

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 SUBMISSION OF NEW ZEALAND

28 June 2019

TABLE OF CONTENTS

TABLE OF CASES CITED IN SUBMISSION	2
I. INTRODUCTION	3
II. SCOPE AND PURPOSE OF THE NATIONAL TREATMENT OBLIGATION UNDER ARTICLE III GATT	3
Article III requires Members to extend to <i>all</i> imports treatment that is equivalent to the <i>best</i> domestic treatment.....	4
Article III(2) first sentence does not require proof of actual trade effects	6
Article III(4) does not require proof of actual trade effects	8
III. THE MEASURES IN DISPUTE COLLECTIVELY OPERATE TO TARGET IMPORTS	9
Federal excise tax.....	9
Ontario wine boutiques and the Ontario basic wine tax	10
Ontario grocery store wine and beer authorisations	12
a. Discriminatory restrictions on the type of wine that can be sold in grocery stores.....	12
b. Discriminatory restrictions on the type of wine that must be displayed in grocery stores.....	15
c. Conclusions on Ontario authorisations:	15
Direct access to grocery and convenience stores for Quebec wines	16
Nova Scotia reduced product mark-up for Nova Scotia wines	16
III. THE MEASURES IN DISPUTE ARE NOT JUSTIFIED UNDER ARTICLE XXIV GATT 19	
IV CONCLUSION	19

TABLE OF CASES CITED IN SUBMISSION

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Canada - Pharmaceutical Patents</i>	Panel Report, <i>Canada – Patent Protection of Pharmaceutical Products</i> , WT/DS114/R, adopted 7 April 2000, DSR 2000:V, p. 2289
<i>Canada – Provincial Liquor Boards (US)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies</i> , DS17/R, adopted 18 February 1992, BISD 39S/27
<i>Canada – Wheat Exports and Grain Exports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru - Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
<i>Turkey - Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, p. 2345
<i>US - Malt Beverages</i>	GATT Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , DS23/R, adopted 19 June 1992, BISD 39S/206

I. INTRODUCTION

1. New Zealand’s participation in this dispute reflects its concern over the measures challenged and its interest in the proper interpretation of the provisions at the centre of this dispute, notably Article III of the General Agreement on Tariffs and Trade (**GATT**).

2. New Zealand has a well-regarded, fast-growing wine industry. Its wines have a strong international reputation and demand a premium price globally. Canada is an important market for New Zealand wine. It is New Zealand’s fourth largest export market and accounts for around 7.5% of New Zealand annual export wine revenue.¹ The measures challenged in this case have had a significant impact on the New Zealand wine industry and, in particular, its ability to access and compete within the Canadian market.

3. The arguments raised in this case focus on the scope and interpretation of the national treatment obligation contained in the GATT. The national treatment obligation is one of the central principles of the WTO rules based international trading system. The arguments raised by Canada present a challenge to the utility of this obligation. In defending its actions, Canada has sought to reduce the national treatment obligation to an overly formulaic principle that can easily be avoided by creative legislating. If Canada’s arguments are accepted, the national treatment obligation will cease to have practical effect for any Member that legislates on the provincial, territory or state level. These arguments must be resisted.

4. The measures in dispute are designed to protect Canada’s domestic wine industry by excluding imports from certain sales outlets and granting more favourable treatment to domestic wines. New Zealand has no issue with Canada seeking to promote and cultivate its domestic wine industry. Provided, however, that this is done in a World Trade Organization (**WTO**) consistent manner. New Zealand asks that the Panel recognise the measures in dispute for what they are: an impermissible attempt by Canada to protect its domestic wine industry from import competition.

II. SCOPE AND PURPOSE OF THE NATIONAL TREATMENT OBLIGATION UNDER ARTICLE III GATT

5. This case concerns one of the core tenants of the WTO system: the national treatment obligation contained in Article III GATT. In *Japan – Alcoholic Beverages II* the Appellate Body held that:²

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III “is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production”.

6. Before moving to a discussion of the measures that have been challenged, New Zealand wishes to comment on three particular aspects of the legal standard to be applied under Article III.

¹ New Zealand Winegrowers Inc. Annual Report 2018, June 2018, available at <https://www.nzwine.com/en/media/statistics/annual-report>, at p 42.

² Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 16 (footnotes omitted).

Article III requires Members to extend to *all* imports treatment that is equivalent to the *best* domestic treatment

7. There are two points to emphasise in respect of the scope of the protection afforded under Article III. First, Article III requires Members to afford imported products treatment that is no less favourable than that accorded to the *most favoured* domestic products.³ A number of the measures challenged in the present case are directed at the protection of wine from a specific province within Canada. While most measures also favour Canadian wine as a whole, in some instances wine from other Canadian provinces is subjected to the same less favourable treatment as imported wine. WTO jurisprudence makes it clear that the relevant treatment that must be extended to imported products is the best treatment that is given to domestic products. In *US – Malt Beverages* the GATT Panel stated:⁴

The national treatment provisions require contracting parties to accord to imported products treatment no less favourable than that accorded to any like domestic product, whatever the domestic origin. Article III consequently requires treatment of imported products no less favourable than that accorded to the *most-favoured* domestic products.

8. This approach has been applied in a number of cases. In *Canada – Wheat Exports and Grain Exports* the Panel held that certain measures breached Article III(4) by affording less favourable treatment to imported grain than Eastern Canadian grain.⁵ This was notwithstanding the fact that Western Canadian grain was also afforded the same less favourable treatment.⁶ In *Canada – Provincial Liquor Boards (US)*, a case that bears some resemblance to the current case, the Panel considered a range of measures that afforded more favourable treatment to beer within the province that it was brewed. Imported beer and beer from other provinces received less favourable treatment. Again the Panel found that these measures breached Article III GATT.⁷ It is telling that, in applying Article III to each measure, the Panel used the term 'domestic beer' as short hand for the beer that received the most favourable treatment by Canada in the province in question.⁸

9. The second point to be made regarding the scope of the protection afforded under Article III, is that Article III requires Members to afford national treatment to *all imports*. Canada suggests that, if some imports have escaped, or could escape, the discriminatory effect of a measure, then the measure cannot be contrary to Article III.⁹ This is incorrect. A measure that affords less favourable treatment to some, but not all, imported like products, will still be inconsistent with Article III. As stated by the Panel in *Argentina – Hides and Leather*, in respect of Article III(2) first sentence:¹⁰

³ Panel Report, *Canada – Wheat Exports and Grain Exports*, at para 6.294.

⁴ GATT Panel Report, *US - Malt Beverages*, para 5.17 (emphasis added). See also para 5.33.

⁵ Panel Report, *Canada – Wheat Exports and Grain Exports*, para 7.4.

⁶ Panel Report, *Canada – Wheat Exports and Grain Exports*, para 6.294.

⁷ Panel Report, *Canada – Provincial Liquor Boards (US)*, at para 6.1.

⁸ Panel Report, *Canada – Provincial Liquor Boards (US)*, at p 43, FN 1.

⁹ See, for example, Canada's written submission, 14 June, at paras 89, 301.

¹⁰ Panel Report, *Argentina – Hides and Leather*, at para 11.260.

Article III:2, first sentence, is applicable to each individual import transaction. It does not permit Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances.

10. The instances where some imports have managed to escape discrimination all relate to measures that have a *de facto* discriminatory effect. In order to be discriminatory, *de facto* discrimination need not capture every single imported like product. In many cases, it would be almost impossible to structure a *de facto* discriminatory measure in a way that will achieve 100% discrimination. Indeed, the fact that Canada is only able to point to a few discrete (or hypothetical) imports that escape the measure is telling.¹¹

11. Canada rejects both of the above propositions regarding the interpretation of Article III GATT. It appears to take the view that, Article III will only be triggered where the treatment of all imported like products, as a group, is less favourable than the treatment afforded to all domestic products as a group.¹² Canada refers to this as an “asymmetric impact analysis”.¹³ It argues that a Member is permitted to provide ‘sub-groups’ of domestic products with more favourable treatment, without being obliged to afford that same favourable treatment to all imports.¹⁴ In setting out this argument, Canada erroneously relies on the Appellate Body decision in *EC-Asbestos*. In *EC - Asbestos* the Appellate Body made the following observations:¹⁵

A complaining Member must establish that the measure accords to the group of "like" *imported* products less favourable treatment than it accords to the group of *domestic* products.

...

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.

12. Canada places significant weight on the Appellate Body’s use of the term ‘group’ in the above extracts. Two things should be noted here. First, the focus of the Appellate Body in making these comments was on the requirement that a complainant establish ‘less favourable treatment’.¹⁶ It was not even considering the question of grouping all like domestic and imported products together. Care should be taken not to extrapolate meanings from Appellate Body Reports that are not there. Second, it is apparent from the Appellate Body’s reference to the ‘group of imported products’ and the ‘group of

¹¹ See, for example, Canada’s written submission, 14 June, at paras 89, 301.

¹² See Canada’s written submission, 14 June, at paras 164,

¹³ See Canada’s written submission, 14 June, at paras 155-164.

¹⁴ See Canada’s written submission, 14 June, at para 173.

¹⁵ Appellate Body Report, *EC – Asbestos*, at para 100 (emphasis in original). Note that Canada quotes these extracts in its written submissions with emphasis on the word ‘group’. At FN 189 and 190 in its written submissions, Canada incorrectly states that this emphasis appears in the original text. The Appellate Body Report text italicises the words ‘imported’ and ‘domestic’ only.

¹⁶ This is clear for the discussion surrounding this extract, which is focused on the requirement that less favourable treatment be established not assumed: see Appellate Body Report, *EC – Asbestos*, at para 100.

domestic products’ that the Appellate body was not suggesting that less favourable treatment had to be shown between *all* “like” domestic products and *all* “like” imported products – had the Appellate Body meant this then they would have said as much. There is nothing in the Appellate Body’s comment in *EC – Asbestos* that suggests that the group of like domestic products cannot be, for example, the like domestic products from a particular province. Indeed, the decisions in *US – Malt Beverages*, *Canada – Provincial Liquor Boards* and *Canada – Wheat Exports and Grain Exports* make it clear that this is exactly how Article III is intended to apply.

13. This issue goes to the heart of Article III GATT. Article III is aimed at avoiding protectionism and ensuring equality of competitive conditions as between imported and domestic products.¹⁷ 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 the measure is limited to a particular geographic area and its effect is to provide more favourable treatment to the product originating from that area. In the present case, a number of the measures challenged are structured so as to ensure that domestic wine is granted more favourable treatment in the province where it is produced and where it is most likely to be sold. These are not measures where the relative impact on imports and domestic products is unclear or incidental. They 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 from competitive advantages. New Zealand considers that the challenged measures are clear examples of a breach of Article III GATT. It asks that the Panel find them as such.

Article III(2) first sentence does not require proof of actual trade effects

14. In *Japan – Alcoholic Beverages II* the Appellate Body held that a breach of Article III(2) first sentence will be found where it is shown that imported products are taxed in excess of like domestic products.¹⁸ The Appellate Body made two important observations about Article III(2) first sentence. First, it noted that a finding of breach of Article III(2) first sentence did not require a complainant to demonstrate that the excess tax was imposed in order to afford protection to domestic production.¹⁹ This is because, where the specific requirements set out in Article III(2) first sentence are met, the measure is deemed to afford protection to domestic production within the meaning of Article III(1).²⁰ Second, the Appellate Body made it clear that there is no obligation on a complainant to demonstrate the trade effects of the excess taxation. It is sufficient that tax was applied to imported products in excess of that applied to like domestic products. In the Appellate Body’s words:²¹

¹⁷ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 16.

¹⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 18.

¹⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 18.

²⁰ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 18 and Panel Report, *Argentina – Hides and Leather*, at para 11.137.

²¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 23.

Even the smallest amount of "excess" is too much. "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 *de minimis* standard."

This standard has been applied in a number of other cases.²²

15. Canada does not contest the legal standards set out by the Appellate Body in *Japan – Alcoholic Beverages II*.²³ It suggests, however that the Appellate Body merely recognised a *presumption* that any measure that meets the requirements under Article III(2) first sentence affords protection to domestic production within the meaning of Article III(1).²⁴ It argues that parties should be able to rebut this presumption with evidence of the effects of the measure.²⁵ Later, Canada goes further and asks the Panel to find that "a violation of the first sentence of Article III:2 cannot be established in the absence of *any* evidence of impact on competitive opportunities for imported products".²⁶ The basis for this argument is unclear. At points in its written submissions, Canada argues that evidence of actual trade effects is required both in order to show that the measures 'afford protection to domestic products',²⁷ and prove that the measures impose taxation on imports 'in excess' of that imposed on domestic like products.²⁸

16. The interpretation of Article III(2) first sentence proposed by Canada is incorrect for several reasons. First, it is inconsistent with the text of Article III(2) read in context. Article III(2) first sentence prohibits measures that tax imported products 'in excess' of domestic like products. Unlike the second sentence to Article III(2), there is no additional reference to the measure being contrary to the principles set forth in Article III(1). This is because a measure that is inconsistent with Article III(2) first sentence is *necessarily* inconsistent with the principles in Article III(1).²⁹ This is not a presumption that may be rebutted, it is a conclusion that is built into the text of Article III(2). The interpretation proposed by Canada ignores this important textual difference between the first and second sentences of Article III(2).

17. Second, whether a tax is imposed 'in excess' is a simple quantitative exercise. 'Excess' means "beyond the usual or specified amount".³⁰ This is not a *de minimis* standard.³¹ There is no basis in the context to Article III, or the object and purpose of GATT, to read a qualitative trade effects test into Article III(2) first sentence. Finally, *even if* Article III(2) first sentence were to be interpreted as requiring consideration of whether the measure affords protection to domestic production, this would not amount to

²² Panel Report, *Argentina – Hides and Leather*, at para 11.137; Appellate Body Report, *Korea – Alcoholic Beverages*, at para 153. See also the comments of the Panel in *US – Malt Beverages*, at para 5.6.

²³ Canada's written submissions, at paras 140-141.

²⁴ Canada's written submissions, at para 142-143, 300-303, 329.

²⁵ See for example, Canada's written submissions, at para 142-143, 329.

²⁶ Canada's written submissions, at paras 303 and 319.

²⁷ Canada's written submissions, at paras 303 and 319.

²⁸ Canada's written submissions, at paras 303 and 319.

²⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 18 and Panel Report, *Argentina – Hides and Leather*, at para 11.137.

³⁰ www.oed.com. Last accessed on 24 June 2019.

³¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 23. See also the comments of the GATT Panel in *US – Malt Beverages*, at para 5.6.

a requirement that a complainant prove that the measure has some identifiable trade effect. In *Korea – Alcoholic Beverages* the Appellate Body rejected an argument made by Korea that a measure will only be shown to protect domestic production for the purposes of Article III(2) second sentence if there are discernible trade effects. The Appellate Body held that “Article III is not concerned with trade volumes. It is ... not incumbent on a complaining party to prove that tax measures are capable of producing any particular trade effect”.³² The same conclusion had been reached by the Appellate Body in *Japan – Alcoholic Beverages II*. There the Appellate Body explained:³³

[I]t is irrelevant that the “trade effects” of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the *equal competitive relationship* between imported and domestic products.

18. In support of its claim that trade effects are relevant to the application of Article III(2), Canada relies on *Thailand – Cigarettes (Philippines)*.³⁴ The first thing to note about *Thailand – Cigarettes (Philippines)* is that the Appellate Body comments were made in respect of Article III(4), not Article III(2) first sentence. More importantly, however, far from advocating for a ‘trade effects test’, the Appellate Body expressly held that “[t]his [‘less favourable treatment’] 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.”³⁵ As discussed further below, proof of actual trade effects is not necessary for, or determinative of, a finding that Article III has been breached.

Article III(4) does not require proof of actual trade effects

19. Canada appears to suggest that evidence showing actual trade effects may also be necessary in order to find a breach of Article III(4).³⁶ It suggests, for example, that “it is also axiomatic that, in each case, the complainant must adduce evidence to demonstrate that the measure at issue has in fact resulted in a change in competitive conditions to the detriment of the imported product.”³⁷

20. This is incorrect. As set out above, Article III does not only require equality of competitive conditions between imported and domestic products, it also protects the *expectations* of equal competitive relationships.³⁸ While the impact of a measure on trade *may* be relevant to an assessment under Article III(4), the actual trade effects of a measure are not determinative of the consistency of that measure with Article III. As noted above, the Appellate Body has made it clear that a measure may be inconsistent with Article III even when the trade effects of the measure are insignificant or non-

³² Appellate Body Report, *Korea – Alcoholic Beverages*, at para 153.

³³ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 16 (emphasis added).

³⁴ Canada’s written submissions, at paras 310 and 318 and FNs 331 and 344.

³⁵ Appellate Body Report, *Thailand – Cigarettes (Philippines)*, at para 129 (emphasis added).

³⁶ Canada’s written submissions, at paras 128, 153-154 and 180.

³⁷ Canada’s written submissions, at para 154.

³⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 16.

existent.³⁹

III. THE MEASURES IN DISPUTE COLLECTIVELY OPERATE TO TARGET IMPORTS

21. Through its submission Canada has attempted to paint a picture of the measures in dispute as nothing more than innocent attempts to provide benefits to small-scale producers and wine from emerging wine regions.⁴⁰ It argues that these measures are origin neutral and that the benefits granted by them are open to wine from all countries.⁴¹ In the paragraphs that follow, New Zealand will provide a picture of the challenged measures that definitively shows this to be incorrect. The challenged measures are carefully designed to discriminate against imported products in a strategic and multi-faceted manner. This is clear from the design, architecture, structure and overall application of the measures.

22. New Zealand will address the challenged measures in the following order:

- (a) Federal excise tax
- (b) Ontario wine boutiques and the Ontario basic wine tax
- (c) Ontario grocery store wine and beer authorisations
- (d) Provision of direct access to grocery and convenience stores for Quebec wines
- (e) Nova Scotia reduced product mark-up for local producers

Federal excise tax

23. Canadian federal excise tax is structured to capture *all* imported wine, and exclude *all* wine produced in Canada from raw materials grown in Canada (100% Canadian wine). This is achieved through two instruments. The first is the Federal Excise Act. The Excise Act imposes tax on all wine 'packaged in Canada'.⁴² This includes wine that is imported in bulk and then bottled in Canada as 100% imported wine, as well as wine that is imported in bulk and then blended with Canadian wine to create what is referred to as 'International Canadian Blends' (**ICB wine**). Under current rates, all bulk imported wine bottled in Canada is subject to excise tax of \$CAN0.653 per litre.⁴³

24. On its face, the imposition of excise tax on all wine 'packaged in Canada' would appear to capture domestic Canadian wine. Wine that is produced in Canada from raw materials grown in Canada is, however, expressly exempt from excise tax under the

³⁹ Appellate Body Report, *Japan – Alcoholic Beverages II*, at p 16. Discussed above at para 17.

⁴⁰ See for example, Canada's written submission, at paras 40, 64, 67, 73, 84, 86, 169, 175, 176, 204, 268, 272.

⁴¹ See for example, Canada's written submission, at paras 86, 89, 169, 174, 175, 179, 182, 189, 248, 286, 301.

⁴² *Excise Act, 2001*, SC 2002 c 22 (**AUS-34**), s 135(1) and sch 6.

⁴³ Government of Canada, Excise Duty Rates (**AUS-36**).

Act.⁴⁴ As a result, *no* excise tax is payable on 100% Canadian wine.

25. The second instrument is the Customs Tariff. The Customs Tariff is not one of the measures challenged by Australia in the current dispute. It does, however, form part of the context within which the measures in dispute must be understood. Under the Customs Tariff all pre-bottled wine that is imported into Canada is subject to excise tax 'equal to' that applied to wine packaged in Canada (ie. \$CAN0.653 per litre).⁴⁵ While the Customs Tariff is not part of the measures challenged, it shows that the excise tax imposed on imported bulk wine is not standalone. It is part of a wider system that ensures that excise tax is imposed on all imported wine entering the Canadian market.

26. The combined effect of the Customs Tariff and the Excise Act is that *all* imported wine, whether in bulk or pre-bottled form, is subject to an excise tax that is not applied to *any* 100% Canadian wine. As set out in Australia's submissions, this is a clear breach of Canada's obligations under GATT Article III(2).

27. This is not the end however. The federal excise tax is merely the first layer of discrimination that imported wine will encounter when it enters Canada. The disadvantage imposed on all imported wine through the excise tax amplifies and compounds the further disadvantage that is imposed on this wine at the provincial level. The following paragraphs will discuss these additional measures.

Ontario wine boutiques and the Ontario basic wine tax

28. Ontario has enacted two measures that restrict access and competitive opportunities for imported wine in winery retail stores (**WRSs**). Both of these measures expressly discriminate against imported wine on the basis of origin. Apart from the government owned Liquor Control Board of Ontario (**LCBO**) stores, WRSs are the primary retail channel for the sale of wine in Ontario.⁴⁶ The impact of these combined measures on the competitive opportunities for imported wine is therefore significant.

29. The first measure is the prohibition on sales in winery boutiques of all imported wine other than that contained in ICB blends. Winery boutiques are WRSs authorised to relocate into spaces within grocery stores. They were introduced in 2016 as an extension of the existing WRS scheme.⁴⁷ Only Ontario based wineries are eligible to operate winery boutiques⁴⁸ and, in addition to their own wine (which is by definition either 100% Ontario

⁴⁴ *Excise Act (AUS-34)*, s 135(2).

⁴⁵ Customs Tariff S.C. 1997, c 36, s 21.2(2).

⁴⁶ Premier's Advisory Council on Government Assets, *Striking the Right Balance: Modernizing Wine and Spirits Retailing and Distribution in Ontario* (19 February 2016) ["PAC Report"] (**AUS-17**) at p 7.

⁴⁷ *Sale of Liquor in Government Stores*, O Reg 232/16 ["Regulation 232/16"] (**AUS-41**).

⁴⁸ Only wineries that already operate multiple WRSs are eligible to open a wine boutique (Regulation 232/16, s 31.1(1)). An authorisation to operate a WRS can only be granted to wineries that manufacture Ontario wine (*Liquor Control Act*, RSO 1990, c L18 (**AUS-19**), cl 3(1)(e)). "Ontario wine" is defined in the Liquor Control Act as having the same meaning as in the Liquor Licence Act. That Act defines Ontario Wine as "wine produced in Ontario from grapes, cherries, apples or other fruits grown in Ontario..." (*Liquor Licence Act*, RSO 1990, c L19 (**AUS-21**, s 1).

wine or wine blended in-house⁴⁹) they are only permitted to sell Vintners Quality Alliance (VAQ) wine.⁵⁰ VAQ wine is, by definition, 100% Ontario wine.⁵¹ The only imported wine that can be sold in wine boutiques is therefore bulk imported wine that has been blended by the owner of the particular wine boutique to create ICB wine. Wine that is imported in bottled form and wine that is imported in bulk and bottled in Canada as 100% imported wine cannot be sold in winery boutiques.⁵² Further, in light of the fact that some winery boutique owners may not make ICB wine, and the fact that a winery boutique cannot sell ICB wine made by other producers, it follows that only a very small fraction of all ICB wine produced is able to be sold in winery boutiques.

30. New Zealand exports both pre-bottled and bulk wine to Canada. In light of the premium price of New Zealand bulk wine,⁵³ it is rarely economical to blend New Zealand wine with wine from other origins. Bulk New Zealand wine imported into Canada is exclusively bottled and sold as 100% New Zealand wine.⁵⁴ The effect of this measure is therefore to bar *all* New Zealand wine exports from being sold in winery boutiques. By contrast, *all* 100% Ontario VQA wine is eligible for sale in this important avenue for sales.

31. The second Ontario measure that expressly discriminates against imported wine is the Ontario basic wine tax. The basic wine tax applies to wine sold in WRSs and wine boutiques.⁵⁵ As noted above, the only imported wine that is permitted to be sold in WRSs and wine boutiques is ICB wine made by the boutique owner. The current basic tax rates for 100% Ontario wine sold in a WRS or wine boutique are 6.1% and 9.6%

⁴⁹ Wine sold through the WRS system must be "made by" the winery that operates the WRS or wine boutique: *General Regulation*, RRO 1990, Reg 717, ss 3(1) and (2) (**AUS-25**). Wine will be "made by" an operator when they carry out at least one significant winemaking step (which includes "blending" but does not include bottling) for each bottle of wine sold: Alcohol and Gaming Commission of Ontario, *Winery Retail Store Information Guide* (December 2018) (**AUS-24**) at pp 3-4.

⁵⁰ Regulation 232/16 (**AUS-41**), s 28.1.

⁵¹ Vintners Quality Alliance wine is defined in Regulation 232/16 as having the same meaning as in the Vintners Quality Alliance Act, 1999, S.O. 1999, c. 3 (**AUS-18**). Clause 2 of that Act defines VQA wine as wine that:

- 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; ("vin de la Vintners Quality Alliance").

⁵² *General Regulation*, RRO 1990, Reg 717 (**AUS-25**), ss 3(1) and 3(2), read with explanation of 'made' set out in *Winery Retail Store Information Guide* (**AUS-24**) pp 3-4.

⁵³ The average price of bulk wine exported by New Zealand is roughly twice that of the nearest competitor. Based on global data collected by the Spanish Wine Markets Observatory, for the year ended December 2018, the average price per litre of New Zealand bulk wine exports was €2.21/litre. The next highest average bulk wine price was for French wine at €1.21/litre. The global average bulk wine price per litre was €0.81/litre: Spanish Wine Markets Observatory *Principales exportadores mundiales de vino Año 2018*, Appendix, at p 12.

⁵⁴ Only five New Zealand wineries exported bulk wine to Canada in 2017 and 2018. All of the bulk wine exported in those years was bottled and sold in Canada as 100% New Zealand wine: information provided by New Zealand Wine Growers.

⁵⁵ *Alcohol, Cannabis and Gaming Regulation and Public Protection Act*, SO 1996 c 26, ["ACGRPPA"] (**AUS-20**), s 27, read with s 1. New Zealand notes that Canada states in its submissions that, in wine boutiques, the basic tax is only applied to wine that was produced by the owner of the Wine Boutique (Canada's submission, at para 99). New Zealand notes that, whether this is correct or not, it does not alter the fact that the basic wine tax rates for ICB wine are significantly greater than the rates for 100% Ontario wine.

respectively.⁵⁶ The current basic tax rates for non-Ontario wine sold in a WRS and wine boutique are over twice this, at 19.1% and 22.6% respectively.⁵⁷ ICB wine sold in winery boutiques is therefore subject to *over double* the rate of basic tax imposed on 100% Ontario wine. The only basis for this higher tax rate on ICB wine is the presence of imported wine.

32. The combined impact of these two measures is significant. The prohibition on the sale of imported wine (other than ICB wine produced by the boutique owner) means that other than a very small amount of ICB wine, all imported wine is prohibited from being sold in winery boutiques. The Ontario basic tax rates then ensure that the small amount of ICB wine that *is* permitted to be sold in winery boutiques and WRSs is subject to significantly greater tax than 100% Ontario wine. As set out in Australia's submissions, these measures represent a clear breach of Canada's obligations under GATT Article III(2) and GATT Article III(4).

Ontario grocery store wine and beer authorisations

33. Wine can be sold in grocery stores in Ontario under two authorisations: a restricted beer and wine authorisation or a standard / unrestricted beer and wine authorisation. These authorisations prescribe the type of wine that a grocery store can sell and display and, in doing so, they *de facto* discriminate against imported wines. In *Canada – Pharmaceutical Patents*, the Panel described *de facto* discrimination as arising where "an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties".⁵⁸ The paragraphs below will set out how the grocery authorisation measures achieve this.

a. Discriminatory restrictions on the type of wine that can be sold in grocery stores

34. Unrestricted authorisations permit the sale of all wine. A restricted beer and wine authorisation, however, permits the sale of two categories of wine only:⁵⁹

- (a) Wine that is made by a 'small winery' using grapes from a single country ('Category 1');
- (b) Wine that made by a mid-sized winery, is quality assurance wine, and is made using grapes from only one country ('Category 1').

35. The two categories each contain a number of elements that must be pulled apart. Category 1 has two elements. A 'small winery' is one that had worldwide sales of less than 200,000 litres of wine in the last 12 months.⁶⁰ This criteria alone rules out the vast majority of imported wine, as wineries with such a small annual output are unlikely

⁵⁶ ACGRPPA (**AUS-20**) s 27; Ontario Ministry of Finance, "Beer and Wine Tax" (**AUS-40**) p 6.

⁵⁷ ACGRPPA (**AUS-20**) s 27; Ontario Ministry of Finance, "Beer and Wine Tax" (**AUS-40**) p 6.

⁵⁸ Panel Report, *Canada – Pharmaceutical Patents*, at para 7.101.

⁵⁹ Regulation 232/16 (**AUS-41**), s 22.

⁶⁰ In addition, any affiliate of the winery must also have sales falling below this threshold: Regulation 232/16 (**AUS-41**), s 43(2).

to export wine. The small winery criterion is coupled with a requirement that wine sold must also be made from grapes from a single origin. This is significant. The only wine sold in Canada that will not meet this criteria are blends containing imported wine, in particular, ICB wine.

36. In 2018, only 2.46% of the total volume of wine exported by New Zealand globally was produced by a 'small winery'.⁶¹ More specifically, only 1.14% of the total volume of New Zealand wine exported to Canada was produced by a small winery.⁶² This means that around 98.8% of New Zealand's wine exports to Canada in 2018 *did not* qualify for sale under Category 1.⁶³ While no evidence has been presented on the number of Canadian wineries that fall within the above definition of a 'small winery', evidence has been presented on the number of Canadian wineries that would qualify as 'small' under an alternative definition based on the volume of grapes crushed in a year. Here, the Canadian Vintners Association records that, of the approx. 700 wineries producing wine in Canada, all but 20 are small wineries.⁶⁴ Canada's own written submissions state that the "vast majority" of its domestic wineries "would be considered small wineries producing on a small scale"⁶⁵ and that Ontario, specifically, is home to "a significant number of small-scale wine producers".⁶⁶

37. Category 2 wine has three elements. Like Category 1, these elements collectively discriminate against imported wines. A 'mid-sized winery' is a winery that had worldwide sales of less than 4.5 million litres in the last 12 months.⁶⁷ 'Quality assurance wine' is wine that is designated as meeting the quality control standards of a statutory appellation of origin regime that certifies, in the aggregate, less than 50 million litres of wine (excluding cider) annually.⁶⁸ Category 2 is also limited to wine made from grapes from a single origin, thus excluding all ICB wine.

38. New Zealand export wine is not 'quality assurance wine'. As noted above, quality assurance wine is wine that is designated as meeting the quality control standards of a statutory appellation of origin regime that certifies, in the aggregate, less

⁶¹These figures were provided by New Zealand Winegrowers and are based on the total volume of export wine produced in the 2018 calendar year. New Zealand wine sales and production figures are very unlikely to materially differ as only a small amount of New Zealand wine is cellared for any period of time before sale. The production figures in the two preceding years are similar: in 2016, only 3.04% of the total volume of wine exported by New Zealand globally came from a small winery, in 2017, only 2.34% of the total volume of wine exported by New Zealand globally came from a small winery (figures provided by New Zealand Winegrowers).

⁶² These figures were provided by New Zealand Winegrowers and are based on the total volume of export wine produced and exported in the 2018 calendar year.

⁶³These figures were provided by New Zealand Winegrowers and are based on the total volume of export wine produced in the 2018 year.

⁶⁴ A small winery here is defined as one that crushes no more than 500 tonnes of grapes in a 12 month period: Canadian Vintners Association Answers to Questions, May 2019 (**CAN-2**), item 5. In its written submissions, Canada equates a crush of no more than 500 tonnes to an annual wine production of approximately 350,000 litres: First Written Submission of Canada, 14 June 2019, at FN 339.

⁶⁵ Canada's written submission, at para 314.

⁶⁶ Canada's written submission, at para 22.

⁶⁷ And is not a 'small winery'. In addition, any affiliate of the winery must also have sales falling below the 4.5 million litre threshold: Regulation 232/16 (**AUS-41**), s 43(1).

⁶⁸ Regulation 232/16 (**AUS-41**), s 1.

than 50 million litres of wine annually.⁶⁹ New Zealand has no statutory appellation of origin regime that meets this definition.⁷⁰ Accordingly, *all* New Zealand export wine is excluded from sale under Category 2. By comparison, the very small appellation of origin regime envisioned by the ‘quality assurance’ criterion is much more amiable to Canada’s provincial appellation framework and, in particular, the relatively small appellation of origin regime in Ontario. The appellation of origin regime in Ontario, VQA Ontario,⁷¹ certified 28.8 million litres in 2018, and 25.7 million litres in 2017.⁷² Accordingly, *all* Ontario VQA wine qualifies for sale under Category 2. This means that to the extent that any Ontario wine is not eligible to be sold under the “small wine” category, it will still be eligible to be sold under this second ‘quality assurance’ category.

39. The structure of these two categories is not incidental. Category 1 is designed to capture almost all domestic wine and exclude almost all imported wine (including all ICB wine). To the extent that a small portion of domestic wine will not meet the ‘small wine criterion’, Category 2 provides a second opportunity for it to be captured. Coupling the mid-sized winery criterion with the ‘appellation of origin’ criterion, however, significantly reduces the chances that imported wine from mid-size wineries will be captured by Category 2. It is not common to have an appellation of origin regime administered at a level low enough (eg. provincial or regional) to fall under the 50 million litre threshold. Few export countries will therefore produce wine that qualifies as ‘quality assurance wine’.

40. Taken together, the application of the two categories is striking. Around 98.8% of all New Zealand wine exported to Canada is *excluded* under Category 1⁷³ and *no* New Zealand export wine qualifies for sale under Category 2.⁷⁴ This means that virtually all New Zealand wine is barred from being sold in grocery stores holding restricted authorisations. Conversely, wine from the vast majority of Canadian wineries and *all* Ontario VQA wine is eligible for sale in groceries with restricted authorisations. As set out above, extending more favourable treatment to products from a particular province will amount to a breach of Article III(2) first sentence.⁷⁵

⁶⁹ Regulation 232/16 (**AUS-41**), s 1.

⁷⁰ The closest New Zealand has to a statutory appellation of origin regime is the *Geographical Indications (Wine and Spirits) Registration Act 2006* (GI Act). The GI Act prescribes the circumstances in which New Zealand geographical indications can be registered by the Intellectual Property Office of New Zealand, and used on wine. These registered geographical indications relate exclusively to the origin of the wine and do not impose ‘quality standards’ per se. In any event, the LCBO has taken the position that, where an appellation of origin regime is nation-wide, the volume of wine certified by that regime must be assessed at the national level: Email from Ian Loadman to Steve Guy, 31 July 2016 (**AUS-83**). On a national level, New Zealand produces approximately 300 million litres of wine annually that is eligible to carry a geographical indication under the GI Act: New Zealand Winegrowers Inc Annual Report 2018, June 2018, at p 37. This is well over the 50 million litre cap contained in the definition of quality assurance wine.

⁷¹ VQA Ontario ‘About VQA Ontario’ (**AUS-8**).

⁷² Ontario VQA Annual Reports 2017 and 2018 (**AUS-86**).

⁷³ As set out above, only 1.14% of the New Zealand wine exported to Canada in 2018 was produced by a small winery: see above para 36.

⁷⁴ See para 38 above.

⁷⁵ See discussion above from para 7.

b. Discriminatory restrictions on the type of wine that must be displayed in grocery stores

41. As noted above, unrestricted authorisations permit the sale of imported wine. This is countered, however, by display requirements which bolster and promote domestic wine over imported wine. Unrestricted authorisations impose the following display requirements on grocery stores:⁷⁶

- (a) At least 10% of the wine on display must be manufactured by a small winery;
- (b) At least 50% of the wine on display must contain wine produced using grapes from a single country *and* must be at least one of the following:
 - i. quality assurance wine;
 - ii. produced by a small winery; or
 - iii. produced using grapes from a country that produces less than 150 million litres of wine annually from grapes grown in that country.

42. These size-based criteria are designed to target characteristics that are rarely exhibited by imported wine, while the requirement that 50% of wine displayed be made from single-origin grapes acts to exclude ICB wine. By way of example, virtually all New Zealand export wine is ineligible for the promotional boost afforded by these advertising requirements. New Zealand produces well over 150 million litres of wine annually.⁷⁷ As noted above, New Zealand wine is not 'quality assurance wine', and only 1.14% (approx.) of New Zealand wine exported to Canada annually is produced by a small winery.⁷⁸ The remaining 98.8% (approx.) of New Zealand wine is denied enhanced promotion under all of the display requirements. By contrast, the "vast majority" of Canadian wineries⁷⁹ and at least a "significant number"⁸⁰ of Ontario wineries are small wineries, Canada produces well under 150 million litres of wine annually⁸¹ and *all* 100% Ontario wine is eligible to be certified as quality assurance wine.⁸²

c. Conclusions on Ontario authorisations:

43. The sum effect of these measures is striking. Based on 2018 figures, 98.8% of New Zealand global export wine does not qualify for sale in grocery stores with restricted authorisations *and* does not qualify for *any* enhanced promotion under the mandatory

⁷⁶ Regulation 232/16 (**AUS-41**), s 25(2).

⁷⁷ In the 2018 financial year, New Zealand produced 301.7 million litres; in 2017 New Zealand produced 285.1 million litres: New Zealand Winegrowers Annual Report 2018 (<https://www.nzwine.com/en/media/statistics/annual-report>) at p 37.

⁷⁸ These figures were provided by New Zealand Wine Growers. See para 36 above.

⁷⁹ Canada's written submission, at para 314. See discussion above at para 36.

⁸⁰ Canada's written submission, at para 22. See discussion above at para 36.

⁸¹ The Canadian Vintners Association estimates that Canada produced 73 million litres of Canadian wine in 2018: Canadian Vintners Association Answers to Questions (**CAN-2**), at item 1.

⁸² See discussion above at para 38.

display requirements in grocery stores with unrestricted authorisations. By way of contrast, *all* Ontario VQA wine is eligible for sale in groceries with restricted authorisations and *all Canadian wine* is eligible for enhanced promotion under the mandatory display requirements.

44. New Zealand considers that the measures relating to the sale and display of wine in Ontario grocery stores are text-book examples of *de facto* discrimination. As set out in Australia’s submissions, the measures are a clear breach of Canada’s obligations under GATT Article III(4).

Direct access to grocery and convenience stores for Quebec wines

45. Quebec prohibits the sale of imported bottled wine in grocery stores.⁸³ It also allows Quebec wineries holding small-scale production permits to sell and deliver wine directly to grocery stores,⁸⁴ thus avoiding the SAQ mark-up that is applied to all other wine. The wine sold by these small-scale permit holders must be comprised of at least 75% Quebec wine.⁸⁵ This means that, in addition to bottled imported wine, bulk imported wine that is bottled and sold as 100% imported wine (as all New Zealand bulk wine is) is also unable to be sold direct. All imported bottled wine and imported bulk wine bottled as 100% imported wine must be sold through the SAQ network and is subject to the SAQ mark-up.

46. As a result, wines produced by small-scale permit holders are not only able to be sold in a retail outlet where no 100% imported wine has access, but further, having utilised this additional retail avenue, these wines are then exempt from SAQ mark-ups imposed on all other wines sold in Quebec. This means that they have a competitive advantage over other wines sold in grocery stores, including those that contain bulk imported wine (eg. ICB wines), which are subject to the standard SAQ mark-up. As set out in Australia’s submissions, this is a clear breach of Canada’s obligations under GATT Article III(4).

Nova Scotia reduced product mark-up for Nova Scotia wines

47. Wine sold in Nova Scotia is subject to a mark-up set by the Nova Scotia Liquor Corporation (**NSLC**). The authority of the NSLC to impose mark-ups is found in legislation and government regulations. The NSLC is controlled by its sole shareholder, the Nova Scotia Government, who is also the sole recipient of any profits released as dividends.⁸⁶ The mark-ups imposed on imported wine are greater than those imposed on Nova Scotia wine.

48. As a preliminary issue, Canada argues that the mark-ups are not internal taxes

⁸³ *Regulation respecting the terms of sale of alcoholic beverages by holders of a grocery permit*, c S-13, r 6, [“Grocery Permit Regulation”] (**AUS-29**) s 2, which sets out the alcoholic beverages that a grocer is permitted to sell.

⁸⁴ Grocery Permit Regulation (**AUS-29**), s 2 read with Act respecting the Société des alcools du Québec (chapter S-13) (**AUS-26**), s 24.1 (3).

⁸⁵ *Regulation respecting use of raw materials by holders of a small-scale wine producer’s permit*, RRQ c S-13, r 6.2 (**AUS-58**), s 1.1.

⁸⁶ Canada’s written submissions, at paras 257-258.

or other charges for the purposes of GATT Article III(2) because NSLC is a “government owned corporation that operates according to commercial considerations”.⁸⁷ Canada argues that the mark-ups are intended to cover the corporation's costs associated with normal business operations as well as incorporating a profit component.⁸⁸

49. This characterisation of NSLC as an arms-length business entity independent of the Nova Scotia government is misleading. NSLC is the sole importer and distributor of alcohol in Nova Scotia.⁸⁹ It is granted statutory authority by the government of Nova Scotia to control the possession, sale, transportation and delivery of liquor under the Liquor Control Act.⁹⁰ The Liquor Control Act grants NSLC authority to set liquor pricing⁹¹ and Nova Scotia regulations expressly provide for NSLC liquor prices to include a retail ‘mark-up’.⁹² It is also artificial to suggest that the NSLC is a purely corporate entity and that the mark-ups are driven by ‘costs associated with normal business operations’.⁹³ If this were correct, the mark-up applied to wine from Nova Scotia would be expected to be the same as that applied to wine from other origins. As discussed below, this is not the case.

50. Wine sold in Nova Scotia is subject to a standard 140% mark-up, with two exceptions:

- (a) Wine that has been bottled in Nova Scotia, irrespective of the origin of the wine, will receive a mark-up of 120%;⁹⁴
- (b) Wine from an “emerging wine region” is subject to a 43% mark-up.⁹⁵

51. An emerging wine region is one that:⁹⁶

- (a) is considered as a distinct winemaking region as demonstrated by the existence of defined viticultural areas, and the adoption of guidelines or standards for production of wine from grapes grown in the region by a recognized industry association or group; and
- (b) has a total annual production of wine within its political boundaries (state, province, or equivalent) that does not exceed 50,000HL annually.

52. The Nova Scotia retail mark-up is designed to capture locally produced wine and exclude imports. This is apparent from statements made by the NSLC both prior to and

⁸⁷ Canada’s written submissions, at paras 257-258.

⁸⁸ Canada’s written submissions, at paras 258.

⁸⁹ Canada's New and Full Notification Pursuant to Article XVII:4(A) of the GATT 1994 and Paragraph 1 of the Understanding on the Interpretation of Article XVII, circulated 22 July 2016, G/STR/N/16/CAN (**AUS-5**) at p 27.

⁹⁰ Section 12(b) of the Liquor Control Act 1989.

⁹¹ Nova Scotia *Liquor Control Act*, RSNS 1989, c 260 (**AUS-14**), s 42(1) and *Nova Scotia Liquor Corporation Regulations*, NS Reg 1/2017 [“NSLC Regulations”] (**AUS-59**), s 13(7).

⁹² NSLC Regulations (**AUS-59**), s 39.

⁹³ Canada’s written submissions, at para 258.

⁹⁴ NSLC Markup Structure, April 2017 (**AUS-63**).

⁹⁵ NSLC Policy and Public Affairs, 'Emerging Wine Regions Policy' (**AUS-65**), cl 4a.

⁹⁶ NSLC Policy and Public Affairs, 'Emerging Wine Regions Policy' (**AUS-65**), cl 3.

after the implementation of the policy⁹⁷ and from the design and structure of the measure itself. The 'emerging wine region' concept is designed to capture all Nova Scotia wine. The requirement of a defined viticultural area with adopted wine production standards fits Nova Scotia's provincial wine regulatory structure well, while the 50,000HL volume cap effectively captures Nova Scotia's production and excludes many global wine making regions. Indeed, Canada records in its written submissions that Nova Scotia's current annual wine production amounts to barely 1/3 of the 50,000HL ceiling under the emerging wine region definition.⁹⁸ This means that *all* wine produced in Nova Scotia is eligible for the lowest 43% mark-up. By contrast, New Zealand produces around 300 million litres of wine annually.⁹⁹ While there are a number of distinct wine making regions within New Zealand, no guidelines or standards for production have been adopted within these regions by a recognised industry association or group.¹⁰⁰ New Zealand wine accordingly falls outside of the definition of wine from an 'emerging wine region' and, as a result, *no* New Zealand wine is eligible for the reduced 43% mark up.

53. The manner in which the Nova Scotia mark-up is applied further demonstrates the origin-based discriminatory nature of this measure. The 'NSLC mark-up spreadsheet', which records the mark-ups currently being applied under the policy, separates wine into four categories: "NS wine" (which receives the 43% emerging wine region mark-up); "NS bottled" (which receives the 120% mark-up) and then Canadian and non-Canadian wine (which both receive the standard 140% mark-up).¹⁰¹ It is clear that the imposition of the 140% mark-up on all non-Nova Scotian wine is origin based. As set out in Australia's submissions, this is a clear breach of Canada's obligations under GATT Article III(2) or, in the alternative, Article III(4).

54. One final observation about the three-tier mark-up structure may be made. The purpose behind the first and third tiers is relatively straight forward. The first tier imposes a competitive disadvantage onto non-Nova Scotian wine, while the third tier provides Nova Scotian wine with a competitive advantage. Canada has said very little at all about the second tier, which imposes a slightly reduced 120% mark up on wine bottled in Nova Scotia. As all Nova Scotia wine is eligible for the reduced 43% mark-up, the 120% mark-up must apply only to bulk international wine or ICB wine bottled in Nova Scotia. The effect of this second mark-up tier is that, to the extent that demand for imported wine will continue (despite the more attractive Nova Scotia wine prices), the middle 120% mark-up operates to encourage as much of that demand as possible

⁹⁷ Reproduced in Australia's written submissions, at para 101-104, 106.

⁹⁸ Canada's written submissions, at para 278.

⁹⁹ New Zealand Winegrowers Inc Annual Report 2018, June 2018, available at <https://www.nzwine.com/en/media/statistics/annual-report>, at p 37.

¹⁰⁰ New Zealand has a number of regional associations that represent all growers and winemakers in the region. These associations do not adopt standards or guidelines for the production of wine grown from grapes in those regions. There are also several independent bodies within wine regions that have voluntary opt-in memberships. These include: Central Otago Pinot Noir Limited, Gimblett Gravels Winegrowers Association and Appellation Marlborough Wine Incorporated. These bodies do not represent all wine producers in the region and largely function to market wines from the region and produced by its members. They are not recognised as having authority to adopt standards or guidelines for the production of all wine grown from grapes in those regions.

¹⁰¹ NSLC Markup Structure (**AUS-63**).

towards Nova Scotia producers that bottle imported wine, and away from pre-bottled imported wine.

III. THE MEASURES IN DISPUTE ARE NOT JUSTIFIED UNDER ARTICLE XXIV GATT

55. Canada argues that any measures found to be inconsistent with the provisions of GATT are nevertheless justified under Article XXIV GATT(5).¹⁰² Article XXIV only provides a defence where two requirements are met. First, the measure in question must have been *introduced upon the formation* of the customs union or fair trading agreement. Second, it must be shown that the establishment of the customs union or fair trading agreement would have been prevented/made impossible¹⁰³ if the measure was not adopted.¹⁰⁴ This is a narrow defence.¹⁰⁵

56. Canada's claim under Article XXIV fails on the first of the two requirements as all of the measures challenged were in existence prior to the Comprehensive and Progressive Trans Pacific Partnership (**CPTPP**) entering into force. New Zealand accordingly asks that the Panel dismiss the alleged defence relied on by Canada under Article XXIV.

IV CONCLUSION

57. Canada has presented a number of arguments regarding the interpretation of Article III GATT, and its application to the measures in dispute. New Zealand considers that these arguments are unfounded and, if accepted, would set a dangerous precedent.

58. For the reasons set out above, and other reasons contained in the submissions filed by Australia, which New Zealand agrees with, New Zealand requests that the Panel find that the measures in dispute are inconsistent with Canada's obligations under GATT Article III.

Word Count: 9189

¹⁰² Canada's written submissions, at para 344.

¹⁰³The Appellate Body took the use of the words 'to prevent', in the chapeau to paragraph 5, to mean that "the provisions of the GATT 1994 *shall not make impossible*" the formation of a customs union or fair trade agreement: Appellate Body Report, *Turkey - Textiles*, at para 45-46 (emphasis added).

¹⁰⁴ Appellate Body Report, *Turkey - Textiles*, at para 58. See also paras 45-46.

¹⁰⁵ Appellate Body Report, *Peru – Agricultural Products*, at para 5.116.