually from grapes grown in that country.

125. Australia submits that the grocery store authorizations appear, on their face, to allow imported bottled wines access to grocery stores. It argues that imported bottled wine and domestic bottled wine are like products because they have similar physical characteristics, have the same end-uses, consumers consider them to be inter-changeable and they have the same tariff classification.

126. Australia also explains that the Ontario grocery sales measures directly govern and regulate the internal retail sale of domestic Ontario wine and imported wine in grocery stores in Ontario. Accordingly, the Ontario grocery sales measures evidently "affect" the internal sale, offering for sale, purchase and distribution of imported and domestic wine in Ontario.

127. With regard to the existence of less favourable treatment, Australia makes a distinction between restricted and unrestricted authorization.

128. Regulation 232/16 limits the wine that can be sold in grocery stores under restricted authorizations (restricted grocery stores), to single origin wine that is from a "small winery" or "quality assurance" wine that is also from a "mid-size" winery. Those criteria appear at first sight origin neutral.

129. However, the design, structure, and expected operation of those criteria, is such that Ontario wines can qualify under both of the criteria, while no Australian wines can qualify under the quality assurance criteria and most Australian wine is unlikely to gain access under the "small winery" criteria.
130. First, the "quality assurance" criteria essentially limits wine sold in restricted grocers to wine certified under smaller appellation of origin regimes (those that certify in the aggregate less than 50 million liters of wine annually). The LCBO has confirmed to Australia that "it is the aggregate amount of wine certified by the appellation of origin regime as a whole and not the amount of wine in any region or appellation that makes up only part of that regime" that matters in order to comply with the "quality assurance" criterion.98 Therefore, the design and application of this criterion is such that it automatically excludes all Australian wine from qualification because Australia has a nation-wide appellation of origin regime that certifies well above 50 million liters of wine annually. On the contrary, Ontario's VQA appellation of origin regime evidently qualifies under the "quality assurance" criteria because the amount certified is well below the threshold. This means that all Ontario VQA wine meets the "quality assurance" criteria and can qualify for sale in grocery stores under this criterion.

131. Second, while in theory Australian wine could access restricted grocery stores under the remaining "small winery" criterion, in reality the number of Australian small producers who export their wines to Ontario for sale in grocery stores is very limited.

132. This difference in access to retail outlets results in a detrimental impact on the competitive opportunities to like Australian wine, because domestic wines benefit from greater opportunities to reach consumers as compared to imported wine.

133. As for unrestricted authorization, Australia explains that domestic wine can fulfill the minimum shelf-display conditions under unrestricted authorization whilst Australian wine cannot. Australia wine cannot meet the quality assurance criteria, and in practice, it does not meet the small winery criterion either, whereas Ontario wine can meet both those criteria. As to the small wine producing country criterion (which requires the wine to be from a country that produces in the aggregate less than 150 million litres of wine annually from grapes grown in that country), this criterion is met by all wine produced in Canada (whose production is below the threshold) but not by any wine from Australia and other major wine producing countries.

98 Exhibit AUS-83.
134. It follows that the shelf-display conditions under the unrestricted authorization are such as to ensure a minimum shelf-display space for domestic wine and conversely limit the shelf-space available for imported wine. Hence, imported wines will have fewer opportunities to reach customers in grocery stores and this modifies the conditions of competition to the detriment of imported wine. Australia argues that the same holds for the requirement to display a sign indicating the availability of domestic (VQA) wine, which is necessarily domestic wine, whereas there is no legal requirement to advertise the availability of imported wine. This constitute a mandatory promotional requirement for domestic wine only, which alters the conditions of competition in the market between like product to the detriment of imported ones.

135. Australia concludes that the design, structure, and expected operation of the conditions under grocery store authorizations is such that on the whole like domestic wines are able to qualify, and thus access grocery stores under all criteria, while on the whole like Australian bottled wines qualify neither under the "quality assurance" criterion nor the small-country production criterion and would be unlikely to benefit from access under the "small winery" criterion. Accordingly, the conditions set out by Regulation 232/16 for both restricted and unrestricted grocery store authorizations discriminate against Australian wine in violation of Article III:4.

3.3.1.2 The wine boutiques

136. Under Section I of the Ontario Regulation 232/16, Sale of Liquor in Government Stores “wine boutique” means a winery retail store:

(a) that is located inside the shopping area of a grocery store, and

(b) at which the winery is authorized to sell wine to the public under a supplementary wine authorization

137. Moreover, according to Section 28(1) of the Ontario Regulation 232/16, Sale of Liquor in Government Stores, a “supplementary wine authorization” is a single authorization that permits a winery to sell, at a wine boutique operated by the winery, VQA wine manufactured by another winery that owns fewer than three winery retail stores (excluding on-site retail stores)

139. “Vintners Quality Alliance wine” (VQA wine) means wine,

(a) that is produced in Ontario from grapes that have been grown in Ontario or from grape juice or grape must produced from such grapes, and

(b) that meets the standards of the wine authority; \(^99\)

140. Moreover, the LCBO shall not issue a supplementary wine authorization to a winery in respect of a wine boutique unless the winery owns and operates at least three winery retail stores (excluding on-site stores) \(^100\)

141. A wine boutique is subject to mandatory “shelf-display requirements” pursuant to Section 28.9 of the Ontario Regulation 232/16, Sale of Liquor in Government Stores as follows:

... at least 50 per cent of the containers of wine on display in the wine boutique are containers of VQA wine and ... at least one-half of those containers are containers of wine manufactured by other wineries.

... at least 5 per cent of the containers of wine on display in the wine boutique are containers of wine manufactured by a small winery.

... one or more signs indicating that VQA wines are available for sale.

142. A wine boutique is subject to mandatory “sales targets” pursuant to Section 28.9 of the Ontario Regulation 232/16, Sale of Liquor in Government Stores as follows:

... at least 20 per cent of the wine sold in any 12-month period in all wine boutiques operated by the winery is VQA wine, and that at least 40 per cent of the VQA wine sold is manufactured by other wineries.

143. According to Australia, also the conditions regulating the sale of wine in the wine boutiques accord less favorable treatment to imported like product. First, those conditions formally treat imported bottled wine differently to domestic Ontario wine by excluding imported bottled wine from wine boutiques. Second, only domestic Ontario wine bottled in Ontario, including VQA wine, can be sold in wine boutiques. Hence, imported bottled wine is excluded from a significant portion of available sales outlets in the new lucrative grocery sales channel, and has access to fewer grocery sales outlets as compared to domestic wine. In keeping with the findings of the panel in Canada- Provincial Liquor Boards

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\(^99\) Exhibit, AUS-18, section 2.

\(^100\) Exhibit AUS-41, section 28(1).
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(US), the fewer sales and marketing opportunities granted to imported wine as compared to domestic wine constitute less favourable treatment within the meaning of Article III:4 of the GATT.

3.3.2. Canada’s arguments under Article III:4

144. **Canada** maintains that in order to prove that imported products are treated less favourably than domestic product, it is not sufficient for a complainant to demonstrate that there may be some imported products and some domestic like products that are treated differently. Indeed, a complainant is required to demonstrate, on the facts, that the group of imported products is treated less favourably than the group of domestic like products. This assessment requires an examination of the overall impact of the challenged measures on the distribution and sale of wine in Canada.

145. The policy rationale of the grocery store authorizations relates to a regulatory distinction responding to a market for wines produced by small wineries, regardless of origin. These are wines that, due to barriers to entry in grocery store chains including production costs, may not normally have access to that retail channel. Ontario has made a completely legitimate, GATT-consistent policy choice to preserve what amounts to a very limited (relative to overall wine shelf space in Ontario as a whole) space on grocery store shelves for products from small wineries of any origin, that is wineries whose wines are not as readily available to consumers in the LCBO stores, where 81.6% of wine is sold in Ontario. If consumers wish to buy Australian large-producer wines, they can easily do so, either at the LCBO stores or in grocery stores that have transitioned to unrestricted authorizations.

146. Canada stresses that Ontario has its own significant small and medium-sized wine producing sector that faces considerable obstacles to reaching consumers beyond the farm gate.101

147. Canada makes the point that a regulatory distinction that provides equally favourable market access for imported and domestic like products does not result in a violation of the national treatment principle just by virtue of the fact that not all imported products receive the same treatment. Instead, Australia’s approach would require the Panel to find that WTO Members cannot regulate on an origin-neutral basis to provide market access opportunities for Micro,

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101 Canada FWS, paras. 7, 22.
Small and Medium-sized enterprises (MSMEs), even where those regulations provide a balanced outcome in terms of competitive opportunities for imported and domestic products.

148. Canada also makes the point that the analysis under Article III:4 must begin with an assessment of the "design, structure and expected operation of the measure in question. However, Australia instead of showing an actual alteration in the conditions of competition to the detriment of imported products has formulated mere suppositions without any economic data, any econometric analysis and any compelling arguments as to why the origin-neutral grocery store measures affect the conditions of competition for imported wines.

149. With regard to the grocery store restricted authorizations the "small wineries" criterion and "med-sized wineries producing "quality assurance wine" reflect the "design and structure" of the measure. The "expected operation" of the measure is reflected in the recommendations of the PAC Report according to which any changes to the system should support the Ontario industry and provide improved access for imports, representing a balanced package. Moreover, Australia admits that Australian wineries may qualify under the small winery criteria and their limited presence in the Canadian market may be explained by the fact that Australian grants export subsidies to small wine producers to export to other markets. Canada stresses that also the quality assurance and mid-sized winery category is open to wines of any origin.

150. With regard to the unrestricted authorization, Canada observes that this type of authorization provides Australian wine unfettered access to the grocery store channel, as it is demonstrated by the fact that Australian wine holds a higher percentage of the market in the grocery store channel than it does in the LCBO. Therefore, the shelf-display conditions under the unrestricted authorization is not trade restrictive but simply a response to the marketing obstacles faced by small wine producers in a highly competitive Ontario wine market and to the global market dynamic that already tremendously favours mega-producers over micro, small and medium-sized wine producers.

151. As regards the wine boutiques, Canada argues that Australia provides no analysis, no evidence, and no data to support the contention that moving WRSs into grocery stores alters the conditions of competition to the detriment of imported products. Canada observes that a significant percentage of the wine sold through wine boutiques is imported wine, sold in the form of ICB
wine. Imported wine comprises up to 75% of ICB. Therefore, the WRS channel, far from excluding imported wine, in fact offers a lucrative sales channel for imported wine that may not exist absent the measure.

152. In conclusion, according to Canada with the grocery measures Ontario has established a new retail channel separate from the existing LCBO and WRS network by allowing sales of wine in grocery stores; and, improving convenience and consumer choice in the existing off-site WRS system.

3.3.3. European Union observations under Article III:4 as regards the Ontario grocery measures

153. Both Canada and Australia seem to agree that these measures are laws or regulations affecting the sale of wine (domestic and imported) in the Canadian market. The EU will therefore focus its comments on the existence of less favourable treatment.

154. The Ontario grocery measures draw several regulatory distinctions between like products based on different criteria that are formally origin-neutral. Moreover, different distinctions apply to different wine distribution channels at the retail level. Hence, the final consumers of wine has the possibility to buy wine from each of these channels, which are necessarily in competition with each other.

155. As mentioned before, Article III:4 does not prevent Members to draw regulatory distinctions within the group of like products provided that by doing so they are not affording to the group of like imported products less favourable treatment. The Panel therefore has to assess whether the measures at issue modify the conditions of competition in the relevant market to the detriment of imported products, or rather ensure effective equality of competitive conditions. The Panel has to investigate the implications of the contested measure for the equality of competitive conditions between imported and like domestic products, scrutinising closely the fundamental thrust and the actual and potential effects of the measure, considering its design, structure, and expected operation, in the light of all the information that are put before the Panel. It goes without saying that this type of assessment must be quantitative as well as qualitative and is not just a simple mathematical exercise.

156. First, it should be observed that the measures at issue do not modify the conditions of competition between domestic and imported wine over the LCBO retail network, as they do not apply to it. Hence, the competitive conditions
over that network can be considered as a given and stable element that does not need to be considered further.

157. Second, in order to illustrate the desing of the Ontario Grocery measures both Canada and Australia refer to the PAC Report, which triggered the introduction of these measures and whose conclusions were substantially implemented by Canada. This document should therefore be carefully studied by the Panel.

158. Third, the European Union underlines that Canada allegations according to which Australia failed to demonstrate the actual effects of the measures is not conclusive and in any event does not seem entirely correct. Australia has provided some concrete data, for instance about the increased sales of domestic wine in the grocery retail network, or the share of domestic wine sales in the grocery network compared to the share in the LCBO network.

159. Fourth, the EU would like to stress that it shares Canada’s view that the simple fact for a Member to draw a regulatory distinction between like products on the basis of the size of the producer does not necessarily violate Article III:4. A Member may have many good reasons for considering appropriate to provide support to small or medium sized companies. However, support can be provided in various ways and it is each Member’s duty to ensure that the support it provides complies with its WTO obligations. For instance, under footnote 2 of Article 2.1 of the SCM Agreement, subsidies paid to small or medium domestic producers may be non-specific and they would also escape Article III of the GATT, by virtue of Article III:8(b) thereof. In other words, providing support to small and medium sized companies does not necessarily require a Member to draw regulatory distinctions between like products. When a Member decides nevertheless to go down this route, it must make sure that it does not affect the competitive conditions of imported like products so as to afford to the group of imported like products less favourable treatment.

160. Fifth, the EU believes that Australia has demonstrated that the grocery measures adopted by Ontario are overall designed to improve the retail sale of wine in Ontario, notably by making it more accessible to consumers. By allowing the purchase of wine in grocery stores the grocery measures provide consumers with the convenience of a one stop shop. It is therefore to be expected that any measures that improves the position of domestic wine within the grocery retail channel (restricted, unrestricted authorization and wine boutiques) will also improve the competitive position of domestic wine in the Ontario market overall and conversely afford less favourable treatment to
imported wine. Indeed, the condition of competition over the LCBO network are a given in the present case.

161. In this connection, with regard to the wine boutiques, the EU observes that bottled imported wine is excluded from this retail channel, whereas domestic wine can enter this channel both bottled as 100% Ontario or bottled as ICB wine. The expansion of the assortment of the domestic wines that can be found in the wine boutiques improves the competitive opportunities for domestic wine. Indeed, domestic wines that did not have access to these outlets (because they were not manufactured by the licence holder) get the possibility to reach consumers over a broader number of shops, located moreover in a convenient location. On the other hand, imported bottled wine still is excluded from these outlets. Imported wine can access the wine boutiques only as blended in ICB wine (which is however a domestic product in its own right). The EU finds therefore difficult to understand Canada’s argument according to which the competitive position of imported wine is improved by allowing some off-site WRS outlets to move within the grocery stores.

162. With regard to the restricted authorization, which allows for the sale of wine from small winery of medium-sized wineries producing “quality assurance wine” or the unrestricted authorization, which requires a minimum shelf-display to be reserved for these wines, the Panel should conduct a thorough analysis of the implications of these measures for the competitive position of imported and domestic wine. In this context, and without thereby covering the important element of what effect the Canadian measures have on domestic and imported wine, the EU believes that the Panel should also explore the question of how Canada has designed the criteria for qualifying as "small winery" or "quality assurance wine" produced by a "mid-size" winery. If those criteria were designed to cater for the majority of small or medium Ontario producer, that could be an indication that the measure’s design and expected operation is indeed to improve the competitive position of the domestic products manufactured by these producers. If, on the other hand, those criteria were designed to capture the set of wine producers that typically suffer from difficulties to have their products distributed because of their size (i.e. the size below which is generally considered that wine production is hardly competitive), that could provide an indication that the measure’s design is not to treat import less favourably.
Particular attention should be paid to the criteria wine has to meet to qualify as “quality assurance wine”. If the criteria have some relation to the intrinsic quality or characteristics of the wine, then they may be expected not to operate to the detriment of imported products. For instance, wine entitled to benefit from a geographical indication (GI) is produced in certain delimited regions in compliance with some manufacturing rules (which sometimes also involve a quantitative limit on the wine that can be produced in that area). Those rules aim at ensuring *inter alia* the quality of the wine. A Member may therefore consider appropriate to draw a regulatory distinction between wine based on whether or not they comply with some GIs certification regime that ensures the quality or characteristics of the wine. Such a distinction would not appear to be designed or expected to operate to afford imported products less favourable treatment. GIs regimes are indeed wide-spread virtually all over wine producing countries. However, in the present case, Ontario seem to reserve the “quality assurance” label for wine that was certified under an appellation of origin regime that certifies in the aggregate less than 50 million liters of wine annually (and the Ontario regime falls below the threshold). Therefore, it is not the quantity of wine certified under the appellation or region that matters, but the size of the certification regime. However, while a limit on the quantity of wine that can be produced under a given appellation of origin may help in ensuring the quality of that wine, it is hard to see how the size of the certification regime can have any connection with the quality or the characteristics of the wine. Therefore, it would seem that this measure could have been designed in a way so that Ontario wine can surely qualify, whereas wine from many other countries (like Australia) cannot regardless of its quality or characteristics or the adequacy of the certification regime to certify the wine’s quality and characteristics. And indeed the actual effects of the measure reflect this design as Australian wine is excluded simply because of the size of its certification regime and regardless of the suitability of that regime to ensure the quality of the wine. Hence, this criteria, especially if it were to operate in tandem with other criteria that may make it more difficult for imported wine to have access or to be displayed in the grocery stores, may be expected to operate to the detriment of imported wine and hence afford less favourable treatment to that wine.

It is also difficult to understand the rationale or the design of the regulatory distinction between wine from small producing countries and other wine. Canada does not provide any information in this respect. Australia observes
that all Canadian wine can meet this definition, and Canada does not deny it. Hence, when one considers that Canadian wine can surely benefit from minimum shelf display obligations under all of the three categories (small winery; quality assurance from a mid-sized winery; and small producing country) whereas imported wine typically may not either because it is not produced by a small or mid-sized winery, or because of the size of the certification regime or because of the quantity of the national wine production, this consideration tend to indicate that these criteria have been designed and can be expected to operate so as to afford less favourable treatment to imported wine. In any case, any distinction between like products based on an inherent characteristics of the producing country may end up operating to the detriment of all imported products that have a certain foreign origin and hence will likely afford imported products less favourable treatment.

165. With regard to the other measures identified by Australia, such as the mandatory sales targets or the requirement to display the availability of quality assurance wine, the EU observes that these measures are clearly designed to improve the competitive opportunities of the subcategories of wine they refer to. Whether they also afford less favourable treatment to imported products will therefore depend on the effects of those measures on import. To the extent that actual effects may be missing or may be not conclusive the Panel may have to investigate how those subcategories have been designed and how they are expected to operate.

3.4. **Québec’s Small-Scale Producer Measures**

3.4.1. Arguments of the Parties

166. Australia challenges the consistency with Article III:4 of the GATT 1994 of the Québec measures contained in Bill 88, entitled *An Act respecting the development of the small-scale alcoholic beverages industry*. According to Australia, these measures adopted by the Québec National Assembly in 2016 draw a distinction based on origin and allow only Québec small-scale wine producers to distribute and sell their wines directly in grocery and convenience stores in Québec.  

102 Australia notes that like imported bottled wines are not granted any access to these sales outlets.  

103 It points out that grocery and

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102 Australia’s first written submission, para. 245 and Canada’s first written submission, paras. 197 and 207.

103 Australia’s first written submission, para. 245.
convenience stores are only permitted to sell wine bottled in Québec, thus
Australian wine that is bottled in Australia is entirely excluded from that
channel of distribution.\footnote{Canada’s first written submission, paras. 34, 88 and 252.} Bottled Australian wine imported into Québec must
be sold through the government-owned and operated retail network of the
\textit{Société des alcools du Québec} (SAQ) and is subject to the standard SAQ mark-
up covering the costs of storage, delivery and marketing of the wine.

167. Australia points out that the SAQ’s network comprises a maximum of 840
retail outlets, while there are over 9 000 grocery and convenience stores in
Québec.\footnote{Australia’s first written submission, para. 95.} It argues that the challenged Québec measures grant qualifying
domestic wines access to an additional and important retail network from
which imported bottled wines are excluded.\footnote{Australia’s first written submission, paras. 254-256.} Moreover, Québec small-scale
producer wine is allowed to bypass the SAQ distribution system and avoid its
fees and mark-ups, while imported bottled wine cannot be delivered directly to
groceries and convenience stores and must use the SAQ retail channel and pay
the inherent charges.\footnote{Australia’s first written submission, paras. 256-260.} Australia concludes that the Québec measures accord
less favourable treatment to imported like products than is accorded to
domestic like products that meet the conditions set out in Bill 88.\footnote{Australia’s first written submission, paras. 261-263.}

168. Canada does not contest that the Québec’s small-scale wine producer
measures affect the offering for sale of wine in the province of Québec,\footnote{Canada’s first written submission, para. 200.} nor
does it seriously contest that wine produced by small-scale producers
registered in Québec is "like" imported wine, although it criticizes Australia for
narrowing the group of imported like products to Australian bottled wine.\footnote{Canada’s first written submission, paras. 197-199.}

169. Canada confirms that imported bottled wine may not be delivered directly to
Québec’s sales outlets in grocery and convenience stores and that this
distribution channel is reserved to wine bottled in Québec. It emphasizes,
however, that there are no limitations on the origin of the wine bottled in
Québec and that Australian bulk wine is a major source of wine distributed
through the grocery and convenience stores channel.\footnote{Canada’s first written submission, paras. 44-48.}
170. According to Canada, Québec’s measures do not accord less favourable treatment to imported like products because only a minuscule portion of the wine sold in Québec’s grocery and convenience stores is delivered directly by small-scale Québec producers and because the conditions applying to wine imported into Canada from other WTO Members are identical to those applying to wine produced or bottled in other Canadian provinces. In the alternative, Canada argues that any detrimental impact of the Québec’s measures on the competitive opportunities for imported wine is de minimis and this circumstance should lead the Panel to refrain from finding a violation of Article III:4.

3.4.2. Observations of the European Union

171. In assessing Australia’s claim that the Québec’s small-scale producer measures are inconsistent with Article III:4 of the GATT 1994, the first element to be kept in mind is that the measures at issue contain a de jure discrimination in favour of small-scale wine producers registered in Québec who meet a number of additional conditions concerning the size, content and other characteristics of their production and delivery processes. Canada does not dispute this point and seeks only to emphasize that given the multiple conditions imposed by the relevant legislation and the concentration of wine-producing activities in a small part of Québec’s territory, the direct sales by beneficiaries of those measures to grocery and convenience stores represent a mere 0.23% of that retail market.

172. Canada implies, without explicitly contesting Australia’s definition of imported “like products” as Australian wine bottled in Australia, that the category of “like products” should also include Australian wine imported in bulk and bottled in Québec. This type of wine is also sold through the grocery and convenience store distribution channel.

173. The European Union agrees with Australia, however, that Australian bulk wine is not the appropriate comparator for assessing whether Québec small-scale producer measures accord less favourable treatment to imported products than to the like products of national origin.
174. The difference in treatment of domestic and imported wine identified by Australia does not concern bulk wine of any origin. Only bottled wine is sold in retail outlets. Both domestic and imported bulk wine must first be bottled by authorised wine-bottlers established in Québec before it can be sold in grocery and convenience stores in Québec. On the other hand, wine bottled outside Québec may only be sold through the SAQ distribution network, while the measure challenged allows small-scale Québec producers to sell their self-bottled wine directly through grocery and convenience store retail outlets. This is the different treatment identified by Australia and the task of the Panel is to examine whether the treatment afforded to imported wine is less favourable than that afforded to wine of small-scale Québec producers, because only the latter can sell their self-bottled wine directly through grocery and convenience store retail outlets.

175. The European Union considers that this is clearly the case, even if the small-scale Québec producers must meet a number of additional conditions in order to be able to use the grocery and convenience stores network for sales of their bottled wine. Imported wine of a small-scale foreign producer, if it would be able to meet some of those additional conditions, could not, in any event, be delivered directly by the producer to the convenience stores in Québec. Access to a distribution channel that is never available to any imported bottled wine grants qualifying domestic wine a competitive advantage, since it allows it to reach a greater number of consumers. That advantage is compounded by the ability to escape the high fees and mark-ups charged by SAQ for use of its retail network, which allows producers to charge lower prices or increase their margins of profit. The conditions of competition are therefore altered by the challenged Québec measures.

176. The fact that those advantages are only granted to a small fraction of the bottled wine sold on the Québec market does not change the conclusion that like imported wine is afforded a less favourable treatment than domestic wine. Also, the fact that not all of the domestic wine is afforded the most favourable treatment does not lead to a different conclusion either. Although bottled wine originating in other Canadian provinces is subject to the same treatment as bottled wine imported from any WTO Member, the legal standard for the application of Article III:4 does not require that all like products of national origin are afforded the most favourable treatment provided for in the territory of the importing Member. It is sufficient to establish that, in so far as the categories of domestic and imported products under consideration are “like”,
the imported products are afforded less favourable treatment than that afforded by the measures at issue to a category of domestic products.

177. In closing this section, the European Union reiterates that it does not contest Canada’s legitimate policy objective of supporting Quebec’s small-scale producers of wine, which face obvious difficulties in competing against larger producers. However, such support must be granted in a manner that is consistent with the covered agreements and does not infringe the fundamental prohibition on the application of discriminatory regulation.

3.5. **The Nova Scotia Liquor Corporation Reduced Mark-Up For Local Producers Under Its Emerging Wine Regions Policy**

### 3.5.1. Arguments of the Parties

178. Australia challenges the reduced mark-up applied by the Nova Scotia Liquor Corporation (NSLC) to all wine produced in Nova Scotia under its Emerging Wine Regions Policy as inconsistent with Article III:2, first sentence, of the GATT 1994. In case the Panel finds that the measure at issue does not come within the scope of Article III:2 or does not violate that provision, Australia claims that the reduced mark-up measure is inconsistent with Canada’s obligations under Article III:4.

179. Australia argues that the mark-ups applied by the NSLC are an internal charge on products within the meaning of Article III:2. It recalls that such mark-ups are adopted and levied by the NSLC pursuant to the authority bestowed upon it by two legislative or regulatory acts of Nova Scotia, the Liquor Control Act and the Liquor Corporation Regulations. The mark-ups are triggered by an internal event, which is the internal retail sale of the product. In addition, mark-ups are mandatory and they are borne by the products subject to that charge, so that they are reflected in the price paid by the consumer.

180. As regards “likeness”, Australia considers that the distinction drawn by NSLC between wine originating in “emerging wine regions” and elsewhere is
arbitrary does not affect the fact that domestic Nova Scotia bottled wine and Australian bottled wine are “like” for the purposes of article III:2, first sentence. It sets out to show that domestic and imported wine share the same physical characteristics, end-uses, fulfil the same consumer tastes or habits and have the same tariff classification regardless of whether they come from an “emerging wine region” or not.  

181. Australia also sets out to demonstrate that the reduced mark-up of 43%, ostensibly applicable to wines from an “emerging wine region” applies, in fact, to all domestic Nova Scotia wine, while virtually all Australian wine imported to Nova Scotia is subject to the much higher 140% mark-up. It provides ample evidence showing that the main criterion for defining an “emerging wine region” under the NSLC Emerging Wine Regions Policy, i.e., a total annual production not exceeding 50,000HL within the political boundaries of a distinct winemaking region, was chosen in order to afford protection to domestic production. According to Australia, that criterion ensures that all wine produced in Nova Scotia is subject to the “preferred” or “preferential” mark-up and that the vast majority of Australian wine remains subject to the standard 140% mark-up on its retail price. Australia therefore concludes that imported Australian wine is taxed or charged “in excess” of the like domestic Nova Scotia wine, in violation of Article III:2, first sentence.

182. Alternatively, if the Panel disagrees with its primary contention that the reduced mark-up breaches the obligation in Article III:2, Australia submits that the measure breaches Canada’s national treatment obligation under Article III:4.

183. Australia argues that the mandatory mark-ups set by the NSLC, pursuant to the legislation under which it is established, are themselves laws, regulations or requirements affecting the internal sale, offering for sale and purchase of wine. It asserts that domestic Nova Scotia wine and imported Australian wine are “like” products for the purposes of Article III:4.

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120 Australia’s first written submission, paras. 271-283.
121 Australia’s first written submission, paras. 101-283.
122 Australia’s first written submission, paras. 102 and 289-292.
123 Australia’s first written submission, paras. 284 and 294.
124 Australia’s first written submission, paras. 295-313.
125 Australia’s first written submission, paras. 296-298.
126 Australia’s first written submission, para. 299.
184. Since domestic Nova Scotia wine is granted a reduced mark-up of 43% under the Emerging Wine Regions Policy adopted by the NSCL, and the design and expected operation of the criteria defining an "emerging wine region" de facto exclude virtually all Australian wine from qualifying for the reduced mark-up, Australia concludes that the measure affords like imported wine less favourable treatment than that afforded to domestic Nova Scotia wine.\(^\text{127}\)

185. Australia adds that the measure at issue modifies the conditions of competition to the detriment of imported wine in the Nova Scotia market, by allowing domestic Nova Scotia wines to reduce their retail price and increase their market share, as highlighted in several documents published by the NSLC itself.\(^\text{128}\) Although Australia stresses that it is not necessary to show the actual trade effects of the measure to establish a violation of Article III:4, it refers to evidence that the sales and market share of Nova Scotian wine have steadily increased since the introduction of the reduced mark-up for local wine in 2008, under the Emerging Wine Regions Policy adopted by the NSLC.\(^\text{129}\)

186. Canada disputes Australia’s main contention that the mark-ups applied by the NSLC are an internal charge within the scope of Article III:2 of the GATT 1994. For Canada, since the NSLC acts with full autonomy from its sole shareholder, the government of Nova Scotia, the mark-ups are applied in accordance with independent commercial practices and considerations. Its mark-ups under the Emerging Wine Regions Policy are part of the NSLC’s pricing strategy for covering costs and generating revenue.\(^\text{130}\)

187. Moreover, Canada argues that, since the NSLC is a State Trading Enterprise subject to the disciplines of Article XVII of the GATT 1994, any claim of violation of the general principles of non-discriminatory treatment must be brought under Article XVII and not under the provisions of Article III. Because Australia made no claim under Article XVII, the Panel would have no basis to examine Australia’s claims related to the application of discriminatory mark-ups.\(^\text{131}\)

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\(^{127}\) Australia’s first written submission, paras. 302-305.

\(^{128}\) Australia’s first written submission, paras. 305-308.

\(^{129}\) Australia’s first written submission, paras. 103-110 and 309-312.

\(^{130}\) Canada’s first written submission, paras. 226-229 and 251-259.

\(^{131}\) Canada’s first written submission, paras. 226-229 and 251-259.Fi
188. In case the Panel disagrees with Canada that the reduced mark-up is only subject to Article XVII and not to Article III, Canada argues, in the alternative, that the measure is subject to Article III:4 rather than Article III:2. If the Panel finds otherwise, Canada argues, further in the alternative, that the reduced mark-up does not violate Article III:2. 132

189. Canada admits that the challenged measure draws a regulatory distinction between products within the group of “like products”. 133 According to Canada, the distinction between “emerging wine regions” and wine regions that are well established is origin-neutral and pursues a legitimate policy objective, which is to allow producers in emerging wine regions to market their products to Nova Scotia consumers at competitive prices through the NSLC. 134 As the complainant, Australia has the burden of demonstrating that the non-discriminatory regulatory distinctions that Canada draws in favour of MSMEs alter the balance of competitive opportunities to the detriment of imported like products. 135

190. Canada considers that Australia has not met its burden to demonstrate that the design, structure and expected operation of the challenged measure alters the balance of competitive opportunities in Nova Scotia in favour of domestic wine. 136 It points out that, as acknowledged by Australia, 8% of total Australian wine production would be eligible for the reduced mark-up, while many Canadian wine regions would not qualify as “emerging wine regions”. Canada stresses that 8% of Australian wine production is more than 60 times the total volume of wine produced in Nova Scotia and more than 140% of all wine produced in Canada. 137 In addition, it considers that Australia, aside from pointing out that the sales of Nova Scotia wine have increased, has failed to demonstrate a detrimental economic impact on the competitive opportunities for imported wine. 138 Canada contends that, to the contrary, Australian wine

132 Canada’s first written submission, paras. 249-250.
133 Canada’s first written submission, para. 265.
134 Canada’s first written submission, paras. 265, 268 and 272.
135 Canada’s first written submission, paras. 268 and 270.
136 Canada’s first written submission, para. 268.
137 Canada’s first written submission, paras. 266-267.
138 Canada’s first written submission, para. 302.
has long-enjoyed commercial success within the Nova Scotia and broader Canadian market.\textsuperscript{139}

191. Canada includes wines from other Canadian provinces in its definition of “domestic wine” and argues that, since the majority of domestic wine is unlikely to qualify for the reduced mark-up, imported wine is not afforded less favourable treatment than domestic wine. Therefore, it concludes that the challenged measure does not violate Article III:4.

192. As regards the application of Article III:2, Canada also surmises that wine originating in Canadian provinces other than Nova Scotia should be considered domestic wine. It then asserts that the majority of domestic products is subject to the same standard retail mark-up as imported products.\textsuperscript{140} Further, Canada recalls its view that it should be possible to rebut any presumption that taxation “in excess” is deemed to “afford protection” to the domestic production. In Canada’s opinion, the analysis under Article III:2 requires both an assessment of nominal taxation rates and the impact of those rates on competitive opportunities for the like imported products.\textsuperscript{141} In the absence of a demonstration of such detrimental impact on imports, Canada posits that the breach of Article III:2, first sentence, is not established.

### 3.5.2. Observations of the European Union

193. The European Union does not consider persuasive Canada’s arguments to the effect that the mark-ups applied by the NSLC on retail sales of wine do not fall within the scope of Articles III:2 or III:4 because they are “inherently a private sector commercial activity”.\textsuperscript{142} Regardless of the degree of autonomy that NSLC enjoys vis-à-vis the government of Nova Scotia, which is its sole shareholder, it seems appropriate to recall that NSLC is not a “private sector” retailer of wines and liquors. As acknowledged by Canada itself, the NSLC is the monopoly purchaser and importer of wine in the territory of Nova Scotia.\textsuperscript{143} Moreover, it is the understanding of the European Union that the mark-ups set by the NSLC are mandatory for any retail sale of wine in Nova

\textsuperscript{139} Canada’s first written submission, para. 297.
\textsuperscript{140} Canada’s first written submission, paras. 294–297.
\textsuperscript{141} Canada’s first written submission, paras. 299–303.
\textsuperscript{142} Canada’s first written submission, para. 244.
\textsuperscript{143} See for instance Canada’s first written submission, para. 284.
Scotia\textsuperscript{144} and that they are not negotiable. Although Canada suggests that the NSLC may have some flexibility for deciding which products originate in an “emergent wine region” and could qualify for the reduced mark-up,\textsuperscript{145} there is no indication that the wineries and their agents may freely negotiate a different rate of mark-up. The fact that the NSLC is a State Trading Enterprise subject to Article XVII and uses the term “mark-up” for the price of its services also suggests that such prices are not formed under normal market conditions. The European Union is therefore of the opinion that such mark-ups, which impose a mandatory pecuniary burden on retail sales of wine, may be deemed an “internal charge” within the meaning of Article III:2 or a “requirement affecting” the internal sales of wine within the meaning of Article III:4.

194. As regards Canada’s argument that a claim alleging the violation of the national treatment obligation through mark-ups levied by the NSLC could only have been brought under Article XVII, the European Union is not convinced that this is the case. Article XVII:1(a) contains a reference to “the general principles of non-discriminatory treatment prescribed in this Agreement” and such reference does not denote the intention to establish a standard of “non-discriminatory treatment” that is different or special as regards the general obligations of non-discrimination under Article III. The European Union sees no compelling reason for the Panel to reject or decline to examine, on this basis, the claims brought by Australia under Article III:2 and, in the alternative, under Article III:4.

195. The European Union considers, moreover, that Australia’s claim under Article III:2 appears \textit{prima facie} well founded. Although the distinction drawn by the measure at issue between “emergent wine regions” and other wine-producing regions is origin-neutral, Australia has put before the Panel substantial evidence of the asymmetric impact that the regulatory distinction has on the domestic production of Nova Scotia, on the one hand, and on imports of the like product, on the other hand. The fact that the main criterion on which the distinction is based is such that the entirety of Nova Scotia’s wine production is subject to the reduced mark-up, while only very few foreign or other Canadian wine regions are likely to qualify as an “emergent wine region” is in itself indicative that the design, structure and expected operation of the measure is suitable “to afford protection to domestic production”.

\textsuperscript{144} See Australia’s first written submission, para. 269.
\textsuperscript{145} See Canada’s first written submission, paras. 280-281.
196. However, in this respect, Canada’s insistence in including products from other Canadian provinces within the category of “like domestic products” seems justified. At the same time, the Panel should take account of the restrictions on the interprovincial and international importation of wine into a Canadian province that Canada refers to in paragraphs 206 and 207 of its First Written Submission. Given the existence of provincial import monopolies such as NSLC, it is the understanding of the European Union that each Canadian province constitutes a separate market for wine products. The application of Article III:2 and Article III:4 nonetheless requires comparison to be made between the charges levied on the domestic production of Canada with those levied on the imported like products. The existence of a de facto discrimination may depend on the extent to which Canadian wine originating outside of Nova Scotia is, in fact, subject to the higher NSLC mark-up of 140% when sold on the Nova Scotia retail market.

197. Finally, the European Union will note that it is not ready to follow Canada’s suggestion that once it has been found that internal charges of any kind are imposed on imported products “in excess of those applied to” like domestic products, it is still necessary to establish that the discrimination has an actual detrimental impact on imports. Even if Canada frames its proposal in terms of allowing the responding Member to rebut the presumption of detrimental impact, neither the text of Article III:2 nor the the practice of its interpretation and application over many decades leave any space for such a rebuttal. There are many reasons why a decline in imports may not be immediate, significant or even occur despite the existence of a discrimination. This does not mean that Members should be allowed to apply discriminatory internal taxes or charges until the imports of like products are significantly reduced.

3.6. **Canada’s Defence Under Article XXIV of the GATT**

198. Canada argues that if the Panel finds that any of the impugned measures violate any relevant provisions of the GATT, those measures are permitted under Article XXIV by virtue of their being an essential element of the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) establishing a free-trade area consistent with the requirements of Article XXIV CPTPP, to which Canada and Australia are both parties and which entered into force December 30, 2018. Indeed, The CPTPP specifically exempts measures related to the sale and distribution of wine in Canada from a challenge of a national treatment violation.
199. First, the EU underlines that Article 2.3 of the CPTPP reads as follows:

Article 2.3: National Treatment

1. Each Party shall accord national treatment to the goods of the other Parties in accordance with Article III of GATT 1994, including its interpretative notes, and to this end, Article III of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis.

... 

3. Paragraph 1 shall not apply to the measures set out in Annex 2-A (National Treatment and Import and Export Restrictions).

200. Annex 2-A of the CPTPP titled "National Treatment and Import and Export Restrictions" provides as follows:

1. For 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.

201. Moreover, with regard to the measures that Canada has listed Annex 2-A, the annex reads as follows:

1. Article 2.3.1 (National Treatment) ... shall not apply to:
... (f) the internal sale and distribution of wine and distilled spirits.

202. It is therefore clear that Annex 2-A only has the effect of excluding the application of Article 2.3.1 of the CPTPP to Canada's measures relating to the internal sale and distribution of wine and distilled spirits. It does not affect the rights or obligations of any CPTPP Party under the WTO Agreement with respect to any measure listed in this Annex and this may be so already by virtue of the formulation of Annex 2-A (1) itself. In other words, it does not affect the application of Article III:4 of the GATT and the possibility for Australia to invoke a violation of that WTO provision before a panel established pursuant to the DSU.

203. On a more general level the EU recalls that Article XXIV:4 reads:

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. (emphasis added)
204. Moreover, paragraph 5(b) of the same Article provide:

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;

Provided that:

(b) respect to a free-trade area ... the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area ... to the trade of contracting parties not included in such area ... shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area ...;

205. Moreover, the Appellate Body has provided useful guidance on the conditions to be fulfilled for a Member in order to invoke Article XXIV:4 of the GATT.

206. In Turkey – Textiles the Appellate Body clarified 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.146

207. However, it immediately added that the phrase "provided that" contained in paragraph 5 of Article XXIV is "... an essential element of the text of the chapeau"147. Then the Appellate Body added that:

According to paragraph 4, the purpose of a customs union is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should not do so in a way that raises barriers to trade with third countries.(...)

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146 Appellate Body Report, Turkey – Textiles, para. 45.
147 Appellate Body Report, Turkey – Textiles, para. 51.
Accordingly, on the basis of this analysis of the text and the context of the chapeau of paragraph 5 of Article XXIV, we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. 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 sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV. (emphasis added)\textsuperscript{148}

208. These findings apply \textit{mutatis mutandis} when Article XXIV is invoked in relation to the formation of FTA, as it is demonstrated by the Appellate body report in \textit{Peru – Agricultural Products}, where the Appellate Body explicitly referred to that case.\textsuperscript{149}

209. Hence, in \textit{Peru – Agricultural Products}, the Appellate Body clarified that:

\begin{quote}
In setting out the above cited conditions for a GATT 1994-inconsistent measure to be justified as part of a customs union or FTA under paragraph 5 of Article XXIV of the GATT 1994, in \textit{Turkey – Textiles}, the Appellate Body relied also on paragraph 4 of this provision, which states that the purpose of a customs union or FTA is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. We further note that paragraph 4 qualifies customs unions or FTAs as "agreements, of closer integration between the economies of the countries parties to such agreements". In our view, the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements.\textsuperscript{150}
\end{quote}

210. The derogation from the national treatment obligation provided for by the CPTPP clearly rolls back on Canada’s WTO obligations. Moreover, an interpretation of that derogation as allowing Canada to roll back on the national treatment not only with regard to Australia, but with regard to all WTO members, is in any event inconceivable. It would be tantamount to say that Canada and Australia have amended a fundamental obligation of Canada towards all WTO Members by concluding an FTA in disregard of one of the

\textsuperscript{148} Appellate Body Report, \textit{Turkey – Textiles}, paras. 57-58.
\textsuperscript{149} Appellate Body Report, \textit{Peru – Agricultural Products}, para. 5.115.
\textsuperscript{150} Appellate Body Report, \textit{Peru – Agricultural Products}, para. 5.116.
main precepts of public international law according to which *pacta tertiiis nec prosunt nec nocent*. Finally, in doing so they would have adopted a regulation of commerce with regard to wine in the Canadian market, which is clearly more restrictive to the trade of non-FTA members than that applicable prior to the formation of the FTA.

211. In light of all the above, the EU respectfully submits that Canada’s defence is doomed to fail.

4. CONCLUSION

212. The European Union considers that this case raises important questions of interpretation of the GATT 1994. The European Union requests the Panel to examine them carefully in light of the observations made in this submission. The European Union reserves its right to submit further comments during the Panel’s meeting with the Parties.

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