WORLD TRADE ORGANIZATION
Panel established pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

Canada – Measures Governing the Sale of Wine (DS537)

THIRD PARTY ORAL SUBMISSION OF NEW ZEALAND

19 July 2019

Introduction

1. Mr Chairman, distinguished members of the Panel.

2. As a wine exporting nation, New Zealand is directly impacted by the measures challenged in this case. The measures impede entry and genuine competition within the Canadian market – a market that is the *fourth* largest export destination for New Zealand wine.

3. New Zealand's interest in this proceeding, however, goes further than the direct effect of the measures in dispute. New Zealand has a systemic interest in the proper interpretation of the provisions engaged - notably Article III GATT. Canada proposes novel interpretations of Article III, and invites the Panel to depart from established jurisprudence. If accepted, these interpretations would create a loop-hole for Members that legislate on the provincial, state or territorial level – and would make it almost impossible for complainants to successfully establish a breach of Article III(2) first sentence or Article III(4). It is crucial that they are rejected.

4. We begin our submissions today by setting out four points concerning the interpretation of Article III.

Article III requires Members to extend to *all* imports treatment that is no less favourable than the *best* domestic treatment

5. First - Article III GATT requires Members to afford imported products treatment that is no less favourable than that accorded to the *most favoured* domestic products. This is not controversial. It is supported by well-settled jurisprudence, including two cases brought against Canada in respect of measures applied at the provincial level.[1] In both cases, the group of like domestic products that was used by the Panel to carry out its assessment was the group of domestic products that received the *most favourable* treatment. The fact that other like domestic products received the same less favourable treatment as imported products had no bearing on this analysis.

6. Second - Article III GATT requires Members to afford this 'most favoured' treatment to *all* imports. Again, this is not controversial. A Member cannot bypass its obligations under Article III simply by granting national treatment to a selection of

[1] Panel Report, *Canada – Wheat Exports and Grain Exports* and GATT Panel Report, *Canada – Provincial Liquor Boards (US).*

imported products. Members must give effect to their obligations under Article III GATT in a meaningful and genuine manner.

7. Canada rejects both of these propositions. It invites the Panel instead to engage in a novel interpretation that cuts across established jurisprudence and would rob Article III GATT of much of its utility. Canada suggests that Article III requires what it refers to as an 'asymmetric impact assessment'. Under such an assessment, measures that favour a *subset* of domestic products over imports would be permitted. This would enable countries that legislate on the provincial, state or territorial level to enact measures that favour local products. Such measures could easily be crafted to meet the bare requirements stipulated by Canada's 'asymmetric assessment' test.

8. The interpretation of Article III proposed by Canada is inconsistent with the plain meaning of the text. Article III(2) first sentence and Article III(4) refer to the "products of any contracting party" and "like domestic products" or "products of national origin". Neither Article III(2) nor Article III(4) refer to "*all"* imported products or "*all"* domestic products. Nor do any of the terms used suggest a net impact assessment.

9. The purpose of Article III GATT is to avoid protectionism and ensure equality of competitive conditions between imported and domestic products.[2] The interpretation proposed by Canada would cut across this purpose. A measure does not need to affect an entire market to be protectionist. A measure that affords more favourable treatment to a *segment* of domestic products is *just* as capable of advancing protectionism, and distorting the conditions of competition, as one that applies across the board. This is particularly so where measures are enacted at the provincial, territorial or state level. The interpretation of Article III proposed by Canada would permit regional legislatures to enact measures aimed at providing competitive advantages to domestic products over imports, in the markets in which they are most likely to be sold, and where they will therefore benefit most from competitive advantages. Moreover – there is nothing in Canada's interpretation to prevent such measures being enacted by most, or even all, regional legislatures within a Member's territory. The result could be a patchwork quilt of discriminatory measures, each favouring local products, but collectively ensuring that imports face discrimination across the board. Such an interpretation is clearly inconsistent with the object and purpose of Article III - and should be rejected.

[2] Appellate Body Report*, Japan – Alcoholic Beverages II*, at p 16.

Article III(2) first sentence does not require proof of a protective purpose

10. Turning to our third point. A breach of Article III(2) first sentence will be found where it is shown that imports are subject to internal taxation 'in excess' of like domestic products. There is no requirement to show more. Specifically, there is no requirement that a complainant show that the excess taxation was imposed for the purposes of protecting domestic production. It is well established that, if imported products are taxed in excess of like domestic products, that taxation will *necessarily* afford protection to domestic production within the meaning of Article III(1).[3] This is not a rebuttable presumption, it is a conclusion that is built into the text of Article III.

Article III(2) first sentence and Article III(4) do not require proof of actual trade effects

11. Fourth, and finally - it is well-established that neither Article III(2) first sentence nor Article III(4) require proof of actual trade effects. Article III(2) first sentence is clear. It prohibits tax 'in excess'. This is not a *de minimis* standard – even the smallest amount of 'excess' is too much. Nor is it conditional on a trade effects test. The Appellate Body has clearly held that "Article III protects expectations not of any particular trade *volume* but rather of the *equal competitive relationship* between imported and domestic products."[4] In arguing that Australia should have provided evidence of trade effects to support its claims, Canada is attempting to muddy this straight forward and settled interpretation.

12. Canada makes the same argument in respect of Article III(4). Again, this is incorrect. Article III(4) requires proof that imported products are granted less favourable treatment than like domestic products. This requires consideration of whether the measures in dispute alter the conditions of competition. There is no additional requirement that a complainant go further and provide evidence of actual trade effects.

13. This is not to say that evidence demonstrating the trade effects of a measure is not relevant. Where available, evidence of trade effects can provide important assistance in a panel's assessment. It is not, however, a requisite element of a breach of Article III(2) first sentence or Article III(4).

[3] Appellate Body Report*, Japan – Alcoholic Beverages II*, at p 18 and Panel Report, *Argentina – Hides and Leather*, at para 11.137.
[4] Appellate Body Report*, Japan – Alcoholic Beverages II*, at p 16 (emphasis added).

The measures in dispute collectively operate to discriminate against imports

14. In concluding, we wish to comment very briefly on the measures in dispute. Canada has attempted to paint a compelling picture of the challenged measures. It argues that they are origin neutral, and that the benefits granted by them are open to wine from all countries. It denies that they are protectionist.

15. This characterisation of the measures is misleading. The discriminatory function of each measure is clear from its design, architecture, structure and overall application. The measures either discriminate expressly based on origin, or grant preferential treatment to wine exhibiting characteristics that are *crafted* to capture local wine and exclude imported wine. These are targeted measures aimed at providing competitive advantages to domestic products in the markets in which they are most likely to be sold and where they will therefore benefit most. The challenged measures are text book examples of a breach of Article III GATT. New Zealand asks that the Panel find them as such.

16. Thank you.